Appeal Nos. 23-35543, 23-35533

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION,

Plaintiff-Appellee,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendant-Appellants,

and

J.R. SIMPLOT COMPANY,

Intervenor-Defendant-Appellant.

On Appeal from the U.S. District Court
for the District of Idaho
Case No. 4:20-cv-553 (Hon. B. Lynn Winmill)

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLEE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and 29(a)(4)(A), the undersigned counsel certifies that National Congress of American Indians is a non-profit corporation with no parent corporations or publicly held companies that own 10% or more stock in their governments.

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STATEMENT OF INTEREST[1]

Amicus Curiae the National Congress of American Indians ("NCAI") is the oldest and largest national organization comprised of Tribal Nations and their citizens. Since 1944, NCAI has advised and educated Tribal, state, and federal governments on a range of issues, including self-government, treaty rights, and policies affecting Tribal Nations. NCAI has long advocated for the United States to fully adhere to and honor the trust relationship including refraining from any federal action that impinges upon the rights of Tribal Nations. NCAI, Major Policy Resolution No. 1, Treaties and Trust Responsibilities, Resolution SD-95-45.

SUMMARY OF ARGUMENT

In the Agreement of February 5, 1898, 31 Stat. 672 ("1898 Agreement"), the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation ("Shoshone-Bannock") ceded approximately 416,000 acres of their homeland to the United States—including the lands at issue here.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The United States took those lands into the public domain. In exchange, the United States made solemn and binding promises that the Shoshone-Bannock would retain usufructuary rights on those lands so long as they remained public. Those promises and the trust doctrine obligate the United States to remove the ceded lands from the public domain only by lawful means.

The Act of June 6, 1900, ch. 813, 31 Stat. 672 (1900) ("1900 Act"), which ratified the 1898 Agreement, and all of Federal Appellants' actions must be understood in the context of the trust relationship that exists between the United States and all federally recognized Indian Tribes, including the Shoshone-Bannock. This sovereign-to-sovereign relationship developed through extensive dealings between Tribal Nations and government representatives. Today, all three branches of government rely on the trust relationship to guide interactions with Tribal Nations and as a source of authority for their actions and decision making.

This brief outlines the development of the trust relationship and why understanding the federal government's duties thereunder is necessary in cases implicating Tribal rights. The brief also explains how

this relationship gave rise to specific canons of interpretation that apply to treaties, statutes, executive orders, and regulations that implicate Tribal interests. This includes the clear statement rule which requires Congress be explicit when abrogating Tribal rights. Congress has made no such clear statement abrogating the Shoshone-Bannocks' rights under the 1898 Agreement or 1900 Act, and Federal Appellants are not at liberty to act without one.

Federal Appellants' opening brief entirely fails to address its trust relationship with the Shoshone-Bannock. *Cf.* Attorney General Guidelines Stating Principles for Working With Federally Recognized Indian Tribes, 79 Fed. Reg. 73,905 (Dec. 12, 2014). The government's land exchange with J.R. Simplot Company ("Simplot") and atextual reading of the 1900 Act do not honor its relationship or the agreements made with the Shoshone-Bannock. The opinion below correctly considered and cited the trust relationship to ground its findings. This Court must also hold the government to its word and affirm.

ARGUMENT

I. The Trust Relationship Underpins All Issues on Appeal.

The United States has a special relationship of trust with all federally recognized Indian Tribes. *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* § 5.04[3][a] (Nell Jessup Newton ed., 2023) ("Cohen") ("[T]he trust doctrine is one of the cornerstones of Indian law."). This relationship, founded in international law, developed through hundreds of years of negotiations, agreements, and interactions between sovereign entities. In its most fundamental terms, the trust relationship provides the evaluative lens for all federal actions that impact Tribal Nations. This is because, "[i]n carrying out its treaty obligations with the Indian tribes the Government is . . . more than a mere contracting party. Under a humane and self imposed policy . . . it has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

A. The Trust Relationship is Deeply Rooted in History and Precedent.

1. The Trust Relationship Developed During Treatymaking and Diplomacy.

Under the Articles of Confederation, regulatory power over Indian affairs was reserved to the federal government. Articles of Confederation of 1781, art. IX. After the American Revolution, the United States signed treaties that established Congress's sole authority to regulate trade with Tribal Nations as sovereigns and oversee Indian affairs. *See, e.g.*, Hopewell Treaty with the Cherokee Tribe, Nov. 28, 1785, 7 Stat. 18 (1785). These treaties were critical to the security of the United States. Cohen § 1.02[2]. From the Hopewell Treaty in 1785, until the last formal treaties with the Navajo Nation, the Shoshone-Bannocks, and the Nez Perce in the summer of 1868, the United States entered into hundreds of treaties with Tribal Nations. *See* 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1020-25 (1904) ("Kappler"); Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* 284 (1994) ("Prucha"). During this period, the United States bargained to obtain millions of acres of Native land, peace with Tribal Nations, and loyalty against other countries. Tribal Nations treated to ensure the

preservation of a homeland, land use rights, and the United States' care and protection.

The trust relationship developed during these sovereign-to-sovereign interactions, built on traditional principles of international relations and contract law, including good faith and fair dealing. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 (1789) (art. III) (stating "[t]he utmost good faith shall always be observed towards the Indians"); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 ("A treaty is 'essentially a contract between two sovereign nations.'" (quoting *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979))); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (confirming Cherokee Nation's right of occupancy until federal government chooses to extinguish title); *see also* Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection From Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 Mich. J. Env't & Admin. L. 397, 401–04, 412 (2017) ("[T]he relationship of Indian tribes with the United States is founded on 'the settled doctrine of the law of nations[.]'").

Although treaties and agreements reflect contracts between sovereign nations and explicitly pledged that the United States had conducted negotiations in good faith—and always would—the parties bargained from unequal positions. Tribal Nations' representatives faced negotiations characterized by language barriers, cultural and religious differences, and power imbalances. Negotiations were often conducted in English with non-Native interpreters. *See Jones v. Meehan*, 175 U.S. 1 (1899). The United States had the advantage of drafting the agreements, which reflect its preferred language and terminology. Further, Tribal consent was, at times, induced by fraud and some degree of coercion from military threats, starvation, and the incursion of non-Native settlers. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 380–83 (1980); Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. Colo. L. Rev. 1, 8 (2013) ("Some [treaties] were manifestly fraudulent . . . Others were signed by the Indians practically under duress."). Despite these inequities, "comprehensive principles" evolved that "have continued significance to this day. These include the sanctity of Indian title . . . the sovereign status of tribes, and the special trust relationship between Indian tribes and the United States." Cohen,

§ 1.01. Treaties reflect bargained-for promises the United States must honor.

The Shoshone-Bannock's treatymaking experience provides one illustration. Pre-contact, the Shoshone-Bannock were part of a diverse Native community that occupied extensive territory, moving seasonally to ensure adequate food and shelter. Contact with non-Natives occurred in the early nineteenth century primarily through fur traders. John W. Heaton, *The Shoshone-Bannocks: Culture & Commerce at Fort Hall, 1870-1940* 33 (2005). By the 1850s, "hundreds of thousands of Euramericans invaded the Shoshone-Bannock homeland. Overland travelers disrupted subsistence patterns and usurped resources when they used riparian travel corridors that ran through the heart of [traditional Shoshone-Bannock] country." *Id.* at 37. Tensions between Native and non-Native communities led to conflict, and the United States stepped in to negotiate, seeking to open land in the West to non-Native settlers and gain rights of way for the Union Pacific Railroad. *Id.* at 99–100.

From 1863 to 1898, the United States and Shoshone-Bannock negotiated several treaties to establish peace, recognize Tribal

territories, cede land to the United States, establish a reservation, and reserve hunting and fishing rights. *See* Fort Bridger Treaty of 1868, art. I, July 3, 1868, 15 Stat. 673, 674–75 (1868) ("[T]hey shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon[.]"); 2 Kappler at 849 (Treaty with the Eastern Shoshoni, art. IV, July 2, 1863); 2 Kappler at 851 (Treaty with the Western Shoshoni, art. V, Oct. 1, 1863); 5 Kappler at 693 (Treaty of Soda Springs, Oct. 14, 1863 (unratified)). Under the terms of the Fort Bridger Treaty, President Andrew Johnson established the Fort Hall Reservation by Executive Order. *See* Executive Order of June 14, 1867, *reprinted in* 1 Kappler at 836. The Reservation originally comprised 1.8 million acres of land.[2] Shoshone-Bannock Tribes, https://www.sbtribes.com/about/ (last visited Mar. 21, 2024).

[2] The Reservation was reduced from 1.8 to 1.2 million acres in 1872 due to surveying errors. Shoshone-Bannock Tribes, https://www.sbtribes.com/about/ (last visited Mar. 21, 2024). Today, after subsequent agreements, legislation, and Allotment, the Reservation comprises 540,764 acres. *Id.*; Partnership with Native Americans, *Reservations*, http://www.nativepartnership.org/site/PageServer?pagename=PWNA_Native_Reservations_FortHall (last visited Mar. 21, 2024).

2. The Trust Relationship Continued Through Sovereign-to-Sovereign Agreements and Indian Affairs Statutes.

Congress ended the treatymaking era in 1871. *See Antoine v. Washington*, 420 U.S. 194, 202 (1975). The conclusion of that era did not, however, end the federal government's engagement with and obligations to Tribal Nations. After 1871, the federal government negotiated agreements that were codified in legislation enacted by Congress. *See* Cohen § 1.03[9]; Prucha, *supra*, at 312. Agreement-making began in 1872. During this period, most agreements concerned land cessions or modifications of reservation boundaries, while others dealt with allotment or railroad rights of way. Prucha, *supra* at 313. "Once ratified by [an] Act of Congress, the provisions of the agreements become law, and like treaties, the supreme law of the land." *Antoine*, 420 U.S. at 204. The end of the treatymaking era "in no way affected" Congress' responsibility including "legislating the ratification of contracts[.]" *Id.* at 203.

Thirty years after the Fort Bridger Treaty, the United States again sought significant land cessions from the Shoshone-Bannock. Facing external pressures, including non-Native settler encroachment, the Shoshone-Bannock agreed to cede a significant portion of their

Reservation in exchange for monetary payments and reserved rights to harvest timber, pasture livestock, and hunt and fish on ceded lands that "remain part of the public domain." 1900 Act at Art. IV; *see also* 1-ER-3. Congress ratified and incorporated this 1898 Agreement in its entirety in the 1900 Act.1-ER-3. Section 5 of the 1900 Act delineates specific, limited processes by which the federal government can remove the ceded lands from the public domain: "under the homestead, townsite, stone and timber, and mining laws of the United States only" and that no purchaser "shall be permitted in any manner to purchase more than one hundred and sixty acres of the [ceded] land." 1900 Act at 676 ("Section 5").

B. The Trust Doctrine Remains the Foundation for All Interactions Between Tribal Nations and the United States.

All three branches of the federal government acknowledge the importance of the trust relationship and reference it to support their actions and policy. As discussed above, Congress has taken the lead role in formalizing agreements with Tribal Nations. Congress has also passed numerous statutes for the benefit of Native people in furtherance of those agreements and the trust relationship generally. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5302(b) (2023) ("The Congress declares its commitment to the maintenance of the

Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy[.]"); Cohen § 5.04[3][a].

The executive branch also has a significant role in fulfilling the trust relationship—indeed numerous presidential actions honor and effectuate it. *See, e.g.*, Exec. Order No. 14112, 88 Fed. Reg. 86,021 (Dec. 11, 2023) (outlining federal funding reform as "consistent with our commitment to fulfilling the United States' unique trust responsibility to Tribal Nations and the deep respect we have for Tribal Nations."). Federal agencies incorporate the trust relationship into their guidance, including requirements to consult with and consider impacts on Tribal Nations. *See, e.g.*, Sec. of the Dept. of the Interior, *Order No. 3335 Reaffirmation of the Federal Trust Responsibility to Federally Recognized Tribes and Individual Indian Beneficiaries*, at 1 § 3(a) (2014) https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf ("The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and

treaty and similarly recognized rights."); Dept. of the Interior, 512 DM 4, at 3 https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf ("It is the policy of the Department to . . . carry out its trust relationship . . . and invite Tribes to consult on a government-to-government basis whenever there is a Departmental Action with Tribal Implications.").

Finally, federal courts play an important role in implementing the trust doctrine when evaluating congressional and executive actions. *See, e.g.*, *Haaland v. Brackeen*, 599 U.S. 255, 257 (2023) ("[T]he trust relationship between the United States and the Indian people informs the exercise of legislative power." (internal marks omitted) (quoting *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 225 (1983))); *see also Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship."); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court

on many occasions."). The principles of the trust doctrine control when courts interpret treaties and statutes.

II. Courts Apply the Indian Canons of Construction to Effectuate the Trust Relationship.

The Federal Courts have developed binding rules for interpreting treaties, agreements, statutes, and executive branch documents that implicate Tribal rights and interests. *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Accordingly, 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).

A. The Indian Canons of Construction Reflect the Trust Responsibility and Context Surrounding Sovereign-to-Sovereign Interactions.

The Indian canons of construction evolved out of the federal government's fiduciary duties inherent in the trust relationship and the historical circumstances of the United States' government-to-government relationship with Tribal Nations. The canons also account for the fact that, even as the United States assumed its role as the trustee and promised to safeguard Tribal interests, treaties were sometimes negotiated through coercion and fraud.

Throughout the treatymaking era, the United States drafted hundreds of agreements in which Tribal Nations ceded millions of acres of land under duress. *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1007 (2019). In the normal course of international treaty and contract law, courts construe "ambiguities against the drafter who enjoys the power of the pen." *Id.* at 1016 (Gorsuch, J., concurring). In the context of Tribal treaties, courts have recognized the importance of holding the government to the terms of its deal because it employed the power of the pen to its advantage. *Id.* These principles extend to other federal actions—executive orders, statutes, and regulations—"to ensure that Congress and the executive would uphold their promised fiduciary responsibilities when unilaterally affecting Indian rights." Jill De La Hunt, *The Canons of Indian Treaty and Statutory Construction*, 17 Univ. Mich. J. of L. Reform 681, 688 (1984).

The Indian canons set forth three distinct interpretive principles. First, the Indian canons require treaties, agreements, statutes, and executive orders be liberally construed in favor of Tribal Nations and that all ambiguities must be resolved in their favor. *Cnty. of Oneida*, 470 U.S. at 247. Through this essential canon, courts fulfill "[their] responsibility

to see that the terms of the treaty are carried out[.]" *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942).

Next, the Indian canons require treaties and agreements to be construed as Indians would have understood them when they were negotiated. *See Herrera*, 139 S. Ct. at 1690. Words must not be reduced to their technical or plain meaning. *See Jones*, 175 U.S. at 11. Courts also consider the context in which the treaty was written and signed. *See United States v. Winans*, 198 U.S. 371, 381 (1905); *Fishing Vessel*, 443 U.S. at 667–68. Courts rely on historical records to confirm how Tribal representatives and signatories would have understood the agreements at the time of signing. *See Cougar Den,* 139 S. Ct. at 1012. This serves to moderate the unequal positioning of Tribal representatives and potential misunderstandings at treaty negotiations where Tribal representatives were compelled to negotiate and sign agreements in a foreign language. *See Jones*, 175 U.S. at 11.

Finally, the Indian canons require subsequent legislation which implicates Tribal rights be construed narrowly. Tribal treaty rights cannot be diminished or extinguished unless Congress's intent to do so is explicit and unambiguous. Therefore, when "Congress has not said

otherwise, [courts] hold the government to its word." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020); *see also Herrera,* 139 S. Ct. at 1698 ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.'" (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999))). This canon is often referred to as the clear statement rule or non-abrogation doctrine, which mirrors the presumption against implied repeals. Courts will not construe later legislation as a backhanded way to abrogate treaty reserved rights. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968). This rule recognizes that Tribal Nations' inherent sovereign authority pre-dates the United States, and that attendant rights were not bestowed by the United States but retained and reserved by Tribal Nations in binding agreements. *See Montana*, 471 U.S. at 764; *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (Tribes are "separate sovereigns pre-existing the Constitution[.]").

B. The Indian Canons Apply to Agreements and Statutes Implicating Tribal Rights and Interests.

The Indian canons also protect Tribal rights recognized in agreements, statutes, and executive orders. *See Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995). Congressionally ratified agreements are

the "supreme law of the land" and subject to the same Indian canons. This principle is so well established that the U.S. Supreme Court has "conclusively presumed" that Congress intends a liberal construction of statutes ratifying Indian agreements such as the Shoshone-Bannock 1898 Agreement and 1900 Act. *See Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Swim v. Bergland*, 696 F.2d 712, 716–18 (1983). Specifically, the Indian canons direct that when courts are faced with two possible statutory constructions, the "choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (alteration in original) (quoting *Montana*, 471 U.S. at 766); *see also* Alexander Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 4 Utah L. Faculty Scholarship 2021, 8–9 (2021).

C. Courts Apply the Indian Canons as a Matter of Course.

Myriad examples exist in which courts apply the Indian canons to treaties, agreements, and statutes.[3] Courts' application of the canons in disputes over retained usufructuary rights in Tribal Nations' ceded territories demonstrate how courts consistently apply the canons and reinforce the trust relationship as a fundamental norm in Indian law cases.

For example, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, the U.S. Supreme Court relied on the canons to conclude that the Band's 1837 treaty-reserved usufructuary rights were not extinguished when the Band ceded additional lands to the United States by treaty in 1855. 526 U.S. at 195. Despite the 1855 treaty's broad language, the Court declared that it did not abrogate the Band's rights on additional ceded lands given the treaty history's "plausible ambiguity." The Court "look[ed] beyond the written words to the larger context that frames the Treaty," including "the history of the treaty, the negotiations, and the

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[3] *See, e.g., Winters v. United States*, 207 U.S. 564 (1908); *Citizens Exposing the Truth About Casinos v. Kempthorne,* 492 F.3d 460, 471 (D.C. Cir. 2007); *McClanahan v. State Tax Comm'n of Ariz.,* 411 U.S. 164, 176 (1973); *HRI, Inc., v. E.P.A.*, 198 F.3d 1224, 1245 (10th Cir. 2000).

practical construction adopted by the parties." *Id.* at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). The *Mille Lacs* Court also applied the clear statement rule, rejecting the State of Minnesota's argument that the Band's rights were extinguished by its 1858 Statehood Act, which, according to the Court, lacked "'clear evidence' of congressional intent to abrogate the [ ] Treaty rights[.]" *Id.* at 203.

The U.S. Supreme Court also applied the canons in *Antoine v. Washington*, rejecting Washington State's argument that it could regulate Tribal members hunting on the Colville Confederated Tribes' ceded lands. 420 U.S. at 205. Pursuant to their 1891 Agreement, the Tribes reserved usufructuary rights on the lands ceded to the United States. *Id.* at 197-98. Congress ratified the 1891 Agreement, though did not explicitly provide for those rights in the ratification statutes. *Id.* at 196. The Court held, however, that under the Indian canons, the ratified statutes' statement that it "carr[ied] into effect the (1891) agreement" was sufficient to preserve the Tribes' hunting rights. *Id.* at 199–205.

Similarly, in *Swim v. Bergland*, involving the 1868 Fort Bridger Treaty and 1898 Agreement, the Ninth Circuit relied on the canons—

specifically the clear statement rule—in rejecting non-Indian cattle grazing permittees' argument that the Shoshone-Bannocks' grazing rights on national forest lands had been abrogated by subsequent statutes. 696 F.2d at 715–16. The Ninth Circuit found that "[n]othing in the 1898 Agreement indicates that the Tribes granted away [the 1868 Treaty grazing] rights to the United States." *Id.* at 716. This Court further held that the 1900 Act reserved the Shoshone-Bannock's rights, and unless Congress's intent to modify or abrogate rights reserved in treaties and agreements is expressed clearly and unequivocally, the Shoshone-Bannock's rights remain. *Id.* at 717–18.

III. The Trust Doctrine and Indian Canons Compel Plaintiffs' Reading of the 1900 Act and FLPMA.

Under the 1898 Agreement, the Shoshone-Bannock reserved usufructuary rights on the lands at issue. The 1900 Act codified that Agreement, with Section 5's limitations bearing on the Shoshone-Bannock's rights. *See* I(A)(2) *supra*. As the district court recognized, the 1900 Act "deals exclusively with the [Fort Hall] ceded lands" and Section 5 set out the process for removing the lands from the public domain. 1-ER-11–12. These provisions, the court found, "indicate[d]

congressional intent to restrict the means of . . . terminating tribal members' usufructuary rights." 1-ER-12.

The trust doctrine requires the United States to operate in good faith with respect to rights reserved and implicated by the 1898 Agreement, the 1900 Act, and Section 5. The United States promised the Shoshone-Bannock they would retain rights on public lands. With this promise came the obligation to remove the ceded lands from the public domain only through lawful means.

The plain reading of Section 5 is clear: the ceded lands "shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States *only*[,]" and sale of the lands is limited to 160-acre parcels. 1900 Act at 676 (emphasis added). Nevertheless, to justify their exchange, Federal Appellants interpret Section 5 to serve their interests. This is the opposite of what the trust doctrine requires. Federal Appellants are not at liberty to creatively extinguish treaty reserved rights; they are bound by law to protect them. By purporting to exchange the ceded lands out of federal ownership without complying with the relevant laws, Federal Appellants failed to operate in good faith with respect to the Shoshone-Bannock's reserved rights, violated the

1900 Act, and breached their trust obligation to the Shoshone-Bannock. 1-ER-11.

A. Should the Court Look Beyond the Plain Text, the Indian Canons Apply.

The district court found that the 1900 Act "has a plain, clear meaning," 1-ER-17, and NCAI agrees: only means only. *See* 1900 Act at 676. If this court finds Section 5 unclear or ambiguous, the Indian canons apply and require the section to be interpreted in the Shoshone-Bannock's favor. Simplot asserts the Indian canons are irrelevant because the statute is not ambiguous; yet, Appellants rely on other interpretive canons and assert Section 5, in light of The Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2786 (1976) (codified at 43 U.S.C. § 1701 *et seq.*) ("FLPMA"), must be "harmonized" beyond its unambiguous meaning. U.S. Br. 26, ECF No. 15 ("[s]ensibly reading FLPMA as the modern version of these laws harmonizes the 1900 Act and FLPMA"); Simplot Br. 36, ECF No. 21. Appellants cannot have it both ways. As explained above, standard interpretive canons are significantly less compelling in Indian law cases. *See* II *supra*. If the court accepts Appellants' invitation to apply canons

of construction in interpreting Section 5, the Court must employ the Indian canons above all others.

Similarly incorrect is Simplot's assertion that the Indian canons are inapplicable because neither FLPMA nor Section 5 were "enacted to benefit Indian Tribes." Simplot Br. 62; *see also id.* at 23. This ignores the Shoshone-Bannock's reserved treaty rights under the 1898 Agreement and 1900 Act. Under Appellants' construction, FLPMA would impliedly grant BLM unilateral authority to extinguish reserved treaty rights in the ceded territory. This reading is impermissible: if Congress wishes to abrogate Indian treaty rights, it "must clearly express its intent to do so[,]"*Mille Lacs*, 526 U.S. at 202, and if Congress' intent is in question, ambiguities must be resolved in favor of Tribal Nations.

B. The Clear Statement Rule Precludes Appellants' Reading.

The clear statement rule, discussed above, is particularly concerned with unilateral modifications of Tribal rights. Only Congress, not federal agencies, may abrogate Tribal rights and sovereignty. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014). And, "absent explicit statutory language, [the Supreme Court] ha[s] been extremely reluctant to find congressional abrogation of treaty rights[.]" *Fishing Vessel*, 443

U.S. at 690. The trust doctrine obligates federal agencies such as the BLM to ensure that Tribal rights are given full effect and not abrogated or impinged by agency actions. *Nance v. E.P.A.*, 645 F.2d 701, 711 (9th Cir. 1981) ("[A]ny Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes.").

The clear statement rule applies to the 1900 Act. *See Swim*, 696 F.2d at 717–18 ("[I]n 1900 Congress ratified the 1898 Agreement . . . . Subsequent congressional action would therefore be necessary to modify or abrogate its terms."). Still, Appellants assert that FLPMA, while silent on its applicability to the 1900 Act and explicit in its non-revocation of non-enumerated statutes, *see* FLPMA, at § 701(f), opened for exchange treaty-reserved lands whose disposal methods Congress previously limited.

Attempting to avoid the plain language of Section 701(f), Simplot asserts that FLPMA's "explicit" exchange authority for "any public land" does not "impliedly" repeal or modify the 1900 Act, even when interpreting Section 5 as including disposal methods not codified in 1900. Simplot Br. 58. FLPMA, however, in no way explicitly authorizes exchange of "any" public land. Instead, FLPMA's exchange provision

contemplates that acquired lands within various national land systems' units "shall immediately be reserved for and become a part of the unit . . . and shall thereafter be managed in accordance with all laws, rules, and regulations applicable." 43 U.S.C. § 1716(c). Extending Simplot's logic, those systems' statutory disposal protections could be eviscerated by "giving legal effect to FLPMA's terms," Simplot Br. 58, all in a way, according to Simplot, that does not impliedly repeal them. Federal Appellants similarly assert their interpretation does not repeal the 1900 Act, U.S. Br. 32, yet argue that FLPMA's processes should be understood to replace several of Section 5's enumerated disposal methods. U.S. Br. 24.

Even if FLPMA itself does not foreclose implied repeals, *but see* 90 Stat. at 2786, the clear statement rule applies to protect the Shoshone-Bannock's reserved rights. Congress knows how to be explicit when expanding disposal methods beyond those originally outlined in 1900. For example, the Acts of May 19, 1926 and May 4, 1932—cited by Appellants—specifically extended the Isolated Tracts and Desert Lands disposal statutes to the ceded lands. Act of May 19, 1926, ch. 337, 44 Stat. 566 (1926) ("[T]he provisions of [the Isolated Tracts Act] . . . are made

applicable *to the ceded lands on the former Fort Hall Reservation*[.]" (emphasis added)); Act of May 4, 1931, ch. 164, 47 Stat. 146 (1932) ("[T]he provisions of the [Desert Lands Act] . . . are made applicable *to the ceded lands on the former Fort Hall Reservation opened to entry by the Act of June 6, 1900*." (emphasis added)).

In contrast, FLPMA does not mention the ceded lands or the 1900 Act. Instead, Congress was clear about what FLPMA repealed and left in place. *See* FLPMA, at § 702–03. And contrary to other *amici*'s assertions, the "notwithstanding" provision is insufficient in light of the specificity required by the clear statement rule. S*ee* Nat'l. Assoc. of Mfrs. Mot. 20, ECF No. 19-1; Gov'r Little Br. 8, ECF No. 28. Moreover, FLPMA's legislative history emphasizes that any such omission of the 1900 Act was not an accident, but a feature. As Senator Haskell's report out of the Committee on Interior and Insular Affairs explained:

> 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*. For example, [the bill] . . . does not repeal the Desert Land Act . . . the mining laws . . . or laws concerning . . . the . . . Wildlife Refuge, Park, Wild and Scenic Rivers, and Wilderness Preservation Systems.

S. Rep. No. 94-583, 94th Cong., 1st Sess. at 26-27 (1975) (emphasis added). Appellants' reading, which would allow BLM to extinguish Tribal

treaty rights via land disposal methods beyond those Congress expressly supplied for the ceded territory, cannot survive the clear statement rule.

C. Under the Indian Canons, the Shoshone-Bannock's Interests Control.

When a court faces different possible constructions of statutes enacted to benefit a Tribal Nation, they construe the statutes "liberally" and interpret ambiguous provisions to Tribal Nations' benefit. *See* II(A)(1), *supra*. The district court's interpretation clearly aligns with the Shoshone-Bannocks' stated interests, yet Federal Appellants argue the opposite, focusing on hypothetical situations in which land might be exchanged with the Shoshone-Bannock or another Tribal Nation. U.S. Br. 38. This is incorrect for two reasons.

First, since the 1960s, the United States' policy has been one of Indian "self-determination," with particular emphasis on Tribal decision making and "eras[ing] old attitudes of paternalism." Cohen § 1.07. Tribal Nations—including NCAI's members—are sovereigns, capable of determining, representing, and pursuing their own interests. Federal Appellants assert that the opinion below harms the Shoshone-Bannock by foreclosing a future federal land exchange. This assertion, without consultation and at odds with the Shoshone-Bannock's stated position in

this case, is unfounded and misaligned with the government's duties under the trust relationship. *See* Off. of the Att'y Gen., *June 1, 1995 Memorandum on Indian Sovereignty* (last visited April 12, 2024), https://www.justice.gov/archives/ag/attorney-general-june-1-1995-memorandum-indian-sovereignty ("The trust responsibility . . . will guide the Department in litigation [and] enforcement, . . . affecting Indian country, when appropriate[.]").

The Shoshone-Bannock presumably knew full well if the district court's interpretation foreclosed exchanges, that ruling would also apply to them. Nevertheless, they pursued this action. It is not for Federal Appellants to second guess them.

Second, the U.S. Supreme Court has stated when interpreting treaties, the relevant Tribal understanding is that of the Indian *signatories* to the agreement. *See Mille Lacs*, 526 U.S. at 196; *see also Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1163 (9th Cir. 2017). Federal Appellants' hypothetically injured non-signatory Tribal Nation's interest cannot control over the Shoshone-Bannock's interests. To NCAI's knowledge, no court has discarded actual Tribal interests to protect hypothetical ones, as Federal Appellants suggest.

And Federal Appellants are not faced with choosing between their equal legal obligations to multiple Tribal Nations "claiming contradictory rights under the same statute or treaty[.]" *Makah Indian Tribe*, 873 F.3d at 1164. The only Tribal parties to the 1898 Agreement and this litigation assert one interest: that Federal Appellants follow the laws applicable to the lands on which they retain treaty rights.

D. The Indian Canons Support the Tribes' Reading of the Legislative Intent Behind Section 5 and FLPMA.

As part of the Indian canon requiring "the resolution of ambiguities in favor of Indians," "doubtful expressions of legislative intent must be resolved in [their] favor." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Accordingly, congressional intent to abrogate Tribal rights "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

1. 1900 Act

Federal Appellants' assertion that the congressional purpose of Section 5 was "simply . . . to make the lands disposable in accordance with the general laws," U.S. Br. 9, fails in light of the liberal construction Indian canon. Federal Appellants provide no citation to contemporaneous

or subsequent legislative history that meaningfully substantiates this articulated congressional purpose. For example, Federal Appellants cite the Acts of May 19, 1926, and May 4, 1932, discussed and quoted above, as evidence that Congress did not see the "only" language within Section 5 as meaningfully restrictive. But these Acts' explicit extension of the Isolated Tracts and Desert Lands laws to the ceded lands may well have been in recognition that "congressional action to repeal, supersede, or amend the 1900 Act is required." 1-ER-18. And Federal Appellants further ignore the legislative history of the Act of May 19, 1926, in which Postmaster General Hubert Work's statement to Committee on the Public Lands Chairman Sinnott explained:

> [The 1900 Act] provides that the lands shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws only. . . . The act did not extend the provisions of the isolated tract laws to the lands, and *under the construction given by the department in similar cases no laws other than those specifically extended to the lands are applicable thereto*.

S. Rep. No. 685, 69th Cong., 1st Sess. (1926) (emphasis added).

Federal Appellants also cite the legislative history of the 1904 Act as evidence that "subsequent Congresses certainly understood Section 5" as bringing the lands "under the government's general administration of

public lands." U.S. Br. 34; *see also* An Act Relating to Ceded Lands on the Fort Hall Indian Reservation, Pub. L. No. 58-76, 33 Stat. 153 (1904). This ignores the more explicit statement of congressional understanding on this issue, quoted above.

Clear evidence shows that Congress used "only" intentionally in Section 5. Regardless, the Indian canons require "doubtful expressions of legislative intent must be resolved in favor of the Indians." *Catawba Indian Tribe*, 476 U.S. at 506.

2. FLPMA

FLPMA and its congressional purpose are best understood contextualized by the evolution and congressional discussion of federal land policy. This context and the legislative history provide no support for Appellants' reading. FLPMA is indeed a comprehensive land management statute, *see* U.S. Br. 8, but its passage also represented a monumental shift in federal policy—*away* from federal land disposal. Indeed, FLPMA was passed following a 1970 recommendation from the Public Land Law Review Commission ("PLLRC") that "[t]he policy of large-scale disposal of public lands . . . should be revised. . . ." Public Land Law Review Comm'n, *One-Third of the Nation's Land: A Report to the*

President and to the Congress by the Public Land Law Review Commission 1 (1970).

Congress understood FLPMA to be significant in this regard. Senator Henry Jackson, Chairman of the Committee on Energy and Natural Resources, when introducing and explaining the urgent need for FLPMA, testified that FLPMA was designed to address BLM's dependence on some 3,000 "clearly antiquated" laws "enacted when disposal and largely uncontrolled development were the dominant themes," and that FLPMA "specifically adopts the [PLLRC's] goal in stating as policy that the national interest will be best served by retaining the national resource lands in Federal ownership." Staff of the S. Comm. on Energy and Nat. Res., 95th Cong., *Legislative History of the Federal Land Policy and Management Act of 1976*, at 64 (Comm. Print 1978) (hereinafter "*FLPMA Legislative History*"). Thus, FLPMA's opening lines declare that "it is the policy of the United States that [] the public land be retained in Federal ownership . . ." 43 U.S.C. § 1701(a)(1). FLPMA's focus on federal ownership and conservation is further evident in its integration of statutes which protect certain lands from disposal, such as Wilderness areas and Wild and Scenic Rivers. *See* 43 U.S.C. §

1713(a) (exempting such lands from sale); *id.* at § 1714(l)(2) (exempting some lands from withdrawal review); *id.* at § 1716(c) (encompassing acquired exchanged lands into lands systems).

Although FLPMA does include land disposal mechanisms, this does not suffice to reduce it to an "all-encompassing land disposal scheme" somehow inconsistent with additional or overlapping land protections. U.S. Br. 25; *Id.* at 9 ("the district court's interpretation . . . leaves an unexplained hole in FLPMA[]"). Far from unexplained, FLPMA's text and legislative history provide ample evidence that disposal limitations were consistent with Congress' purpose and policy. FLPMA was written to empower the BLM in a new era of federal land policy in which federal retention was an explicit and important policy goal. 43 U.S.C. § 1701(a)(1). In light of the policies motivating FLPMA and FLMPA's statutory disclaimer against implied revocation, the "hole" allegedly created by Section 5 is better understood as purposeful congressional action and policy. *See FLPMA Legislative History* at 24, 64, 194 (respectively: summary of purpose; Sen. Jackson's statement; Sen. Haskell's statement).

3. The District Court's Opinion Does Not Preclude Disposal or Create a Statutory Conflict.

As the district court recognized, compliance with FLPMA is "necessary for a lawful land exchange, but not automatically sufficient." 1-ER-17. "BLM had to comply with both the 1900 Act and FLPMA." 1-ER-16–17. The court concluded that because FLPMA was not one of the enumerated disposal methods listed in Section 5—all of which are currently repealed or defunct—the Blackrock Land Exchange violated the 1900 Act. 1-ER-13. NCAI agrees: the exchange was not authorized under the 1900 Act. Nor was the exchange authorized by the disposal laws extended by the Acts of May 19, 1926, and May 4, 1932. Faced with this inconvenient legal landscape, Appellants allege that the district court's finding that the "the federal government does not currently have a viable method for disposing of the ceded lands," *id.*, constitutes a statutory conflict created by the court. *See also* U.S. Br. 37; Simplot Br. 55.

Appellants are mistaken that it is only the district court opinion which bars "Interior from disposing of the ceded lands under any circumstance." U.S. Br. 33; *see* Simplot Br. 55. None of the 1900 Act's disposal methods are currently available to Federal Appellants. But it

was Congress that abolished the homestead, timber, and stone laws, as well as the Isolated Tracts laws—extended to the ceded lands in 1926—and it was Congress who later placed the mining laws under a statutory moratorium.[4] Defendants are not without recourse, but that power "belongs to Congress alone." *McGirt*, 140 S. Ct. at 2462.

And, despite their reliance on the Acts extending the Isolated Tracts and Desert Lands laws to the ceded territory, Federal Appellants fail to acknowledge that the Desert Lands Act is still good law. BLM's own Resource Management Plan now precludes disposal under the Desert Land laws, the sole legal mechanism not repealed by Congress for disposal of the ceded lands. It is not a result of this case that BLM determined none of the ceded lands are appropriate for disposal under those provisions. *See* Bureau of Land Mgmt. Pocatello Field Off., *Approved Resource Management Plan* 79 (2012).

The district court's determination that FLPMA is "necessary" but "not automatically sufficient" creates no statutory conflict. 1-ER-17. Though Federal Appellants argue that FLPMA's exchange power applies

[4] When FLPMA was passed two disposal methods were available: the mining and Desert Land laws.

to "public lands" regardless of "how the United States acquired ownership," U.S. Br. 29, their argument misses the point. No party argues that the ceded lands are exempt from FLPMA's mechanisms because they were acquired by Tribal cession. The Shoshone-Bannock simply assert that because of the United States' solemn trust obligations to protect their usufructuary rights, the lands are subject to FLPMA *and* the Congressional acts that govern their disposal: the Acts of 1900, May 19, 1926, and May 4, 1932.

CONCLUSION

For the above reasons, the Court should affirm.

Dated: April 12, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a) because this brief contains 6,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2024, I electronically this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM / ECF system. I certify that all participants in this case are registered CM / ECF users and service will be accomplished by the CM / ECF system.

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