No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

With narrow exceptions that are inapplicable here, the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, authorizes the sale or exchange of "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership," 43 U.S.C. 1702(e); see 43 U.S.C. 1713(a), 1716(a). The question presented is as follows:

Whether the United States may invoke FLPMA to dispose of land that the government previously acquired from an Indian tribe, when the statute that approved the land's earlier purchase stated that the land "shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, town-site, stone and timber, and mining laws of the United States only." Act of June 6, 1900, ch. 813, § 5, 31 Stat. 676.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are the United States Department of the Interior; the United States Bureau of Land Management; and Lanny E. Erdos, the senior official performing the delegable functions and duties of the Assistant Secretary for Land and Minerals Management.*

Respondents are the Shoshone-Bannock Tribes of the Fort Hall Reservation (plaintiff-appellee below) and the J.R. Simplot Company (defendant-intervenor-appellant below).

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* Mr. Erdos is automatically substituted for his predecessors in office. See Sup. Ct. R. 35.3.

RELATED PROCEEDINGS

United States District Court (D. Idaho):

Shoshone-Bannock Tribes of the Fort Hall Reservation v. *United States Dep't of the Interior*, No. 10-cv-4 (May 3, 2011)

Shoshone-Bannock Tribes of the Fort Hall Reservation v. *Daniel-Davis*, No. 20-cv-553 (Mar. 31, 2023)

United States Court of Appeals (9th Cir.):

Shoshone-Bannock Tribes of the Fort Hall Reservation v. *United States Dep't of the Interior*, No. 12-35181 (Sept. 17, 2012) (dismissing appeal)

Shoshone-Bannock Tribes of the Fort Hall Reservation v. *United States Dep't of the Interior*, No. 23-80058 (Aug. 16, 2023) (granting permission to appeal)

Shoshone-Bannock Tribes of the Fort Hall Reservation v. *J.R. Simplot Co.*, No. 23-80059 (Aug. 16, 2023) (granting permission to appeal)

Shoshone-Bannock Tribes of the Fort Hall Reservation v. *United States Dep't of the Interior*, No. 23-35543 (Apr. 21, 2026) (denying rehearing)

Shoshone-Bannock Tribes of the Fort Hall Reservation v. *J.R. Simplot Co.*, No. 23-35544 (Apr. 21, 2026) (denying rehearing)

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OPINIONS BELOW

The order of the court of appeals denying rehearing (App., *infra*, 68a-104a) is reported at 173 F.4th 1012. The opinion of the court of appeals (App., *infra*, 1a-67a) is reported at 153 F.4th 748. The opinion of the district court certifying the appeal (App., *infra*, 149a-152a) is available at 2023 WL 5345102. The opinion of the district court granting summary judgment (App., *infra*, 105a-148a) is available at 2023 WL 2744123.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2025. Petitions for rehearing were denied on April 21, 2026 (App., *infra*, 68a-69a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix. App., *infra*, 153a-157a.

INTRODUCTION

Before 1976, the federal government's authority to manage and dispose of its own lands was governed by a "chaotic" patchwork of overlapping authorities. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 876 (1990). In the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2744 (43 U.S.C. 1701 *et seq.*), Congress replaced that disorganized regime with new, "uniform procedures for any disposal of public land," 43 U.S.C. 1701(a)(10). The decision below, which construed a pre-FLPMA statute to bar a land exchange that FLPMA unambiguously authorizes, threatens a return to the pre-FLPMA chaos.

This case involves a parcel in southeastern Idaho that, since 2007, the government has sought to transfer to the J.R. Simplot Company. Simplot plans to use the land to continue operating a fertilizer plant of considerable importance to Idaho's economy and the Nation's food supply. In exchange, Simplot offered the United States conservation and recreation lands of equal value.

The court of appeals agreed that FLPMA's text "clear[ly]" authorizes that exchange. App., *infra*, 15a. FLPMA applies to all "'public lands,'" a term that encompasses (with limited exceptions that are inapplicable here) "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership." 43 U.S.C. 1702(e). The parcel here undisputedly met that definition. Until the transfer, it was land owned by the United States, within a State, administered by the Bureau of Land Management. FLPMA therefore authorized the government to exchange that land.

The court of appeals nevertheless invalidated the exchange, concluding that the government's authority to alienate the land remained subject to a statutory restriction enacted 126 years ago, when the government purchased the land from respondent, the Shoshone-Bannock Tribes of the Fort Hall Reservation (the Tribes). The Act approving the purchase stated that the land would be opened to settlement "under the homestead, town-site, stone and timber, and mining laws of the United States only." Act of June 6, 1900 (1900 Act), ch. 813, § 5, 31 Stat. 676. The court of appeals read the word "only" in that Act to bar the government from invoking later-enacted authorities (like FLPMA) as independent bases for disposing of the relevant lands, unless and until Congress amends or repeals the 1900 Act. Because the homestead, town-site, stone and timber, and mining laws referenced in the 1900 Act have all been repealed or are otherwise defunct, the government has no way to complete the exchange, notwithstanding FLPMA's clear authorization.

The court of appeals' decision is incorrect. The 1900 Act and FLPMA provide "two independent ways to dispose of the land involved in the exchange." App., *infra*, 42a (Bumatay, J., dissenting) (emphasis omitted). Under the 1900 Act, the government could have offered the land to settlers only under the homestead, town-site, stone and timber, and mining laws. But in FLPMA, Congress granted new disposal authority subject to new requirements. The two statutes sit alongside each other and can operate harmoniously; the 1900 Act does not "prospectively preempt" FLPMA. *Id.* at 77a (Tung, J., dissenting from the denial of rehearing en banc). Even if the government were limited to using the authorities listed in the 1900 Act, the exchange would be lawful because FLPMA is the modern version of those authorities.

The court of appeals' erroneous and disruptive holding warrants this Court's review. The Statutes at Large are littered with similar turn-of-the-century provisions —at least 35 by the government's count—that use similar language to authorize the disposal of specific tracts only under specific, enumerated authorities. The Department of the Interior (Interior) estimates that more than 4 million acres of land covered by those statutes—an area larger than the State of Connecticut—remain under federal ownership. More than 2.4 million acres of that land are in the Ninth Circuit. The decision below arguably prevents the government from invoking FLPMA as a source of authority to dispose of any tract within that sizable acreage.

The decision below also needlessly complicates all federal land disposals, destroying the uniformity that Congress enacted FLPMA to provide. Instead of disposing of "any land * * * without regard to how the United States acquired ownership," 43 U.S.C 1702(e), under "uniform procedures," 43 U.S.C. 1701(a)(10), Interior must now comb through century-old land records and statutes to identify potential restrictions that were long thought to be inapplicable. The requirement to conduct such inquiries and the inability to dispose of some lands altogether will "severely hamper the federal government's ability to administer its lands" and freeze "large portions of public land" "in frontier amber." App., *infra*, 95a, 97a (Tung, J., dissenting from the denial of rehearing en banc). This Court should grant certiorari to correct the Ninth Circuit's error and prevent that destabilizing result.

STATEMENT

A. The Federal Land Policy And Management Act

Before 1976, federal lands were governed by a "chaotic" patchwork of land-management authorities. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 876 (1990). For example, the Homestead Act of 1862, ch. 75, 12 Stat. 392 (Homestead Act), allowed U.S. citizens over the age of 21 to acquire 160 acres of land to live and farm by working the land for five years. §§ 1-2, 12 Stat. 392. Under the Timber and Stone Act of 1878, ch. 151, 20 Stat. 89 (Timber and Stone Act), citizens in California, Oregon, Nevada, and Washington Territory could acquire 160 acres for at least $2.50 per acre by attesting that the land was "unfit for cultivation, and valuable chiefly for its timber and stone." §§ 1-2, 20 Stat. 89. Another provision authorized the Commissioner of the General Land Office to sell "isolated or disconnected tracts" on 30 days' notice when he deemed such sales "proper." Rev. Stat. § 2455 (1878).

In enacting FLPMA, Congress sought to replace that patchwork of laws with "uniform procedures for any disposal of public land." 43 U.S.C. 1701(a)(10). FLPMA broadly defines "'public lands'" as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership." 43 U.S.C. 1702(e). FLPMA contains only two exceptions to that definition: (1) "lands located on the Outer Continental Shelf," and (2) "lands held for the benefit of Indians, Aleuts, and Eskimos." 43 U.S.C. 1702(e)(1) and (2).

While FLPMA states a general "policy" that "the public lands be retained in Federal ownership," it also recognizes that the "disposal of a particular parcel" may "serve the national interest." 43 U.S.C. 1701(a)(1). Accordingly, FLPMA gives the Secretary various tools to dispose of federal lands. The Secretary may sell federal land for fair market value in certain circumstances, such as when the land is not suitable for federal management or when a sale would serve "important public objectives." 43 U.S.C. 1713(a)(3); see 43 U.S.C. 1713(a) and (d). And, relevant here, the Secretary may exchange federal lands for non-federal lands of equal value when the Secretary determines that an exchange would "well serve[]" "the public interest." 43 U.S.C. 1716(a); see 43 U.S.C. 1716(b).

While granting the government those new authorities, FLPMA repealed a raft of "laws relating to homesteading and small tracts," "laws related to disposal," and other public-land laws. §§ 702-703, 90 Stat. 2787-2791 (capitalization omitted). FLPMA further provides that "[n]othing in this Act shall be deemed to repeal any existing law by implication." § 701(f), 90 Stat. 2786.

B. Factual Background

1. The J.R. Simplot Company (Simplot) is an Idaho-based agricultural business and the principal supplier of McDonald's French fries. See John O'Connell, *McDonald's Spent Almost $136 Million on Idaho Ag Products Last Year*, Idaho Farm Bureau Fed'n (Aug. 26, 2019), https://perma.cc/3FC2-AE98. Since 1944, Simplot has also operated a phosphate-fertilizer plant, called the Don Plant, near the city of Pocatello, Idaho, and the Tribes' reservation. 23-35543 C.A. E.R. 248-249. The Don Plant produces more than one million tons of products annually and is one of the largest phosphate-fertilizer plants in America. *Id.* at 249; *Major North*

American Fertilizer Production and Rail Network, Argus Media (2023), https://perma.cc/N88V-E7DU.

Phosphate-fertilizer production generates a toxic byproduct called phosphogypsum, which generally must be stored onsite. See App., *infra*, 107a, 109a. The Don Plant is projected to run out of storage space by 2031, which would force the plant's closure. *Id.* at 4a-5a. Since 1994, Simplot has sought to acquire around 700 acres of adjacent federal land that would extend the plant's life until 2085. *Id.* at 4a; *id.* at 36a (Bumatay, J., dissenting).

In 2007, Interior approved under FLPMA a transaction that would give Simplot the adjacent federal land in exchange for Simplot-owned land elsewhere. 2011 WL 1743656, at *5. The Tribes sued in the United States District Court for the District of Idaho, alleging that the land exchange violated FLPMA; the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; and the federal government's trust responsibilities to the Tribes. 10-cv-4 Compl. ¶¶ 43-60. The court granted summary judgment to the Tribes on their NEPA claim and blocked the exchange. 2011 WL 1743656, at *12.

2. In August 2020, having conducted further environmental analysis, Interior approved a new land exchange with Simplot. App., *infra*, 110a. The Tribes again sued, reprising their arguments that the exchange violated FLPMA, NEPA, and the government's trust responsibilities. 20-cv-553 Compl. ¶¶ 92-119.

In addition to those arguments, the Tribes asserted a new claim: that because of the circumstances under which the United States had acquired the federal land from the Tribes in 1900, the government could not invoke FLPMA to dispose of the land today. 20-cv-553

Compl. ¶¶ 84-91. The cession agreement approved by the 1900 Act did not preclude the United States from disposing of the relevant land; it granted usufructuary rights to the Tribes for hunting, grazing, fishing, and logging only for so long as the land "remain[ed] part of the public domain." 1900 Act § 1, 31 Stat. 674 (reproducing agreement). The Tribes argued, however, that the 1900 Act approving the agreement effectively bars the government from invoking FLPMA as a source of authority to effectuate the land exchange. 20-cv-553 Compl. ¶ 88.

The 1900 Act allowed Indians to request the allotment of land that they occupied at that time. § 4, 31 Stat. 675. The Act further provided that, "on the completion of the allotments * * * , the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, town-site, stone and timber, and mining laws of the United States only." § 5, 31 Stat. 676. That provision, the Tribes contended, meant that the United States could not rely on FLPMA to dispose of the ceded lands, but instead were limited to the homestead, town-site, stone and timber, or mining laws. 20-cv-553 D. Ct. Doc. 37-1, at 13-14 (Apr. 29, 2022). Because those laws have all been repealed or are otherwise defunct, that theory would effectively bar the land from ever being sold absent a new Act of Congress. See App., *infra*, 6a & n.6, 114a.[1]

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[1] The stone and timber laws were repealed in 1955. Act of Aug. 1, 1955, ch. 448, 69 Stat. 434. FLPMA repealed the homestead and town-site laws. See FLPMA §§ 702, 703(a), 90 Stat. 2787-2790. The General Mining Act of 1872, ch. 152, 17 Stat. 91, has not been repealed, but since 1994 Congress has barred new land patents under

The Tribes did not seek preliminary relief, and the land exchange was completed in December 2020. App., *infra*, 6a. Simplot intervened to defend the exchange. *Ibid.*

3. The district court granted summary judgment to the Tribes in relevant part. App., *infra*, 105a-148a. The court agreed with the Tribes that the 1900 Act's statement that the ceded lands "'shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States *only*'" means that those laws, not FLPMA, provide "the exclusive means of lawful disposal." *Id.* at 114a (quoting 1900 Act § 5, 31 Stat. 676). The court acknowledged that, because those laws are no longer operative, the practical effect of its holding was that "the federal government does not currently have a viable method for disposing of the ceded lands." *Ibid.*

As an alternative ground for its decision, the district court held that Interior had not adequately weighed the public interest or adequately appraised the land under FLPMA, and that Interior's analysis of some environ-

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that Act. See, *e.g.*, Pub. L. No. 103-332, § 112, 108 Stat. 2519; Pub. L. No. 119-74, § 404, 140 Stat. 157.

Congress later authorized the disposal of the ceded Fort Hall lands using Revised Statutes § 2455 (1878), which governed the disposal of isolated tracts of land, and the Act of March 3, 1877, ch. 107, 19 Stat. 377, which governed the sale of desert lands. See Act of May 19, 1926, ch. 337, 44 Stat. 566; Act of May 4, 1932, ch. 164, 47 Stat. 146. FLPMA repealed both Section 2455 and the 1926 statute that had extended Section 2455 to the ceded lands. § 703(a), 90 Stat. 2790. The Act of March 3, 1877, remains on the books, see 43 U.S.C. 321 *et seq.*, but it is "virtually a dead letter" given the small quantity of remaining desert land subject to its provisions, Robert L. Glicksman, *Public Natural Resources Law* § 6:21 (2d ed. Feb. 2026 update).

mental impacts was deficient under NEPA. App., *infra*, 119a-130a, 132a-135a. The court ordered further briefing on remedy but suggested that "it seems the only remedy" is "unwinding the deal." *Id.* at 118a; see *id.* at 148a.

On Simplot's motion, the district court certified its decision for immediate appeal under 28 U.S.C. 1292(b), and the court of appeals granted permission to appeal. App., *infra*, 7a-8a.

4. A divided panel of the court of appeals affirmed. App., *infra*, 1a-67a. The court recognized that, viewed in isolation, FLPMA "clear[ly]" authorizes disposal of the ceded Fort Hall lands. *Id.* at 15a. The court held, however, that the word "'only'" in the 1900 Act makes the laws listed in that Act the "exclusive" means of disposal. *Id.* at 8a. To the extent the statutes were ambiguous, the court favored the reading that limited the government's disposal authority, based on a purported "clear statement canon" that "any federal statute that abrogates a Tribe's treaty rights must clearly express Congress's intent to do so." *Id.* at 27a.

The court of appeals concluded that the 1900 Act precluded the government from using FLPMA to dispose of the land because FLPMA "is a general land-management law," "not a homestead, townsite, stone and timber, or mining law." App., *infra*, 9a. The court purported to limit its holding to "this particular exchange," without deciding whether a "land disposal for purposes related to the laws listed in the 1900 Act" would be permissible. *Id.* at 30a.

Judge Bumatay dissented. App., *infra*, 34a-67a. In his view, the 1900 Act and FLPMA provide "complementary grants of authority" to dispose of the ceded lands. *Id.* at 42a. He viewed the word "only" in the 1900

Act as directing that the listed laws are the "only" ways of disposing of covered lands under that Act. *Id.* at 42a-43a. He concluded, however, that in enacting the 1900 Act, Congress did not "permanently encumber the land or disable the federal government from disposing of it under other congressional grants of authority." *Id.* at 42a. Judge Bumatay stated that the majority's contrary view produced a needless conflict between the two statutes and would "*permanently* bar[] any disposal of the ceded Fort Hall lands under current law." *Id.* at 41a; see *id* at 45a-46a. Judge Bumatay also explained why the district court's alternative rationales for invalidating the exchange (which the panel majority had not addressed) lacked merit. *Id.* at 58a-67a.

5. The court of appeals denied petitions for rehearing en banc filed by the government and by Simplot. Seven judges dissented from the denial of en banc review. App., *infra*, 68a-104a.

In his dissent, Judge Collins explained that the 1900 Act's exclusivity had been "vitiated by subsequent statutes," including a 1926 law that had extended to the ceded Fort Hall lands a pre-existing statute that authorized the government to dispose of isolated tracts. App., *infra*, 70a-71a; see p. 8 n.1, *supra*. Judge Collins viewed FLPMA's express repeal and replacement of that 1926 statute as demonstrating Congress's intent to apply FLPMA to the ceded lands. App., *infra*, 71a-72a.

Judge Tung, joined by Judges Callahan, Bennett, Ryan Nelson, Bumatay, and VanDyke, also dissented. App., *infra*, 75a-98a. Judge Tung expressed the view that the panel majority had erred in perceiving a conflict between FLPMA and the 1900 Act's complementary grants of authority, "in violation of basic rules of statutory interpretation." *Id.* at 75a. He identified 22 other statutes with similar phrasing to which the panel's reasoning would seemingly apply. *Id.* at 95a-97a & nn.3-4. Judge Tung warned that the panel's decision would "severely hamper the federal government's ability to administer its lands" and "effectively freeze the sale or exchange of large portions of public land throughout this circuit and beyond." *Id.* at 79a, 95a.

Judge Friedland and District Judge Kennelly (the two judges in the panel majority) wrote a statement responding to Judge Tung, App., *infra*, 101a-104a, to which Judge Tung responded with another statement, *id.* at 99a-100a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in reading the 1900 Act to supersede FLPMA and to maintain in effect the sort of chaotic land-management regime that FLPMA was intended to replace. FLPMA and the 1900 Act provide "complementary grants of authority *empowering* the federal government to dispose of the land." App., *infra*, 45a-46a (Bumatay, J., dissenting). Properly construed, the two laws are not at war with each other. The logic of the decision below threatens the government's ability to dispose of more than 4 million acres of federal land nationwide, including 2.4 million acres in the Ninth Circuit. And even for parcels whose disposal is ultimately determined to be unrestricted, the decision below imposes significant operational burdens that the government must bear before conducting any sale or exchange in the Ninth Circuit—where the vast majority of federal land is located. This Court should grant certiorari and correct the court of appeals' error.

A. The Decision Below Is Incorrect

1. As the court of appeals recognized, FLPMA's text "clear[ly]" authorizes the government to dispose of the ceded Fort Hall lands. App., *infra*, 15a. With two narrow exceptions that are inapplicable here, FLPMA defines the term "'public lands'" to mean "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership." 43 U.S.C. 1702(e). FLPMA authorizes the Secretary to "dispose[] of" such "public land" "by exchange" when he "determines that the public interest will be well served by making that exchange." 43 U.S.C. 1716(a).

Those provisions unambiguously authorized the land exchange at issue here. Until the transfer, the ceded Fort Hall lands were owned by the United States; they are within the State of Idaho; and they were "managed by the Bureau of Land Management." 20-cv-553 Compl. ¶ 1. Although those lands previously belonged to the Tribes, FLPMA applies "without regard to how the United States acquired ownership." 43 U.S.C. 1702(e). The lands therefore met the statutory definition of "public lands" and were subject to disposal under FLPMA, including disposal through an exchange for other land.[2]

2. The court of appeals held that the land exchange was nonetheless barred by the 1900 Act. That holding is incorrect.

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[2] The Tribes have not argued that the ceded lands fall within FLPMA's exception for "lands held for the benefit of Indians," 43 U.S.C. 1702(e)(2), presumably because the Tribes previously ceded the lands to the United States outright. See App., *infra*, 6a n.5.

a. The 1900 Act does not restrict the government's authority to dispose of land under FLPMA. It initially *granted* disposal authority by creating a framework for transferring the land under the relevant then-existing laws.

The 1900 Act was part of "a series of surplus land Acts" that Congress passed "at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." *Solem* v. *Bartlett*, 465 U.S. 463, 467 (1984). Accordingly, under the 1900 Act, the Commissioner of Indian Affairs would first offer to allot the land to Indians living there. § 4, 31 Stat. 675. "[O]n the completion of the allotments," the remaining lands would "be opened to settlement by the proclamation of the President, and * * * subject to disposal under the homestead, town-site, stone and timber, and mining laws of the United States only." § 5, 31 Stat. 676. The Act thus established an orderly process for disposing of the ceded lands: allotments to resident Indians followed by a public offering under the listed laws.

The court of appeals read the word "'only'" in the 1900 Act to mean that the listed laws provide the "exclusive" means of disposing of the ceded lands. App., *infra*, 8a. The court was correct that the listed laws were and are the exclusive means of disposal *under the 1900 Act*. When President Theodore Roosevelt initially proclaimed the lands open to settlement, he could not have invoked the laws governing the disposal of, say, desert lands; he had to use the specific laws that the 1900 Act referenced. See 14 *A Compilation of the Messages and Papers of Presidents* 6688 (1917) (President Roosevelt's 1902 proclamation opening the ceded lands "to settlement and entry under the terms of and subject to all the conditions, limitations, reservations, and restrictions" in the 1900 Act). The word "'only'" in the 1900 Act thus is not "superfluous" as the court of appeals feared. App., *infra*, 11a. Together with the list of pre-existing laws that the 1900 Act designated as available sources of disposal authority, that word meaningfully constrained the government's authority under the 1900 Act.

It does not follow, however, that the 1900 Congress intended to restrict the government's ability to invoke *subsequent*, generally applicable laws that by their terms authorize disposal of the relevant lands. "[O]ne Congress cannot bind another." *Exxon Mobil Corp.* v. *Corporación CIMEX, S.A. (Cuba)*, No. 24-699 (June 23, 2026), slip op. 7. "It is inconceivable that Congress would have sought to trap th[e] lands in frontier amber" rather than simply offering an initial path for their disposal. App., *infra*, 97a (Tung, J., dissenting from the denial of rehearing en banc). Yet the court of appeals' reading assumes that the 1900 Congress tried to do precisely that: prevent future Congresses from adding new disposal authorities without expressly amending the 1900 Act.

Several textual and contextual clues reinforce the more limited reading of the statutory list and the word "only" that the dissenting judges below endorsed. To start, Congress used the definite article "the" to refer to "*the* homestead, town-site, stone and timber, and mining laws." 1900 Act § 5, 31 Stat. 676 (emphasis added). That wording suggests that Congress had "particular" laws in mind. *Slack Techs., LLC* v. *Pirani*, 598 U.S. 759, 767 (2023). And the only specific laws that Congress might have contemplated in 1900 were those already on the books. The 1900 Act's use of the definite article thus reinforces the natural inference that Congress was not attempting to restrict the reach of *future* statutes but was simply identifying the pre-existing laws that could be invoked to dispose of the ceded lands.

Congress also specified in meticulous detail how the initial offering would be conducted. Grazing lands would cost $1.25 per acre, agricultural lands $2.50 per acre, and lands irrigated by the Idaho Canal $10 per acre. 1900 Act § 5, 31 Stat. 676. All purchasers would make a 20% down payment. *Ibid.* Lands in the 16th and 36th sections would be set aside for Idaho's common schools. *Ibid.* Lands within five miles of Pocatello would be sold at a public auction where the starting bid would be $10 per acre. *Ibid.* Union Civil War veterans would get preferential treatment with respect to the timing of their entries, but not with respect to price. *Ibid.*; see Rev. Stat. §§ 2304-2305 (1878). Those provisions all signal that Congress was focused on the initial disposal of the land. Set prices, Civil War preferences, and the like would make little sense in a statute that Congress intended to restrict the Executive Branch's authority more than a century later.

The pre-existing land-disposal statutes referenced in the 1900 Act "required proof that the proposed settler would in fact live on the land or put it to productive use before a land patent would issue." App., *infra*, 84a (Tung, J., dissenting from the denial of rehearing en banc). By including the phrase "under the homestead, town-site, stone and timber, and mining laws of the United States only" in the 1900 Act, § 5, 31 Stat. 676, Congress made such proof a precondition to sales of the ceded Fort Hall lands. If that phrase had been omitted, by contrast, the 1900 Act might well have been understood to confer freestanding disposal authority, subject only to the requirements (regarding, *e.g.*, mandatory down payments and preferences for Union Civil War veterans) imposed specifically by the Act, thereby allowing "disposal of [the ceded] lands to speculators and squatters who would not advance the Act's purpose." App., *infra*, 84a (Tung, J., dissenting from the denial of rehearing en banc). Inclusion of that phrase also ensured that the government could not sell ceded lands under (for example) the then-existing statute that authorized sales of federal coal lands, see Act of Mar. 3, 1873, ch. 279, 17 Stat. 607, unless and until Congress determined that coal was present on the lands and authorized sales under that statute. The phrase "under the homestead, town-site, stone and timber, and mining laws of the United States only" in the 1900 Act therefore imposed significant limits on the government's authority to dispose of the ceded lands, even if that phrase is read to refer solely to *pre-existing* laws.

b. The court of appeals devoted much of its opinion to analyzing whether the 1900 Act or FLPMA should take precedence, taking as a given that the two statutes are in conflict. See App., *infra*, 15a-25a. But "there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, *Reading Law* 180 (2012) (*Reading Law*); see *Watson* v. *Republican Nat'l Comm.*, No. 24-1260 (June 29, 2026), slip op. 15 n.8 (noting that an ambiguous earlier provision must be read in a way that "fits most logically and comfortably into the body of both previously and subsequently enacted law") (citation omitted).

Here there is an obvious way to harmonize the 1900 Act and FLPMA: Each confers a "separate and independent grant[] of authority on the federal government." App., *infra*, 46a (Bumatay, J., dissenting). When the government sought to dispose of land under the 1900 Act, it was required to comply with the 1900 Act's conditions; when it seeks to dispose of land under FLPMA, it must comply with FLPMA's requirements. See *id.* at 77a-78a (Tung, J., dissenting from the denial of rehearing en banc). "Neither statute displaces the other." *Id.* at 87a.

The court of appeals believed that it had "satisf[ied] [its] duty to harmonize statutes by giving effect to the 1900 Act's specific restrictions" with respect to the ceded Fort Hall lands, while treating FLPMA as governing conveyances of "other lands." App., *infra*, 24a. But that is not harmonizing the two statutes. Although FLPMA contains two explicit exceptions to its broad definition of "public lands," see p. 5, *supra*, neither exception applies to the ceded lands here. "Where Congress explicitly enumerates certain exceptions," courts have no license to imply "additional exceptions" absent "evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (citation omitted). But the effect of the court of appeals' decision is to create an additional (Fort Hall-specific) exception to the scope of FLPMA's geographic coverage, on top of the two that Congress enacted. App., *infra*, 41a-42a (Bumatay, J., dissenting); *id.* at 78a (Tung, J., dissenting from the denial of rehearing en banc).

The court of appeals invoked the specific-governs-the-general canon of construction to treat the 1900 Act as an implicit carveout to FLPMA. See App., *infra*, 20a-22a. But that principle applies only "when conflicting provisions simply cannot be reconciled." *Id.* at 78a-79a (Tung, J., dissenting from the denial of rehearing en banc) (quoting *Reading Law* 183). Even if the 1900 Act is the more specific statute, but see *id.* at 90a-91a; *id.* at 47a-49a (Bumatay, J., dissenting), the specific-governs-the-general principle is not a license to create a conflict where none exists.

The court of appeals also invoked the presumption against implied repeals and FLPMA's statement that "[n]othing in this Act shall be deemed to repeal any existing law by implication." App., *infra*, 15a-16a (quoting FLPMA § 701(f), 90 Stat. 2786) (brackets in original). But the concept of an implied repeal presumes that "the two acts are in irreconcilable conflict" or that the later statute "covers the whole subject of the earlier one." *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). Again, there is no conflict here.

Even if there were a conflict, FLPMA would control. FLPMA establishes "uniform procedures for any disposal of public land," 43 U.S.C. 1701(a)(10), and broadly defines " 'public lands' " in a way that unambiguously encompasses the ceded Fort Hall lands, 43 U.S.C. 1702(e). When a statute contains such "*express* indications" of its applicability, "the implied-repeal canon does not apply." *Exxon*, slip op. 19.

c. In places, the court of appeals suggested that the relationship between FLPMA and the 1900 Act might be "ambiguous." App., *infra*, 15a; see *id.* at 18a-19a. But rather than treat ambiguity as a reason to harmonize the statutes, the court applied a purported "clear statement canon" requiring "any federal statute that abrogates a Tribe's treaty rights" to "clearly express Congress's intent to do so." *Id.* at 27a. In the court's view, that principle required reading the 1900 Act and FLPMA to restrict the government's authority because the land exchange would divest the Tribes of their usufructuary rights under the 1898 cession agreement to hunt, graze, fish, and log the land. *Id.* at 27a-29a.

Even assuming that some clear-statement rule applies in this context, there is no ambiguity as to the effect of the 1898 cession agreement and the 1900 Act on the Tribes' usufructuary rights. See App., *infra*, 53a-56a (Bumatay, J., dissenting). The Tribes sold their land outright for $600,000. 1900 Act § 1, 31 Stat. 673. And the cession agreement gave the Tribes usufructuary rights only for "[s]o long as any of the" ceded lands "remain part of the public domain." *Id.* at 674. Congress made no promises as to the length of time the land *would* remain in the public domain or the means by which it could be conveyed to others. Indeed, the 1900 Act set up a process that could have led to the immediate disposal of all of the ceded lands. See § 5, 31 Stat. 676. The Tribes had no treaty or contractual right to insist that their former lands remain in federal hands.

3. a. As explained above, the 1900 Act's reference to "the homestead, town-site, stone and timber, and mining laws of the United States only," § 5, 31 Stat. 676, is best understood to identify the *pre-existing* laws that the government was authorized to invoke as sources of power to dispose of the ceded Fort Hall lands. So construed, that language referred to a closed set of identifiable laws. But if (as the court of appeals believed) the language is read as also restricting the *future* laws that the government could invoke for that purpose, the enacting Congress obviously could not have had specific future laws in mind. Rather, on that reading, the language necessarily would identify the *types* of future laws that the government could invoke as sources of disposal authority.

On that approach, FLPMA would still be an available source of disposal authority for the ceded Fort Hall lands. FLPMA currently performs substantially the same function as the "homestead, town-site, stone and timber, and mining laws" that were in effect in 1900. In 1900, disposal authorities generally turned on the nature of the land, with different statutes governing mineral, timber and stone, saline, town-site, desert, coal, and agricultural lands. See Thomas Donaldson, *The Public Domain: Its History, with Statistics* 411 (2d ed. 1884); Henry N. Copp, *The American Settler's Guide: A Popular Exposition of the Public Land System of the United States of America* 7-8 (24th ed. 1904). The commissioners who negotiated the 1898 agreement informed Congress that the ceded lands contained mineral, timber, town-site, and agricultural lands, see S. Rep. No. 60, 56th Cong., 1st Sess. 9 (1900), so Congress naturally designated laws governing such lands as available sources of disposal authority (with the homestead laws governing agricultural lands).[3]

In 1976, Congress replaced the "patchwork" of authorities that had previously applied to the various classes of ceded lands with FLPMA's "'uniform procedures for any disposal of public land.'" App., *infra*, 72a (Collins, J., dissenting from the denial of rehearing en banc) (quoting 43 U.S.C. 1701(a)(10)). FLPMA is the modern successor to the then-existing homestead, town-site,

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[3] In 1926, Congress authorized disposal of the ceded lands under a statute governing isolated tracts, presumably because earlier settlement patterns had created such tracts out of the originally unbroken cession. See Act of May 19, 1926, ch. 337, 44 Stat. 566. And in 1932, Congress identified the laws governing the disposal of desert lands as an additional source of authority after Congress became aware of one small desert parcel in the Fort Hall area. See Act of May 4, 1932, ch. 164, 47 Stat. 146; 75 Cong. Rec. 3034 (1932).

stone and timber, and mining laws referenced in the 1900 Act, covering the waterfront of lands that were previously governed by a variety of separate statutes. Thus, even if the 1900 Act is understood to limit the types of future laws under which the Fort Hall lands may be conveyed, a transfer under FLPMA would still be authorized.

b. The court of appeals declined to uphold the land exchange on that theory, stating that FLPMA is "a general land-management law," not "a homestead, townsite, stone and timber, or mining law." App., *infra*, 9a. But FLPMA repealed most of those earlier laws, see p. 8 n.1, *supra*, and established new rules to govern the disposal of *all* "public lands," a term that encompasses (though is not limited to) the categories listed in the 1900 Act, 43 U.S.C. 1702(e). FLPMA thus is the modern successor to the listed laws, as it is the successor to other land-disposal laws as well.

The court of appeals suggested that it might have reached a different conclusion if "the purpose of the Exchange [were] related to homestead, townsite, stone and timber, or mining laws." App., *infra*, 26a. But the applicability of the 1900 Act does not turn on whether the disposal of a particular tract serves a "purpose" analogous to the listed statutes. *Ibid.* Rather, it authorizes "disposal under the homestead, town-site, stone and timber, and mining *laws*." § 5, 31 Stat. 676 (emphasis added). Here, FLPMA *is* the modern version of those earlier laws.

As explained above, FLPMA's core purpose was to establish *uniform* land-disposal mechanisms that would apply without regard to the anticipated post-conveyance uses of particular tracts. To the extent there is incongruity in attempting to apply the particularized categories in circa-1900 land-disposal statutes to FLPMA's generalized regime, that only underscores the court of appeals' more fundamental error. That incongruity is best avoided by construing the 1900 Act as simply identifying the *pre-existing* laws under which the ceded lands could be conveyed. See pp. 13-17, *supra*. But if the 1900 Act is read as also restricting the types of *future* laws that the government could invoke as sources of disposal authority, FLPMA would qualify, whatever the purpose of any individual transfer.

B. The Decision Below Carries Significant Consequences For Federal Land Management And Warrants This Court's Review

1. This Court's review is warranted given "the importance of the decision to the utilization of the public lands." *United States* v. *Coleman*, 390 U.S. 599, 601 (1968). Public-lands cases are inherently limited by geography, with each regional court of appeals able to effectively determine the scope of the government's authority over federal lands in that circuit. Perhaps for that reason, this Court often grants certiorari in such cases, even in the absence of a square circuit conflict. See, *e.g.*, *United States Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 590 U.S. 604 (2020); *Public Lands Council* v. *Babbitt*, 529 U.S. 728 (2000); *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983); *Andrus* v. *Utah*, 446 U.S. 500 (1980). That is particularly true in cases arising from the Ninth Circuit, in which nearly three quarters of all federal land is located. See Cong. Research Serv., *Federal Land Ownership* 7 (Feb. 21, 2020); see, *e.g.*, *Sturgeon* v. *Frost*, 587 U.S. 28 (2019); *Sturgeon* v. *Frost*, 577 U.S. 424 (2016); *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992); *Andrus* v. *Idaho*, 445 U.S. 715 (1980); *Coleman*, *supra*.

This Court's intervention is likewise appropriate here. The court of appeals "incorrectly resolved an important question in a manner that has potentially significant ramifications for other cases." App., *infra*, 70a (Collins, J., dissenting from the denial of rehearing en banc). Because the statutes listed in the 1900 Act are no longer operative, the court's decision leaves the federal government with no "viable method for disposing of the ceded lands." *Id.* at 114a (district-court decision). Interior estimates that more than 72,000 acres of the ceded Fort Hall lands (an area five times the size of Manhattan) remain under federal ownership and are directly affected by the decision below.

The consequences of the court of appeals' holding, however, reach far beyond the ceded lands. In his dissent from denial of rehearing en banc, Judge Tung identified 22 other turn-of-the-century statutes that use similar phrasing to govern the disposal of land on both former Indian reservations and former military installations. See App., *infra*, 95a-97a & nn.3-4. The government has identified at least 13 additional statutes with similar language that might effectively preclude disposal under the logic of the decision below.[4] Neither the

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[4] See Act of May 27, 1920, ch. 209, § 1, 41 Stat. 628 (California and Oregon) ("Title to all said lands can be acquired by homestead entry under the general homestead laws and the provisions of this Act and not otherwise."); Act of Feb. 14, 1913, ch. 54, § 2, 37 Stat. 676 (North and South Dakota) ("That the lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President * * * ; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in said proclamation."); Act of May 27, 1910, ch. 257, § 2, 36 Stat. 441 (South Dakota) (same); Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461 (North and South Dakota) (same); Act of Mar. 2,

Tribes nor the court of appeals has offered any way to distinguish those statutes. And other statutes, while not barring disposal altogether, appear to bar FLPMA land exchanges under the court of appeals' logic by authorizing disposal for "cash only" or "money only."[5]

Collectively, "[t]hose statutes cover large portions of public land throughout [the Ninth Circuit] (and beyond)." App., *infra*, 95a-97a (Tung, J., dissenting from

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1907, ch. 2536, § 2, 34 Stat. 1230 (South Dakota) (same); Act of May 29, 1908, ch. 217, § 2, 35 Stat. 458-459 (Washington) (similar, but limited to homestead laws); Act of Mar. 22, 1906, ch. 1126, § 4, 34 Stat. 81 (Washington) ("That the said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, and enter any of said lands except as prescribed in such proclamation."); Act of Apr. 23, 1904, ch. 1495, § 9, 33 Stat. 304 (Montana) (same); Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 642 (Oklahoma) (incorporating the disposal provisions of the Act of March 2, 1889, ch. 412, § 13, 25 Stat. 1005, which authorized disposal "to actual settlers under the homestead laws only"); Act of Mar. 3, 1893, ch. 209, § 13, 27 Stat. 644 (Oklahoma) (incorporating the previous provision); Act of Mar. 3, 1893, ch. 200, § 2, 27 Stat. 555 (Nebraska) (former military reservation "shall be open to settlement under the homestead law only"); Act of Apr. 30, 1888, ch. 206, § 21, 25 Stat. 102 (Nebraska, North Dakota, and South Dakota) ("That all the lands in [a former Indian reservation] * * * shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law * * * and under the law relating to townsites."); Act of May 15, 1872, ch. 165, 17 Stat. 120 ("That the lands constituting the Fort Collins military reservation * * * are hereby restored to the United States and made subject to pre-emption and homestead entry only, as now provided for by law.").

[5] *E.g.*, Act of Mar. 3, 1873, ch. 333, §1, 17 Stat. 634 (California) ("[A]ll said lands shall be sold and disposed of for cash only."); Act of July 27, 1868, ch. 248, § 6, 15 Stat. 223 (California) ("[A]ll said lands shall be sold and disposed of for money only.").

the denial of rehearing en banc). This Court has previously granted certiorari when a case presents "a significant issue regarding the disposition of vast amounts of public lands"—a description the Court has applied to as little as 571,000 acres of federal land. *Andrus* v. *Utah*, 446 U.S. at 506 & n.6; see also *Andrus* v. *Idaho*, 445 U.S. at 722 (granting certiorari to resolve the status of 2.4 million acres of federal land in Idaho). Here, Interior informs this Office that the 35 statutes listed above and in Judge Tung's dissent cover more than 4 million acres of land that remain under federal ownership. Of that land, 2.4 million acres are in the Ninth Circuit. The decision below risks "effectively freez[ing] the sale or exchange" of that sizable portion of the West. App., *infra*, 79a (Tung, J., dissenting from the denial of rehearing en banc).

2. The court of appeals attempted to minimize the consequences of its ruling by purporting to limit its decision to "this particular exchange," while holding out the possibility that transfers for "purposes related to" the listed laws (*e.g.*, for timber or mining purposes) might be permissible. App., *infra*, 30a. That aspect of the court of appeals' decision provides no sound reason for this Court to deny review.

The pre-existing laws referenced in the 1900 Act generally focused on individual settlers who would, for example, fell timber for "domestic purposes," Act of June 3, 1878, ch. 150, § 1, 20 Stat. 88—a category of disposal that is unlikely to recur today. The statutes also contained strict acreage limitations that are incompatible with many modern projects. *E.g.*, Homestead Act § 1, 12 Stat. 392 (160 acres); Timber and Stone Act § 1, 20 Stat. 89 (same). If conveyances of the ceded Fort Hall lands under post-1900 statutes are subject to similar restrictions, the practical effect of the court of appeals' decision would be tantamount to barring disposal outright. And even if the Ninth Circuit's decision is read as potentially allowing any disposal related to logging, mining, or the like, the listed laws taken together omit many common purposes of modern FLPMA land transfers, such as conservation, economic development, infrastructure, and recreation.

The decision below also imposes significant practical costs beyond the sheer inability to dispose of the affected land. Congress enacted FLPMA to address the "virtual chaos with respect to the public lands" that previously existed. *United States* v. *Locke*, 471 U.S. 84, 86 (1985). Just with respect to mineral claims, for example, the web of overlapping, dormant restrictions meant that "federal land managers had to proceed slowly and cautiously in taking any action affecting federal land." *Id.* at 87. "Each time the Bureau of Land Management * * * proposed a sale or other conveyance of federal land, a title search in the county recorder's office was necessary" to determine whether some outstanding, potentially invalid claim still applied. *Ibid.*

The decision below would recreate that discarded regime with respect to federal land management generally. The Bureau of Land Management sells or exchanges tens of thousands of acres of federal land each year. See U.S. Dep't of the Interior, Bureau of Land Mgmt., *Public Land Statistics 2024*, at 12 (June 2025), https://perma.cc/5YQD-E3PH. For every transfer, federal officials would need to trace the history of every constituent parcel, comb through the Statutes at Large for any potentially restrictive condition, and then determine whether that provision has been repealed, by FLPMA or otherwise. The transferees of such lands in turn would risk the undermining of their title by some "arcane statute[]" that an unhappy neighbor might unearth more than a century later. App., *infra*, 51a (Bumatay, J., dissenting).

The United States acquired ownership of the ceded Fort Hall lands 126 years ago. Interior reports that, over that time, the government has often conveyed portions of the land, including for residential development, a Jewish community center, the expansion of the Bannock County landfill, and Idaho State University's flagship Pocatello campus. With respect to the specific land exchange at issue here, Interior estimates that the land conveyed to Simplot will support 3763 jobs and contribute $768 million annually to Idaho's economy. See 23-35543 C.A. E.R. 127. The public in turn would benefit from the land that Simplot has given the federal government in exchange. See *id.* at 127, 458 (explaining that this land includes "crucial mule deer habitat" and will provide new recreational opportunities for hikers, bikers, hunters, and others). The government first approved this project under President George W. Bush and has defended it across the last five administrations.

Until this case, no one had questioned the government's authority under FLPMA to effect such transfers. Indeed, the Tribes had previously challenged this very project on procedural grounds without alleging that the government lacked statutory authority to conduct a land exchange. See p. 7, *supra*. It was only in 2020 that the Tribes first raised this argument, mere weeks before the completion of a land exchange decades in the making. The risk that future transfers could be blocked or undone poses a substantial hindrance to the government's management of federal land.

3. Neither the interlocutory nature of the decision below nor the district court's alternative holdings counsel against review.

Although the court of appeals' decision finally resolved the merits of the Tribes' suit, the case is still in an interlocutory posture because the district court previously reserved judgment on the appropriate remedy. See App., *infra*, 118a. The interlocutory nature of a decision is often a sound basis to deny certiorari. But in this case, the merits question "is fundamental to the further conduct of the case" and warrants immediate resolution by this Court. *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). As the district court observed, the meaning of the 1900 Act "will likely be determinative of the remedy question." App., *infra*, 151a. Although the United States previously suggested that it would be more efficient for the district court to address the remedy before any appeal on the merits, 23-80059 Gov't C.A. Resp. Br. 2-3, the district court and the court of appeals disagreed, and the court of appeals has now resolved the merits on the broadest ground possible. There is consequently no reason for this Court to await a logically subsequent remedial order before reviewing the merits itself.

The district court held in the alternative that the land exchange violated procedural requirements imposed by FLPMA and NEPA. App., *infra*, 119a-130a, 132a-135a. But those holdings were incorrect at the time, and the district court's error is even clearer now, given this Court's recent clarification of the deferential standard that governs review of agency action under NEPA. See *id.* at 58a-67a (Bumatay, J., dissenting) (discussing *Seven Cnty. Infrastructure Coal.* v. *Eagle County*, 605 U.S. 168 (2025)). In dissenting from the denial of rehearing en banc, five more judges agreed with Judge Bumatay's panel dissent on this point, and none sided with the district court. See *id.* at 81a n.1 (Tung, J., dissenting from the denial of rehearing en banc). In any event, the district court's alternative holdings involve purported procedural defects that the agency could cure on remand. The court of appeals' holding, by contrast, permanently threatens the government's ability to dispose of the ceded Fort Hall lands and a sizable portion of the West.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-35543, 23-35544
D.C. No. 4:20-cv-00553-BLW

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, PLAINTIFF-APPELLEE

v.

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

and

J.R. SIMPLOT COMPANY, INTERVENOR-DEFENDANT

Argued and Submitted: Nov. 21, 2024
San Jose, California
Filed: Aug. 22, 2025

Appeal from the United States District Court for the District of Idaho
B. Lynn Winmill, Chief District Judge, Presiding

OPINION

Before: MICHELLE T. FRIEDLAND and PATRICK J. BUMATAY, Circuit Judges, and MATTHEW F. KENNELLY,* District Judge.

Opinion by Judge FRIEDLAND;

Dissent by Judge BUMATAY.

FRIEDLAND, Circuit Judge:

This interlocutory appeal requires us to determine the validity of a recent exchange of land between the Bureau of Land Management ("BLM") and the J.R. Simplot Company. In that exchange, BLM traded land that was formerly part of the Fort Hall Reservation of the Shoshone-Bannock Tribes ("the Tribes") for land owned by Simplot. The Tribes had ceded that land to the United States in an 1898 agreement, which Congress ratified in the Act of June 6, 1900, ch. 813, 31 Stat. 672 ("the 1900 Act"). The 1900 Act specifies categories of laws under which the ceded Fort Hall lands can be "disposed" (meaning transferred, including by sale or exchange) to private parties and reserves the Tribes' right to continue using any ceded land that has not been so disposed.

BLM authorized the land exchange under the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1787, which generally gives BLM authority to dispose of public lands. But the Tribes argue that the land exchange contravened the 1900 Act's restrictions on disposal of the ceded Fort Hall lands. We agree with the Tribes that the 1900 Act precludes the

* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

land exchange, and we therefore affirm the district court's ruling invalidating it.

I.

A.

The Shoshone-Bannock Tribes are a federally recognized Indian Tribe whose permanent home is the Fort Hall Reservation. The Reservation, located in Idaho near the town of Pocatello, was established in 1868 under the terms of the Fort Bridger Treaty, 15 Stat. 673, between the Tribes and the United States.

In 1896, Congress authorized the Secretary of Interior to appoint a commission to negotiate with the Tribes for the "surrender" of a portion of the Reservation. Act of June 10, 1896, ch. 398, 29 Stat. 321, 341-42. That commission and the Tribes reached an agreement in 1898, in which the Tribes ceded a portion of the Fort Hall Reservation lands in exchange for $600,000. Agreement of February 5, 1898, 31 Stat. 672, 672-74 ("1898 Agreement"). The 1898 Agreement also specified that:

> So long as any of the [ceded lands] remain part of the public domain, [the Tribes] . . . shall have the right, without any charge therefor, to cut timber for their own use, . . . and to pasture their live stock on said public lands, and to hunt thereon and to fish in the streams thereof.

Id. at 674.

Congress ratified the 1898 Agreement in the 1900 Act, incorporating the 1898 Agreement verbatim and adding several provisions. Those added provisions specify the processes by which the ceded Fort Hall lands can be removed from the public domain. In relevant part, Section 5 of the 1900 Act states that, after land allotments are made to certain individual Tribal members,[1] "the residue of said ceded lands shall be opened to settlement . . . and shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States only."[2] *Id.* at 676.

B.

Simplot owns and operates the Don Plant, a phosphate-processing facility adjacent to the Fort Hall Reservation. The Don Plant manufactures phosphates for fertilizer through a process that produces a waste called phosphogypsum. Since 1994, Simplot has been seeking to complete a land exchange with BLM to enable Simplot to expand the Don Plant's phosphogypsum disposal facilities.[3] Simplot contends that a land exchange is nec-

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[1] Section 4 of the 1900 Act specifies that the ceded lands shall first be allotted to Tribal members. 31 Stat. 672, 675. Allotment was a federal policy, common in the late 19th century, in which the government transferred former Tribal lands that had previously been collectively owned by Tribes to Tribal members individually. *See County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992).

[2] Homestead laws opened public lands for private settlement, and townsite laws authorized the disposal of public lands for building towns. *See, e.g.*, Act of May 20, 1862, ch. 75, 12 Stat. 392; Act of May 23, 1844, ch. 17, 5 Stat. 657. Stone and timber laws opened public lands to private use and ownership for growing timber and extracting stone. *See, e.g.*, Timber and Stone Act of 1878, ch. 151, 20 Stat. 89; Timber Culture Act of 1873, ch. 277, 17 Stat. 605. Mining laws opened public lands for mineral mining. *See, e.g.*, Mining Law of 1872, ch. 152, 17 Stat. 91.

[3] An earlier attempt at the land exchange was halted after a court held that BLM's approval of the exchange violated the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347. *Shoshone-*

essary because the Plant's existing phosphogypsum disposal facility is projected to reach capacity by 2031, and the Plant will not be able to continue operating if it runs out of phosphogypsum storage space.

C.

In August 2020, BLM approved the Blackrock Land Exchange ("the Exchange").[4] BLM agreed to transfer to Simplot certain federal land that was part of the lands ceded by the Tribes in the 1898 Agreement. In return, Simplot agreed to transfer to BLM certain land that it owned.

BLM stated that it was approving the Exchange pursuant to its authority to dispose of public lands under FLPMA. FLPMA, enacted in 1976, declares a federal policy that "the public lands be retained in Federal ownership" except when the disposal of a particular parcel of land "will serve the national interest." 43 U.S.C. § 1701(a)(1). FLPMA establishes "uniform procedures" for the disposal of public lands, including by authorizing exchanges of public lands when "the Secretary concerned determines that the public interest will be well served by making that exchange." 43 U.S.C. §§ 1701(a)(10), 1716(a). FLPMA defines "public lands" to cover "any land and interest in land owned by the United States

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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).

[4] The BLM's Record of Decision on the Exchange is available online. *See* U.S. Dep't of the Interior, Bureau of Land Mgmt., Blackrock Land Exchange, Record of Decision 3 (2020), https://eplanning.blm.gov/public_projects/119626/200293977/20024325/250030529/200818%20Blackrock%20Land%20Exchange%20Record%20of%20Decision-508%20final-shortened%20emails%20-%20typo%20fixed.pdf [https://perma.cc/2HBZ-HZ4A].

within the several States and administered by [BLM], without regard to how the United States acquired ownership."[5] *Id.* § 1702(e). When FLMPA was enacted, it expressly repealed a long list of laws that had previously governed disposal of public lands. Pub. L. No. 94-579 §§ 702-03, 90 Stat. 2743, 2787-91 (1976). The 1900 Act was not on that list. The list of repealed statutes did include most homestead, townsite, stone and timber, and mining laws, with some exceptions—for example, FLPMA left certain mining laws in place, including the Mining Law of 1872, 30 U.S.C. §§ 22-54.[6]

The Tribes challenged the Exchange by filing suit in December 2020 against BLM, the Department of the Interior, and the Principal Deputy Assistant Secretary for Land and Minerals Management (collectively, "the Government") in the United States District Court for the District of Idaho. Although the Tribes' complaint sought injunctive relief, they did not move for a temporary restraining order or a preliminary injunction, and the Exchange was carried out that same month.

Simplot intervened in the suit as a defendant, and all parties cross-moved for summary judgment on the ad-

[5] The scope of "public lands" is subject to two exclusions: "lands located on the Outer Continental Shelf" and "lands held for the benefit of Indians, Aleuts, and Eskimos." 43 U.S.C. § 1702(e). The Tribes do not argue that either applies here, so we assume neither does for purposes of our analysis.

[6] The Mining Law of 1872 is still in effect but is currently subject to a moratorium under a separate statute. *See* Dep't of the Interior and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-332 §§ 112-13, 108 Stat. 2499, 2519 (1994). FLPMA also left in place the Desert Lands Act of 1877, ch. 107, 19 Stat. 377, which was made applicable to the ceded Fort Hall lands in a separate statute, *see* Act of May 4, 1932, ch. 164, 47 Stat. 146.

ministrative record. In 2023, the district court granted summary judgment to the Tribes in relevant part. The court held that because the Exchange did not comply with the 1900 Act, BLM's approval of the Exchange violated the Administrative Procedure Act ("the APA"), 5 U.S.C. § 706(2)(A), and breached the United States' trust responsibility to the Tribes. The court also held, in the alternative, that BLM's approval of the Exchange failed to comply with the requirements of FLPMA and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347. Instead of reaching the issue of remedies in the summary judgment order, the district court ordered the parties to confer and submit proposals for briefing on what remedies would be appropriate given that the Exchange had been carried out more than two years earlier.

Simplot then requested certification to file an interlocutory appeal under 28 U.S.C. § 1292(b), which the district court granted. The court concluded that the interplay between the 1900 Act and FLPMA was a controlling question of law for which there were substantial grounds for differences of opinion. The court further concluded that an immediate resolution of the question would materially advance the ultimate termination of the litigation because our court's review would "create certainty that [would] likely save substantial time and resources in litigating remedies," given the difficult questions that the district court would have to resolve about whether (and, if so, how) to unwind the Exchange.

Simplot timely petitioned for permission to appeal, and the Government filed a conditional petition to preserve its right to participate should Simplot's petition be granted. Our court granted the petitions under 28 U.S.C. § 1292(b).

II.

"We review de novo the district court's decision on cross motions for summary judgment." *Csutoras v. Paradise High Sch.*, 12 F.4th 960, 965 (9th Cir. 2021) (quoting *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007)). Under the APA, we set aside agency actions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

III.

A.

The Tribes contend that the plain text of the 1900 Act does not allow the Exchange. We agree.[7]

Section 5 of the 1900 Act specifies that the ceded Fort Hall 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). That list of specific categories of laws, followed by the limiter "only," indicates that the listed categories comprise the exclusive set of laws to be used for disposing of the lands ceded by the Tribes in the 1898 Agreement.

[7] The Tribes also argue that BLM's approval of the Exchange breached the United States' trust responsibility to the Tribes. The Government does not dispute that a violation of the 1900 Act by BLM would breach the United States' trust responsibility. The Tribes further argue that the Exchange also violated a separate clause in the 1900 Act that states that "no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres of the land hereinbefore referred to." 31 Stat. at 676. The district court did not reach that issue, and we do not reach it on appeal.

See Only, Merriam-Webster's Collegiate Dictionary (11th ed. 2020) (defining "only" as "solely, exclusively"); *see also, e.g.*, *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 334 (1994) (interpreting a list beginning with "only" as an exclusive list); *Fed. Lab. Rels. Auth. v. Aberdeen Proving Ground, Dep't of the Army*, 485 U.S. 409, 412 (1988) (per curiam) ("The phrase 'only if' denotes exclusivity.").

The Exchange disposed of ceded Fort Hall lands under FLPMA. FLPMA is not a homestead, townsite, stone and timber, or mining law. Rather, it is a general land-management law that governs "any land and interest in land owned by the United States within the several States and administered by [BLM]" and that establishes "uniform procedures" for the disposal of those lands. 43 U.S.C. §§ 1702(e), 1701(a)(10). FLPMA's scope is wider than the combination of all the categories of land disposal laws covered in Section 5. And even to the extent that FLPMA overlaps with Section 5's listed land disposal laws, the Exchange is outside that area of overlap: Here, the Exchange disposed of ceded land to facilitate the expansion of a phosphogypsum waste facility, which is not a purpose that would be encompassed within the categories of laws listed in Section 5. The Exchange therefore contravened Section 5's restrictions on the disposal of the ceded lands.

The Government and Simplot (collectively, "Defendants"), offer several arguments why we should not interpret Section 5 to restrict the options for disposing of the ceded Fort Hall lands. Defendants' proposed interpretations of Section 5, however, are not consistent with the 1900 Act's text or its historical context.

The Government contends that the categories of laws listed in Section 5 represent "essentially the full range" of federal statutes that covered disposal of public lands in 1900. Because Section 5 was intended to allow for disposal of the ceded lands under all the federal legal authorities then in effect, the Government argues, Section 5 should now be interpreted to allow for disposal under all current federal laws that authorize land disposal, including FLPMA.

But contrary to the Government's premise, the categories of laws listed in Section 5 did not encompass the full range of public-land disposal statutes that existed in 1900. Other Tribal land cession agreements that were ratified during the same period and included provisions similar—but not identical—to Section 5 specified options for removing ceded lands from public ownership that were absent from the 1900 Act, including under laws governing disposal of "coal lands" and "desert lands." Act of May 1, 1888, ch. 213, § 3, 25 Stat. 113, 133 (opening ceded lands under "the laws governing the disposal of coal lands, desert lands, and mineral lands"); Act of May 30, 1908, ch. 237, § 7, 35 Stat. 558, 561 (specifying that ceded lands shall be disposed of "under the general provisions of the homestead, desert-land, mineral, and town-site laws"). The 1900 Act's omission of such land laws indicates that Congress did not intend to capture the full range of public-land disposal statutes.

Indeed, other Tribal land cession statutes enacted during the same period expressly allowed for disposal under all public-land laws. *See, e.g.*, Act of Aug. 15, 1894, ch. 290, § 17, 28 Stat. 305, 336 (stating that ceded lands "shall . . . be subject to disposal *under the provisions of the general land laws*" (emphasis added)). That Congress chose not to use such language in the 1900 Act further shows that Congress did not intend to include all public-land disposal statutes.

Subsequent Congresses, moreover, enacted statutes seemingly based on the presumption that the 1900 Act did not allow for land disposal under all statutory methods. In 1926 and 1932, Congress amended Section 5 to expand the disposal options for the ceded Fort Hall lands by allowing for disposal under a desert lands statute and a statute governing disposal of isolated tracts of land. Act of May 19, 1926, ch. 337, 44 Stat. 566; Act of May 4, 1932, ch. 164, 47 Stat. 146. Those amendments would not have been necessary unless Congress understood Section 5 to restrict disposal options to the listed categories of laws.

Another problem with the Government's argument is that it would seem to render Section 5's qualifier "only" superfluous. The Government argues that the purpose of "only" was to prohibit disposal via methods outside the then-existing federal statutory framework. The Government, however, does not offer any example of a disposal method that would be excluded from Section 5 under that reading.

Simplot attempts to offer a non-superfluous interpretation of "only." Simplot contends that the term "only" in "shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States only," 31 Stat. at 676, should be read to modify the immediately preceding phrase "laws of the United States." Under Simplot's interpretation, the phrase "laws of the United States only" means that disposal can occur under any federal law—but only under federal law, not under state law.

There are two problems with that interpretation. First, it reads the entire phrase "homestead, town-site, stone and timber, and mining" out of the statute. Under Simplot's view, Section 5 conveys that any federal statute can authorize disposal of the ceded Fort Hall lands, so Section 5's list of specific categories of laws has no purpose. Second, Simplot's interpretation is an unnatural reading of the provision as a whole. The phrase "laws of the United States" modifies each item in the list of statutory categories ("homestead, townsite, stone and timber, and mining"), such that "only" should be read as a limiter on the entire listed set of statutory categories. In other words, the best reading is that the ceded lands may be disposed of only under the listed categories of federal laws.

Defendants rely on the legislative history of bills amending the 1900 Act to support their non-restrictive reading of Section 5, but that reliance is unavailing. As an initial point, "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear." *McGirt v. Oklahoma*, 591 U.S. 894, 916 (2020). Extratextual materials are useful only to "clear up," rather than "'create[,]' ambiguity about a statute's original meaning." *Id.* (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011)). The plain meaning of the 1900 Act is clear, so there is no reason for us to look to the legislative history. Moreover, Defendants' evidence comes primarily from subsequent amendments to the 1900 Act and therefore is "less illuminating than . . . contemporaneous evidence" from the passage of the 1900 Act. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) (quoting *Hagen v. Utah*, 510 U.S. 399, 420 (1994)).

Even if the legislative history of subsequent laws could be informative, the legislative history invoked here would at most provide equivocal evidence about the meaning of the 1900 Act. The Government points to a House report on a 1904 bill amending the 1900 Act,[8] which described Section 5 of the 1900 Act as opening the ceded lands "to settlement and appropriation *under the general laws of the United States*." H.R. Rep. No. 57-3161, at 2 (1903) (emphasis added). Although that statement could support interpreting Section 5 to broadly allow for disposal under any public-land laws, other legislative history from a different amendment to the 1900 Act supports the opposite interpretation. In 1926, Congress amended the 1900 Act to add laws regarding the disposal of isolated tracts of land to the list of statutes providing disposal options. A House report accompanying the 1926 bill incorporated a statement by the Secretary of Interior that the 1900 Act "did not extend the provisions of the isolated tract laws to the lands, and under the construction given by the [Department of Interior] in similar cases *no laws other than those specifically extended to the lands are applicable thereto*." S. Rep. No. 69-685, at 2 (1926) (emphasis added). Congress in 1926 apparently agreed with the Secretary of Interior's assessment because it otherwise would not have been necessary to add isolated-tract laws to the 1900 Act's list of available land disposal options.

Simplot further argues that reading Section 5 to restrict future disposal options for the ceded Fort Hall lands would conflict with the purpose of the 1900 Act,

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[8] The 1904 bill eliminated a requirement imposed by the 1900 Act that ceded lands within five miles of the town of Pocatello be sold at public auction. *See* Act of March 30, 1904, ch. 854, 33 Stat. 153 (1904).

which was to support a then-prevailing federal policy that encouraged "the population's westward expansion" and "private settlement and development of public lands." The 1900 Act was indeed enacted against a backdrop of westward expansion and private settlement on former Tribal lands. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106 (1998). But Congress apparently did not have a policy preference to allow for disposal of ceded lands by any means whatsoever because it enacted numerous land cession statutes during that period that listed the specific categories of laws to be used for disposal of ceded lands, and those statutes often clearly stated that the listed categories comprised the sole disposal options for the ceded lands. *See, e.g.*, Act of May 1, 1888, ch. 213, § 3, 25 Stat. 113, 133 (specifying that ceded lands are open to entry under "the laws regulating homestead entry . . . and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; *but are not open to entry under any other laws regulating the sale or disposal of the public domain*" (emphasis added)); Act of Jan. 14, 1889, ch. 24, § 6, 25 Stat. 642, 644 (specifying that ceded lands "shall be disposed of by the United States to actual settlers *only* under the provisions of the homestead law" (emphasis added)). The similarly restrictive language of Section 5 of the 1900 Act belies Simplot's contentions about Congress's purpose and policy preferences. In any event, "no amount of policy-talk can overcome a plain statutory command." *Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021).

B.

Having interpreted the 1900 Act's list of disposal options as exclusive, we next consider Defendants' various arguments contending that FLPMA repeals or supersedes that exclusivity. We conclude that the best interpretation of FLPMA is that it does not repeal or supersede the 1900 Act's restrictions on disposal. At most, it is ambiguous whether FLPMA does so, triggering application of the Indian canons of construction. And, as explained in Part III.C below, one of the Indian canons—the principle that Congress must clearly express its intent to abrogate a Tribe's treaty rights—resolves any ambiguity in favor of the interpretation advocated by the Tribes, given that Congress has not done so here.

1.

Because FLPMA broadly defines "public lands" and provides for their disposal by exchange, it is clear that if the 1900 Act did not exist, FLPMA would permit disposal of the ceded Fort Hall lands. *See* 43 U.S.C. §§ 1702(e), 1716. It is also clear that FLPMA contains no express repeal of the 1900 Act's restrictions on disposal of the ceded Fort Hall lands. Still, the Government and Simplot urge us to read FLPMA as impliedly repealing or superseding those restrictions.

a.

Although a later-enacted statute "can sometimes operate to amend or even repeal an earlier statutory provision . . . , 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (second alteration in original) (quoting *Watt v.*

Alaska, 451 U.S. 259, 267 (1981)). FLPMA reveals no "clear and manifest" intent to amend or repeal Section 5 of the 1900 Act—to the contrary, FLPMA plainly states an intent not to do so. When Congress passed FLPMA, it expressly repealed or struck portions of 147 laws, and it marked an additional 104 laws for repeal effective on FLPMA's tenth anniversary. §§ 702-03, 90 Stat. at 2787-91. The list of repealed laws includes many laws governing disposal of public lands, but, critically, does not include the 1900 Act. And, in Section 701 of FLPMA, Congress emphasized the exclusivity of that list, stating that outside of the list of explicitly repealed laws, "[n]othing in this Act shall be deemed to repeal any existing law by implication." § 701(f), 90 Stat. at 2786.[9] Section 701's clear statement against implied repeal shows that Congress did not intend to repeal any laws beyond those listed and thus shows that FLPMA did not implicitly repeal the disposal restrictions in Section 5.[10]

Simplot argues that the enactment of FLPMA as a comprehensive land management law automatically repealed specific disposal laws that impose restrictions not contained in FLPMA.[11] But if that were true, Congress

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[9] Simplot suggests that because this provision is not codified, it should be ignored. But "it is the Statutes at Large that provides the legal evidence of laws," despite the U.S. Code's omission of any particular provision. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (quotation marks omitted).

[10] A Senate report accompanying FLPMA further underscored that intent: "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." S. Rep. No. 94-583, at 26-27 (1975).

[11] Simplot also points to a separate provision of FLPMA, 43 U.S.C. § 1715(a), which grants the Secretary of Interior authority to acquire land "[n]otwithstanding any other provisions of law." Simplot ar-

would have had no reason to explicitly repeal so many other disposal laws. The plain text and structure of FLPMA indicate that Congress did not intend any such automatic repeal.

By contrast, as noted above, several other statutes passed after the 1900 Act *did* modify Section 5, including by clearly and expressly adding disposal options for the ceded lands. *See* Act of March 30, 1904, ch. 854, 33 Stat. 153 (eliminating a requirement imposed by the 1900 Act that sales of any parts of the ceded lands within five miles of the town of Pocatello occur through public auction), Act of May 19, 1926, ch. 337, 44 Stat. 566 (making a prior statute on disposal of isolated tracts of land "applicable to the ceded lands on the former Fort Hall Indian Reservation"); Act of May 4, 1932, ch. 164, 47 Stat. 146 (making a prior statute on disposal of desert lands "applicable to the ceded lands on the former Fort Hall Indian Reservation"); Act of May 12, 1920, ch. 181, 41 Stat. 596 (conveying specifically described tracts of land within the ceded Fort Hall lands to the city of Pocatello). Those statutes, which specifically refer to the ceded Fort Hall lands and therefore express an intent to add to the disposal methods listed in Section 5, illustrate that Congress knows how to properly add to Section 5's disposal options when it wants to do so.

Simplot points to FLPMA's express repeal of the Act of May 19, 1926, in support of its contention that FLPMA applies to the ceded Fort Hall lands and thus supersedes the 1900 Act's restrictions on disposal. The

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gues that the use of "notwithstanding" in § 1715(a) supersedes any conflicting provision in the 1900 Act. But § 1715(a) governs *acquisition* of land under FLPMA, not *disposal* of land, so that provision has no relevance here.

1926 Act, which had applied a statute governing disposal of isolated tracts of land to the ceded Fort Hall lands, was included in a list of isolated tract laws that FLPMA marked for repeal. § 703(a), 90 Stat. at 2790. Under Simplot's view, that express reference to the 1926 Act shows that FLPMA was, by extension, intended to apply to the ceded Fort Hall lands. Simplot argues that the reference makes FLPMA analogous to the other statutes that added to the 1900 Act's disposal options.

But unlike those statutes, FLPMA did not reference the 1900 Act or name the ceded Fort Hall lands—instead, it merely included the 1926 Act in its list of repealed isolated tract laws. That reference to the 1926 Act does not provide a clear expression of intent to repeal or modify the 1900 Act's disposal restrictions. To the contrary, it reinforces the narrowness of those restrictions by eliminating one disposal option, under which any isolated tracts of the ceded Fort Hall land would have been readily disposable. Also, unlike the other statutes that added individual narrow disposal options onto the 1900 Act's list of permissible disposal options, interpreting FLPMA to amend the 1900 Act would not merely add a discrete category for disposal of the ceded Fort Hall lands while leaving Section 5 otherwise intact. Rather, FLPMA sets forth a comprehensive framework for land disposal, and its application to the ceded Fort Hall lands would functionally repeal the 1900 Act's disposal restrictions by broadly enabling disposal of the ceded lands for purposes far outside those encompassed within the categories of laws listed in Section 5. FLPMA's singular reference to the 1926 Act (which in turn references the ceded Fort Hall lands) is insufficient to demonstrate Congress's intent to wholly repeal the 1900 Act's disposal restrictions. At most, it creates ambiguity as to whether FLPMA impliedly repealed Section 5.

That Congress would repeal the 1926 Act but leave the 1900 Act's disposal restrictions in place is consistent with FLPMA's overarching purpose. With FLPMA's enactment, Congress declared a policy that "the public lands be *retained* in Federal ownership." 43 U.S.C. § 1701(a)(1) (emphasis added); *see also* S. Rep. No. 94-583, at 24 (1975) ("[T]he Nation has come to regard [federally owned lands] as a permanent national asset which, for the most part, should be retained and managed."). Congress's focus on the retention of public lands would align with its decision to repeal the 1926 Act, which opened the ceded Fort Hall lands to an additional disposal method, but to keep in place the 1900 Act, which restricts disposal of the ceded Fort Hall lands.

The history behind FLPMA's enactment further suggests that Congress did not intend to repeal Section 5's disposal restrictions. FLPMA's enactment followed an extensive investigation by the congressionally created Public Land Law Review Commission into the country's public-land laws and history. *See* Paul W. Gates, Pub. Land L. Rev. Comm'n, History of Public Land Law Development (1968); Pub. Land L. Rev. Comm'n, One Third of the Nation's Land (1970). The Commission's reports informed FLPMA's express repeal of many public-land laws, including the 1926 Act and other statutes that had applied disposal laws to other ceded Tribal lands. *See, e.g.*, § 702, 90 Stat. at 2787 (repealing Act of June 13, 1902, ch. 1080, 32 Stat. 384, which had applied homestead laws to former Ute Indian Reservation lands); § 703(a), 90 Stat. at 2790 (repealing Act of February 9, 1903, ch. 531, 32 Stat. 820, which had applied townsite laws to former Tribal lands in Minnesota). The Commission's careful and extensive investigatory work preceding those repeals suggests that FLPMA's drafters would have been aware of the 1900 Act and that their omission of Section 5 from the list of repealed laws thus reflects that they chose not to modify it.

b.

The interplay between the 1900 Act and FLPMA is best understood under the interpretive principle that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum . . . '[w]here there is no clear intention otherwise.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)); *Nat'l Ass'n of Home Builders*, 551 U.S. at 663 (same). In *Radzanower*, the Supreme Court held that a narrow provision in an earlier-enacted statute that restricts venue options for lawsuits against national banks was not effectively repealed by the later-enacted Securities Exchange Act, which includes a broad provision setting venue rules for securities lawsuits. 426 U.S. at 149-50, 158. The Court reasoned that because the earlier Congress was focused on the narrow, "particularized problem[]" of determining venue in suits against national banks and the later Congress was focused broadly on the "objective of promoting fair dealing in the securities markets," the later-enacted statute "[should] not be considered as intended to affect the more particular," earlier-enacted statute, absent some "clear intention otherwise." *Id.* at 153-54 (quotation marks omitted). Based on that interpretation, the Court applied the narrow venue rule and held that venue was improper even though the later, broader venue provision would have allowed the suit. *Id.* at 158. Similarly, here, because the 1900 Act is narrowly drawn and specifically applicable to the ceded Fort Hall lands, and because FLPMA applies broadly to all public lands and does not reveal a clear intent to repeal the 1900 Act's restrictions on disposal, FLPMA should not be read to effectively repeal the 1900 Act's restrictions, which continue to govern disposal of the ceded lands. The principle in *Radzanower* also distinguishes FLPMA's broad mandate from the other statutes that applied narrowly to the ceded Fort Hall lands and amended the 1900 Act by adding discrete options for those lands' disposal.

National Association of Home Builders provides another application of that principle. There, the Supreme Court considered whether Section 402(b) of the Clean Water Act, a specific provision requiring the Environmental Protection Agency to delegate permitting responsibility to state governments that can perform a list of nine particular functions, was repealed by a later-enacted Endangered Species Act provision that broadly requires all federal agencies to ensure that any action they authorize will not jeopardize endangered species. *Nat'l Ass'n of Home Builders*, 551 U.S. at 662. The Court held that the Endangered Species Act's broad mandate could not be read to require the Environmental Protection Agency to determine whether the delegation of permitting responsibility to a state would jeopardize any endangered species, because such an interpretation would "effectively repeal § 402(b)'s statutory mandate by engrafting a tenth criterion" to its listed set of nine criteria. *Id.* at 663. Here, reading FLPMA to apply to the ceded Fort Hall lands would engraft onto Section 5 an additional—very broad—disposal option that would effectively subsume Section 5's restrictions on disposal, without a clear expression of Congress's intent to do so.

To argue otherwise, Simplot points to *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), where the Supreme Court held that a later statute did impliedly repeal part of an earlier statute. *Argentine Republic* involved the Alien Tort Statute, which grants federal district courts jurisdiction over tort actions by noncitizens for violations of international law, and the later-enacted Foreign Sovereign Immunities Act of 1976 ("the FSIA"), which governs immunities of foreign states. *Id.* at 432-34. The FSIA prohibits jurisdiction over suits against foreign states in some instances where the Alien Tort Statute would permit jurisdiction. *See id.* The Court concluded that, despite the FSIA's lack of any express repeal of the conflicting portions of the Alien Tort Statute, Congress nevertheless intended that the FSIA be the "sole basis" for obtaining jurisdiction over foreign states. *Id.* at 434, 436.

Argentine Republic is of no assistance to Defendants. There, the Court explained that it was *not* a case "where a more general statute is claimed to have repealed by implication an earlier statute dealing with a narrower subject." *Id.* at 438. Indeed, the later-enacted FSIA was arguably the narrower statute of the two because "[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants," whereas the FSIA applies only to foreign state defendants. *Id.* The Court in *Argentine Republic* also put diminished weight on the FSIA's lack of a clear statement of repeal because, at the time the FSIA was enacted, no court had yet held that the Alien Tort Statute conferred jurisdiction in suits against foreign states. *Id.* at 436. So, the Court reasoned, Congress may not have even understood there to be tension between the statutes. *Id.* By contrast, the study of land laws preceding the enactment of FLPMA makes it likely that Congress was aware of the 1900 Act's restrictions on disposal.

2.

Simplot relatedly argues that even if we conclude that FLPMA did not repeal the 1900 Act's restrictions on disposal, our duty to harmonize statutes requires us to read FLPMA as creating an additional source of land disposal authority for the ceded Fort Hall lands. Under the principle of harmonization, courts cannot "'pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (quoting *Morton*, 417 U.S. at 551). That principle requires courts to "regard each [statute] as effective" if they are "capable of co-existence." *Morton*, 417 U.S. at 551. In Simplot's view, we must harmonize the 1900 Act and FLPMA by reading Section 5 as setting out only the *initial* disposal options and allowing later-enacted laws like FLPMA to expand disposal authority over the ceded lands.

But harmonizing the 1900 Act and FLPMA does not require the approach Simplot urges. The 1900 Act's specific restrictions govern the ceded Fort Hall lands while FLPMA's general land disposal rules govern other public lands. That coexistence is consistent with the Supreme Court's reasoning in *Morton*, where the Court held that a statutory provision creating an employment preference for "qualified Indians" in the Bureau of Indian Affairs could "readily co-exist" with a general statute broadly prohibiting employment discrimination on the basis of race. *Id.* at 538, 550. There, the Court viewed the harmonization principle as preventing it from reading a statute of "general application" to nullify a "specific provision applying to a very specific situation," absent evidence of congressional intent to nullify the specific provision. *Id.* at 550-51. Under that same reasoning, we satisfy our duty to harmonize statutes by giving effect to the 1900 Act's specific restrictions on disposal of the ceded Fort Hall lands and FLPMA's rules for disposal of other lands. Both statutes are valid and "enjoy[] separate spheres of influence." *Epic Sys. Corp.*, 584 U.S. at 503.

Our decision in *Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055 (9th Cir. 1988), does not dictate otherwise. In *Blackfeet Indian Tribe*, we held that fifty-year right-of-way easements for natural gas pipelines across a Reservation could be allowed through the harmonization of two statutes: an earlier statute that allows the Secretary of Interior to grant oil and gas rights of way across Tribal lands for a maximum term of twenty years with the Tribe's consent, and a later statute that allows the Secretary to grant rights of way across Tribal lands for any purpose for any length of time with the Tribe's consent. *Id.* at 1056-58. Simplot contends that *Blackfeet Indian Tribe* should be read to allow general statutes to add broader options for the handling of land than those provided in earlier, specific statutes. But central to the reasoning in *Blackfeet Indian Tribe* was that the Tribe's consent was the key requirement for a right of way to be granted under both statutes. *Id.* at 1058. Because, under either statute, "the Tribe [would] preserve[] its election and its ability to protect Tribal interests," the two statutory methods for granting a right of way could live alongside each other "while still preserving their sense and purpose."

Id. By contrast, reading FLPMA to allow additional disposal options would effectively remove the qualifier "only" from Section 5 and thus would fundamentally alter the 1900 Act's plain meaning.

3.

The Government next argues that BLM's authorization of the Exchange under FLPMA is consistent with the 1900 Act in light of the "reference canon" of statutory interpretation. Under the reference canon, "when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises." *Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 209 (2019) (citing 2 J. Sutherland, Statutory Construction §§ 5207-5208 (3d ed. 1943)). The logic of the canon is that a general reference to a body of law indicates an intent to continue referencing that body of law even as it evolves. By contrast, a statute's specific reference to another statute by title or number "in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments." *Id.* at 209-10. In the Government's view, the laws listed in Section 5 of the 1900 Act referenced all federal land disposal statutes and FLPMA serves as the modern federal land disposal statute, so disposal of the ceded land under FLPMA is consistent with the 1900 Act.

But applying the reference canon here does not lead to the Government's desired conclusion. As explained in Part III.A, the 1900 Act's referenced laws (homestead, townsite, stone and timber, and mining) are specific categories of land disposal laws that do not comprise the full body of land disposal laws that existed in 1900. The list of laws is further rendered exclusive by the limiter "only." Thus, the "general subject" to which Section 5 refers is not public-land laws generally but a more limited set of land disposal laws. *Id.* at 209. No one has argued that the purpose of the Exchange is related to homestead, townsite, stone and timber, or mining laws. Rather, the Exchange's purpose is to facilitate waste disposal.

Relying on *Jam v. International Finance Corp.*, the Government argues that the 1900 Act's reference to land disposal laws encompasses FLPMA even though FLPMA embodied a fundamental change in land management law. In *Jam*, the Supreme Court considered a 1945 statute that tied the immunity of international organizations to the law of foreign-government immunity. *Id.* at 203. In 1945 foreign-government immunity was "virtually absolute," but in 1976 Congress had enacted the FSIA, allowing federal courts to exercise jurisdiction in many more suits against foreign governments. *Id.* at 204 (quotation marks omitted). Despite that substantial interim change, the Court read the 1945 statute to reference foreign-government immunity law in its newer form, encompassing the changes from the FSIA. *Id.* at 207, 210.

The circumstances of *Jam*, however, are not analogous to those presented here. The 1945 statute's reference to foreign-government immunity was expansive enough to accommodate the FSIA's transformations to that body of law. As the Supreme Court explained, the 1945 statute's specification that international organizations receive the "same immunity . . . as is enjoyed by foreign governments," *id.* at 202 (quoting 22 U.S.C. § 288a(b)), was "an instruction to look up the applicable rules of foreign sovereign immunity, wherever those rules may be found." *Id.* at 211. By contrast, Section 5, which specifically references "homestead, townsite, stone and timber, and mining laws," is not broad enough in scope to encompass the Exchange.

C.

Any ambiguity as to whether FLPMA repeals or supersedes the 1900 Act's restrictions on disposal must be resolved by the Indian canons of construction. The Indian canons are "'rooted in the unique trust relationship' between the United States and the sovereign tribes, who stood in an unequal bargaining position" when negotiating treaties and agreements. *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1163 (9th Cir. 2017) (quoting *Oneida County v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985)). One longstanding principle of federal Indian law, which we refer to as the clear statement canon, applies here and dictates that the 1900 Act's restrictions on land disposal remain in effect and preclude the Exchange.

Under the clear statement canon, any federal statute that abrogates a Tribe's treaty rights must clearly express Congress's intent to do so. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Id.* at 202-03 (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)). Although Congress certainly has the power to modify Tribes' rights, the United States' trust responsibility to Tribes requires the preservation of Tribal rights unless Congress's contrary intent is clear and unambiguous. *See id.*; *Oneida*, 470 U.S. at 247.

Section 5's restrictions on land disposal directly bear on the Tribes' treaty rights that were reserved in the 1898 Agreement and codified in the 1900 Act. Title IV of the 1898 Agreement, copied verbatim in the 1900 Act, states:

> So long as any of the lands ceded, granted, and relinquished under this treaty remain part of the public domain, [the Tribes] . . . shall have the right, without any charge therefor, to cut timber for their own use, . . . and to pasture their live stock on said public lands, and to hunt thereon and to fish in the streams thereof.

31 Stat. at 674. The 1900 Act thus reserves the Tribes' usufructuary rights to the ceded lands for as long as the lands remain public.[12] Indeed, our court has already recognized those rights: In *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983), we held that the Tribes' grazing rights on the original Fort Hall Reservation lands were established in the 1868 treaty that created the Reservation, and that the 1898 Agreement reserved those continued grazing rights for the Tribes despite the cession of their possessory rights to the land. *Id.* at 715-16. *Swim*, moreover, observed that by 1898 the Tribes "had begun to rely on the production of meat" from their herds grazing on lands ceded in the 1898 Agreement. *Id.* at 716. Abrogating those usufructuary rights (by ex-

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[12] The dissent contends that any application of the clear statement canon would render "Congress's enactment of the 1904 Act, 1920 Act, 1926 Act, and 1932 Act . . . invalidated," Dissent at 58, but application of the clear statement canon plainly does not require that result. The 1904 Act, the 1920 Act, the 1926 Act, and the 1932 Act all expressly add disposal options to the ceded lands specifically. *See supra* pages 21. FLPMA, by contrast, does not do so.

panding the methods under which the ceded lands can be removed from the public domain) would require a clear expression of congressional intent, which FLPMA does not provide.

Contrary to Defendants' contentions, the conditional nature of the Tribes' usufructuary rights in the 1900 Act does not negate the principle that Congress must speak clearly to abrogate those rights. In *Herrera v. Wyoming*, 587 U.S. 329 (2019), the Supreme Court rejected an argument that the Crow Tribe's usufructuary treaty rights on non-reservation lands—which exist so long as, inter alia, the relevant lands belong to the United States and remain unoccupied—were "temporary and precarious" and thus could be impliedly extinguished upon Wyoming's statehood. *Id.* at 340 (quotation marks omitted). Despite the conditional nature of the Crow Tribe's usufructuary rights, the Court still looked to whether Congress had expressly abrogated those treaty rights. *Id.* at 344-45. Similarly, here, the relevant inquiry is whether FLPMA provides a clear indication of Congress's intent to abrogate the Tribes' usufructuary rights, which it does not.[13]

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[13] Other Indian canons of construction instruct that courts should construe Tribal treaties and agreements, as well as statutes that expressly focus on Native Americans, liberally in favor of Tribes and resolve all ambiguities in Tribes' favor. *See, e.g.*, *Oneida*, 470 U.S. at 247 (explaining the "well established" principle that Indian treaties should be interpreted liberally in Tribes' favor); *Antoine v. Washington*, 420 U.S. 194, 199 (1975) (applying that same principle to "statutes ratifying agreements with the Indians"); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766-68 (1985) (construing "in favor of the Indians" a statute that authorized mineral leasing of Indian lands); *County of Yakima*, 502 U.S. at 269-70 (construing in Tribes' favor an ambiguous provision of a Tribal land allotment stat-

D.

Defendants also raise broader practical concerns. Simplot urges that the Don Plant is "crucial to the Nation's production of high-quality fertilizer" and that it needs to acquire the land to continue operations. The possibilities of negative economic consequences, however, cannot overcome the 1900 Act's plain meaning. *See McGirt*, 591 U.S. at 923 (rejecting the "unspoken message . . . that we should be taken by the 'practical advantages' of ignoring the written law").

The Government argues that ruling in favor of the Tribes would create the "anomalous" result that the ceded Fort Hall lands could not be disposed of at all without congressional action. But our ruling leads to no such result. Our holding is limited to this particular exchange, and we do not reach whether other instances of land disposal for purposes related to the laws listed in the 1900 Act, such as timber or mining, could be permissible. Regardless, as noted above, we are not permitted to "rewrite the statute that Congress has enacted" to reach a favored policy outcome. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 130 (2016) (quoting *Dodd v. United States*, 545 U.S. 353, 359 (2005)).

E.

Finally, we address the dissent's argument that the foregoing reasoning violates the anti-entrenchment

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ute). Those canons would appear to further require that we construe the 1900 Act in the Tribes' favor, but we need not even consider them here because the 1900 Act is clear due to its plain text that it restricts the disposal options for the ceded Fort Hall lands, and any ambiguity as to whether FLPMA supersedes the 1900 Act's restrictions is resolved by the clear statement canon.

principle, which provides that an earlier Congress cannot enact limitations on the exercise of legislative power by a future Congress. We disagree that the anti-entrenchment principle is implicated here.

Faced with statutory provisions seeking to impose additional procedural requirements on future Congresses, the Supreme Court has at least sometimes declined to read those requirements as binding future Congresses. *See, e.g.*, *Dorsey v. United States*, 567 U.S. 260, 272-74 (2012). In *Dorsey*, the Supreme Court considered a law stating that new criminal statutes that repeal older statutes shall not change the penalties incurred under the older statutes "unless the repealing Act shall so expressly provide." *Id.* at 272 (quoting 1 U.S.C. § 109). The Court declined to read that law to require an express statement of repeal to change penalties in a new criminal statute because of the principle that "statutes enacted by one Congress cannot bind a later Congress." *Id.* at 274. Rather, Congress remained free to modify the older statutory provisions and "express any such intention either expressly or by implication as it chooses." *Id.*; *see also Reichelderfer v. Quinn*, 287 U.S. 315, 317-18 (1932) (declining to read a statute that "perpetually dedicated and set apart" land for use as a public park to prohibit later Congresses from devoting that land to other uses).

Unlike the relevant statute in *Dorsey*, the 1900 Act does not contain any language imposing additional procedural requirements on Congress or otherwise limiting the ways in which Congress could repeal it in the future. If Congress had chosen to amend the 1900 Act's restrictive list, it could have done so without needing to follow any extra procedures (as it has on several occasions).

See supra Part III.B.1. In FLPMA, however, Congress did not do so.

Accordingly, our task here is merely to determine whether the 1900 Act's list of disposal options for the ceded Fort Hall lands is restrictive—we conclude that it is—and whether FLPMA indicates any congressional intent to repeal or supersede that restrictive list—we conclude that it does not. The only elements of our analysis that might plausibly implicate a notion of a constraint on Congress are the Indian law canon that requires a clear expression of congressional intent to abrogate a treaty right and the general interpretive canon that repeals by implication are not presumed unless Congress's intent is clear. But requiring *courts* to examine whether Congress has spoken clearly in a given context is not what concerned the Court in *Dorsey*. Here, there is no binding of a later Congress to some procedure selected by an earlier Congress as there was in *Dorsey*—clear statement canons have nothing to do with one Congress binding a later Congress at all. And even if the need to speak clearly could be seen as an additional procedural requirement that Congress must satisfy, the Supreme Court has long applied the clear statement canons at issue here without questioning their legitimacy in light of the anti-entrenchment principle or any other principle. *See, e.g.*, *Mille Lacs*, 526 U.S. at 202-03 (requiring a clear expression of Congress's intent to abrogate an Indian treaty right); *Herrera*, 587 U.S. at 344-45 (same); *Radzanower*, 426 U.S. at 154-57 (applying the presumption against implied repeals); *Nat'l Ass'n of Home Builders*, 551 U.S. at 662-63 (same).

* * *

Because the 1900 Act precludes the Exchange and FLPMA does not repeal or supersede the 1900 Act's restrictions on land disposal, BLM's authorization of the Exchange was "not in accordance with law" under the APA. 5 U.S.C. § 706(2)(A). Given that conclusion, we need not reach the district court's alternative grounds for invalidating the Exchange.

IV.

For the foregoing reasons, we **AFFIRM** the district court's order granting summary judgment to the Tribes.

BUMATAY, Circuit Judge, dissenting:

The three rules of real estate are simple: location, location, location. That's as true here as anywhere else. J.R. Simplot Company, an agribusiness, set its eyes on a plot of federally owned forest land next to its fertilizer plant near Pocatello, Idaho. The land is, for Simplot, an ideal location to store the chemical byproducts of its fertilizer production factory. The added land would allow the company to continue running its factory for decades, which is vital to the local and national economy. For others, however, the land is only useful for agricultural, recreational, or wildlife-preserve purposes. So more than thirty years ago, Simplot proposed an exchange with the federal Bureau of Land Management. It offered to give the federal government other parcels of land valuable to the public in return for the federal land. But this exchange has been mired in litigation ever since. That's because the federal land was once owned by the Shoshone-Bannock Tribes ("Tribes"), who seek to stop the land exchange even though they ceded the property to the United States over 125 years ago.

This dispute begins and ends with the Federal Land Policy and Management Act ("FLPMA"), 43 U.S. § 1701 *et seq*. In 1976, Congress enacted FLPMA to create a uniform, comprehensive system for disposing of and acquiring public lands. Before FLPMA, an unwieldy patchwork of laws governed the management of public lands. Congress then sought to order the chaos. FLPMA expressly authorizes the exchange of public land for private land so long as the Bureau "determines that the public interest will be well served by making that exchange." 43 U.S.C. § 1716(a). Because the land exchange here complied with FLPMA, the district court should have denied the Tribes' challenge. It's that simple.

Rather than straightforwardly applying FLPMA, the majority concludes that an apparently defunct 1900 statute overrides Congress's most recent and comprehensive instruction and thus unwinds the land exchange. The majority essentially freezes turn-of-the-20th-century law in place and ignores Congress's will. Never mind that FLPMA explicitly repealed and replaced a 1926 statute that referenced this land—confirming the statute's applicability here. The result is that the plot of Idahoan land must forever remain in the federal government's hands—unless Congress *again* acts to reform public-land laws.

Because FLPMA governs this transaction, I respectfully dissent.

I.

Background

Since 1944, Simplot has owned and operated the "Don Plant" near Pocatello, Idaho, on privately owned lands. The Don Plant processes phosphate ore. According to Simplot, the phosphate produced at the plant is crucial to making high-quality fertilizer and supports the country's food supply. But the plant also produces a byproduct, phosphogypsum—also called just "gypsum." Gypsum can't simply be thrown away because of its mineral content, and so the chemical must be stored in an onsite facility called a "gypsum stack" or "gypstack." If gypstacks run out of space, the plant cannot continue to operate. In 2020, Simplot projected that the Don Plant's gypstack would reach capacity by 2031.

The solution? Simplot sought new land to expand its gypstack capacity. By 1994, Simplot had proposed a land exchange with the Bureau. Simplot identified a 713-acre plot of public land next to the Don Plant that was well-suited for gypstack expansion. The added land would extend the Don Plant's operative life over 50 years—to 2085.

Long ago, this land was part of the Tribes' Fort Hall Reservation, which was created in 1868. *See* Treaty with the Shoshonees and Bannocks, Art. II, July 3, 1868, 15 Stat. 674 ("Fort Bridger Treaty"). In 1898, the Tribes ceded that portion of their Reservation to the federal government. *See* Agreement with the Shoshonees and Bannocks, Feb. 5, 1898, Arts. I, IV, 31 Stat. 672, 674 ("1898 Agreement"). The 1898 Agreement granted the Tribes the right to use the land for certain purposes "[s]o long as [the ceded Fort Hall lands] . . . remain part of the public domain." 1898 Agreement, Art. IV, 31 Stat. 674. The Agreement did not restrict the government's ability to dispose of the land. *See generally id.*

Congress ratified the 1898 Agreement two years later. Act of June 6, 1900 ("1900 Act"), ch. 813, § 1, 31 Stat. 672, 675. Under the 1900 Act, Congress expressly commanded that the ceded land "shall be opened to settlement by the proclamation of the President." *Id.* at 676. It then established that "the residue of said ceded lands . . . shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States only." *Id.* The 1900 Act has other requirements. It sets the price for the sale of land at "two dollars and fifty cents per acre" of certain "agricultural land" and "one dollar and twenty-five cents per acre" for "grazing lands." *Id.* It also limits "purchasers" of the land to no "more than one hundred and sixty acres." *Id.*

Fast forward to the present day. After years of environmental assessments and litigation, the Bureau approved the swap in its current form in August 2020. Under the agreement, the Bureau would transfer the 713-acres parcel to Simplot, and Simplot would give the government two plots—one 666 acres and another 160 acres—of privately owned land and a cash donation to the Bureau of Indian Affairs or the Tribes directly.

In accepting the land exchange, the Bureau concluded that the exchange would well serve the public interest. For example, the Bureau noted that the exchange would lead to a net *gain* of 113 acres of lands available for exercise of off-reservation tribal treaty rights. The Bureau also noted that the exchange would support about 3,763 jobs—generating around $172.7 million in income—and would contribute nearly $768.3 million a year in industrial activity across the region.

To ensure the exchange was fair, the Bureau relied on a professional third-party appraisal of the land exchange's market value. The appraisal determined that the public land's highest and best use was for "agricultural uses." Though the appraisal acknowledged Simplot's unique plans to use the land to expand its gypstack capabilities, the appraisal didn't factor that use into its market-value calculation.

The Tribes sued to challenge the Bureau's approval of the exchange under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A) (stating that courts may "set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Simplot then intervened. The district court held that FLPMA didn't govern the land exchange and that the 1900 Act barred the exchange altogether. The district court held also that the exchange violated the procedural requirements of FLPMA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-47. Given the remedial difficulty of unscrambling the egg of an exchange "completed more than two years ago," the district court certified its order for immediate appeal and stayed further proceedings pending our decision. We granted Simplot's petition for permission to appeal and the Bureau's cross-petition.

II.

FLPMA Governs the Land Exchange

Under its plain text, FLPMA governs the land exchange between the Bureau and Simplot. It broadly applies to the exchange of *all* "public lands," subject to two narrow exceptions not relevant here. It was thus an error to rule that the land exchange violated the 1900 Act. While the 1900 Act is another way to dispose of the land involved in the exchange, it coexists with FLPMA. It doesn't in any way limit or supplant FLPMA's procedures.

A.

In 1964, Congress recognized a problem with federal public-land laws. In Congress's view, the then-existing federal public-land laws were "inadequate" to meet the "needs of the American people." Act of Sept. 19, 1964, Pub. L. No. 88-606, § 2, 78 Stat. 982. That's because they "ha[d] developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other[.]" *Id.* Congress found that a "comprehensive review" of the laws was needed. *Id.* So Congress established the "Public Land Law Review Commission" to study the laws and recommend changes to them. *Id.* § 3. The Commission's goal was to reform the laws for the retention, management, and disposal of public lands "in a manner [that] provide[s] the maximum benefit for the general public." *Id.* § 1.

The result of "more than a decade of studying this problem" was FLPMA. *United States v. Locke*, 471 U.S. 84, 87 (1985). Passed in 1976, FLPMA provides a "comprehensive land-management" framework, *Bolt v. United States*, 944 F.2d 603, 608 (9th Cir. 1991)—establishing "uniform procedures" for the disposal and acquisition of public lands, 43 U.S.C. § 1701(a)(10). In enacting FLPMA, Congress also repealed hundreds of public-land laws. *See* Pub. L. 94-579, 90 Stat. 2743, 2787-91 (October 21, 1976).

FLPMA governs the land exchange for two reasons.

First, FLPMA applies broadly. FLPMA defines "public lands" as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership[.]" 43 U.S.C. § 1702(e). So FLPMA governs *all* public lands no matter how the land came into the possession of the federal government —including cession from Indian tribes.

And FLPMA provides for only two narrow exceptions to the meaning of "public lands"—confirming the Act's near universal scope. FLPMA allows one exception for "lands located on the Outer Continental Shelf," *id.* § 1702(e)(1), which are already governed by another statute, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq*. *See Parker Drilling Mgmt. Services, Ltd. v.*

Newton, 587 U.S. 601, 606 (2019). A second exception exists for "lands held for the benefit of Indians, Aleuts, and Eskimos," 43 U.S.C. § 1702(e)(2), presumably because those lands cannot easily be disposed of by the federal government. No other exception applies to the Act's "public lands" definition—meaning that FLPMA applies to all federally owned lands, regardless of whether existing laws govern the land.

Second, FLPMA facilitates the acquisition and disposal of public lands by expressly approving land exchanges. To begin, the federal government may "acquire" public lands "by . . . exchange" "[n]otwithstanding any other provisions of law." *Id.* § 1715(a). Next, "public land . . . may be disposed of by exchange . . . under this Act" when it "well serve[s]" the "public interest." *Id.* § 1716(a). In considering the "public interest," the government must "give full consideration to . . . the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife." *Id.* FLPMA then mandates that the "values of the lands exchanged" must be "equal, or if they are not equal, the values [must] be equalized by the payment of money." *Id.* § 1716(b). In the end, the import of these sections is that the government may exchange land "under this Act" without regard to "other provisions of law." *See id.* §§ 1715(a), 1716(a).

Given this, FLPMA definitively governs the Bureau's approval of this public-land exchange. The federal government owns the plot of land exchanged with Simplot and no party disputes that the Bureau manages the land. *Id.* § 1702(e). It also makes no difference that the land was once part of the Tribes' reservation because FLPMA applies "without regard to how the United States acquired ownership." *Id.* Finally, because the Tribes "cede[d]" the land to "the public domain" over a hundred years ago, 1898 Agreement, Arts. I, IV, 31 Stat. at 672-74, FLPMA's exception for lands held for the "benefit of Indians," 43 U.S.C. § 1702(e)(2), doesn't apply. Thus, so long as the government complied with FLPMA's requirements, the Bureau had authority to dispose of the exchanged land "under th[e] Act." *See id.* § 1716(a).

B.

Despite FLPMA's plain language, the majority contends that the 1900 Act bars the Bureau from exchanging these lands. Recall that § 5 of the 1900 Act provides that the lands ceded by the Tribes in 1898 "shall be opened to settlement . . . and shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States only." 31 Stat. at 676. Based on the solitary word "only," the majority argues that the 1900 Act supersedes FLPMA simply because FLPMA doesn't fit into one of the four categories of law permitting the disposal of the ceded Tribal land. Even more, the majority would read the 1900 Act as *permanently* barring any disposal of the ceded Fort Hall lands under current law. That's because "Congress has repealed nearly all the homestead, townsite, stone and timber, and mining laws," and so "the federal government does not currently have a viable method for disposing of the ceded lands." *Shoshone-Bannock Tribes of Fort Hall Reservation v. Daniel-Davis*, No. 4:20-cv-00553-BLW, 2023 WL 2744123, at *4 (D. Idaho 2023). Thus, while FLPMA expressly contains only two exceptions to the definition of "public lands," *see* 43 U.S.C.

§ 1702(e)(1)-(2), the majority invents a third exception—one for the Tribes' ceded Fort Hall lands.

The majority is wrong for several reasons.

1.

First, "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Because FLPMA and the 1900 Act "readily c[an] be seen as supplementing one another," we must give them both full effect. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). In this case, Congress granted the federal government *two* independent ways to dispose of the land involved in the exchange—the 1900 Act and FLPMA. As complementary grants of authority to dispose of land, the Bureau could follow either.

Through the 1900 Act, Congress provided one way to dispose of the Tribes' ceded territory. Congress devised four paths to dispose of the land under the 1900 Act—through "the homestead, townsite, stone and timber, and mining laws of the United States only." § 5, 31 Stat. at 676. The 1900 Act clearly stated its objective—it "opened" the ceded Fort Hall lands to "settlement." *Id.* Given this language, the word "only" doesn't permanently encumber the land or disable the federal government from disposing of it under other congressional grants of authority. Rather, § 5 should be read as a permission to convey the land to settlers using the 1900 Act's framework. In context then, the word "only" emphasized the federal government's authority to dispose of the land *under the 1900 Act*. But it didn't restrict the federal government's authority to act under future congressional grants of power.

At all times, Congress was free to create new paths for disposal of public lands, including the ceded land. In other words, nothing in the 1900 Act abrogated the Bureau's ability to use *future* grants of disposal authority under *other types* of statutes. "It would be inappropriate to interpret th[e 1900 Act's] language as being continuously exclusive in nature" in light of later congressional enactments. *See Pub. Serv. Co. of Colo. v. FERC*, 754 F.2d 1555, 1563 (10th Cir. 1985).

Indeed, even before FLPMA, Congress provided other ways to dispose of the Tribes' ceded Fort Hall lands—supporting the view that the 1900 Act is just one independent, but non-exclusive, grant of authority. Just four years after the 1900 Act, Congress removed the public-auction requirement from "all lands of the former Fort Hall Indian Reservation" near Pocatello. Act of Mar. 30, 1904, ch. 854, 33 Stat. 153-154 ("1904 Act"). Twenty years later, Congress authorized the grant of "public lands" to the city of Pocatello. *See* Act of May 12, 1920, 41 Stat. 596-97 (May 12, 1920) ("1920 Act"). Shortly after that, Congress added another category of disposal laws "applicable to the ceded lands on the former Fort Hall Indian Reservations"—auction provisions for isolated tracts of public lands. *See* Act of May 19, 1926, ch. 337, 44 Stat. 566 ("1926 Act"). And then in the 1930s, Congress included yet another category—laws for the "sale of desert lands." Act of May 4, 1932, ch. 164, 47 Stat. 146 ("1932 Act"). As this shows, the term "only" in the 1900 Act wasn't meant to forever preclude other ways to dispose of the ceded Fort Hall lands.

And in FLPMA, Congress expressly created the latest path for disposal of all public lands, including the Tribes' ceded land.

So FLPMA and the 1900 Act pose no "irreconcilable" conflict. *See Morton*, 417 U.S. at 550. The 1900 Act offers one way to dispose of the ceded land under its narrow grant of authority and FLPMA offers another way under its broader grant of authority. Under the 1900 Act, the "only" way to dispose of the land was through the four categories of statutes. Under FLPMA, land can be exchanged if it "well serves" the "public interest." There's no reason to read a conflict between the two. Indeed, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *see also Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."). Reading them harmoniously then, we should interpret the 1900 Act and FLPMA as granting supplemental, but independent, authorities to dispose of the public lands involved in the exchange. And so the federal government doesn't violate the 1900 Act when acting under FLPMA's authority.

Think of it this way. In 1900, Congress gave the federal government the statutory equivalent of a Ford Model T. At the time, Congress made clear that the Model T was the *only* car the federal government could use. To dispose of ceded Fort Hall lands then, the federal government had to drive the Model T—even though it was slow and its parts fell into disrepair over time. But in 1976, Congress bought the federal government a new car—this time a sleek Mustang. The Mustang is, of course, much faster and more efficient than the Model T.

So while the Model T may still sit in the garage, nothing prevents the government from taking the new Mustang for a spin. Here, the federal government drove the legislative Mustang—FLPMA.

2.

Second, rather than apply the plain meaning of both statutes, the majority manufactures a clash between the two—contrary to the rules of statutory interpretation. By fixating on the word "only," the majority treats the 1900 Act as an enduring bar on the federal government's ability to dispose of the ceded land—even after FLPMA. In other words, the majority views the 1900 Act and FLPMA as overlapping *restrictions* on the federal government, requiring the Bureau to comply with *both* to exchange the land.

But that reading conflicts with the plain meaning of FLPMA. It would be surprising if Congress meant to frustrate its own authority to facilitate future land exchanges of the ceded land through a lone adverb in a 125-year-old statute. Compare this to other congressional statutes that *did* seek to bind future Congresses. *See* Religious Freedom Restoration Act, 42 USCA § 2000bb-3 ("Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter."); Freedom of Information Act, 5 U.S.C. § 552(b)(3)(B) ("This section does not apply to matters that are . . . specifically exempted from disclosure . . . if that statute . . . specifically cites to this paragraph."). Indeed, given that both statutes were enacted to open the public lands, rather than conceiving of the two laws as overlapping restraints on the government, the better reading is to view them as complementary grants of authority *empowering* the federal government to dispose of the land. Again, the federal government can drive either the Model T or the Mustang—it needn't drive *both* at once.

Not to mention that it would raise significant constitutional questions for this court, through a clear statement requirement, to argue that the 1900 Congress barred the 1976 Congress from fully exercising its legislative power. *See Dorsey v. United States*, 567 U.S. 260, 274 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress."); *Ctr. for Investigative Reporting v. U.S. Dep't of Justice*, 14 F.4th 916, 942 (9th Cir. 2021) (Bumatay, J., dissenting) ("Express-statement laws are a form of entrenchment: they require a later-enacted law to expressly refer to the prior law if it is to actually supersede that law."). So we should avoid applying "a canon of 'constitutional collision'" to the 1900 Act. *United States v. Hansen*, 599 U.S. 762, 781 (2023) (simplified). It's better to read the two statutes as harmoniously conferring separate and independent grants of authority on the federal government.

3.

Third, the majority invokes the specific-governs-the-general canon to argue that the 1900 Act trumps FLPMA. But the canon isn't applicable. Under the canon, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007) (simplified). The specific/general distinction is, however, beside the point. FLPMA doesn't "submerge" the 1900 Act—both statutes coexist as independent grants of disposal authority. *See Argentine Republic*, 488 U.S.

at 438; *see also United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1101 (9th Cir. 2000) (reading "two enactments by Congress over thirty-five years apart" to allow them to "most comfortably coexist, giving each enacting Congress's legislation the greatest continuing effect").

Indeed, the canon's most common application occurs when there's "a general prohibition that is contradicted by a specific permission, or a general permission that is contradicted by a specific prohibition." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012); *see also Wood v. United States*, 41 U.S. 342, 365 (1842) (holding that the "more natural, if not the necessary, inference" is that two later-enacted, specific statutes on revenue collection are simply "auxiliary to . . . the old[er, far more general] law [on revenue collection], even when" the laws overlap). Here, we don't have either situation; instead, we have a "specific permission" (the 1900 Act) followed by a "general permission" (FLPMA). So we have coexistence—not conflict. Rather than pit the statutes against each other, we should read them as providing two self-contained grants of disposal authority. So the Bureau can follow either the 1900 Act procedures or FLPMA's procedures.

And besides, FLPMA *does* address the Fort Hall lands, and so the specific-governs-the-general canon wouldn't apply. Even if we were to read the 1900 Act as a specific restriction (as the Tribes argue), FLPMA *specifically* targets the Fort Hall lands, and so there's no conflict between the specific and the general. Instead, we have two provisions that specifically address the land.

Recall that FLPMA identified and repealed 12 categories of disposal laws to make space for its uniform disposal and planning procedures. *See* §§ 702, 703(a), 705(a)(2), 90 Stat. 2787-2791, 2793; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 877 (1990) ("FLPMA . . . repealed many of the miscellaneous laws governing disposal of public land . . . and established a policy in favor of retaining public lands for multiple use management."). It turns out that the 1926 Act was one of these statutes. § 703(a)(6), 90 Stat. 2790. And as mentioned earlier, the 1926 Act's *only* effect was to "[e]xtend[]" isolated tract disposal authority "to ceded lands of the Fort Hall Indian Reservation." Act of May 19, 1926, ch. 337, 44 Stat. 566. It would blinker reality to deny that this repeal specifically references the ceded Fort Hall lands.

As a result, the specific-governs-the-general canon simply can't apply here. How could it? Underlying that canon is the assumption that, between a specific and a general provision, the specific provision "comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016) (quoting Scalia & Garner, *Reading Law* 183). That assumption is unwarranted where FLPMA's repeal of the 1926 Act shows "the mind of the legislator [was] turned to the details" of the Fort Hall lands. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (simplified). True, whether a statute's chosen rule is couched in general or narrow language can be a helpful proxy for figuring out which problems Congress addressed through its legislation. But proxies aren't perfect. *See Perez-Guzman*, 835 F.3d at 1075 (noting that it is "[s]ometimes . . . difficult to determine whether a provision is a general or a specific one") (quoting Scalia & Garner, *Reading Law*

187). Since Congress confronted "the particularized problems" of the disposal of the ceded Fort Hall lands when it repealed the 1926 Act in FLPMA, *Radzanower*, 426 U.S. at 153, it follows that Congress has expressed its "clear intention" that FLPMA's uniform disposal procedures apply to those lands too, *Morton*, 417 U.S. at 550. In other words, the Fort Hall lands couldn't be a specific case that escaped Congress's attention when it enacted FLPMA, because FLPMA explicitly repealed the 1926 Act—a statute that *exclusively* regulates the Fort Hall lands.

FLPMA and the 1900 Act's common design to open and distribute federal land distinguishes this case from the cases applying the specific/general canon cited by the majority. Take *Radzanower*. That case involved the conflict of two dissimilar statutes—one "focused on the narrow, 'particularized problem[]' of determining venue in suits against national banks" and the other "focused broadly on the 'objective of promoting fair dealing in the securities markets.'" Maj. Op. at 24 (quoting *Radzanower*, 426 U.S. at 153-54). Likewise, *National Association of Home Builders* dealt with a conflict between two statutes addressing distinct problems: the Clean Water Act, which establishes a system "designed to prevent harmful discharges into the Nation's waters," and the Endangered Species Act, which is "intended to protect and conserve endangered and threatened species and their habitats." 551 U.S. at 650-51. Unlike in those cases, Congress here confronted the specific issue of disposal authority over the ceded Fort Hall lands when drafting both the 1900 Act and FLPMA. *See* § 703(a)(6), 90 Stat. at 2790.

In sum, FLPMA's text and structure show that Congress understood its disposal procedures to apply to "the very problem posed by the case at hand"—the ceded Fort Hall lands. *See Perez-Guzman*, 835 F.3d at 1075.

4.

Fourth, the majority focuses heavily on FLPMA's uncodified provision establishing that "[n]othing in this Act shall be deemed to repeal any existing law by implication." § 701(f), 90 Stat. at 2786. Given that FLPMA expressly repealed hundreds of laws but not the 1900 Act, the majority believes that Congress purposefully excluded the Fort Hall lands from FLPMA's land disposal mechanism. But this argument falls flat.

For one, as stated above, FLPMA *does* specifically address the ceded Fort Hall lands by repealing the 1926 Act. *See* § 703(a)(6), 90 Stat. 2790. So this argument cuts the other way. We can't ignore that Congress specifically intended FLPMA to govern the ceded Fort Hall lands when it repealed the 1926 Act, which governed *only* those lands. So FLPMA's repeal of the 1926 Act settles that Congress contemplated the Fort Hall lands, along with so many other federal lands, to be subject to FLPMA's disposal procedures.

And more to the point, there's no "clear repugnancy" between the two statutes requiring a choice between one or the other. *Georgia v. Pa. R. Co.*, 324 U.S. 439, 456-57 (1945) ("Only a clear repugnancy between the old . . . and the new [law] results in the former giving way"). Thus, Congress didn't need to expressly repeal the 1900 Act. Nor does giving FLPMA full effect implicitly repeal the 1900 Act. To return to the automobile analogy, Congress's giving the Bureau the keys to the Mustang didn't take away the keys to the Model T. The Model T remains in the garage—even if it's broken down.

Even so, the majority would require Congress to expressly repeal the 1900 Act for FLPMA to apply to the Tribes' ceded Fort Hall lands. Such a reading eviscerates the plain meaning of FLPMA. Rather than follow statutory text, the majority would have us consult the patchwork of public-land laws that FLPMA expressly tried to reform. And in the majority's telling, if an arcane law happens to have escaped Congress's notice, then that law serves as a living fossil that supersedes FLPMA's plain text. But "unawareness" of obscure public law statutes is not new. *See Wilderness Soc. v. Morton*, 479 F.2d 842, 881 (D.C. Cir. 1973). Legislation is not the esoteric exercise of cataloguing arcane statutes. Congressmen are not archivists. Rather, legislation is about making rules that govern our nation. And through FLPMA, Congress placed those fossils in a museum—to look and wonder at—but not to govern modern life. And requiring Congress to explicitly reference the 1900 Act to give FLPMA full effect is merely a "magical password[]" requirement, which has been soundly rejected. *Dorsey*, 567 U.S. at 274 (quoting *Marcello v. Bonds*, 349 U.S. 302, 310 (1955)).

5.

Fifth, because the plain meaning offers little support, the majority relies on legislative purpose. The majority argues that repealing the 1926 Act, but not the 1900 Act, "is consistent with FLPMA's overarching purpose." Maj. Op. at 22. According to the majority, FLPMA enshrines a federal policy that "the public lands be retained in Federal ownership." *Id.* (emphasis omitted) (quoting 43 U.S.C. § 1701(a)(1)). But the majority ignores the rest of § 1701(a)(1), which expressly encourages the disposal of public land if the "disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1)). Indeed, according to another circuit, FLPMA just "embodie[d] a congressional intent to centralize and systematize the management of public lands." *Sierra Club v. Hodel*, 848 F.2d 1068, 1082 (10th Cir. 1988); *see* 43 U.S.C. § 1701(a)(10) (announcing a congressional policy that "uniform procedures for any disposal of public land . . . be established by statute").

This proves the "dangers in using supposed purpose rather than statutory text to interpret the law." *Mi Familia Vota v. Fontes*, 129 F.4th 691, 744 (9th Cir. 2025) (Bumatay, J., dissenting). The Supreme Court has "emphasized many times [that] what Congress (possibly) expected matters much less than what it (certainly) enacted." *Stanley v. City of Sanford, Fla.*, 145 S. Ct. 2058, 2067 (2025) (simplified). Thus, it is "quite mistaken to assume . . . that any interpretation of a law that does more to advance a statute's putative goal must be the law." *Id.* (simplified). It is even more so the case when Congress had multiple, sometimes competing purposes.

So the bottom line is that it strains credulity to read FLPMA as accomplishing federal retention of the Fort Hall lands *only* by repealing the 1926 Act—and not through its uniform disposal procedures—while acknowledging that FLPMA simultaneously accomplishes the same policy for most other federal land *through* those uniform procedures. Congress simply did not make an idiosyncratic, plot-specific judgment about the procedures applicable to the ceded Fort Hall lands. Instead, FLPMA's repeal of the 1926 Act cleared the way for its uniform procedures to apply to the ceded Fort Hall lands, along with all the other lands governed by the many statutes FLPMA repealed. *See* 43 U.S.C. § 1701(a)(10).

6.

Next, the Indian canon is no help here. Under the Indian canon of construction, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). But before jumping to the canon, two requirements must be met. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003).

To begin, there must be ambiguity in the statute. "The canon of construction . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); *see also Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("[E]ven though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." (simplified)).

Next, the statute must be "passed for the benefit of dependent Indian tribes." *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993) (simplified); *see also Artichoke Joe's Cal. Grand Casino*, 353 F.3d at 729 ("[T]he presumption applies only to federal statutes that are 'passed for the benefit of dependent Indian tribes.'" (simplified)).

The district court applied the Indian canon to the 1900 Act even though it expressly found that "the 1900 Act is not ambiguous." *Shoshone-Bannock Tribes*, 2023

WL 2744123, at *5 n.3. That concession immediately takes this out of the canon's scope. Further, even if there were ambiguity, the land-disposal provision of the 1900 Act was not passed for the benefit of the Tribes. Section 5 was no codification of the Fort Bridger Treaty or the 1898 Agreement. While the Tribes maintained use rights over the ceded Fort Hall lands as long as the land remained in the federal government's hands, neither the Fort Bridger Treaty nor the 1898 Agreement provided the Tribes with a say on how the public lands would be disposed of or conveyed to settlers once the cession was complete. Rather, the 1900 Act went further than the federal government's agreements with the Tribes to set up mechanisms for the disposal of the ceded land, which did not benefit the Tribes. This also takes the case out of the canon's scope. After all, the canon's most "basic idea" is that "ambiguous treaty provisions should be construed against the drafting party." *Arizona v. Navajo Nation*, 599 U.S. 555, 572 (2023) (Thomas, J., concurring). That's not an issue here.

Perhaps conceding the 1900 Act's clarity, the majority tries a different take. Instead of an interpretive canon to help make sense of semantic ambiguity, the majority turns it into a "clear statement canon." Maj. Op. at 30. It is true that "Congress . . . must clearly express its intent to" "abrogate Indian treaty rights[.]" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). But the majority's invocation of this "clear statement canon" is wrong for two reasons. First, the "clear statement canon" *only* applies to abrogation of "Indian treaty rights." *Cf. id.* at 202-03 (examining conflict between 1837 Treaty with the Chippewa and Minnesota's enabling Act). And neither the 1900 Act nor FLPMA abrogate the Tribes' treaty rights. As just stated, the 1898 Agreement grants the Tribes' use rights "[s]o long as any of the [ceded Fort Hall lands] remain part of the public domain[.]" Art. IV, 31 Stat. at 674. By its express terms, any treaty rights terminate when the ceded Fort Hall lands leave the "public domain." And nothing in the 1898 Agreement gives the Tribes the right to determine whether the ceded Fort Hall lands remain in the "public domain." So disposing of the ceded Fort Hall lands under either the 1900 Act or FLPMA doesn't violate any treaty right and the "clear statement canon" doesn't apply.

Second, the majority all but concedes that this case has nothing to do with abrogation of treaty rights. Instead, the majority admits that the only "ambiguity" here is "whether FLPMA repeals or supersedes the 1900 Act's restrictions on disposal." Maj. Op. at 30. So the only conflict here—and by now this should come as no surprise—is between the 1900 Act and FLPMA. That question doesn't implicate the "clear statement canon." Indeed, the majority's use of the "clear statement canon" proves too much. If Congress needed to provide any more of a "clear indication" of "intent to abrogate the Tribes' usufructuary rights," Maj. Op. at 33, than its explicit reference to the 1926 Act in FLPMA, then Congress's enactment of the 1904 Act, 1920 Act, 1926 Act, and 1932 Act, as well as the repeal of the 1926 Act in FLPMA, would all be invalidated based on the failure to give a "clear statement."

For the same reasons, the argument that the land exchange breached the United States' trust responsibility to the Tribes fails. As the Tribes acknowledge, to establish 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." *Navajo Nation*, 599 U.S. at 563. "[U]nless there is a specific duty that has been placed on the government with respect to Indians, the government's general trust obligation is discharged by the government's 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) (simplified). As discussed, Section 5 of the 1900 Act doesn't grant the Tribes any rights regarding the disposal of the ceded Fort Hall lands. And so, the federal government complies with its trust obligations by following FLPMA—a generally applicable law.

7.

Finally, the majority downplays our precedent. Almost forty years ago, we encountered a nearly identical situation to this case. *See Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055 (9th Cir. 1988). There, we sensibly read two statutes with seemingly contradictory requirements as "coexisting" and gave the parties the "choice" between the two. *Id.* at 1058, 1059. In that case, Congress enacted two statutes governing rights-of-way over tribal lands—one in 1904 and one in 1948. *See id.* at 1056-57. The 1904 Act was "specific"—it authorized rights-of-way "for oil and gas pipelines" for up to 20 years. *Id.* at 1058 (citing 25 U.S.C. § 321). The later Act of 1948 was "more general"—it authorized rights-of-way "for *all* purposes" without any statutory time limit. *Id.* (quoting 25 U.S.C. § 323). By regulation, these rights-of-way could extend up to 50 years. *Id.* at 1057. What's more, the Act of 1948 expressly didn't repeal "any existing statutory authority empowering the

Secretary of the Interior to grant rights-of-way over Indian lands." *Id.* (citing 25 U.S.C. § 326). Very familiar.

The Secretary of the Interior then granted a power company five 50-year natural-gas rights-of-way over Blackfeet tribal lands. *Id.* at 1055-56. The tribe sued, claiming that the rights-of-way could not last more than 20 years under the 1904 Act. *Id.* We then had to confront the "essential question"—"whether the 1904 Act, the 1948 Act, or both, control[led] the five rights-of-way." *Id.* at 1057. The tribe argued that the 1904 Act—as the more specific statute governing natural gas—should control. *Id.* at 1056. And we noted that any legal ambiguity should be resolved in favor of the tribe under the Indian canon of construction. *Id.* at 1058. Again, this should sound familiar.

Still, we interpreted the laws "with an eye toward upholding both statutes." *Id.* We observed that the later 1948 law was meant to "broaden" the federal government's powers to grant rights-of-way and to "satisfy the need for simplification and uniformity in the administration of Indian law." *Id.* (simplified). The two laws then "c[ould] be read as coexisting." *Id.* Given that "both [laws] should be applied. . . . [,] the term of years for the rights-of-way can be either 20 or 50 years." *Id.* at 1059. Thus, the parties in the case had a "choice" between the two time limits and, because the tribe had agreed to the 50-year term, the 1948 law governed. *Id.* In other words, the statutes were overlapping, independent grants to the government—empowering the Secretary to authorize rights-of-way under either law.

Blackfeet Indian Tribe's parallels to this case are obvious. Both the 1900 Act and the 1904 Act granted the Secretary of Interior limited authority over a narrow subject matter—the authority to dispose of ceded Fort Hall lands and authority to grant rights-of-way for oil and gas pipelines, respectively. Both acts were followed by comprehensive statutory reforms to modernize and simplify complex areas of law. Both FLPMA and the Act of 1948 vested *broader* powers in the Secretary over *broader* subject matters. And both FLPMA and the 1948 Act did not purport to impliedly repeal the earlier statutes. And given that both statutes implicated tribal lands, the Indian canon was invoked. We should thus treat this case as we did *Blackfeet Indian Tribe*—both the 1900 Act and FLPMA "coexist" and serve as independent vehicles to dispose of the public lands in the land exchange. *See id.* at 1058.

* * *

Under the plain text of FLPMA, the canons of statutory interpretation, the history of the ceded land, the context of public-land laws, and our precedent, FLPMA should govern the land exchange. It was mistaken to conclude that a relic from the turn of the last century supersedes all this.

III.

The Land Exchange Complies with FLPMA and NEPA

Aside from invalidating the land exchange for violating the 1900 Act, the district court also sought to unwind the land exchange (1) for violating FLPMA's market valuation regulations, (2) for failing to expressly incorporate the Bureau's findings on "cultural resources" into its record of decision, and (3) for violating NEPA. None warrant setting aside the land exchange.

A.

Under FLPMA, "[t]he values of ... lands exchanged" by the Bureau and the other party "shall be equal . . . [or] equalized by the payment of money[.]" 43 U.S.C. § 1716(b). To ensure that lands in an exchange are close enough in value, the Bureau must "arrange for [an] appraisal," *id.* § 1716(d)(1), to determine the exchanged lands' "market value," 43 C.F.R. §§ 2200.0-5(c), 2200.0-6(c). The appraiser here determined that the highest and best use for the exchanged land was for "agricultural and recreational uses, wildlife habitat, [or] watershed," even though the appraiser recognized that the land had unique "appeal" to Simplot for "expansion" of its gypstack facility. The district court ruled the appraisal insufficient because it believed that Simplot's plan to use the exchanged land for gypstack expansion should drive "market value." But because a one-off land-use plan by a unique market participant doesn't reflect "market value," the district court's decision was wrong.

"Market value" refers to the lands' value "in a competitive and open market." *Id.* § 2200.0-5(n). To calculate "market value," the appraiser must first "[d]etermine the highest and best use of the property." *Id.* § 2201.3-2(a)(1). And under FLPMA's regulations, the appraisal must, "to the extent appropriate," follow the Department of Justice's Uniform Appraisal Standards for Federal Land Acquisitions ("Appraisal Standards"). *Id.* § 2201.3. The Appraisal Standards, in turn, provide that "there must be demonstrated an actual profitable use or a market demand" for a use to qualify as a highest and best use. Appraisal Standards § 4.3.2.2, at 104; *see id.* § 4.3.2.1, at 103. That highest and best use becomes the basis to "[e]stimate the value of the lands ... as if ... available for sale in the open market." 43 C.F.R. § 2201.3-2(a)(2).

But "market value does not include the special value of property to the owner arising from its adaptability to his particular use." *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979). On the contrary, only the "general demand" that gives property "value transferrable from one owner to another" can be considered. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). The Appraisal Standards adopted this rationale when it comes to a unique demand:

> [V]alues resulting from the urgency or uniqueness of the government's need for the property or from the uniqueness of the use to which the property will be put do not reflect what a willing buyer would pay to a willing seller .... [G]overnment projects may render property valuable for a unique purpose. Value for such a purpose, if considered, would cause "the market to be an unfair indication of value," because there is no market apart from the government's demand.

Appraisal Standards § 4.3.2.2, at 104 (quoting *United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1366, 1367 (9th Cir. 1976)) (simplified). While this refers to the federal government's unique demand, the same principle applies to nonfederal parties too. "[N]either an existing federal use nor a nonfederal party's proposed use can be considered [in the highest and best use analysis] unless there is competitive demand for that use in the private market." *Id.* § 4.10, at 186.

As stated earlier, location is key to market value. The appraiser correctly refused to treat Simplot's unique plan to use the land for gypstack expansion to set market value. That's because, as the district court acknowledged, "[t]here is not a generalized demand for gypstacks," and "a gypstack is only valuable to Simplot." *Shoshone-Bannock Tribes*, 2023 WL 2744123, at *10. In other words, the location is only valuable to Simplot. For others, the record shows that the location was exceedingly difficult to access legally, had steep topography, and lacked utilities.

The Tribes gesture to two waste disposal sites that they claim are "in the region" of the Don Plant to suggest there's a market for industrial waste sites on the exchanged land. But the Tribes ignore that the two waste sites appear to be about 274 miles apart. Even more to the point, *established* waste sites—unlike *competing proposals*—don't constitute a competitive market to build a new waste site. *See* Appraisal Standards § 4.10, at 186 (barring consideration of a "nonfederal party's proposed use" if there is no "competitive demand for that use in the private market").

Finally, the district court asserted that "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." *Shoshone-Bannock Tribes*, 2023 WL 2744123, at *10. But this view is economically unsound and violates the emphasis on competitive demand incorporated into the Appraisal Standards. No Ph.D. in economics is necessary to understand that "supply and demand" favor the appraiser's view of the land as agricultural, wildlife, or recreational use. The land is abundant. And only one market participant values the land highly. Imagine the land was worth $10/acre to ten buyers and $100/acre to a single buyer. If the seller put the land up for auction, the ten buyers would each bid no more than $10/acre—the ceiling of their demand. The single buyer would then win the auction by simply bidding $10.01. That's because auctions only require beating the other bids. So even with one eccentric buyer, the market price would still coalesce around the value to the other market participants. One-off plans have no place in the highest and best use analysis. Plain and simple.

So, in short, the Bureau did not err by relying on an appraisal that refused to consider Simplot's gypstack plans.

B.

Next, under FLPMA's regulations, in evaluating whether the "public interest" will be "well served," 43 U.S.C. § 1716(a), the Bureau must give "full consideration" to the exchange's impact on "cultural resources." 43 C.F.R. § 2200.0-6(b). The district court faulted the Bureau for failing to analyze the "cultural resources" factor in its record of decision. But the record of decision expressly incorporated the Bureau's environmental impact statement, which the district court recognized properly engaged in the "cultural resources" evaluation. Thus, there's no basis to set aside the land exchange when the combined record of decision and environmental impact statement gave "full consideration" to all necessary factors.

Neither the Tribes nor the district court point to a statute or regulation requiring the Bureau to articulate its full public-interest analysis in a single document—rather than incorporating some analysis by reference. Indeed, we've expressly *endorsed* the incorporation of analysis across documents in other FLPMA cases. Take *National Parks & Conservation Association v. Bureau* *of Land Management*, 606 F.3d 1058, 1063 (9th Cir. 2010). In that case, in reviewing the Bureau's public-interest analysis, the district court looked "only to the Record of Decision" to hold that the analysis glossed over certain factors. *Id.* at 1063. We reversed the district court's determination. *Id.* at 1069. We concluded that the district court was improperly "constrained by its decision to review only the Record of Decision." *Id.* Instead, the final agency action "incorporate[d] the [environmental impact statement]" and we consulted both. *Id.* And after reviewing the "material not considered by the district court" in the environmental impact statement, we were convinced that the Bureau gave "full consideration" of the "public interest." *Id.* In other words, FLPMA has no "cut-and-paste" requirement.

Likewise, the Bureau's record of decision here expressly stated that it was "based on the consideration of the information from the Final [Environmental Impact Statement]." And the district court acknowledged that the environmental impact statement "considered and fully disclosed the impacts of the proposed project on cultural resources." *Shoshone-Bannock Tribes*, 2023 WL 2744123, at *16. Thus, that the "cultural resources" analysis was spread among two documents doesn't constitute a FLPMA violation. *See Garland v. Ming Dai*, 593 U.S. 357, 369 (2021) ("[A] reviewing court must 'uphold' even 'a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" (simplified)).

And FLPMA proceedings are subject to harmless-error analysis. *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir. 1986); *see also* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."). An agency's error is "harmless" when "its 'mistake . . . is one that clearly had no bearing on the procedure used or the substance of decision reached.'" *Sagebrush Rebellion*, 790 F.2d at 764-65 (simplified). The plaintiff bears the burden of proving that an error was prejudicial. *Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 41 (9th Cir. 2025). Because the Bureau undertook the "full consideration" of the "cultural resources" factors as required by FLPMA, any error was ultimately harmless.

C.

Finally, NEPA doesn't "demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989). Instead, "NEPA requires agencies to evaluate the direct and indirect effects of the proposed action." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 737 (9th Cir. 2020). Sometimes that task is challenging. But the federal government doesn't need to "peer into a crystal ball," "engage in speculative analysis," or "do the impractical, if not enough information is available to permit meaningful consideration." *Solar Energy Indus. Ass'n v. FERC*, 80 F.4th 956, 995 (9th Cir. 2023) (simplified). So all NEPA requires is the government to "engage in reasonable forecasting." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (simplified). The federal government doesn't need to explain its analysis *beyond* what is reasonably foreseeable. For example, the Supreme Court has approved NEPA analysis that discusses mitigation steps that are "merely conceptual," which "will be made more specific as part of the design and implementation stages of the planning process." *Robertson*, 490 U.S. at 339 (simplified).

Additionally, the Supreme Court has recently reaffirmed the narrow scope of judicial review of an environmental impact statement under NEPA. "The bedrock principle of judicial review in NEPA cases can be stated in a word: Deference." *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colo.*, 145 S. Ct. 1497, 1515 (2025). That's because "the adequacy of an [environmental impact statement] is relevant only to the question of whether an agency's final decision . . . was reasonably explained." *Id.* at 1511. And when an agency "assess[es, *inter alia*,] . . . feasible alternatives for purposes of NEPA," it "invariably make[s] a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry—and also about the length, content, and level of detail of the resulting EIS." *Id.* at 1513. Thus, the Supreme Court has forcefully reminded us to "afford substantial deference and not micromanage those agency choices so long as they fall within a broad zone of reasonableness." *Id.* Indeed—even if an environmental impact statement *does* "fall[] short in some respects, that deficiency may not necessarily require" vacatur of the agency's approval of a project, "at least absent reason to believe that the agency might disapprove the project if it added more to the" environmental impact statement. *Id.* at 1514. Deference is our marching order.

Although the district court denied most of the Tribes' NEPA claims, it ruled that the Bureau flouted NEPA on the narrow ground that it didn't specifically analyze Simplot's design options for its cooling ponds and expanded gypstacks. True, the Bureau explained in its record of decision that it didn't consider "specific design options" for those proposed actions because they "would be finalized during design and permitting and are subject to change based on technical changes, final engineering, Don Plant production, and other factors." But this determination falls within the "broad zone of reasonableness" permitted by NEPA given that the plans were uncertain. *Id.* at 1513. Moreover, nothing shows that the Bureau would have "disapproved the project if it added more to the" environmental impact statement here. *Id.* at 1514. And that's all that NEPA requires—a good-faith, hard look at the proposals. *See N. Plains Res. Council, Inc.*, 668 F.3d at 1079. Anything more would be speculative, and our court would exceed the proper scope of review by inserting itself further into the Bureau's "fact-dependent, context-specific, and policy-laden choices about the depth and breadth" of the environmental impact statement. *Seven Cnty. Infrastructure Coal.*, 145 S. Ct. at 1513.

The Tribes emphasize that the Bureau glossed over Simplot's "*existing* preliminary design plans and locations." But that misses the point—the fact that *a* plan exists doesn't resolve the uncertainty surrounding which specific design details *will ultimately be selected*. Again, the Bureau need only engage in reasonably forecasting—not crystal-ball reading. *See id.*

The Bureau also noted that final "design details" would have to comply "with other Federal and State requirements"—further mitigating their effects. The Tribes contend that this improperly assumes the effective enforcement of environmental laws by federal and state agencies. But under the presumption of regularity, courts presume that agencies carry out their allotted functions "[i]n the absence of clear evidence to the contrary[.]" *Angov v. Lynch*, 788 F.3d 893, 905 (9th Cir. 2015) (simplified). Simplot is already subject to remedial orders from prior litigation and is required to obtain approvals from multiple federal and state environmental regulators before it begins its project. Simplot has worked effectively with these regulators for decades. With no compelling evidence to the contrary, the Bureau appropriately assumed that these regulators would properly enforce the law going forward.

Thus, the Bureau properly followed NEPA.

IV.

FLPMA directly authorized the challenged exchange. And the Bureau didn't otherwise violate FLPMA or NEPA. For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-35543, 23-35544

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, PLAINTIFF-APPELLEE

v.

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

and

J.R. SIMPLOT COMPANY, INTERVENOR-DEFENDANT

D.C. No. 4:20-cv-00553-BLW
District of Idaho, Pocatello
Filed: Apr. 21, 2026

ORDER

Before: MICHELLE T. FRIEDLAND and PATRICK J. BUMATAY, Circuit Judges, and MATTHEW F. KENNELLY,* District Judge.

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* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

Order;
Dissent by Judge COLLINS;
Dissent by Judge TUNG;
Statement by Judge TUNG;
Statement by Judges FRIEDLAND and KENNELLY

Judges Friedland and Kennelly voted to deny Simplot's petition for panel rehearing, and Judge Bumatay voted to grant it. Judge Friedland voted to deny both petitions for rehearing en banc and Judge Kennelly so recommended. Judge Bumatay voted to grant the petitions for rehearing en banc. The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 40. Judges Gould and Johnstone did not participate in the deliberations or vote in this case.

The petitions for panel rehearing and rehearing en banc (Dkt. Nos. 129 and 131) are **DENIED**. Judge Collins's and Judge Tung's dissents from the denial of rehearing en banc, Judge Tung's statement respecting the denial of rehearing en banc, and the panel majority's statement in response to the dissents, are filed concurrently herewith. No further petitions for rehearing will be entertained.

COLLINS, Circuit Judge, dissenting from the denial of rehearing en banc:

The panel majority in this case incorrectly resolved an important question in a manner that has potentially significant ramifications for other cases. We should have granted rehearing en banc, and I dissent from our failure to do so.

The gravamen of the panel majority's argument is that the general authorization to conduct land exchanges under the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, does not vitiate a more specific provision of a 1900 law stating that certain ceded lands from the Fort Hall Indian Reservation "shall be subject to disposal" "only" under specified categories of laws, *see* Law of June 6, 1900, ch. 813, § 5, 31 Stat. 672, 676 ("the 1900 Act") (emphasis added). *See Shoshone-Bannock Tribes v. Department of the Interior*, 153 F.4th 748, 759-68 (9th Cir. 2025). In my view, that conclusion is plainly incorrect. Indeed, a contrary conclusion follows ineluctably from three undisputed or indisputable premises.

First, the panel majority agrees that, because the FLPMA "broadly defines 'public lands' and provides for their disposal by exchange," the plain text of the FLPMA, considered by itself, authorizes the exchange at issue here. *Shoshone-Bannock Tribes*, 153 F.4th at 759; *see also id.* (stating that "it is clear that if the 1900 Act did not exist, FLPMA would permit disposal of the ceded Fort Hall lands").

Second, the panel majority also agrees that, notwithstanding the continued presence of the word "only" in § 5 of the 1900 Act, the exclusivity of § 5's list of authorized disposal methods was vitiated by subsequent statutes that unambiguously authorized additional means of disposing of ceded Fort Hall lands. *See Shoshone-Bannock Tribes*, 153 F.4th at 760 (agreeing that "several other statutes passed after the 1900 Act *did* modify Section 5, including by clearly and expressly adding disposal options for the ceded lands"). And as the panel majority further concedes, *see id.*, such legislation included the Act of May 19, 1926 (the "1926 Act"), which stated that the disposal authority in § 2455 of the Revised Statutes is "applicable to the ceded lands on the former Fort Hall Indian Reservation." Ch. 337, 44 Stat. 566, 566. Section 2455, in turn, generally authorized, *inter alia*, the sale, at public auction, of "any isolated or disconnected tract or parcel of the public domain not exceeding one quarter section." *See* Act of Mar. 28, 1912, ch. 67, 37 Stat. 77, 77-78.

Third, it is undisputed that an expressly declared purpose of the FLPMA was to establish "uniform procedures for any disposal of public land," 43 U.S.C. § 1701(a)(10), that would replace the prior "chaotic" system of federal land management by "repeal[ing] many of the miscellaneous laws governing disposal of public land," *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 876-77 (1990); *see also Shoshone-Bannock Tribes*, 153 F.4th at 759 (noting that the FLPMA's new uniform procedures were coupled with an immediate repeal of "portions of 147 laws" and a prospective repeal, effective in 10 years, of "an additional 104 laws"). Among the laws that were thus repealed and replaced was the above-described 1926 Act. *See* FLPMA, Pub. L. No. 94-579, § 703(a)(6), 90 Stat. 2743, 2790 (1976).

Taking these three premises together leads inexorably to the conclusion that the FLPMA's disposal authority is applicable here. The 1926 Act had *already* vitiated the exclusivity of § 5's list of disposal methods; the FLPMA explicitly replaced the *additional* disposal authority granted under the 1926 Act with the general disposal authority conferred under the FLPMA; and the FLPMA's disposal authority concededly applies here by its own terms. This case is that simple.

The panel majority resists this logic, but its reasons for doing so ignore the FLPMA's text and declared purpose. Although the 1926 Act concededly vitiated the exclusivity of § 5's listed methods, the panel majority refuses to accept the conclusion that the FLPMA's repeal of the 1926 Act's additional disposal authority means that the FLPMA's general disposal authority *replaces* that now-repealed additional authority. *Shoshone-Bannock Tribes*, 153 F.4th at 760-71. The panel majority gives two reasons for that conclusion, but neither withstands analysis.

First, the panel majority argues that it would be inappropriate to construe the FLPMA as replacing the repealed 1926 Act's additional authority with the FLPMA's general authority because, unlike the grant of authority under the 1926 Act, the FLPMA's general grant of authority did not "name the ceded Fort Hall Lands." *Shoshone-Bannock Tribes*, 153 F.4th at 760. That makes no sense. The entire purpose of the FLPMA—as is confirmed by its expressly declared statutory policy—was to replace the patchwork of literally hundreds of specific authorities with a general set of "uniform procedures for any disposal of public land." 43 U.S.C. § 1701(a)(10); *see also Shoshone-Bannock Tribes*, 153 F.4th at 775 (Bumatay, J., dissenting) (noting that the FLPMA "explicitly repealed the 1926 Act—a statute that *exclusively* regulates the Fort Hall lands"—and replaced it, and all of the other repealed authorities, "with the FLPMA's uniform disposal and planning procedures"). To refuse to give effect to this explicit swap of specific provisions for a general provision, and to do so precisely on the ground that the latter is framed in general terms, is simply to defy the statute.

Second, the panel majority reasons that, because the general authority available under the FLPMA is so much broader than the additional authority that had been granted by the 1926 Act, Congress should not be understood to have replaced the latter with the former absent a "clear expression of intent" to derogate from § 5's exclusivity *to that much greater extent*. *Shoshone-Bannock Tribes*, 153 F.4th at 760; *see also id.* at 761 (noting that, unlike the 1926 Act's addition of an "individual narrow disposal option[] onto the 1900 Act's list of permissible disposal options," the FLPMA's "comprehensive framework for land disposal, and its application to the ceded Fort Hall lands," would "broadly enabl[e] disposal of the ceded lands for purposes far outside those encompassed within the categories of laws listed in Section 5"). Nothing supports the panel majority's demand for a clearer statement before it will give effect to the FLPMA's repeal-and-replacement of prior statutory authorities with respect to the 1926 Act.

Moreover, as the panel majority concedes, its refusal to construe the FLPMA as replacing the 1926 Act's additional disposal authority with the FLPMA's general disposal authority means that, as to the Fort Hall lands, the FLPMA actually had the effect of *contracting* the Government's authority to dispose of those lands. The panel majority argues that this counterintuitive conclusion actually makes sense, because another declared policy of the FLPMA is "that 'the public lands be *retained* in Federal ownership.'" *Shoshone-Bannock Tribes*, 153 F.4th at 761 (quoting 43 U.S.C. § 1701(a)(1) (emphasis added by the panel majority)). But the panel majority's argument falls apart, because it rests on an improper truncating of the quoted statutory purpose. What the phrase quoted by the panel majority actually says is that it is a declared policy of the FLPMA that "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.*" 43 U.S.C. § 1701(a)(1) (emphasis added). If, as the panel majority concedes, this declared policy applies to the Fort Hall lands, then so too does that policy's reference to the FLPMA's "land use planning procedure" for "determin[ing]" whether a "disposal" of the property is authorized. *Id.* That the panel majority found it necessary to selectively edit the statutory policy it purported to apply further confirms that its construction of the FLPMA lacks any basis in the statutory text.

For the foregoing reasons, the panel majority plainly erred in resolving the important question presented in this case, and we should have granted rehearing en banc. I respectfully dissent from our denial of that rehearing.

TUNG, Circuit Judge, joined by CALLAHAN, BENNETT, R. NELSON, BUMATAY, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

We should have reheard this case en banc. The panel majority misapplies a 125-year-old statute to bar the operation of another statute clearly authorizing the disposal of lands that Indian tribes once owned but had long ago ceded to the federal government. The two statutes are reconcilable; one does not bar the operation of the other. Yet the panel majority forces a confrontation between them in violation of basic rules of statutory interpretation while improperly obstructing the government's administration of its own property. Respectfully, I dissent.

* * *

In 1898, the Shoshone-Bannock Tribes sold a portion of their reservation in southeast Idaho to the United States government. The government now wants to transfer some of that land to a company in exchange for land the company owns. The government and company say that the Federal Land Policy and Management Act of 1976 (FLPMA) allows them to carry out the exchange. But the Tribes say that an earlier statute from 1900 bars the exchange despite the Tribes having ceded that land long ago and despite the fact that the FLPMA would otherwise govern the disposal of that land (as the panel majority acknowledges).

Who prevails depends on whether the statutes can be harmonized. The FLPMA allows for the exchange of "public lands"—defined as "any land . . . owned by the United States . . . without regard to how the United States acquired ownership." 43 U.S.C. § 1702(e). There are two "except[ions]" to this definition: land on the "Outer

Continental Shelf," and land "held for the benefit of Indians, Aleuts, and Eskimos." *Id.* Because no exception applies here (as the parties admit), the land the Tribes ceded is "public land[,]" and accordingly, if the exchange procedures in the FLPMA are satisfied, the FLPMA permits the exchange. *Id.*

None of that is in dispute. The only dispute is over how to read the 1900 Act—does it restrict the operation of the FLPMA? Under the 1900 Act, the land at issue was "opened to settlement by the proclamation of the President" and "subject to disposal under the homestead, town-site, stone and timber, and mining laws of the United States only[.]" Act of June 6, 1900, ch. 813, § 5, 31 Stat. 672, 676. The panel majority (and the Tribes) would read the word "only" to prohibit the land exchange otherwise allowed by the later enacted FLPMA because the FLPMA is not one of the "laws" under the 1900 Act permitting "disposal." That reading seems attractive: it is simple, and simple is often right.

But here it is wrong. The panel majority's reading negates the FLPMA, failing the basic rule of statutory interpretation that "[w]hen confronted with two Acts of Congress allegedly touching on the same topic," courts are "not at 'liberty to pick and choose among congressional enactments'" but "must instead strive 'to give effect to both.'" *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (citation omitted). The panel majority picked the 1900 Act over the FLPMA when it should have harmonized the two.

There is a clear way to reconcile them here. Rather than negating the effect of the FLPMA, the word "only" in the 1900 Act served to limit the methods of disposal available at the time the Act was enacted. Besides the federal homestead, town-site, stone and timber, and mining laws, *other* laws existed at the time that might have otherwise permitted disposal. Inserting the word "only" in the 1900 Act made clear that those *other pre-existing* laws would not apply. Not only is that reading entirely plausible, it respects the rule that an earlier Congress cannot bar a later Congress from adding other means of disposal; indeed, later Congresses made such additions—more than once—after the passage of the 1900 Act.

The word "only" in the 1900 Act served another related purpose: it limited "settlement" of the land pursuant to the enumerated laws, which promoted settlement and cultivation of the land, *to the exclusion* of squatters or speculators who would not make productive use of the land. Many other statutes of the homesteading era, phrased similarly, served that purpose. The word "only" thus provided a limitation, but it did not function to prospectively preempt the FLPMA.

The history of the respective Acts reinforces that conclusion. Both statutes serve differing (albeit overlapping) aims, and are thus best read to provide separate, coexisting grants of authority to the government to dispose of the land. If the government seeks to dispose of the land through "settlement" under the 1900 Act—whose avowed aim was to increase private settlement and encourage cultivation in former territories (indeed, Idaho had become a State just ten years before enactment)—the government can do so through the homestead, town-site, stone and timber, and mining laws only. But if the government seeks to exchange the land under the mechanism provided for in the FLPMA, the government can do so if it complies with the specific requirements set forth in the FLPMA, which aims to balance land-preservation goals with the public interest in land development. Each path for land disposal—either the 1900 Act or the FLPMA—carries its own set of requirements. Disposal under the 1900 Act need not comply with the many requirements governing land exchanges under the FLPMA. Conversely, disposal under the FLPMA need not comply with the limitations under the 1900 Act. The two statutes exist as complementary but separate spheres of land-disposal authority. Just as there can be two different routes to one destination, here there are two ways to dispose of the land, and one does not displace the other.

Yet rather than seek statutory congruence, the panel majority creates a conflict. The panel majority's construal of the 1900 Act to prevent the operation of the FLPMA effectively reads in an exception to the FLPMA's coverage of "public lands." That coverage contains two exceptions already (outer-continental-shelf lands and lands held for the benefit of Indians). But the panel majority rewrites the FLPMA to add a third: land that spans 416,000 acres in Idaho ceded by the Tribes over 125 years ago. Not only is carving out such a gaping hole to the FLPMA's coverage improper, doing so is not necessary to give effect to every word of the 1900 Act, which stands on its own. If anything, should the two acts irreconcilably conflict, the FLPMA (as the later statute) would control—not the other way around.

The panel majority's principal argument to the contrary is unpersuasive. The panel majority tries to justify its judicially created exception to the FLPMA by relying on the "general-specific" canon. But that canon comes into play "when conflicting provisions simply cannot be reconciled." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012). Here, as discussed, there is no conflict (nor is there any superfluity), and so the canon need not be deployed. But even assuming a conflict, it is not clear whether the 1900 Act is the more "specific" provision that would trump the more "general" provisions of the FLPMA. True, the 1900 Act addresses specifically the land ceded by the Tribes whereas the FLPMA addresses all public lands (minus the two statutory exceptions). But the FLPMA provides for land exchanges specifically (whereas the 1900 Act does not). That suggests that the FLPMA might be, in fact, the more specific statute. Regardless, the "general-specific" canon does not assist the panel majority; it cannot be used to displace a reading that harmonizes the FLPMA with the 1900 Act.

Further evidence of the panel majority's flawed opinion comes from its highly unusual implications. There are at least twenty-two statutes, phrased similarly to the 1900 Act, that if construed in the way the panel majority would like, would effectively freeze the sale or exchange of large portions of public land throughout this circuit and beyond. None of this is what Congress could have possibly contemplated. Nor is it at all necessary. Because the 1900 Act does not conflict with the FLPMA, the FLPMA must be given effect.

I respectfully dissent from the denial of rehearing en banc.

I.

This dispute concerns land in the Snake River Plain of Idaho. Early settlers had built a trading post on this land in 1834 and named it Fort Hall. The fort served as a place to trade fur and other goods and as a rest stop for those headed west along the Oregon trail. After the Civil War, the federal government established on this land the Fort Hall Indian Reservation for the Shoshone-Bannock Tribes who, in turn, sold 416,000 acres of their reservation to the government in 1898. (We will call the land the government now owns the Fort Hall lands.) The government now wants to transfer some of that land to an owner who would make productive use of it.

Since 1994, the company J.R. Simplot has sought to acquire that land. Simplot produces fertilizer of which phosphogypsum (or gypsum) is a by-product. Simplot will run out of space to store the gypsum unless it acquires a portion of the Fort Hall lands sitting adjacent to its property. In 2020, the Bureau of Land Management approved a land exchange pursuant to the Federal Land Policy and Management Act (FLPMA) whereby the Bureau would transfer to Simplot a portion of the Fort Hall lands in exchange for some of Simplot's lands.

The Tribes sued to stop this exchange. They invoked an older statute—the 1900 Act—that ratified an 1898 agreement in which the Tribes ceded the Fort Hall lands to the government. The 1900 Act also provided that the Fort Hall lands "shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, town-site, stone and timber, and mining laws of the United States only." 31 Stat. at 676.

The district court granted summary judgment for the Tribes. Barring the land exchange, the district court held that the 1900 Act precluded application of the FLPMA and ruled, in any event, that the FLPMA's requirements were not satisfied and that the exchange violated the National Environmental Policy Act. This court, over Judge Bumatay's compelling dissent, affirmed the district court's judgment on the ground that the 1900 Act precluded application of the FLPMA. *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. U.S. Dep't of the Interior*, 153 F.4th 748, 768 (9th Cir. 2025).[1]

II.

Resolution of this long-running dispute turns on a simple question: whether the FLPMA can be harmonized with the 1900 Act. The answer is yes. The 1900 Act does not bar the operation of the FLPMA, and the FLPMA must accordingly be given effect to authorize the land exchange here. The text and history of both statutes compel that conclusion. Precedent confirms that answer too.

A.

The text and history of the FLPMA and the 1900 Act demonstrate that the two statutes do not conflict. Enacted in 1976, the FLPMA is a comprehensive land-management act that sets forth detailed requirements and procedures for how the federal government may dispose of its lands. The FLPMA created "uniform procedures for any disposal of public land," 43 U.S.C. § 1701(a)(10)—in response to the patchwork of "public land laws . . . developed over a long period of years through a series of Acts of Congress which [were] not fully correlated with each other" and which were deemed "inadequate to meet the current and future needs

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[1] The panel majority did not review the other two grounds that the district court reached. For the reasons stated in Judge Bumatay's dissent, the district court erred on those grounds, too. My dissent focuses on the ground the panel majority relied on.

of the American people." Act of Sept. 19, 1964, Pub. L. No. 88-606, § 2, 78 Stat. 982, 982. The FLPMA applies to all "public lands," defined as "any land ... owned by the United States ... without regard to how the United States acquired ownership." 43 U.S.C. § 1702(e). There are two exceptions to this definition—"(1) lands located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts, and Eskimos." *Id.* Neither exception applies here, as the parties do not dispute.

Under the FLPMA, the Secretary of the Interior (acting through the Bureau of Land Management) may dispose of any tract of public land through an "exchange." 43 U.S.C. § 1716(a). The Secretary may pursue an "exchange" if he "determines that the public interest will be well served" after giving "full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy" and "cultural resources" (among several other factors). *Id.*; 43 C.F.R. § 2200.0-6(b). The Secretary must also "find[] that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired." 43 U.S.C. § 1716(a). Furthermore, the FLPMA requires that the lands exchanged be of "equal" value, and that "if they are not equal, the values shall be equalized by the payment of money." 43 U.S.C. § 1716(b). These provisions (along with others) governing the procedures for conducting an exchange of public lands make up part of the comprehensive, reticulated scheme established by Congress for land disposal under the FLPMA. The panel majority does not dispute that the FLPMA covers the Fort Hall lands that the Bureau wishes to exchange in return for Simplot's land—indeed, the panel majority concedes that "it is *clear*" (absent the 1900 Act) that the "FLPMA would permit disposal of the ceded Fort Hall lands." *Shoshone-Bannock Tribes*, 153 F.4th at 759 (emphasis added).

But the panel majority erroneously interprets the 1900 Act to block the operation of the FLPMA because of a single word ("only") in the 1900 Act. No doubt, one word can make all the difference. *See, e.g., Niz-Chavez v. Garland*, 593 U.S. 155, 161 (2021). But a word must be read in context, not divorced from it. Here, the panel majority fails to read "only" in its proper context and deploys the word to "prospective[ly] pre-empt[]" the FLPMA. *Washington Post Co. v. U.S. Dep't. of State*, 685 F.2d 698, 707 (D.C. Cir. 1982) (Scalia, J., statement on the denial of rehearing en banc) (citation omitted). The 1900 Act states (in relevant part) that the Fort Hall lands "shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, town-site, stone and timber, and mining laws of the United States only." 31 Stat. at 676. No one disputes that the word "only" denotes a limitation and must be given effect.

But the question is what effect. Here, context plausibly suggests that the word "only" does not operate to prospectively preempt the FLPMA. Rather, it served to exclude other laws that existed at the time of the 1900 Act's enactment, such as the desert lands laws or the isolated-tract laws, which might have otherwise permitted disposal. *See* Desert Lands Act of 1877, ch. 107, 19 Stat. 377; Rev. Stat. § 2455 (1878) (Isolated Tracts). Context also shows that the word "only" must be read in light of the Act's clearly expressed aim of "open[ing]" the land to "settlement." The word thus served to limit the "settlement" of the Fort Hall lands pursuant to the enumerated laws encouraging settlement and cultivation *to the exclusion* of speculators and squatters who would not make productive use of the land. *See Annual Report of the Commissioner of the General Land Office* 3 (1890) ("The great object of the Government is to dispose of the public lands to actual settlers only—to bona fide tillers of the soil[.]"); Paul W. Gates, *U.S. Pub. Land L. Rev. Comm'n, History of Public Land Law Development* 394-95 (1968); *see also* Brief for the National Mining Ass'n as Amicus Curiae Supporting Appellants, pp. 8-9, 18-23.

An examination of the enumerated laws makes this clear. The homestead, town-site, stone and timber, and mining laws (referred to in the 1900 Act) required proof that the proposed settler would in fact live on the land or put it to productive use before a land patent would issue. *See, e.g.*, Act of Mar. 3, 1891, ch. 561, § 5, 26 Stat. 1095, 1096-97. The 1900 Act promoted settlement in the newly opened former territories, and by using the word "only," the Act sought to avoid disposal of those lands to speculators and squatters who would not advance the Act's purpose. Statutes enacted around this time of homesteading confirm this reading: they used similar language as the 1900 Act to ensure that settlers (not squatters or speculators) would live on or cultivate the land—land (like the Fort Hall lands) that had been ceded by tribes to the federal government. *See, e.g.*, Act of Jan. 14, 1889, ch. 24 § 6, 25 Stat. 642, 644 (Minnesota) ("[T]he said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead law[.]").[2]

Read in context, then, the word "only" was meant to address the issue of ensuring actual settlement or cultivation and to exclude preexisting disposal laws from application. It was *not* meant to preclude a later Congress from adding new ways of disposing of the land. Indeed, notwithstanding the word "only" in the 1900 Act, Congress subsequently added new methods of land disposal in the intervening years leading up to the FLPMA's enactment. *See* Act of May 19, 1926, ch. 337, 44 Stat. 566 ("1926 Act") (adding disposal options for isolated tracts); Act of May 4, 1932, ch. 164, 47 Stat. 146 ("1932 Act") (adding disposal options for "desert lands"). And Congress did so without repealing or modifying the 1900 Act. Just as those intervening additions did not conflict with or repeal the 1900 Act, the FLPMA does not either.

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[2] *See also, e.g.*, Act of Feb. 13, 1891, ch. 165, § 7, 26 Stat. 749, 759 (Oklahoma) (These lands "shall be disposed of to actual settlers only, under the provisions of the homestead laws."); Act of Mar. 3, 1891, ch. 543 § 22, 26 Stat. 989, 1031 (Idaho) ("That all lands so sold and released to the United States . . . shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law[.]"); *id.* § 25, 26 Stat. at 1035 (North Dakota) (These lands "shall be disposed of to actual settlers only under the provisions of the homestead laws."); *id.* § 34, 26 Stat. at 1043 (Montana) (These lands "shall, except mineral lands, be disposed of to actual settlers only, under the provisions of the homestead laws."); Act of Mar. 3, 1893, ch. 203, § 3, 27 Stat. 557, 563 (Oklahoma) (These lands "shall be disposed of . . . to actual settlers only, under the provisions of the homestead and town-site laws.").

This interpretation of "only" is thus not just plain from context; it avoids that fatal error the panel majority fell into, which was to construe the word "only" to negate the effect of another statute—the FLPMA. "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Sys. Corp.*, 584 U.S. at 510 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Rather than seeking to preserve both statutes, the panel majority sets up a clash. As discussed, the FLPMA authorizes the land exchange here. But to read the 1900 Act (as the panel majority does) to categorically prohibit that exchange creates an unnecessary statutory conflict. The Supreme Court's instruction that courts must "strive to give effect to both [statutes]" thus requires us to reject the panel majority's reading. "A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Id.* (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). The panel majority comes nowhere close to meeting that burden.

The two statutes can coexist easily. The 1900 Act and the FLPMA serve as related but separate grants of authority to the Bureau to dispose of the Fort Hall lands. As Judge Bumatay explained, "Congress granted the federal government *two* independent ways to dispose of the land involved in the exchange—the 1900 Act and [the] FLPMA." *Shoshone-Bannock Tribes*, 153 F.4th at 772 (Bumatay, J., dissenting) (emphasis in original). "As complementary grants of authority to dispose of land, the Bureau could follow either." *Id.* And if the Bureau chooses to follow the 1900 Act, it could dispose of land via *only* the "four paths" under the 1900 Act. *Id.* But if the Bureau chooses to follow the FLPMA, then the land could be exchanged only if the requirements of the FLPMA are met—*i.e.*, that the exchange "well serve[s]" the "public interest" in light of the factors set forth in the FLPMA. *See id.* at 768 (quoting 43 U.S.C. § 1716(a)). And whereas the FLPMA authorizes land *exchanges* and not just sales (in furtherance of one of its aims of preserving land), the 1900 Act does not appear to do so (where its aim was to promote settlement). Put simply, each statute contains its own requirements. Neither statute displaces the other.

Rather than harmonizing the two statutes, the panel majority effectively revises the FLPMA by adding an exception to the Act's definition of "public lands." The FLPMA contains two exceptions (outer-continental-shelf lands and lands held for the benefit of the Indians and other groups)—and two exceptions only. Where (as here) "Congress explicitly enumerates certain exceptions" to a definition, "additional exceptions are not to be implied" by a court. *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980). Yet the panel majority improperly does just that—carving out a third exception to the FLPMA that includes the Fort Hall lands.

The panel majority's reading runs into other problems. A basic rule of construction is that an earlier Congress cannot bind a later one. *Reading Law* at 278-80; *Dorsey v. United States*, 567 U.S. 260, 274 (2012). Related to that rule is the "principle of statutory construction that a later-enacted statute that contradicts an earlier one effectively repeals it." *Reading Law* at 185. Under the (correct) view that the FLPMA and the 1900 Act do not conflict, these rules of construction do not come into play. But on the panel majority's reading, which posits a conflict between the statutes, those two rules would apply. And the panel majority's reading violates them both.

First, under the panel majority's logic, the 1900 Act bars Congress from modifying or repealing the Act unless Congress provides a clear statement expressing that intent (which, in the panel majority's view, requires mention of the Fort Hall lands specifically). *Shoshone-Bannock Tribes*, 153 F.4th at 759-61. But that clear-statement requirement contravenes the rule against legislative entrenchment. "[T]here is no legal effect to a statutory provision stating that any exceptions to the statute's requirements must be express, or must specifically refer to the statute." *Reading Law* at 279. Here, not even the 1900 Act itself contains an "express" statement requirement, which would have "no legal effect"; all the more improper is it for the panel majority to infer such a requirement to deny a later statute its effect.

Second, even assuming that the two statutes conflict, it is the FLPMA as the later-enacted statute that would control. *See Reading Law* at 185, 327-29; *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). "When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) (emphasis in original); *see also* 43 U.S.C. § 1715(a) ("*Notwithstanding any other provisions of law*, the Secretary . . . [is]

authorized to acquire pursuant to [the FLPMA] by purchase, *exchange*, donation, or eminent domain, lands or interests therein[.]") (emphases added). The panel majority thus gets it backwards when it holds that the earlier enacted 1900 Act controls over the later enacted FLPMA, even though the FLPMA was enacted specifically to address the patchwork of land laws, which include the 1900 Act.

The panel majority nevertheless says that the canon against implied repeals requires that result. It does not. At the outset (and again), under the correct reading of the two statutes that gives effect to both, there is no "repeal" at all, so the canon of implied repeal need not be invoked. But even assuming the relevance of the canon, so long as any conflict was "clear enough to overcome the presumption against implied repeal" (*Reading Law* at 279), the FLPMA would control. And here the conflict (under the panel majority's reading) is "clear enough" where the panel majority would use the 1900 Act to bar the FLPMA's operation. It is true, as the panel majority points out, that the FLPMA states that "[n]othing in this Act shall be deemed to repeal any existing law by implication." § 701(f), 90 Stat. at 2786. But that just restates the presumption against implied repeals (*see Lockhart*, 546 U.S. at 149 (Scalia J., concurring)), which as discussed can be overcome when there is clear incompatibility created by the panel majority's reading.

The panel majority seeks to deploy two other canons of construction, but neither applies. First, the panel majority invokes the "general-specific" canon to deny the FLPMA's effect. But that canon "deals with what to do when conflicting provisions simply cannot be reconciled

—when the attribution of no permissible meaning can eliminate the conflict." *Reading Law* at 183; *see In re Border Infrastructure Env't Litig.*, 915 F.3d 1213, 1225 (9th Cir. 2019). The canon thus does not apply where, as here and again, there is no conflict (or superfluity) between the two statutes. The panel majority's repeated invocation of canons that *presume conflict* between statutes underscores its refusal to harmonize where permissible. "[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." *Reading Law* at 180. "The imperative of harmony among provisions is more categorical than most other canons of construction," such as the "general/specific canon." *Id.*

Even assuming the canon's application, however, it is not clear *which* statute is more specific and thus controlling. The panel majority says that the 1900 Act addresses the Fort Hall lands and so is the more specific statute. But the FLPMA also addresses those lands—through a repeal of a statute that had added a disposal option for the Fort Hall lands. *See* § 703(a)(6), 90 Stat. at 2790. Moreover, the FLPMA was designed to address the patchwork of land laws of which the 1900 Act was a part, and so to conclude that the 1900 Act nevertheless controls as the more "specific" statute over the FLPMA would appear to contravene the very aim of the FLPMA. The panel majority cites no example of the "general-specific" canon being deployed in such a circumstance.

The FLPMA might even be viewed as the more specific statute—after all, the FLPMA addresses land *exchanges* specifically, whereas the 1900 Act does not, referring to "disposal" more generally. *See Reading*

Law at 187. The FLPMA contains specific, detailed requirements for when an exchange can take place, whereas the 1900 Act refers to other "laws" more generally. Accordingly, the panel majority's reliance on *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), is of no assistance. There, a more specific venue statute prevailed over a more general one. By contrast here, the FLPMA statute might be the more specific statute that controls. All this, however (and again), is beside the point, since the FLPMA and the 1900 Act can each be given effect without applying the canon.

As a last resort, the panel majority invokes the "Indian canons of construction." *Shoshone-Bannock Tribes*, 153 F.4th at 765. But, as the panel majority itself suggests, there must be "[an] ambiguity as to whether [the] FLPMA repeals or supersedes the 1900 Act's restrictions on disposal" for the canons to apply. *Id.* No ambiguity exists here; as discussed, the statutes can each be given effect without one "repeal[ing] or supersed[ing]" the other. The panel majority nevertheless seeks to impose another "clear statement" hurdle, since the FLPMA might be construed to "abrogate" the Tribes' "treaty rights." *Id.* But any "right" that the Tribes possessed to use the land for certain purposes, under the 1898 agreement, was unambiguously conditioned on the land "remain[ing] part of the public domain." Art. IV, 31 Stat. at 674 ("So long as any of the lands ceded, granted, and relinquished under this treaty remain part of the public domain . . . ."). Nothing in the agreement restricts the federal government's ability to remove the land from the public domain in the first place. To be sure, the FLPMA and section five of the 1900 Act place restrictions. But those statutory provisions did not grant (or ratify) any "treaty rights." Those provisions merely set forth processes by which lands can be removed from the public domain.

The Indian canons do not apply in this circumstance. The application of the Indian canons presupposes a "conflict" between the consequences of following those statutory processes (on the one hand) and "treaty rights" (on the other). *Shoshone-Bannock Tribes*, 153 F.4th at 765 (quoting *Minnesota v. Mile Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999)). But here there is no "conflict" where the purported "treaty rights" already contemplate that the lands could be removed from the public domain (through statutory processes or otherwise). "[T]his court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with *any of the conditions* or requirements of the treaty, or to take away *any qualification* or integral part of any stipulation[.]" *United States v. Choctaw Nation*, 179 U.S. 494, 533 (1900) (internal citation removed) (emphases added).

Herrera v. Wyoming, 587 U.S. 329 (2019), which the panel majority cites, is not to the contrary. There, the Crow Tribe had a "treaty right" to "hunt on the unoccupied lands of the United States so long as game may be found thereon" and "peace subsists . . . on the borders of the hunting districts." *Id.* at 332. The Court held that the Tribe's right did not expire when Wyoming became a State. *Id.* at 333. The Court reasoned that Wyoming's entrance into the Union was not one of the express treaty conditions, which if satisfied, would have resulted in the termination of the Crow Tribe's "treaty right." Here by contrast, removal from the public domain is an express "termination point" of the Tribes' right to use the land. *Id.* at 341. As *Herrera* stated, "the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right *or whether a termination point identified in the treaty itself has been satisfied.*" *Id.* (emphasis added). The termination point of any "usufructuary right" that the Tribes had—to hunt or cut timber on the land—will be satisfied when the land is exchanged pursuant to the FLPMA.

In the end, the panel majority can point to no precedent for its peculiar use of the Indian canons to justify its result here: blocking the government's disposal of public lands even though (1) the agreement between the government and the Tribe confers "treaty rights" that are contingent upon those lands remaining in the public domain and (2) the agreement places no restrictions on disposal. Nor does the panel majority cite any authority for using Indian canons to create a clash between two statutory provisions when they plainly can be reconciled.

B.

In contrast to the panel majority's scant support for its result, this court's precedent requires that the FLPMA be given effect to authorize disposal. *Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055 (9th Cir. 1988), is directly on point. There, this court strove to harmonize two apparently conflicting statutes—one statute (from 1904), which stated that rights-of-way granted by the Secretary of Interior for oil and gas pipelines across Indian reservations "*shall not extend beyond a term of twenty years*"; and a later-enacted statute (from 1948), which stated that rights-of-way may be granted by the Secretary for "all purposes, subject to such conditions as he may prescribe." *Id.* at 1056 (emphasis added). Pursuant to this later statute, the Secretary promulgated a regulation that allowed "rights-of-way for oil and gas pipelines for a period *not to exceed fifty years.*" *Id.* at 1057 (emphasis added). The Secretary granted a power company rights-of-way for a 50-year term across the Blackfeet Indian Reservation, and the Blackfeet Tribe sued, arguing that the rights-of-way had to be limited to 20 years. *Id.* at 1055-56.

This court rejected the Tribe's argument. While acknowledging that the earlier statute was the more "specific" statute, and that "legal ambiguities" are resolved "in favor of Indians," the court nevertheless held that the later statute remained in effect. *Id.* at 1058. It reasoned that the two statutes "can be read as coexisting" and that "[t]he former allows a term of 20 years, the later a term of 50 years." *Id.* "[T]he two Acts are not in direct conflict," this court concluded, "and effect can be given to each while still preserving their sense and purpose." *Id.*; *see also, e.g.*, *Negonsott v. Samuels*, 507 U.S. 99, 105-06 (1993).

That rationale applies with equal force here. The FLPMA and the 1900 Act can "coexist[]" and "are not in direct conflict." *Blackfeet*, 838 F.2d at 1058. The FLPMA allows disposal of land through an exchange; the 1900 Act allows disposal of land through the four enumerated settlement laws. Even if the FLPMA were deemed "more general" than the 1900 Act, "effect can be given to each" while "preserving their sense and purpose." *Id.* The FLPMA does not repeal the 1900 Act, and the 1900 Act does not preempt the FLPMA. Just as in *Blackfeet*, the two statutes can plainly be harmonized, and neither the general-specific canon nor the Indian canons can be deployed to disrupt that harmony.

The panel majority tries to evade *Blackfeet*'s clear holding by noting that the Tribe "consent[ed]" to the 50-year term. *Shoshone-Bannock Tribes*, 153 F.4th at 764. But regardless of the Tribe's consent, the Tribe argued that the specific, earlier *statute* prohibited the Secretary's grant of a 50-year term to the power company. This court rejected that argument, and the basis of its rejection was that the two statutes "can be read as coexisting" (*Blackfeet*, 838 F.2d at 1058), just as the statutes can be done here. The panel majority's attempt to distinguish *Blackfeet* thus fails.

* * *

En banc review should have been granted not just because the panel majority's interpretation is wrong. The decision will severely hamper the federal government's ability to administer its lands, including its ability to sell or exchange lands to promote economic development or sustain jobs in local communities. This outcome could not have possibly been Congress's aim.

Several late-nineteenth-century statutes, which contain language similar to that used in section 5 of the 1900 Act, are still on the books. *See, e.g.*, Act of July 4, 1884, ch. 180, 23 Stat. 76, 80 (Washington) ("[T]he remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only[.]").[3] Those statutes cover

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[3] *See also, e.g.*, Act of May 1, 1888, ch. 213 § 3, 25 Stat. 113, 133 (Montana) (These lands "are open to the operation of the laws regulating homestead entry . . . and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws."); Act of Jan. 14, 1889, ch. 24 § 6, 25 Stat. 642, 644 (Minnesota) ("[T]he said agricultural lands so surveyed, shall be disposed of by the United

States to actual settlers only under the provisions of the homestead law[.]"); Act of Mar. 1, 1889, ch. 317 § 2, 25 Stat. 757, 759 (Oklahoma) (These lands "shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries."); Act of Mar. 2, 1889, ch. 412, § 13, 25 Stat. 980, 1005 (Oklahoma) (These lands "shall be disposed of to actual settlers under the homestead laws only."); Act of Feb. 13, 1891, ch. 165, § 7, 26 Stat. 749, 759 (Oklahoma) (These lands "shall be disposed of to actual settlers only, under the provisions of the homestead laws."); Act of Mar. 3, 1891, ch. 543 § 22, 26 Stat. 989, 1031 (Idaho) ("That all lands so sold and released to the United States . . . shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law[.]"); *id.* at § 25, 26 Stat. at 1035 (North Dakota) (These lands "shall be disposed of to actual settlers only under the provisions of the homestead laws."); *id.* at § 30, 26 Stat. at 1039 (North and South Dakota) (These lands "shall . . . be subject only to entry and settlement under the homestead and town-site laws of the United States."); *id.* at § 34, 26 Stat. at 1043 (Montana) (These lands "shall, except mineral lands, be disposed of to actual settlers only, under the provisions of the homestead laws."); Act of July 13, 1892, ch. 164 § 1, 27 Stat. 120, 124 (Idaho) ("[T]he following tract of land . . . is . . . subject to entry only under the town-site laws of the United States[.]"); Act of Mar. 3, 1893, ch. 203, § 3, 27 Stat. 557, 563 (Oklahoma) (These lands "shall be disposed of . . . to actual settlers only, under the provisions of the homestead and town-site laws."); Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 286, 319 (South Dakota) ("That the lands . . . shall be subject to disposal only under the homestead and town-site laws[.]"); *id.* at § 16, 28 Stat. at 332 (Idaho) ("[T]he lands so ceded . . . shall be subject to disposal only under the homestead, town-site, stone and timber, and mining laws[.]"); Act of June 10, 1896, ch. 398, § 8, 29 Stat. 321, 353 (Montana) ("[T]he lands so surrendered shall be opened to occupation, location, and purchase, under the provisions of the mineral-land laws only[.]"); *id.* at § 9, 29 Stat. at 357 (Montana) ("[T]he lands so surrendered shall be opened to occupation, location, and purchase under the provisions of the mineral-land laws only[.]"); *id.* at § 10, 29 Stat. at 360 (Arizona) ("[T]he lands so surrendered shall be opened to occupation, location, and purchase under the provisions of the mineral-land laws only[.]"); Act of June 7, 1897, ch. 3, § 12, 30 Stat.

large portions of public land throughout this circuit (and beyond). And because nearly all the homesteading (and other settlement) laws, which are referred to in those statutes, have been either repealed or suspended (*See, e.g.*, §§ 702-03, 90 Stat. at 2787-91), the consequence of the panel majority's erroneous ruling would be effectively to freeze the government's ability to dispose of those lands, preventing the government from putting its own lands to higher and better uses. These are not just lands that tribes had ceded to the government over 120 years ago. They also include lands once occupied by military posts (erected by the U.S. Army but since abandoned) and that Congress in the late nineteenth century opened to settlement. *See* Act of May 14, 1890, ch. 204, 26 Stat. 107 (Colorado and Nebraska) ("That the lands embraced in the former military reservation known as the Fort Sedgwick . . . shall . . . be subject to disposal, to actual settlers thereon, . . . according to the provisions of the homestead laws only[.]").[4]

It is inconceivable that Congress would have sought to trap those lands in frontier amber. As discussed,

62, 96 (Wyoming) ("[T]he remainder of the said lands . . . are . . . subject to entry, however, only under the homestead and town-site laws[.]").

[4] *See also, e.g.*, Act of Oct. 1, 1890, ch. 1239, 26 Stat. 561 (Nevada) ("That all the agricultural lands embraced . . . be disposed of under the homestead laws, and not otherwise."); *id.* at ch. 1240, 26 Stat. at 561 (Colorado) ("That the lands embraced . . . shall . . . be subject to disposal, to actual settlers thereon . . . according to the provisions of the homestead laws only[.]"); Act of Dec. 22, 1892, ch. 12, 27 Stat. 408, 408-09 (Wyoming) ("That all public lands now remaining undisposed of within the abandoned military reservations . . . are hereby made subject to disposal under the homestead law only[.]").

Congress enacted the FLPMA in response to the many scattered statutes governing these (and other) lands. To construe the pre-FLPMA patchwork of laws as *disabling* the operation of the FLPMA when the very purpose of the FLPMA was to provide an alternative to it—to flip the FLPMA on its head in that way—would be irrational. I respectfully dissent.

TUNG, Circuit Judge, respecting the denial of rehearing en banc:

I write in response to Judge Friedland and Judge Kennelly's statement.

First, their statement claims that my dissent "omits a critical fact"—that the Acts of 1926 and 1932 refer to the Fort Hall lands—and that such a reference (unlike the FLPMA's more comprehensive coverage) "effectively modif[ies]" the 1900 Act. Maj. Statement 35-36. That argument is incorrect. The Acts of 1926 and 1932 no more modify the 1900 Act than does the FLPMA. Whether or not the 1900 Act is modified, the Acts of 1926 and 1932 provide an alternative means of disposal of the Fort Hall lands—as does the FLPMA. All three statutes, as the panel majority admits, cover the Fort Hall lands; thus, if the Acts of 1926 and 1932 authorize disposal, the FLPMA does too. Indeed, as Judge Collins emphasizes in his separate dissent, the fact that the FLPMA *replaced* the 1926 Act's authorization reinforces the conclusion that the FLPMA supplies an alternative means of disposal of the Fort Hall lands compared to what the 1900 Act allows. *See* Collins Dissent 7.

To say, as the panel majority does, that the Acts of 1926 and 1932 authorize disposal because they expressly mention "Fort Hall" but that the FLPMA fails to authorize disposal because it makes no such mention—even though all three statutes indisputably cover the Fort Hall lands—is, quite literally, to impose a magic-words test that our precedents forbid. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Great Northern R. Co. v. United States*, 208 U.S. 452, 465 (1908); *see also Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring)).

Second, the panel majority now appears to recognize that the enumerated laws, referred to in the 1900 Act, may have *excluded* non-settlement and non-productive uses of the land; yet it chooses not to give the word "only" a meaning consistent with that view. Maj. Statement 36. Rather, it continues to construe the word "only" in the broadest way possible—to negate the effect of subsequent legislation that clearly authorizes the disposal of the land. As my dissent explains, the harmonization canon is cardinal, and the panel majority disregards it entirely. *See* Tung Dissent 20-21, 24. To be sure, the panel majority invokes other canons, such as the Indian Canons. *See* Maj. Statement 37. But it still cites no authority for deploying those other canons to create (rather than resolve) statutory conflict. The panel majority's refusal to harmonize remains its Achilles' heel.

The panel majority faults my reading as "strained" because "other similar laws" appeared to have codified my reading more "more directly." *Id.* But at least my reading, reinforced by similar laws seeking to achieve a similar purpose, has the one advantage that Judge Friedland and Judge Kennelly's reading does not—mine is compatible with the FLPMA; whereas theirs is not. My reading need not "outrun the bear"; it need only outrun theirs. *See* Hon. Neil M. Gorsuch, 2016 Sumner Canary Memorial Lecture: *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Rsrv. L. Rev. 905, 918 (2016). Here it does.

FRIEDLAND, Circuit Judge, and KENNELLY, District Judge, respecting the denial of rehearing en banc:

For the reasons we explained in our opinion, the plain text of the statute codifying the Shoshone-Bannock Tribes' land cession agreement, the Act of June 6, 1900, ch. 813, 31 Stat. 672 ("1900 Act"), prohibits the Government from conducting this land exchange, and the general land management statute, the Federal Land Policy and Management Act of 1976 ("FLPMA"), neither repealed nor superseded that Act. Our court therefore rightly denied rehearing en banc. We write only to address two new theories about the meaning of the key provision of the 1900 Act raised by Judge Tung's dissent from the denial of rehearing en banc: that the provision operates merely to (1) preclude disposal under certain preexisting land disposal laws but not later-enacted land disposal laws, and (2) ensure use of the land for settlement or productive use. Tung Dissent at 11-13, 18-20.[1]

This case turns on the meaning of the word "only" in Section 5 of the 1900 Act. The Act states that, after land allotments are made to certain individual Tribal members, "the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States *only.*" Act of June 6, 1900, Ch. 813, § 5, 31 Stat. 672, 676 (emphasis added). Our opinion interpreted that provision to limit land disposal to the exclusive list of types of laws that "only" follows. The alternative interpretations of the 1900 Act's use of the word "only" of-

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[1] Our opinion already addresses the arguments raised in Judge Collins's dissent, so we do not discuss them further here.

fered by Judge Tung's dissent do not cast doubt on our analysis.

First, Judge Tung's dissent argues that "only" does not operate to exclude land disposal laws enacted after the 1900 Act, instead serving to exclude only laws that already existed in 1900. Tung Dissent at 11-12, 18-19. In support of that idea, Judge Tung's dissent claims that Congress subsequently enacted two laws that "added new methods of land disposal" for the Fort Hall lands "without repealing or modifying the 1900 Act." Tung Dissent at 20. But Judge Tung omits a critical fact about those two laws: both specifically provided that they were "applicable to the ceded lands on the former Fort Hall Indian Reservation." Act of May 19, 1926, ch. 337, 44 Stat. 566 (making a prior statute on disposal of isolated tracts of land "applicable to the ceded lands on the former Fort Hall Indian Reservation"); Act of May 4, 1932, ch. 164, 47 Stat. 146 (making a prior statute on disposal of desert lands "applicable to the ceded lands on the former Fort Hall Indian Reservation"). Thus, when Congress wanted to add disposal options for the Fort Hall lands beyond those set forth in the 1900 Act's exclusive list, it did so by enacting laws that referenced the land governed by the 1900 Act, thereby effectively modifying the 1900 Act's exclusive list. Those express references to the land at issue here made the 1926 Act and the 1932 Act entirely unlike FLPMA, which, by contrast, evinces no indication of any intent to modify or repeal the 1900 Act.[2] Because Congress never repealed the 1900 Act—

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[2] Rather than repeal the 1900 Act, as our opinion explains, FLPMA expressly repealed or struck portions of 147 laws and marked an additional 104 laws for repeal effective on FLPMA's tenth anniversary, but the 1900 Act was not among those laws, and

through FLPMA or otherwise—the 1900 Act precludes this land exchange.

Second, Judge Tung theorizes that the word "only" was meant to limit "settlement" of the ceded Fort Hall lands to enumerated laws that "promoted settlement and cultivation of the land, *to the exclusion* of squatters or speculators who would not make productive use of the land." Tung Dissent at 12 (emphasis in original). We agree that "only" modifies the list of laws through which the land may be disposed, but we struggle to see why the fact that those laws may have each promoted productive use undermines our opinion's conclusion that the 1900 Act's list is exclusive. Judge Tung's reading also seems strained, given that Congress could have expressed a focus on settlers or productive use more directly if that were Congress's intent, as it did in the contemporary enactments that Judge Tung identifies. Tung Dissent at 19-20 & n.2 (citing, among other similar laws, the Act of Jan. 14, 1889, ch. 24 § 6, 25 Stat. 642, 644 ("[T]he said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead law.")). But to the extent that there is any ambiguity as to which understanding of the 1900 Act and its interaction with FLPMA is correct, we must invoke the Indian Canons of Construction. As our opinion explained, those canons require that any ambiguity be resolved in the Tribes' favor.

FLPMA never specifically referenced the Fort Hall lands. Pub. L. No. 94-579 §§ 702-03, 90 Stat. 2743, 2787-91 (1976). Indeed, in Section 701 of FLPMA, Congress emphasized the exclusivity of that list, stating that outside of the list of explicitly repealed laws, "[n]othing in this Act shall be deemed to repeal any existing law by implication." Pub. L. No. 94-579, § 701(f), 90 Stat. 2743, 2786 (1976).

The new arguments offered by Judge Tung are accordingly no more persuasive than the others that our opinion already disproved. Our court was correct to decline to reconsider our decision en banc.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 4:20-cv-00553-BLW

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, PLAINTIFF

v.

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

and

J.R. SIMPLOT COMPANY, DEFENDANT-INTERVENOR

Filed: Mar. 31, 2023

MEMORANDUM DECISION AND ORDER

INTRODUCTION

This case involves a challenge to the Blackrock Land Exchange between the United States and Defendant-Intervenor J.R. Simplot Company in southeast Idaho. Plaintiffs Shoshone-Bannock Tribes allege that BLM's decision and analysis approving the exchange is arbitrary and capricious in violation of the National Environmental Protection Act, the Federal Land Policy Management Act, the 1900 Act, and the Administrative Procedures Act. Before the Court are the parties' cross-motions for summary judgment. Dkts. 37, 60, 61. For the reasons set forth below, the Court grants in part and denies in part the motions.

BACKGROUND

A. The Fort Hall Reservation

In 1868, the Fort Bridger Treaty established the Fort Hall Reservation as the permanent home of the Shoshone-Bannock Tribes, a federally recognized Indian Tribe. AR0055983. Thirty years later, the Tribes agreed to cede a significant portion of the Reservation to the federal government. Act of June 6, 1900, 31 Stat. 672, 672-76 (Art. I) (1900); AR0039297-301. Congress subsequently ratified the 1898 Cession Agreement in the 1900 Act, which incorporates the Agreement in its entirety. *Id*.

As part of the 1898 Agreement, the Tribes retain rights to cut timber, pasture livestock, hunt, and fish on ceded lands that "remain part of the public domain." Act of June 6, 1900, 31 Stat. 672, 674 (Art. IV) (1900). Moreover, Section 5 of the 1900 Act delineates specific, limited processes by which the federal government can remove the ceded lands from the public domain. For example, the Act provides that the ceded lands "shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States *only* . . . .". *Id.* at 676 (emphasis added). In addition, "no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres" of ceded lands. Finally, ceded lands within five miles of Pocatello "shall be sold at public auction." *Id.*

B. The Don Plant and the EMF Superfund Site

In the 1940s, two phosphate processing facilities—Simplot's Don Plant and the neighboring FMC plant—opened next to and on the Fort Hall Reservation. AR0029561. The Don Plant manufactures phosphoric acid through a process that creates a phosphogypsum byproduct containing radioactive materials. AR0029570. At the Don Plant, phosphogypsum waste is mixed with water and pumped into a storage-disposal facility called a gypstack. *Id.* The phosphogypsum solids settle in ponds at the top of the gypstack and the slurry water is then pumped back into the processing facility. AR0029571. Gradually, the gypsum deposits accrue, filling the gypstack. *Id.*

Both gypstacks had an (almost literally) fatal design flaw: they were unlined. Consequently, over the years, the gypstacks released contaminates such as arsenic, cadmium, lead, mercury, nickel, and nitrate into the groundwater. AR0029968. The contaminated groundwater discharged into the Portneuf River, which flowed past the Don Plant and onto the Fort Hall Reservation. *Id*; *Shoshone-Bannock Tribes of the Fort Hall Reservation v. U.S. Dep't of Interior*, No. 4:10-cv-004-BLW, 2011 U.S. Dist. LEXIS 48492, at *3 (D. Idaho May 3, 2011).

EPA detected pollution from the phosphate plants in the late 1980s. *Id.* Because EPA found contaminants of concern in the groundwater, soil, and vegetation, it ultimately made 2,530 acres of land—including the Simplot and FMC phosphate facilities—part of a superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In 1990, the Eastern Michaud Flats (EMF) superfund site was listed on the National Priority List. *Id.* In 1998, the agency finalized its decision designating the superfund site. AR0029561.

Then the cleanup started.

In 2001, EPA issued a consent decree and statement of work specific to the area around the Don Plant. AR0029562. The statement of work required Simplot to install a groundwater extraction system to remove groundwater contaminated by the unlined stack. *Id.*

In 2017, pursuant to a 2010 amendment to the 2001 consent decree and a 2008 voluntary consent order with the Idaho Department of Environmental Quality (IDEQ), Simplot installed a synthetic liner on top of the existing gypstack to reduce groundwater contamination. *Id.* The voluntary consent order also requires the inclusion of a liner in the design of any new gypstack built at the Don Plant or other lands acquired for that purpose. *Id.*

In 2015 EPA and DOJ reached a settlement with Simplot to resolve alleged Clean Air Act violations at five Simplot facilities, including the Don Plant. *Id.* Simplot agreed to pay a civil penalty and install pollution controls and monitoring systems to reduce public health risks associated with sulfur dioxide emissions. *Id.*

In 2016, IDEQ and Simplot agreed to a consent order to address excess fluoride found in forage within a 1-to-2-mile radius of the Don Plant. *Id.* Simplot has to reduce its fluoride emissions by 2026. It can either replace the existing reclaim cooling towers with a low-emission alternative or incorporate other measures that reduce fluoride emissions by more than 50 percent from the cooling towers. *Id.*

C. The Blackrock Land Exchange

The Don Plant continues operating, but its longevity depends on the capacity of its gypstack. Without a method of storing waste, manufacturing comes to a halt. And here, Simplot faces a major dilemma. At current production rates, the Don Plant's gypstack—which now spreads out over nearly 500 acres—is projected to reach design capacity by 2031. AR0029548; AR0053590.

For a quarter century, Simplot has tried to extend the Don Plant's operational life by acquiring adjacent BLM land and building new gypstacks. AR0029545. Critically, the suitable land now belongs to the Federal Government because it was ceded by the Tribes in the 1898 Agreement.

Simplot first proposed solving its storage problem through a land exchange in 1994. *See 1994 Proposal* AR0062706 ("Simplot seeks to acquire this BLM land as a permanent storage area for the gypsum produced as a byproduct in its phosphate fertilizer manufacturing process. Simplot utilizes the land it owns immediately adjacent to the north boundary of this BLM land for gypsum storage."). Although BLM and EPA took steps towards approving the exchange, the process stalled pending EPA's EMF Superfund Site ROD. AR0063084-86; AR0063121; AR0063513.

Simplot came back to the proposal in 2004. AR0063513. This time, BLM approved the exchange, issuing an Environmental Assessment and a Finding of No Significant Impact. AR0064177-AR0064182. The Tribes challenged that administrative decision. In 2011, this Court granted summary judgment in their favor. The Court remanded the decision to BLM because the EA violated NEPA and the project required an EIS.

BLM revisited the land exchange once more in 2019. BLM posted a Notice of Intent to prepare an EIS in the *Federal Register* on May 20, 2019 and provided a 45-day scoping period, during which BLM held two public scoping meetings. AR0029563. BLM prepared a draft EIS, which it made available for comment in late 2019. *Id.* The final EIS was published in May 2020. *Id.*

The EIS considered the proposed action, two action alternatives, and a no action alternative. In August 2020, DOI issued the ROD approving Alternative B and authorizing the exchange of 713.67 acres of Federal land for 666.46 acres of non-Federal land along with 160 acres of non-Federal land in the form of voluntary mitigation Parcel A. AR0039169-84.

In December 2020, Simplot and BLM finalized the exchange and transferred the deeds. AR0031352-53; AR0031357-59; AR0031360-62; AR0065394-95. Simplot acquired federal land that is adjacent to the Don Plant and which the Tribes ceded in the 1898 Agreement. AR0039210. In exchange, the federal government acquired land near the Chinese Peak-Blackrock Canyon area. *Id.* That same month, the Tribes filed this suit.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc). Because this is an administrative record review case, the Court may grant summary judgment to either party based upon a review of the administrative record. *Id.*

A federal agency's compliance with environmental laws is reviewed under the Administrative Procedure Act (APA). 5 U.S.C. § 706; see *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 581 F.3d 1063, 1070 (9th Cir. 2009); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003). Under the APA, the reviewing court must set aside the agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A decision is arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *O'Keeffe's, Inc. v. U.S. Consumer Product Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996). An agency action is also arbitrary and capricious if the agency fails to articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *Id.*

Thus, the agency must set forth clearly in the administrative record the grounds on which it acted. *See Atchison T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973). A court may not accept an agency's post hoc rationalizations for its action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (citation omitted). "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* (citations omitted).

The reviewing court's inquiry must be "thorough," but "the standard of review is highly deferential; the agency's decision is entitled to a presumption of regularity, and [the court] may not substitute [its] judgment for that of the agency." *Id.*; *see also Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 927 (9th Cir. 2008) (holding that although a court's review is deferential, the court "must engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it"). To withstand review under the APA, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43.

ANALYSIS

A. 1900 Act Claims

To survive APA review, BLM's decision to approve the Blackrock Land Exchange must comply with the 1900 Act. Because it does not, it is "not in accordance with law" in violation of the APA and is a breach of the federal government's trust responsibility to the Tribes.

1. Trust Responsibility

The federal government has trust obligations to Indian tribes. *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998). The government must "take a specific action" for the benefit of a tribe that it has an express or implied duty to take under a "treaty, statute or agreement." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006). In addition, the trust responsibility requires "compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Id.*; *see also Gros Ventre Tribe*, 469 F.3d at 810 (holding that the trust obligation "does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations"). "Tribes cannot allege a common law cause of action for breach of trust that is wholly separate from any statutorily granted right." *Gros Ventre Tribe*, 469 F.3d at 810.

In this case, Article IV of the 1898 Cession Agreement protects the Tribes' rights to cut timber, pasture livestock, hunt, and fish on the ceded lands that remain in the public domain. The 1900 Act implements that agreement. Section 5 sets out the process for opening the residue of the ceded lands to settlement. That is, in Section 5, Congress limited how the ceded lands can leave the public domain and become privately owned. The Act deals exclusively with the recently ceded lands. That indicates congressional intent to restrict the means of removing the ceded lands from public domain and, consequently, of terminating tribal members' usufructuary rights. This is the best reading of the statute even though Congress did not specifically state that it imposed the disposal methods for the Tribes' protection. Therefore, the 1900 Act imposes a specific duty to adhere to the Section 5 disposal requirements, which implicates the trust responsibility.

To be sure, the 1900 Act could also be read as a generally applicable statute. After all, the Tribes did not negotiate the disposal requirements as part of the 1898 Cession Agreement. But even then, if the federal government failed to follow the generally applicable law, it breached its trust responsibility. Either interpretation of the statue leads to the conclusion that the 1900 Act imposes an affirmative trust duty to comply with the Section 5 disposal requirements.

2. Section 5 of the 1900 Act

BLM had a two-fold APA and trust obligation to ensure the Blackrock Land Exchange was consistent with the 1900 Act. The plain language of Section 5 provides that the ceded lands "shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States *only* . . . .". Act of June 6, 1900, 31 Stat. 672, 676 (Art. V) (1900) (emphasis added). The statute's terms are clear—these types of laws are the exclusive means of lawful disposal. Here, BLM disposed of ceded lands through the Blackrock Land Exchange, which it authorized pursuant to FLPMA. Because FLPMA is not a homestead, townsite, stone and timber, or mining law, BLM violated the 1900 Act.[1] The upshot is that because Congress has repealed nearly all the homestead, townsite, stone and timber, and mining laws, the federal government does not currently have a viable method for disposing of the ceded lands.

BLM argues that interpretation of the statute is wrong because the outcome conflicts with the congressional intent of FLPMA. The agency's argument goes something like this. In the 1900 Act, Congress named general categories of land disposal statutes, rather than specific laws. This indicates intent to allow general disposal laws to govern the ceded lands. In 1976, Congress replaced those prior disposal laws with FLPMA. There-

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[1] As noted, Section 5 included two other disposal requirements: no purchaser could purchase more than 160 acres of ceded lands and ceded lands within five miles of Pocatello had to be sold at auction. The parties dispute the applicability of those requirements. The Court does not need to reach those issues, so will not.

fore, Congress implicitly intended to add FLPMA to 1900 Act's lawful means of disposal. FLPMA thus "supplant[s] the means of disposal listed in that Act." *Brief*, Dkt. 80 at 6.

Not so. Congressional intent does not change the 1900 Act's text. "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020). Further interpretation of the 1900 Act is not needed.

Moreover, even taking congressional intent into account, BLM still violated the 1900 Act. When Congress enacted FLPMA it repealed hundreds of laws. *See* Pub. L. 94-579, 90 Stat. 2744, 2787-91 (October 21, 1976). The 1900 Act was not one of them. Equally important, Congress specifically provided that FLPMA did not "repeal any existing law by implication." *Id.* at 2786. Those choices, combined with the text of the Act itself, indicate congressional intent to effectively close the door on disposal of the ceded lands. That outcome is not absurd, but a direct result of congressional action.

Beyond that, BLM's position fails to fully grapple with the governing canon of statutory interpretation. The Supreme Court has been consistent and clear that "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Instead, courts apply the Indian canon of construction, which requires resolving ambiguities in agreements and treaties with tribes in the tribes' favor. *Navajo Nation v. United States DOI*, 26 F.4th 794, 802 (9th Cir. 2022) (quoting *Winters v. United States*, 207 U.S. 564, 576 (1908)).

The Indian canon of construction guides the Court's interpretation of the 1900 Act because the statute implements the 1898 Cession Agreement.[2] The law codified a negotiated exchange: the Tribes gave up significant portions of land in exchange for certain rights, including retained usufructuary rights. If the Act is ambiguous because it provides for general categories of laws for disposal, that ambiguity must be read in the Tribes' favor. Applying that interpretive standard, FLPMA is not in the category of homestead, townsite, stone and timber, or mining statutes and so is not a lawful means of disposal.

But the 1900 Act could also be read as an ordinary federal statute, rather than an agreement with the Tribes. Once more, the Indian canon of construction provides some guidance. "[F]ederal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with traditional notions of Indian sovereignty and with the federal policy of encouraging tribal independence." *United States v. Smith*, 925 F.3d 410, 419 (9th Cir. 2019) (quoting *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982))

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[2] Notably, the Act and Agreement repeatedly refer to the cession agreement as a "treaty." Act of June 6, 1900, 31 Stat. 672, 673-74 (Art. II, Art. IV) (1900). Granted, it is not a traditional treaty because the agreement was reached after Congress prohibited treatymaking with tribes in 1871. *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring in the judgment) (quoting 16 Stat 566, codified at 25 U.S.C. § 71). But the Supreme Court has consistently interpreted treaty substitutes—agreements reached with tribes and ratified by Congress, like the 1898 Cession Agreement—as essentially identical to formal treaties. *See, e.g.*, *Antoine v. Washington*, 420 U.S. 194, 201-02 (1975) (holding that agreements ratified by bicameral legislation are indistinguishable from treaties).

(cleaned up); *see also Bryan v. Itasca Cty.*, 426 U.S. 373, 392 (1976) ("[W]e must be guided by that 'eminently sound and vital canon' that 'statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'") (citation omitted). As a statute, rather than an agreement, the 1900 Act is incontrovertibly "relat[ed] to tribes and tribal activities." *Smith*, 925 F.3d at 419. It is a cession-specific act. That means the statute should be construed in the Tribes favor. Once again the Court reaches the same conclusion: BLM cannot use FLPMA to remove ceded lands from public domain.[3]

At the end of the day, BLM had to comply with both the 1900 Act and FLPMA. The laws are not in conflict. Congress enacted FLPMA to establish "uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands ...." 43 U.S.C. § 1701(a)(10). Adherence to FLPMA's procedure is necessary for a lawful land ex-

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[3] There is a bit of a wrinkle here. Ninth Circuit precedent states that statutory ambiguities should not be resolved in the tribes' favor where there is a competing agency interpretation of the statue that deserves Chevron deference. *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015). It is not entirely clear whether that rule applies in cases involving statutes that specifically regulate tribes. *Id.* If it does, then there may be a strong argument that BLM's interpretation of the 1900 Act is entitled to Chevron deference and the Indian canon of construction should not apply. However, that is a hypothetical question. As stated previously, the 1900 Act is not ambiguous. If the intent of Congress is clear, Chevron deference does not apply because agencies—and courts reviewing their actions—must give effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Court does not owe deference to an agency's interpretation that contradicts the plain language of the statute. *Id.*

change, but it is not automatically sufficient. Because this case involves ceded lands with particular restrictions, FLPMA's procedure is only one component of the land exchange's legality—the 1900 Act is another. That law has a plain, clear meaning that is inconvenient for Simplot and BLM. But the Court cannot and will not rewrite the statute. Section 5 says what it says. The Blackrock Land Exchange violated the Act.

BLM's decision to approve the Blackrock Land Exchange is therefore "not in accordance with law" in violation of the APA and represents a breach of the federal government's trust responsibility to the Tribes. Although courts ordinarily vacate unlawful agency action, that remedy is not required. *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). Instead, the "decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (citations omitted).

The question of remedy in this case is fairly unusual. BLM cannot correct its failures on remand, because congressional action to repeal, supersede, or amend the 1900 Act is required. From that starting point, it seems the only remedy is vacating the ROD and issuing an injunction. At the same time, because the Blackrock Land Exchange was completed more than two years ago, unwinding the deal is no simple matter. Given the stakes of the matter for all parties, the Court will invite full briefing on the issue of remedy. The parties should address both the appropriate remedy and any necessary steps or procedures to provide it.

B. FLPMA Claims

BLM's decision to approve the Blackrock Land Exchange must comply with FLPMA. Because it does not, it is "not in accordance with law" and violates the APA. 5 U.S.C. § 706(2)(A).

1. Public Interest Determination

FLPMA provides that the Secretary of the Interior may authorize a public land exchange after "determin[ing] that the public interest will be well served by making that exchange." 43 U.S.C. § 1716(a). FLPMA's implementing regulations set out factors that "the authorizing officer shall give full consideration to . . . [w]hen considering the public interest." 43 C.F.R. § 2200.0-6(b). These mandatory factors are:

- Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values;
- Enhancement of recreation opportunities and public access;
- Consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development;
- Consolidation of split estates;
- Expansion of communities;
- Accommodation of land use authorizations;
- Promotion of multiple-use values; and
- Fulfillment of public needs.

43 C.F.R. § 2200.0-6(b)[4]; *see also Nat'l Coal Asso. v. Hodel*, 675 F. Supp. 1231, 1243 (D. Mont. 1987) ("The Secretary has discretion, of course, to consider any other factor deemed relevant. However, his mandated obligation ceases when the specifically enumerated factors have been considered.").

After appropriately considering the mandatory public interest factors, the authorizing officer must make two findings:

> (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, and
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> (2) The intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.[5]

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[4] The statute itself directs the Secretary of the Interior, in considering the public interest, to "give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife." 43 U.S.C. § 1716(a). The Court will apply the factors set out in the regulations because they are the more specific standard.

[5] Here, BLM correctly made this second finding. FLPMA does not define "Indian trust lands." However, the term's plain language explains its meaning—lands that the federal government holds in trust for the benefit of Indian tribes. See Cohen's Handbook of Federal

Id. After that, the authorizing officer may find that the land exchange will serve the public interest.

The Court "review[s] the BLM's compliance with FLPMA under the deferential 'arbitrary and capricious' standard." *Ctr. for Biological Diversity v. United States DOI*, 623 F.3d 633, 641 (9th Cir. 2010) (citing *Webb v. Lujan*, 960 F.2d 89, 91 (9th Cir. 1992)). The public interest finding is arbitrary and capricious if BLM fails to consider any mandatory factors or to make the necessary determinations.

The Court turns first to consideration of the mandatory factors. To determine whether BLM's "decision was based on a reasonable consideration of the relevant factors," the Court "review[s] the entire record." *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1069 (9th Cir. 2010) (citing *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074 (9th Cir. 1999)). Here, the EIS and ROD adequately considered the mandatory factors. The considerations that the Tribes say BLM ignored—which are not even mandatory public interest factors—were adequately addressed in the EIS.[6] BLM discussed in detail the

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Indian Law § 5.01 ("Although Indian trust lands are owned in fee by the United States, they are administered for the benefit of the tribes and individuals who are the equitable owners of the land."); *see also* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 Idaho L. Rev. 519 (2013).

In this case, there is no Indian trust land adjacent to the federal property exchanged. There is one parcel of land that is directly adjacent to the federal lands and that is within the Fort Hall reservation. But that land is owned by FMC, not the federal government and it is not held in trust for the Tribes. AR0039172. It is not Indian trust land. BLM's determination was correct.

[6] The EIS did not consider in detail the Tribes' plans to offer housing in the Michaud Creek area, but the Tribes did not raise that issue

value of the uses and historical context of the federal lands to be exchanged, the Tribes' exercise of off-reservation treaty rights protected by the Fort Bridger Treaty, the potential presence of burial grounds on the exchanged federal lands, and the impacts on the Tribes' cultural landscape. AR0029615-21. Both the ROD and the EIS acknowledged that the exchange would negatively affect the Tribes' historical and cultural uses of the lands. *See* AR0039172 (ROD) and AR0029618 (EIS).[7] The EIS also considered the Tribes' Policy for Management of Snake River Basin Resources. AR0029611, AR0029920.

Because BLM adequately considered the mandatory public interest factors, the Court turns to the agency's determination that the land's "resource values and public objectives" if retained "are not more than the resource values . . . and the public objectives they could serve if acquired." 43 C.F.R. § 2200.0-6(b). For this question, the Court considers the ROD only. As a NEPA document, the EIS did not—and could not—include the FLPMA public interest determination. Therefore, the question is whether the ROD offered an adequate explanation for BLM's determination the Blackrock Land Exchange serves the public interest.

It did not. True, the ROD evenhandedly listed many advantages and disadvantages of the land exchange.

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during the scoping or drafting process. AR0039198. The information the Tribes did provide was too vague as to time and place for it to affect the public interest determination.

[7] This analysis also demonstrates that BLM took NEPA's requisite hard look at the issues that will affect the Tribes' treaty rights as provided for in the Fort Bridger Treaty, the 1898 Agreement, and the 1900 Act. *See, infra,* Part C.2. The EIS and ROD contained numerous acknowledgements of those rights and examined issues that will affect them. AR0029613-21.

AR0039171-74. It certainly balanced the mandatory factors of recreation opportunities and public access (¶¶ 1-2, 9), consolidation of lands (¶ 3), protection wildlife habitats (¶ 5), expansion of communities and fulfillment of public needs (¶¶ 6-7), and protection of watersheds (¶¶ 8, 12-13). But the ROD failed to balance the protection of cultural resources. At best, the ROD explained that,

> Following conveyance the Federal lands will no longer be available for exercise of off reservation tribal treaty rights; however, exercise of tribal treaty rights will be available within the acquired non-Federal land and voluntary mitigation parcel A. There would be a net gain of 113 acres of lands available for exercise of off reservation tribal treaty rights.

AR0039172 (¶ 4). This assessment neglected many of the considerations noted in the EIS. For instance, the ROD did not discuss how the public interest determination weighed 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 (e.g. opportunities for hunting, fishing, gathering, and livestock grazing), the non-Federal lands likely do not contain the same tribal significance as the Federal lands." AR0029617. 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. This black box decision-making process runs afoul of the basic administrative law principle that agencies must engage in reasoned decision-making. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020).

2. Equal Value

FLPMA requires that "[t]he values of the lands exchanged . . . either shall be equal, or if they are not equal, the values shall be equalized by the payment of money." 43 U.S.C. § 1716(b). To meet that requirement, BLM must appraise lands before approving an exchange. *Id.* at § 1716(d)(1).

An appraisal must "set[] forth an opinion regarding the market value of the lands . . . supported by the presentation and analysis of relevant market information." 43 C.F.R. § 2200.0-5(c). Market value "means the most probable price . . . that lands or interests in lands should bring in a competitive and open market . . . where the buyer and seller each acts prudently and knowledgeably." *Id.* at § 2200.0-5(n). To estimate market value, the appraiser must "[d]etermine the highest and best use of the property," "[e]stimate the value of the lands and interests as if in private ownership and available for sale in the open market," and "[i]nclude historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities that are reflected in prices paid for similar properties in the competitive market."[8] *Id.* at § 2201.3-2(a).

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[8] The Tribes argue that the appraisal in this case did not accurately consider "historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities . . . ." of the land. Specifically, the Tribes take issue with the failure to factor "the adverse impacts the land exchange would have on the Shoshone-Bannock Tribes" into the evaluation. *Brief*, Dkt. 37 at 20-21. The Tribes argue that "a mere comparison of dollar amounts is inadequate and a land exchange with significant adverse effects cannot be valued solely from a monetary standpoint because of BLM's trust responsibilities

The appraisal must also comply, to the extent appropriate, with the separate requirements of the Uniform Appraisal Standards for Federal Land Acquisitions (UAS). 43 C.F.R. § 2201.3. Under the UAS definition, highest and best use is "'[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.'"[9] The Appraisal Institute, Uniform Appraisal Standards for Federal Land Acquisitions 101 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)), *available at* https://www.justice.gov/file/408306/download. The highest and best use must also be: (1) physically possible;

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to the Tribes and its obligation to consider environmental justice concerns." *Brief*, Dkt. 74 at 24.

This argument is not consistent with the text of the regulations, which direct the appraiser to consider "historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities *that are reflected in prices paid for similar properties in the competitive market*." 43 C.F.R § 2201.3-2(a)(3) (emphasis added). The regulation limits the requirement to consider those other values. The Tribes do not present evidence or argument that the prices paid for similar properties in this competitive market reflect the adverse effects on them. There is no evidence that the appraiser deviated from the regulatory standard in this regard.

[9] As the Ninth Circuit has observed, "Department of Interior regulations define highest and best use as the 'most probable' use of land, [but] the Uniform Standards only require 'reasonable probability' of a given use." *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1067; *see also Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1181 n.10 (9th Cir. 2000). As in *Desert Citizens*, the choice of standard is not dispositive in this case, because the gypstack use was the most probable use of the lands at the time the appraisal was made. "The essential point of either probability standard is that the highest and best use must not be merely speculative or conjectural. The fact that the [gypstack] use was not considered at all is what makes the appraisal flawed." *Desert Citizens*, 231 F.3d at 1181 n.10.

(2) legally permissible; (3) financially feasible; and (4) must result in the highest value. *Id.* at 64. "[A] specific highest and best use can only be considered if the use is likely to be reasonably probable in the reasonably near future. Accordingly, there must be proof of present or future demand, the connecting link from adaptability to value." *Id.* at 102 (quotations and citations omitted).

In this case, a private firm prepared an appraisal report for the federal land. *See* AR0032811-942. The appraisal report noted that adjacent land uses "are recreational and agricultural in nature and include livestock grazing, hunting, and wildlife habitat." AR0032856. The appraisal consequently determined that the land at issue had "limited" potential uses that were "similar to other parcels located in the general area." AR0032857. Ultimately, the appraisal report concluded the highest and best use for the federal land was "continued agriculture and recreational uses, wildlife habitat, watershed, with speculative investment potential." AR0032867. Then, based on analysis of recent sales of comparable properties, the appraiser valued the federal land at $900 per acre, or about $645,000 total. AR0032868-75.

The appraisal report did not consider using the federal land for gypstack development. It failed to acknowledge the most relevant and critical economic fact: the Don Plant's continued operation depends on the acquisition of additional land and construction of new gypstacks. At best, the appraisal noted that "the property has appeal to an adjacent property owner [Simplot] for expansion and investment purposes." AR0032867. But that vague gesture to Simplot's intentions did not meaningfully consider the use of the land to build gypstacks. That land use is not only reasonably probable, it is the specific intent of the land exchange, and should have been considered.

In many respects, this case is on all fours with the Ninth Circuit's landfill land exchange cases. *See Desert Citizens Against Pollution v. Bission*, 231 F.3d 1172 (9th Cir. 2000); *Nat'l Parks & Conservation Ass'n*, 606 at 1058. Both cases involved land exchanges designed to turn the public lands into landfills. In both cases, BLM approved the exchange even though the appraisals did not consider a landfill as a potential highest and best use. In both cases, the Ninth Circuit found that BLM erred because "'uses that are reasonably probable must be analyzed as a necessary part of the highest and best use determination.'" *National Parks & Conservation Ass'n*, 606 F.3d at 1067 (quoting *Desert Citizens*, 231 F.3d at 1181). In both cases, the Circuit found that one private party's "proposed use of a parcel of property is certainly relevant to showing a market demand for that use." *Desert Citizens*, 231 F.3d at 1183.

Here, Simplot intends to use the federal lands for gypstack development. It has stood by that plan for nearly 30 years. Under *Desert Citzens* and *National Parks & Conservation Association*, that is sufficient to show a market demand for that use.[10]

Still, the Blackrock Land Exchange is distinguishable from the landfill cases because a gypstack is only val-

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[10] In *Desert Citizens* and *National Parks & Conservation Association*, the Circuit went on to consider the physical, legal, and financial feasibility of landfill use. That analysis is a necessary component of the highest and best use determination. In this case, however, there is not even enough information in the administrative record to assess all the factors. The appraiser—and, by extension, BLM—erred by failing to consider gypstack use at all.

uable to Simplot. There is not a generalized demand for gypstacks. Nor are other parties competing to build gypstacks on the federal lands. Even so, no regulatory provision or UAS standard justifies excluding gypstack use from the appraisal simply because its value is particular to Simplot.

The most relevant regulation provides that the "government's intended use of the property after acquisition is an improper highest and best use and cannot be considered" because the appraisal must estimate "the property's *market value* . . . not the property's value to the government." UAS at 23. "If it is solely the government's need that creates a market for the property, this special need must be excluded from consideration by the appraiser." *Id.; see also United States v. Cors*, 337 U.S. 325, 333 (1949) ("It is not fair that the government be required to pay the enhanced price which its demand alone has created."); *United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1366, 1367 (9th Cir. 1976) ("[V]alues resulting from the urgency or uniqueness of the government's need for the property or from the uniqueness of the use to which the property will be put do not reflect what a willing buyer would pay to a willing seller."). No provision makes similar exceptions for a private party's intended use or need. That comports with basic economics: a private party's need is—definitionally—what drives market value.

Put another way, 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. *See United States v. New River Collieries Co.*, 262 U.S. 341, 345 (1923) (holding that when prices are "controlled by the supply and demand[, t]hese facts indicate a free market"). Here, Simplot has a high demand for land that can be used to construct a gypstack that extends the life of the Don Plant. Such land is in limited supply. These facts would *determine* "the value of the lands . . . if in private ownership and available for sale in the open market." 43 C.F.R. § 2201.3-2(a). Yet they played no role in the appraisal.

The particularity of Simplot's position underscores that the comparables used in the appraisal are not actually comparable. Of the comparables considered in the report, the appraiser selected six "for direct comparison purposes" because they were "most similar to the subject with regard to physical characteristics." AR032850. This is undoubtably an important consideration, but it is not the full story. The appraiser did not include any comparable where the land was uniquely valuable to one buyer for gypstack or other similar industrial construction. True, the appraisal did consider that in one instance the purchaser "was the adjacent property owner who purchased the property for expansion and investment purposes." AR0032869. But the appraisal did not consider what those purposes were or how they might affect the market value of the land. In short, the comparables did not effectively estimate a reasonable market for this land's unique value.

BLM was "willfully blind" to the potential value of the land involved in the Blackrock Land Exchange for gypstack use. *Desert Citizens*, 231 F.3d at 1184. A gypstack may or may not be highest and best use of the land, but it cannot be ignored. BLM's reliance on an appraisal that neglects this issue is arbitrary and capricious because entirely failed to consider an important aspect of the problem. *O'Keeffe's, Inc.*, 92 F.3d at 942.

3. Pocatello Resource Management Plan

FLPMA requires that BLM's land management decisions be "in accordance with the land use plans." 43 U.S.C. § 1732(a); *see also* 43 C.F.R. § 1610.5-3(a) (2003); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004); *Western Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1227-28 (D. Idaho 2005). If a proposed action is not consistent with the land use plan, BLM must rescind its ROD and amend the plan. 43 C.F.R. §§ 1610.5-3, 1610.5-5.

For the Blackrock Land Exchange, the relevant land use plan is the 2012 BLM Approved Resource Management Plan (ARMP) for the Pocatello Field Office. The Tribes argue that the ROD conflicted with the ARMP Goal SW-2 to "[p]rotect and maintain watersheds so that they appropriately capture, retain and release water of quality that meets state and national standards and do not impair source water protection areas" and Goal TR-1 to "[p]rovide for Tribal Treaty Rights and Interests on unoccupied lands and public lands with[in] the ceded reservation boundary." (ARMP 19-20).

The ROD did not conflict with Goal SW-2, which concerns watershed management. As outlined further in the discussion of the Tribes' NEPA claims, BLM carefully considered impacts to ground and surface water from the land exchange. *See Part C.2*; AR0029683. The agency reasonably concluded that total concentrations of arsenic and phosphorous would continue to decline due to implementation of source controls and groundwater extraction activities at the Don Plant. That analysis indicates that the Blackrock Land Exchange is in accordance with the ARMP.

Nor did the ROD conflict with Goal TR-1, which relates to tribal rights and interests in unoccupied public land. Under this Goal, the ARMP provides two action items: to make land management decisions in consideration of the 1868 Fort Bridger Treaty and to consult with Tribal governments on actions that could affect treaty rights. ARMP-10. BLM did both here.

The ROD was consistent with the ARMP.

C. NEPA Claims

"NEPA imposes procedural requirements, but not substantive outcomes, on agency action." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)). 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)).

NEPA "serves two fundamental objectives. First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Id.* (citation and internal quotation marks omitted). "[S]econd, it requires that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Id.* (citation and internal quotation marks omitted). The purpose of these two objectives "is to ensure that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Id.* (citations and internal quotation marks omitted).

"[T]o accomplish this, NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences." *Powell*, 395 F.3d at 1027 (citation omitted). Further, courts are to "strictly interpret the procedural requirements in NEPA to the fullest extent possible consistent with the policies embodied in NEPA. [G]rudging, pro forma compliance will not do." *WildEarth Guardians*, 923 F.3d at 668 (citations, ellipses, and quotation marks omitted). Finally, "agencies must ensure 'that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.'" *Id.* (quoting 40 C.F.R. § 1500.1(b)).

With this statutory framework in mind, the Court turns to its analysis of the Tribes' NEPA claims.

1. Alternative B Plans for Gypstack and Cooling Pond Construction

BLM identified three reasonably foreseeable actions (RFAs): the construction of cooling ponds, gypstacks, and the associated infrastructure. AR0029547. The EIS analyzed RFAS thoroughly for the proposed action but noted that Alternative B would require modifying "the location and extent of the gypsum stacks." AR0029577. As a result,

> The location and extent of the reasonably foreseeable actions on Federal lands under Alternative B are based on preliminary conceptual designs. Additional research

> and engineering is necessary to ensure that these preliminary configurations would be technically and economically feasible. Actual design of the reasonably foreseeable actions under Alternative B would be finalized during design and permitting and are subject to change based on technical changes, final engineering, Don Plant production, and other factors. If no feasible options are identified for gypsum stack expansion within the reconfigured Federal land boundaries, the operational life of the Don Plant would be reduced compared to the Proposed Action and Alternative A.

AR0029577-78. Nevertheless, the EIS opted not to consider "specific design options" for several reasons.

> Requirements for a more specific review of design options for the cooling ponds and expanded gypsum stacks, that may be necessary under existing or future consent orders with the IDEQ and/or EPA, is beyond the scope of this EIS because these facilities would be on private land following the land exchange. Following transfer of the Federal lands into private ownership, Simplot would be responsible for determining final engineering and design details of the gypsum stack expansions and the cooling ponds and permitting these facilities in accordance with other Federal and State requirements.

AR0029580. BLM's refusal to consider design options for cooling ponds and gypstack expansion in Alternative B violates NEPA.

At the very least, NEPA requires BLM to analyze Simplot's preliminary plans in the EIS. *See* AR0029740 (depicting Simplot's "preliminary conceptual locations of the gypsum stacks and cooling ponds for Alternative B based on current information."). It did not.

The bigger problem is BLM's unjustified assumption that it could rely on other agencies' enforcement capabilities. This cropped up twice. First, BLM determined that NEPA would not require analysis of the Alternative B gypstack plans because the agency could rely on oversight from IDEQ and EPA. Second, BLM "assume[ed] 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."[11] AR0029545.

In both instances, BLM's assumption of effective enforcement was not justified. Although "an agency may assume effective enforcement in the ordinary case," that reliance is not appropriate "when credible evidence seems to undercut the assumption." *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 803 (D.C. Cir. 2022) (quotation

[11] The Court is not otherwise persuaded by the Tribes' claim that BLM failed to consider Simplot's history of non-compliance at the Don Plant. The EIS appropriately discussed the Don Plant's history, including environmental contamination from phosphate facilities and efforts to address the contamination. AR0029561-62. In Chapter 3, which considered the affected environment, the EIS discussed existing conditions of air and groundwater quality, including in-depth analysis of past and present emissions and contaminations from the Don Plant. AR0029596-607; AR0029672-84. Moreover, the EIS highlighted the multiple consent decrees and orders that Simplot has entered into with IDEQ and EPA and remedial actions taken on the site to address past contamination and reduce future pollution. AR0029561-62; AR0029677. The EIS accurately depicted the historical contamination, the efforts to reduce pollution, and the results of those efforts.

and citation omitted). Here, there is a decades-long history of enforcement with mixed results. BLM concedes that, as the Tribes argue, "Simplot has not yet completely addressed existing contamination or met agreed-upon goals to reduce phosphorous concentrations in the Portneuf River." *Brief*, Dkt. 80 at 37. At a minimum, NEPA required BLM to analyze the past efficacy of enforcement before relying on the other agencies.

BLM failed to "carefully consider detailed information concerning significant environmental impacts" of the Blackrock Land Exchange. *Wildearth Guardians*, 923 F.3d at 668. It acted, openly, "on incomplete information." *Id.* In so doing, it failed to comply with NEPA.

2. Hard Look at Relevant Considerations

The Tribes argue that BLM did not take NEPA's "hard look" at certain environmental consequences. None of these arguments are persuasive.

a. No Action Baseline

The EIS said that without the Blackrock Land Exchange—the "no action alternative"—"[c]urrent ownership and existing use of Federal and non-Federal lands would persist for the reasonably foreseeable future." AR0029578. Simplot would not construct a new gypstack or new cooling ponds on the Federal lands. *Id.* Instead, it would necessarily evaluate other measures to reduce fluoride emissions and dispose of its gypsum byproducts. *Id.* The Tribes contend this is the wrong baseline. They assert the no action alternative is closing the Don Plant and remediating the area, because at current production rates, the gypstack will soon reach capacity.

BLM's no action alternative met NEPA's requirements. Granted, Simplot has indicated that if the land exchange does not go forward it will reduce production and eventually cease operations. AR0029576. But it is unclear what that would involve or when that would occur. AR0029571, AR0029576. Simplot undoubtably has numerous options about when and how to reduce production or close the plant altogether. Many factors would influence that critical strategic decision. As such, the Tribes' proposed baseline in simply too speculative. BLM's baseline is the most reliable.[12] *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016).

b. Environmental and Health Impacts

The Tribes allege that BLM failed to adequately analyze the overall environmental and health impacts and those specifically resulting from Alternative B. The Court disagrees.

i. Water Quality

The Tribes take issue with the water quality impact analysis. In the water resources section of the EIS, BLM analyzed in detail the RFAs' potential impacts on surface water and groundwater quality. AR0029680-84; *see also* AR0029944-30033 (Appendix H, showing comprehensive modeling and technical analysis performed to assess the potential impacts to groundwater and surface water from the Proposed Action over the projected life of the Don Plant). The analysis showed that "concentrations of contaminants of concern in monitoring wells, springs, and the Portneuf River have shown declining trends since source controls and extraction activities

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[12] The Tribes cumulative impact arguments also rely on the premise that BLM used a bad baseline. Because that is not the case, those arguments fail.

were implemented." AR0029679. Therefore, BLM concluded that under the Proposed Action, "[o]peration of the cooling ponds and gypsum stack expansions on the Federal lands would result in minor incremental additions of phosphorous, arsenic and other constituent loading due to leakage of leachate through the liner." AR0029680. Despite these minimal incremental increases, BLM anticipated that total concentrations of arsenic and phosphorous would continue to decline given the Don Plant's implementation of source controls and groundwater extraction activities. AR0029683.

BLM adequately studied Alternative B's impacts on water quality. The EIS explained that "the reconfigured gypsum stack expansions under Alternative B would have approximately the same gypsum waste disposal capacity as the gypsum stack expansions that would be developed as a result of the Proposed Action." AR0029684. BLM acknowledged that the different location of the gypstack expansions under Alternative B "could result in higher phosphorous and arsenic loading to groundwater extraction wells on the eastern side of the Don Plant site," but concluded that Alternative B "is unlikely to affect the overall downward trend in concentrations resulting from the lining of the existing gypsum stacks and continued application of other source controls." AR0029684. Moreover, analysis of groundwater flow paths demonstrated that alternative B would not materially alter the flow of contaminants. AR0030001. BLM thus determined that the existing groundwater flow analysis was sufficient to predict the water quality impacts of Alternative B. The agency's reliance on the technical report and its conclusions regarding water quality impacts are scientific judgments squarely within its expertise, and are thus entitled to deference. *See Balt. Gas & Elec. Co. v. Nat.*

Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."); *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 997 (9th Cir. 2014) (agency given "substantial discretion" in its reasoned choice of and reliance on modeling methods).

BLM's analysis of groundwater at one monitored point—Batiste Spring—was sufficient. The EIS explained that water quality impacts at Batiste Spring would be similar to "water quality impacts in the river at Fort Hall" because "site affected groundwater enters the Portneuf River within a small stretch of the river between Swanson Road Spring and Batiste Spring." AR0029681. There is no apparent reason this is incorrect, unreasonable, or would result in inaccurate or deficient results. It was appropriate NEPA analysis.

ii. Air Quality

The Don Plant is a major source of air pollutant emissions. AR0029597. "The largest single source of PM_{10} and particulate matter 25 microns or less in diameter ($PM_{2.5}$) emissions at the Don Plant is the evaporative cooling towers .... Fluoride emissions originate primarily from the cooling towers and the gypsum stack." *Id.* Following the Blackrock Land Exchange, Simplot plans to replace its cooling towers with cooling ponds, which will reduce the Don Plant's fluoride air emissions, consistent with the 2016 IDEQ Consent Order. AR0029792

The EIS detailed current and past emissions from the Don Plant. AR0029595-602. BLM concluded that the exchange's primary air quality impact would be a *decrease* in emissions as the cooling towers are replaced with cooling ponds. AR0029604. But it also noted that because the land exchange would "extend the life of the Don Plant by an estimated 65 years," it "would increase the duration of annual emissions associated with the Don Plant." AR0029605.

Specific to Alternative B, the EIS concluded that "[e]ffects on air quality and climate change would generally be the same as those of the Proposed Action." AR0029606. However, because "the location of the gypsum stack expansions and associated releases of fluoride and particulate matter emissions would be situated farther east than under the Proposed Action[,] . . . the gypsum stacks would be closer to residences east of the Don Plant." *Id.* As a result, "Alternative B could result in slightly higher ambient concentrations of fluoride and particulate matter as well as higher fluoride in forage concentrations closer to residences." *Id.* Nevertheless, the EIS noted, "the overall reduction in fluoride and particulate matter emissions is anticipated to negate the effects of moving some of the emissions closer to nearby populations." *Id.; see also* AR0028696-97 ("[T]he net effect of these reasonably foreseeable actions would be a decrease in PM_{10}, $PM_{2.5}$, and fluoride emissions at the Don Plant. Furthermore, because of the decrease in the fluoride emissions from the cooling towers closure, the fluoride in forage concentrations are anticipated to decrease in all forage sampling areas with no concentrations exceeding State standards. Similarly, the overall reduction in particulate matter emissions is anticipated to negate the effects of moving some of the emissions closer to nearby populations.").

This is an adequate analysis of Alternative B's air quality impacts. BLM appropriately discussed the impacts and identified the particular risks of Alternative B. It's conclusions that fluoride and other emissions would decrease overall are supported, as are its conclusion that the relevant emissions do not pose an unacceptable risk to public health. AR0063536; AR0002992; AR0029629.

iii. Visual Resources

The EIS adequately evaluated the land exchange's impacts on visual resources. AR0029636-40. The EIS acknowledged that the construction of cooling ponds and gypstacks would introduce contrasts to the landscape, altering the existing visual character from a generally natural landscape to a modified industrial landscape. AR0029639. It further explained where those changes would be most visible. *Id.* It noted that Alternative B would convert 36 more acres of Federal lands and 15 more acres of Simplot private lands to a modified industrial landscape and that the different gypstack configuration would change the visibility of the embankments as seen from certain spots on the most commonly traveled routes where the lands are in view. AR0029640. BLM met NEPA's requirement to take a hard look at impacts to visual resources.

iv. Public Health and Safety

The EIS stated that "public safety issues associated with the land exchange and reasonably foreseeable actions include potential failure of the gypsum stacks and cooling ponds, exposure to hazardous or solid wastes, and air and water quality degradation and associated health and safety effects." AR0029630. BLM discussed and considered each of these possibilities in detail. *See* AR0029621-27 (Geotechnical Stability); AR0029627-30 (Hazardous or Solid Wastes); AR0029596-607 (Air Quality and Climate Change); AR0029672-84 (Water Resources). For NEPA purposes, BLM adequately analyzed these considerations.

v. Wildlife

BLM conducted wildlife surveys on the lands to be exchanged. AR0029665. The agency focused on information about potential wildlife mortalities from the gypstacks. The administrative record showed none. Based on that information, BLM reasonably concluded that wildlife avoid the gypstack due to human activity, the absence of desirable habitat characteristics, and the proximity of extensive aquatic and wetland habitat associated with the nearby American Falls Reservoir. AR0029664. That is all NEPA requires.

vi. Socioeconomics

BLM reasonably analyzed potential impacts on housing and nonmarket values, such as social and quality-of-life impacts. AR0029695-96. The agency appropriately focused on the communities most likely to be impacted by the Blackrock Land Exchange. *See* AR0029884-940 (Socioeconomic Technical Report).

c. Cultural Resources

"[A]n EIS is required to include 'discussions' of 'historic and cultural resources.'" *N. Idaho Cmty. Action Network v. United States DOT*, 545 F.3d 1147, 1156 (9th Cir. 2008) (quoting 40 C.F.R. § 1502.16(g)). BLM met that standard here.

In 2019, a private firm conducted a Class III cultural resources inventory on the Federal lands, non-Federal lands, and voluntary mitigation Parcel A. AR0029608. It also conducted a cultural resources survey for voluntary donation Parcel B. *Id.* The upshot was three sites that are eligible for listing on the National Register of Historic Place and ten that are not eligible but that "do provide important cultural history and significance for the Shoshone-Bannock Tribes." *Id.* The EIS listed and discussed the cultural sites and historic isolated finds on the lands involved in the exchange. AR0029608-10. BLM examined the direct and indirect impacts, as well as the cumulative effects, of each alternative on cultural resources. AR0029610-12.

Moreover, the EIS also addressed the Tribes' concerns that the historic sites—including burial sites[13] and other culturally significant sites—would lose protection once the lands were transferred to Simplot. For instance, the EIS noted that several historical sites "are not within the footprints of the planned facilities, but would not be subject to protection under Federal laws and regulations, and could be damaged or destroyed in the course of future construction or operational activities." AR0029612. Nevertheless, according to a Memorandum of Agreement prepared under National Historic Preservation Act requirements, sites that were eligible for the National Register of Historic Place were inventoried, recorded, and mitigated before being transferred out of Federal ownership. *Id.* The ROD, meanwhile, in-

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[13] The Tribes' concern on this point is particularly sensitive. The Court recognizes the importance of these sites to the Tribes. Their traditions and cultural preservation work clearly indicate a real possibility that additional burial sites are located in the area. That deserves to be taken seriously. However, NEPA's standard for a discussion of cultural resources is a fairly low bar. Here, BLM's response that the cultural resource surveys—which the Tribes do not challenge—did not identify any burial sites, and "[t]here have been no specifically documented or recorded burial sites on the Federal lands" clears that bar. AR0030356.

dicated that BLM would issue a patent for the federal lands "subject to a deed restriction which would protect [the National Register of Historic Place eligible site] and provide tribal access to the site in perpetuity." AR0039170.

BLM's consideration of cultural resources ultimately led the agency to select Alternative B, which "was developed based on comments received during scoping to adjust the boundary of the Federal lands to avoid cultural and tribal resources in the west canyon area on the north side of Howard Mountain." AR0029576. The EIS stated that this alternative would "[r]esult in BLM retention of 368 acres of Federal lands in the west canyon area that the BLM would continue to manage in accordance with the Pocatello RMP (BLM 2012), including identified cultural and tribal resources." AR0029577. Several important cultural sites "would be retained in Federal ownership and, therefore, would not be damaged or destroyed from construction of the reasonably foreseeable actions of the cooling ponds and gypsum stacks on the Federal lands." AR0029613. This alternative also reconfigured the layout of gypstack expansion and cooling ponds to avoid an National Historic Preservation Act site. *Id.*

In sum, the EIS considered and fully disclosed the impacts of the proposed project on cultural resources. It adequately discussed corresponding mitigation measures. This satisfies NEPA's requirement.

d. Environmental Justice

Executive Order 12,898 requires every federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." Exec. Ord. No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994). The Council on Environmental Quality (CEQ)—the independent agency that implements NEPA—has promulgated environmental-justice guidance for agencies. *Environmental Justice Guidance Under the National Environmental Policy Act* (Dec. 10, 1997).

Although the executive order, and presumably the implementing guidance, "does not create a private right to judicial review ... a petitioner may challenge an agency's environmental justice analysis as arbitrary and capricious under NEPA and the APA." *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021); *see also Latin Ams. For Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 465 (6th Cir. 2014); *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006).[14] But "[a]s always with NEPA, an agency is not required to select the course of action that best serves environmental justice, only to take a 'hard look' at environmental justice issues." *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (citing *Latin Ams.*, 756 F.3d at 475-77).

There is no question that the Fort Hall Reservation is an environmental justice community. AR0029688-89. Much of BLM's environmental analysis implicitly considered the Reservation by virtue of its proximity to the Don Plant. As discussed previously, BLM also consid-

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[14] The Ninth Circuit has not squarely held that an agency's analysis of environmental justice issues implicated by E.O. 12,898 can be challenged as arbitrary and capricious under NEPA, but the Court finds this analysis appropriate.

ered certain statutory factors that are uniquely relevant to the Tribes, such as their cultural resources and treaty rights. Moreover, the EIS's environmental justice analysis specifically discussed how the proposed action and Alternative B would affect the high indicators on the EJSCREEN—ozone concentration, proximity to superfund sites, and wastewater discharge. AR0029689; AR0029696-98. The analysis is sufficient to show that BLM took a hard look at environmental justice issues.

e. Reasonable Range of Alternatives

An agency must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). A "'rule of reason' guides both the choice of alternatives as well as the extent to which the [EIS] must discuss each alternative." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (quoting *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)). An "EIS only needs to consider in detail alternatives that would address both of the Project's stated purposes and needs." *League of Wilderness Defs.-Blue Mts. Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1072 (9th Cir. 2012).

Here, the EIS identified the land exchange's purpose and need for both BLM and Simplot. AR0029562. BLM's purpose and need was evaluating and responding to the land exchange proposal. *Id.* Simplot's purpose and need was "to implement legally enforceable controls as directed by the EPA and IDEQ . . . and to maximize the operational life of its ongoing phosphate processing operations at the Don Plant by expanding gypsum stacks onto adjacent lands." *Id*. BLM analyzed four alternative proposals in detail. AR0029578-80.

More importantly, BLM briefly explained that it eliminated certain other alternatives from further analysis because they did not meet the project objectives. *Id; League of Wilderness Defs.*, 689 F.3d at 1072. Notably, BLM eliminated two fluoride reduction alternatives. The EIS stated that BLM eliminated indirect process water cooling alternative from detailed consideration because of technical concerns about its feasibility due to scaling and water balance. AR0029798. BLM determined that the fluoride condensate alternative was not feasible because Simplot would still need to construct a cooling pond to meet its fluoride reduction obligations. AR0029579. These statements satisfy NEPA's "brief explanation" requirement.

f. Supplemental EIS

BLM must prepare a supplemental EIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). Here, BLM's selection of Alternative B, which is considered in the EIS, is neither. As such, the agency did not need to prepare a supplemental EIS.

3. Responding to Tribes' Comments

NEPA does not require an agency to resolve all concerns raised in comments on a DEIS and FEIS. The regulations require that "[a]n agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond . . . in the final statement." 40 C.F.R. § 1503.4(a). They also provide that an agency "may request comments on a final environmental impact statement before the decision is finally made," but do not require the agency to specifically respond to comments or resolve all issues. 40 C.F.R. § 1503.1. Here, Appendix I to the EIS shows that BLM met those requirements and adequately responded to the Tribes' comments by referencing the portions of the EIS that dealt with the relevant issues.

ORDER

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment (Dkt. 37) is GRANTED in part and DENIED in part, and Defendants' and Intervenor's cross motions for summary judgment (Dkts. 60, 61) are GRANTED in part and DENIED in part as follows:

1. Summary judgment is granted in favor of Plaintiffs on their Trust Responsibility and APA claims that BLM violated the 1900 Act.
2. Summary judgment is granted in favor of Plaintiffs on their FLPMA claim that BLM failed to make an adequate public interest determination.
3. Summary judgment is granted in favor of Plaintiffs on their FLPMA claim that BLM failed to adequately appraise the lands to be exchanged.
4. Summary judgment is granted in favor of Defendants and Intervenor on Plaintiffs' FLPMA claim that the Blackrock Land Exchange is not consistent with the Pocatello Resource Management Plan.

5. Summary judgment is granted in favor of Plaintiffs on their NEPA claim that BLM failed to take a hard look at Alternative B's design options for the cooling ponds and gypstack expansion.

6. Summary judgement is granted in favor of Defendants and Intervenor on all of Plaintiffs' remaining NEPA claims.

IT IS FURTHER ORDERED that the parties are directed to confer and, if possible, jointly propose a briefing schedule on the issue of remedy within 7 days of this order. If the parties cannot agree on a briefing schedule, each party should submit its own proposal by that deadline. The Court anticipates ordering the remedy briefs not exceed 15 pages in length.

DATED: March 31, 2023

/s/ B. LYNN WINMILL
B. Lynn Winmill
U.S. District Court Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 4:20-cv-00553-BLW

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, PLAINTIFFS

v.

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

and

J.R. SIMPLOT COMPANY, DEFENDANT-INTERVENOR

Filed: June 30, 2023

MEMORANDUM DECISION AND ORDER

INTRODUCTION

This case involves a challenge to the Blackrock Land Exchange between the United States and Defendant-Intervenor J.R. Simplot Company in southeast Idaho. In March, the Court partially granted Plaintiffs' motion for summary judgment, finding that BLM's decision and analysis approving the exchange was arbitrary and capricious in violation of the National Environmental Protection Act, the Federal Land Policy Management Act, the 1900 Act, and the Administrative Procedures Act.

Dkt. 89. Simplot now asks the Court to certify that order for interlocutory appeal. Dkt. 94. For the reasons explained below, the Court will grant that motion.

LEGAL STANDARD

"Under 28 U.S.C. § 1292(b) parties may take an interlocutory appeal when 'exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir. 2022) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)). The statute sets out three certification requirements that must be met for a district court to certify an order for interlocutory appeal that is not otherwise appealable.

First, there must be a controlling question of law, not fact. *Id*. A controlling question of law is one that "materially affects the outcome of the litigation in the district court." *Id* (citation and quotation omitted). Second, there must be substantial grounds for differences of opinion as to that question of law. *Id.* That prong is satisfied in cases presenting "novel legal issues . . . on which fair-minded jurists might reach contradictory conclusions." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (citation and quotation omitted). The paradigmatic examples of such cases are issues of first impression and circuit splits, although the "development of contradictory precedent" is not necessary to satisfy the prong. *Id.* The third prong is met when an immediate resolution of that question of that question may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). That means that the resolution of the question "may appreciably shorten the time, effort, or expense of conducting the district court proceedings." *ICTSI Or., Inc*, 22 F.4th at 1131.

ANALYSIS

The first two prongs of the § 1292(b) test are unquestionably met in this case. The interplay between the 1900 Act and FLPMA is a legal question of first impression. Although the Court is confident in its result and reasoning, it wrestled with the complex and nuanced issue of statutory interpretation presented. Another jurist might have reasonably reached a different conclusion.

That brings us to the only real issue at play here: whether an interlocutory appeal will materially advance the ultimate termination of the litigation. Litigation is messy. At this juncture, the parties ask the Court to impose some order, but all disagree about what will be most "just, speedy, and inexpensive." Everyone has good arguments.

The Court is persuaded that an interlocutory appeal will best advance the resolution of this case. The issue of remedy here is difficult. Having the Ninth Circuit review the summary judgment decision first will add clarity to that potentially fraught question. The Court is particularly mindful that the Circuit's judgment as to the 1900 Act question will likely be determinative of the remedy question. Regardless of the outcome the Circuit reaches, its decision will create certainty that will likely save substantial time and resources in litigating remedies.

ORDER

IT IS HEREBY ORDERED

1. Simplot's Motion to Certify Interlocutory Appeal (Dkt. 94) is **GRANTED**.

2. The Court's March 31, 2023, Memorandum Decision and Order (Dkt. 89) is amended as follows: the Court's decision that BLM's decision to approve the Blackrock Land Exchange violated the APA and the federal government's trust responsibility because it did not comply with the 1900 Act involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

3. This case will be stayed until the Court of Appeals has issued an order denying permission to appeal or, if permission is granted, it has issued a final decision.

DATED: June 30, 2023

/s/ B. LYNN WINMILL
B. Lynn Winmill
U.S. District Court Judge

APPENDIX E

1. 43 U.S.C. 1702(e) provides:

Definitions

(e) The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except—

(1) lands located on the Outer Continental Shelf; and

(2) lands held for the benefit of Indians, Aleuts, and Eskimos.

2. 43 U.S.C. 1716(a) provides:

Exchanges of public lands or interests therein within the National Forest System

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

A tract of public land or interests therein may be disposed of by exchange by the Secretary under this Act and a tract of land or interests therein within the National Forest System may be disposed of by exchange by the Secretary of Agriculture under applicable law where the Secretary concerned determines that the public interest will be well served by making that exchange: *Provided*, That when considering public interest the Secretary concerned shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

3. Act of June 6, 1900, ch. 813, 31 Stat. 672, provides:

ARTICLE III.

Where any Indians have taken lands and made homes on the reservation and are now occupying and cultivating the same, under the sixth section of the Fort Bridger treaty hereinbefore referred to, they shall not be removed therefrom without their consent, and they may receive allotments on the land they now occupy; but in case they prefer to remove they may select land elsewhere on that portion of said reservation not hereby ceded, granted, and relinquished and not occupied by any other Indians; and should they decide not to move their improvements, then the same shall be appraised under direction of the Secretary of the Interior and sold for their benefit, at a sum not less than such appraisal, and the cash proceeds of such sale shall be paid to the Indian or Indians whose improvements shall be so sold.

ARTICLE IV.

So long as any of the lands ceded, granted, and relinquished under this treaty remain part of the public domain, Indians belonging to the above-mentioned tribes, and living on the reduced reservation, shall have the right, without any charge therefor, to cut timber for their own use, but not for sale, and to pasture their live stock on said public lands, and to hunt thereon and to fish in the streams thereof.

* * * * *

SEC. 4. That before any of the lands by this agreement ceded are opened to settlement or entry, the Commissioner of Indian Affairs shall cause allotments to be made of such of said lands as are occupied and cultivated by any Indians, as set forth in article three of said agreement, who may desire to have the same allotted to them; and in cases where such Indian occupants prefer to remove to lands within the limits of the reduced reservation, he shall cause to be prepared a schedule of the lands to be abandoned, with a description of the improvements thereon, and the name of the Indian occupant, a duplicate of which shall be filed with the Commissioner of the General Land Office.

Before entry shall be allowed, as hereinafter provided, of any tract of land occupied and cultivated as above and included in the schedule aforesaid, the Secretary of the Interior shall cause the improvements on said tract to be appraised and sold to the highest bidder. No sale of such improvements shall be for less than the appraised value. The purchaser of such improvements shall have thirty days after such purchase for preference right of entry, under the provisions of this Act, of the lands upon which the improvements purchased by him are situated, not to exceed one hundred and sixty acres: *Provided,* That the proceeds of the sale of such improvements shall be paid to the Indians owning the same.

Any Indian electing to abandon the land occupied by him as aforesaid shall have reasonable time, in the discretion of the Secretary of the Interior, within which to remove the improvements situated upon the land occupied by him.

SEC. 5. That on the completion of the allotments and the preparation of the schedule provided for in the preceding section, and the classification of the lands as provided for herein, the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, town-site, stone and timber, and mining laws of the United States only, excepting as to price and excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of Idaho: *Provided*, That all purchasers of lands lying under the canal of the Idaho Canal Company, and which are susceptible of irrigation from the water from said canal, shall pay for the same at the rate of ten dollars per acre; all agricultural lands not under said canal shall be paid for at the rate of two dollars and fifty cents per acre, and grazing lands at the rate of one dollar and twenty-five cents per acre, one-fifth of the respective sums to be paid at time of original entry, and four-fifths thereof at the time of making final proof; but no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres of the land hereinbefore referred to; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged, except as to the sum to be paid as aforesaid.

The classification as to agricultural and grazing lands shall be made by an employee of the General Land Office under the direction of the Secretary of the Interior.

No lands in sections sixteen and thirty-six now occupied, as set forth in article three of the agreement herein ratified, shall be reserved for school purposes, but the State of Idaho shall be entitled to indemnity for any lands so occupied: *Provided*, That none of said lands shall be disposed of under the town-site laws for less than ten dollars per acre: *And provided further*, That all of said lands within five miles of the boundary line of the town of Pocatello shall be sold at public auction, payable as aforesaid, under the direction of the Secretary of the Interior for not less than ten dollars per acre: *And provided further*, That any mineral lands within said five mile limit shall be disposed of under the mineral land laws of the United States, excepting that the price of such mineral lands shall be fixed at ten dollars per acre instead of the price fixed by the said mineral land laws.