No. 23-35543, 23-35544

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

U.S. DEPARTMENT OF THE INTERIOR, ET AL.,
Defendants-Appellants
(in No. 23-35543),

J.R. SIMPLOT COMPANY,
Intervenor-Defendant-Appellant
(in No. 23-35544).

Appeal from the United States District Court
for the District of Idaho
No. 4:20-cv-553 (Hon. B. Lynn Winmill)

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Federal Rules of Appellate Procedure 27 and 29, the Chamber of Commerce of the United States of America ("Chamber") respectfully moves for leave to file a brief as *amicus curiae* in the above-captioned cases in support of Defendants-Appellants, Intervenor-Defendant-Appellant, and reversal. Defendants-Appellants and Intervenor-Defendant-Appellant have consented to the

filing of this brief. Counsel for Plaintiff-Appellee informed counsel for the Chamber that it opposes the Chamber's motion. As a result, the Chamber moves this Court for leave to file.

The Chamber has an interest in the outcome of this litigation and believes the proposed *amicus* brief will help the Court in considering the issues presented by this case. *See* Fed. R. App. 29(a)(3); *Miller-Wohl Co. v. Comm'r of Lab. and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (The "classic role of amicus curiae" is to "assist[] in a case of general public interest, supplement[] the efforts of counsel, and draw[] the court's attention to law that escaped consideration.").

In support of its motion, the Chamber states as follows:

1. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

2. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the Courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that present issues of concern to the nation's business community, including issues related to business property interests. *See e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

3. The Chamber has a substantial interest in the statutory framework that governs transactions involving federal land. In much of the Ninth Circuit, the federal government is the largest single landowner. The Bureau of Land Management alone manages more than 240 million acres of land, almost all of which is located in the western United States. Land acquisitions will therefore often involve the federal government, especially in the West. Because the Chamber's members include businesses that may seek to acquire federal land—as well as businesses that currently own private land that traces its title to the federal government—the Chamber has an interest in predictable, rational, and fair federal land transactions. The Chamber is committed to ensuring that businesses can rely on comprehensive land management statutes and that their real estate interests are settled and final.

4. *Amicus*'s proposed brief explains that the district court's interpretation of the Act of June 6, 1900, ch. 813, 31 Stat. 672, 675 ("1900 Act") defies the text of that statute, well-established canons of statutory interpretation, common sense, and historical context. Under the reference canon, the 1900 Act's reference to the general body of homestead and townsite laws does not freeze the law as it existed in 1900. It incorporates amendments to that body of law, including substantial ones, such as the enactment of the comprehensive and transformative Federal Land Policy Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA").

5. *Amicus*'s proposed brief also argues that the 1900 Act's disposal provision did not create an exclusivity so powerful and permanent that no future Congress could contradict it without amending that act specifically. Rather, a subsequent Congress is free to adopt a new statute adding another source of disposal authority, without referring to the 1900 Act, as long as the new statute is sufficiently clear on its own terms.

6. In addition, *amicus's* proposed brief explains that, if replicated, the district court's error risks harming businesses, other acquirers of federal land, and the federal government in multiple ways. It would prevent FLPMA from providing predictability, reliability, and finality to real estate transactions with the federal government. It would make some land transfers impossible and others riskier. And by keeping some land locked up indefinitely, the district court's interpretation may prevent vast amounts of federal land from being put to its highest and best use. This Court need not, and should not, adopt a novel legal rule that gives rise to such significant problems.

For these reasons, the Chamber respectfully requests that the Court grant it leave to file the proposed *amicus* brief, which accompanies this motion. *See Lefebure v. D'Aquilla,* 15 F.4th 670, 675 (5th Cir. 2021) ("[C]ourts should welcome amicus briefs."); *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) (recognizing that Rule 29's

requirements should be broadly interpreted and leave to file freely granted).

Dated: January 24, 2024

Respectfully submitted,

s/ William M. Jay

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d) because it contains 760 words, excluding the parts of the brief exempted by Rule 32(f). This document complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 24, 2024. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: January 24, 2024

s/ William M. Jay
William M. Jay

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the Courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a substantial interest in the statutory framework that governs transactions involving federal land. In much of the Ninth Circuit, the federal government is the largest single landowner. The Bureau of Land Management alone manages more than 240 million acres of land, almost all of which are located in the western United States. Land acquisitions will therefore often involve the federal government, especially in the West and especially with significant parcels used for business purposes. Because the Chamber's members include businesses that may seek to acquire federal land from the United States—

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

as well as private land that traces its title to the federal government—the Chamber has an interest in predictable, rational, and fair federal land transactions. The Chamber is committed to ensuring that businesses can rely on comprehensive land management statutes and that their real estate interests are settled and final.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2020, after almost three decades of administrative proceedings and litigation, J.R. Simplot acquired 713.67 acres of federal land from the Bureau of Land Management in exchange for non-federal land near the Chinese Peak-Blackrock Canyon area ("Blackrock Land Exchange"). 1-ER-7-8.[2] That land exchange took place pursuant to the comprehensive Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA").

The district court nonetheless held that the now-completed exchange was barred by a statute from 1900 ratifying the original cession of land to the federal government, agreeing with a theory advanced by the Shoshone-Bannock Tribes of the Fort Hall Reservation ("the Tribes"). *See* Act of June 6, 1900, ch. 813, 31 Stat. 672, 675 ("1900 Act").

The 1900 Act was passed during an era in which Congress focused on disposing of Western lands to private ownership to encourage settlement,

[2] All citations to the Excerpts of Record are to the Intervenor-Defendant-Appellant's Excerpts of Record.

development, and transportation. *See* Carol H. Vincent, et al., Cong. Rsch. Serv., R42346, Federal Land Ownership: Overview and Data 2 (2020).[3] The 1900 Act allows for the "disposal" of the relevant land "under the homestead, town-site, stone and timber, and mining laws of the United States only." 31 Stat. at 676. FLPMA later repealed almost all the homestead and townsite laws and took their place as the principal authority for BLM's management of public land, including its disposal, acquisition, and exchange. Yet the district court held that "FLPMA is not a homestead, townsite, stone and timber, or mining law" within the meaning of the 1900 Act. 1-ER-13. Instead, the district court held that there is essentially no law on the books that would allow disposal of any land subject to the 1900 Act.

The district court's interpretation of the 1900 Act defies the text of that statute, well-established canons of statutory interpretation, common sense, and historical context. Under the reference canon, the 1900 Act's reference to the general body of homestead and townsite laws does not freeze the law as it existed in 1900. It incorporates amendments to that body of law, including substantial ones. And the enactment of the comprehensive and transformative FLPMA was such an amendment. Moreover, the 1900 Act's disposal provision did not create an exclusivity so strong and permanent that a future Congress could not contradict it without referring to it specifically.

[3] https://crsreports.congress.gov/product/pdf/R/R42346/18

If replicated, the district court's error risks harming businesses, other acquirers of federal land, and the federal government in multiple ways. It would prevent FLPMA from providing predictability, reliability, and finality to real estate transactions with the federal government. It would make some land transfers impossible and others riskier. And because it would keep some land locked up indefinitely, the district court's interpretation may prevent vast amounts of federal land from being put to its highest and best use. This Court need not, and should not, adopt a novel legal rule that gives rise to such significant problems.

ARGUMENT

I. There is no statutory conflict because FLPMA qualifies as a proper disposal method under the 1900 Act.

The district court erroneously concluded that the 1900 Act conflicted with FLPMA—and that the earlier statute prevailed. But the two statutes can be readily reconciled, and for that reason, it was the district court's duty to give effect to both—not to read the earlier statute to defeat the later one. *See, e.g.*, *Voting Integrity Project, Inc. v. Keisling,* 259 F.3d 1169, 1176 (9th Cir. 2001).

The federal defendants and Simplot offer several reasons to reject the district court's interpretation. This brief focuses on two statutory-interpretation points in

particular.[4] First, under the reference canon, the 1900 Act's reference to various statutes authorizing disposal in 1900 is best read to include FLPMA as successor to those statutes, rather than a null set, now that many of those laws have been repealed and FLPMA has taken their place. Second, the 1900 Act's disposal provision did not create an exclusivity so powerful that no future Congress could contradict it without amending it specifically. Rather, a subsequent Congress is free to adopt a new statute adding another source of disposal authority, without referring to the 1900 Act, as long as the new statute is sufficiently clear on its own terms.

A. FLPMA authorizes the Blackrock Land Exchange unless another statute displaces it.

In FLPMA, Congress provided express authorization for land exchanges between federal and non-federal land like the Blackrock Land Exchange. Section 206(a) of FLPMA provides that a "tract of public land or interests therein may be disposed of by exchange by the Secretary [of the Interior] under this Act . . . where [she] determines that the public interest will be well served by making that exchange." 43 U.S.C. § 1716(a). "Public land" includes "any" BLM-administered land "within the several States . . . , without regard to how the United States

[4] This brief does not address the issues unrelated to the 1900 Act, such as the National Environmental Policy Act.

acquired ownership." *Id.* § 1702(e).[5] The parcel at issue here undisputedly is "public land," as defined. Thus, FLPMA expressly authorized the Secretary to determine whether the land exchange would be in the public interest and, if so, to implement it.

The question in this case is whether FLPMA's express authorization to exchange land—given in a statute comprehensively addressing federal land management policy—is ineffective because of a supposed loophole bored by a statute from 1900. The answer is no.

B. FLPMA became an authorized disposal law under the 1900 Act by replacing homestead and townsite laws.

FLPMA thoroughly amended the general body of homestead and townsite laws when it replaced those laws with a comprehensive framework for federal land management, acquisition, exchange, and disposal. In amending that body of law, FLPMA became the new reference point. If a law incorporated homestead and townsite laws by reference when enacted, today it incorporates FLPMA.

The 1900 Act is an example of a law that referred to the homestead and townsite laws when enacted. That Act ratified an 1898 Cession Agreement between the United States and the Tribes in which the Tribes ceded approximately 416,000 acres of land to the federal government. 31 Stat. at 675; *see Swim v.*

[5] Lands *currently* "held for the benefit of Indians, Aleuts, and Eskimos" are excepted. 43 U.S.C. § 1702(e).

Bergland, 696 F.2d 712, 714 (9th Cir. 1983). The statute, as noted above, states:

> [T]he 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.

31 Stat. at 676.

The purpose of FLPMA was, in part, to create "uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands." Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 102(a)(10), 90 Stat. 2743, 2745; *see also* S. Comm. on Energy & Nat. Resources, 95th Cong., 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976, at VI (1978) (Memorandum of Chairman of the Senate Committee on Energy and Natural Resources Henry M. Jackson) (hereinafter "*Legislative History*") ("For the first time in the long history of the public lands, one law provides comprehensive authority . . . for the administration and protection of the Federal lands.").

FLPMA "enunciates a Federal policy of retention of [public] lands for multiple use management and repeals many obsolete public land laws which [previously] hindered effective land use planning for and management of public lands." *Legislative History* at VI. To accomplish that goal, FLPMA relieved BLM

from depending on a multitude of public land laws, many of which were "clearly antiquated" and were "among the reasons for congressional recognition of a need to review and reassess the *entire body* of law governing Federal lands." *Id.* at 211 (emphasis added). Among those laws were laws addressing the disposal of public lands, including "laws relating to homesteading and small tracts" and "Townsite Reservation and Sale" laws. FLPMA, §§ 702-703(a), 90 Stat. at 2744, 2787-2790 (small caps omitted). FLPMA took their place to create an improved, simplified, and multiple-use land management system—including uniform standards for authorizing proposed land exchanges and other disposal actions. *See* 43 U.S.C. §§ 1713(a), 1716.

In order to accomplish the complete replacement of the prior public land management system, Congress was not required to repeal the homestead, townsite, and other land management laws, *and* also repeal or amend all the statutory provisions that *referred to* those laws. FLPMA did not need to repeal or amend all the laws that referred to the homestead, townsite, and other laws because it stepped into the shoes of the *referred-to* laws themselves.

The Tribes' argument that FLPMA repealed the homestead and townsite laws without providing a substitute and therefore debilitated the laws that previously referred to them, makes little sense. It is hard to fathom that Congress would create a host of statutory dead ends when it repealed the homestead and

townsite laws and left untouched a multitude of references to those laws.

This issue arises frequently enough, in a variety of statutory contexts, that there is a canon of statutory construction to address it—the "reference canon." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (internal quotation marks and citation omitted); *United States v. Ho*, 984 F.3d 191, 201 (2d Cir. 2020); *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1157 (11th Cir. 2019); *Oss Nokalva, Inc. v. Eur. Space Agency,* 617 F.3d 756, 763 (3d Cir. 2010); *see* 2B SUTHERLAND STATUTORY CONSTRUCTION § 51:8 (7th ed. 2015). The reference canon is applicable here, and indeed was already well-established when the 1900 Act was promulgated. *See* 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 405-407, at 787-92 (2d ed. 1904); *id.* § 405, at 789 (Where reference is made "to the law generally which governs a particular subject," the "reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied."); *Culver v. People ex rel. Kochersperger*, 43 N. E. 812, 814 (Ill. 1896) (Where "the adopting statute makes no reference to any particular act, by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting act, but also the law in force when action is taken or proceedings are resorted to."); *Gaston v. Lamkin*, 21 S.W. 1100, 1103-04 (Mo. 1893); *Newman v. City of North Yakima*, 34 P. 921,

921-22 (Wash. 1893).

The reference canon provides that when a statute references law on a general subject (rather than referencing a specific provision of law), the statute "adopts the law on that subject as it exists whenever a question under the statute arises," including all amendments and modifications subsequent to the reference statute's enactment. *Jam*, 139 S. Ct. at 769. The 1900 Act's reference to "the homestead, town-site, stone and timber, and mining laws of the United States," 31 Stat. at 676, is a "reference . . . to an external body of potentially evolving law," *Jam*, 139 S. Ct. at 769; *see Indian Allotments—Old Columbia Reservation,* 6 Pub. Lands Dec. 43 (1887). "Federal courts have often relied on the reference canon, explicitly or implicitly, to harmonize a statute with an external body of law that the statute refers to generally." *Jam,* 139 S. Ct. at 769. Respectfully, the Court should do the same here.

The Supreme Court's decision in *Jam* strongly supports the conclusion that FLPMA is a permissible disposal law under the 1900 Act. In *Jam*, the Supreme Court considered whether a 1945 statute granting international organizations "the 'same immunity' from suit 'as is enjoyed by foreign governments'" tied international organizations' immunity from suit to the law of foreign sovereign immunity as it existed at the time, or incorporated subsequent legal developments—such as the enactment of the "comprehensive" Foreign Sovereign

Immunities Act to govern foreign sovereign immunity in civil suits. *Id.* at 764-65; *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 271 (2023). The Supreme Court held that the reference canon caused the 1945 statute to pick up subsequent changes in the law, even quite significant ones that substantially limited immunity and replaced the common law with a statute. 139 S. Ct. at 770. The Supreme Court instructed that a proper reading of the 1945 statute required "look[ing] up the applicable rules of foreign sovereign immunity, *wherever those rules may be found*—the common law, the law of nations, or a statute." *Id.* (emphasis added).

Common sense and logic support the same conclusion in this case. Even though the body of law that the homestead and townsite laws previously defined has changed considerably, statutes like the 1900 Act that refer to that body of law must be interpreted in accordance with those changes. As *Jam* teaches, it matters not that the body of law is now governed by a comprehensive new statute rather than piecemeal homestead and townsite laws. To elaborate, each time Congress individually amended, re-enacted, or recodified one of the scores of homestead and townsite laws, the was no question that the 1900 Act redirected to the amended law. There is no relevant difference, however, when all of those scores of homestead and townsite laws are repealed and replaced with a comprehensive law addressing the same general subject: land management, including disposal,

acquisition, and exchange. The district court therefore erroneously concluded that the 1900 Act's reference to those general laws does not redirect to FLPMA.

Historical context points to the same outcome. The 1900 Act was not written with the view to restrict the disposal of land, but rather to enable disposal. "The prevailing philosophy was that [land in the public domain] was to be disposed of for a variety of purposes—rewards for military service through land bounties and development of the West through grants to railroads and settlement by home-steading, to name just two." *Legislative History* at III. In light of the federal land policy at the turn of the 20th century, the district court's extreme narrowing of the 1900 Act is starkly anachronistic. Notably, BLM is authorized to conduct land exchanges such as the one here pursuant to FLPMA, which takes a more balanced approach between disposal and retention than the 1900 Act. In practical terms, then, the district court's interpretation restricts land disposal in a way that cuts against the historical backdrop of both the 1900 Act and FLPMA.

The district court therefore erred in relying on the fact that FLPMA did not impliedly overrule laws that it did not expressly list. *See* 1-ER-14. There is no need to conclude that FLPMA impliedly overruled parts of the 1900 Act. Congress did not impliedly overrule that act or the myriad other laws that referred to homestead and townsite laws, nor did it need to. In expressly overruling the *referent* laws, FLPMA stands in the shoes of those laws.

C. The word "only" in the 1900 Act does not prevent Congress from adopting new legislation on the same subject, which it did in FLPMA.

Even if the 1900 Act were not read to *refer* to FLPMA under the reference canon, at a minimum the 1900 Act does not *anticipate and negate* FLPMA, a statute enacted 76 years later. The district court wrongly read "only" to bar Congress from authorizing any land transfer without amending the 1900 Act. Congress in 1900 neither bound subsequent Congresses in that way, nor could have done so if it had tried.

Even assuming that the term "only" modifies more than just "laws of the United States," *contra* Simplot Br. 34, the most the use of that term could indicate is that "the homestead, town-site, stone and timber, and mining laws of the United States" provided the "only" authorizations for disposal *in 1900*—that no other then-extant federal statute should be read to provide such an authorization. It does not indicate that statutes in those categories at the time would provide the "only" authorizations *then and forever*.

The district court's contrary reading insists that the 1900 Act described an exclusivity so powerful that no future Congress could contradict it without amending the 1900 Act *specifically*. But that is not how legislation works. "[O]ne legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). Thus, the Supreme Court held that even

though Section 12 of the Administrative Procedure Act (codified as amended at 5 U.S.C. § 559) provided that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly," one Congress could not require a later one to use "magical passwords." *Marcello v. Bonds*, 349 U.S. 302, 310, 316 (1955). Rather, a subsequent Congress is free to adopt a new statute exempting a provision from the APA by necessary implication, without referring to it. *See id.* As long as a later statute is sufficiently clear on its own terms, "the later enactment governs, regardless of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Dorsey v. United States*, 567 U.S. 260, 274 (2012) (quoting *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring)).[6]

FLPMA provided a cohesive and coherent framework for authorizing land exchanges. FLPMA comes later in time than the 1900 Act and reflects transformational change in land management policy. In this context, it makes little

[6] The district court erroneously applied the Indian canon of construction to conclude that any ambiguity in the 1900 Act's "general categories of laws for disposal" must be read to exclude FLPMA. 1-ER-14-16. But the Indian canon of construction should not be applied to section 5 of the 1900 Act because it is not ambiguous, it does not derive from a provision of the 1898 Cession Agreement with the Tribes, and it does not relate to tribes or tribal activities. The Tribes' hunting and other usufructuary rights, which were granted in the 1898 Cession Agreement, were not tied in that Cession Agreement to any particular disposal methods. 31 Stat. at 674.

sense to interpret the 1900 Act as nullifying FLPMA's independent land exchange authorization given 76 years later. Instead, the better reading of the statutes indicates that FLPMA is an additional authority for the BLM to exchange the relevant lands.

* * *

In sum, there is no conflict between the 1900 Act and FLPMA. The best reading of those two statutes is that the BLM derives specific authorization for land exchanges from FLPMA and the 1900 Act does not prohibit use of that authority.

II. The district court erred in creating centuries-old loopholes in FLPMA, running counter to FLPMA's purpose and creating negative consequences for businesses and other landowners.

Much is at stake in this case. Not only will it potentially affect millions of acres of public land, it threatens to undermine businesses' and landowners' basic reliance interests on comprehensive federal laws and title to land derived from federal ownership.

FLPMA is a comprehensive land management law aimed at providing clarity and reliability in the area of public land acquisition, disposition, and exchange. To that point, Congress expressly stated in FLPMA its aim to create "uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute." 90 Stat. at 2745. Scholars describe FLPMA as giving the BLM "a 'permanent,

comprehensive, and self-contained statutory base for management of the land and other resources under its jurisdiction.'" Catherine L. Butcher, *Not Just Another Federal Pre-Emption Case*, 30 NAT. RESOURCES J. 217, 219 (1990) (citation omitted).

Affirming the district court's decision in this case would roll back the clock and undo the significant progress Congress made in FLPMA. Indeed, amicus's concerns with the district court's ruling are exactly those that motivated the passage of FLPMA in the first place. FLPMA was motived, in part, by a 1963 report issued by a Congressional subcommittee entitled "The Public Lands—Background Information on the Operation of the Present Public Land Laws." *See Legislative History* at III. That report identified several problems with the then-current system of public land disposal. *Id.* Confusion abounded over which public land laws were applicable to particular tracts. *Id.* at IV. And it is no mystery why. As President Kennedy stated, the "public land laws constitute a voluminous, even forbidding, body of policy determinations within which the land management agencies must operate. Dating back as much as a century and a half, this complex of statutory guidelines varies from the most detailed prescription of ministerial acts to mere definition of an objective coupled with broad grants of discretion to administrators." *Id.* (citation omitted). The district court's interpretation of the 1900 Act needlessly plunges public land management back into that quagmire of

confusion and complexity.

The report additionally identified that "[m]ajor public land laws were so circumscribed that many tracts desirable for private development could not be obtained because the law had acreage limitations" or did not meet other onerous requirements. *Id.* (citation omitted). The report recommended revising federal law to "simplify administration, reduce the delay and frustration experienced by citizens and groups who seek to legitimately acquire parts of those lands for private use and serve the interest of those who seek to advance the course of sensible Government stewardship of a great public resource." *Id*. (citation omitted).

Having identified those significant problems with the then-current public land laws, Congress worked for more than a decade on a legislative solution. *Id.* at V. Finally enacting FLPMA in 1976, Congress accomplished "a landmark achievement in the management of the public lands of the United States." *Id.* at VI. "For the first time in the long history of public lands, one law provide[d] comprehensive authority and guidelines for the administration and protection of the Federal lands and their resources under the jurisdiction of the [BLM]." *Id.* The Judicial Branch should not lightly interpret centuries-old statutes to undercut that landmark achievement.

Chamber members are among those seeking to legitimately acquire public lands for productive use and advance the course of sensible Government

stewardship of public land. FLPMA specifically recognized that land exchanges, in particular, will often be consistent with the mission of the responsible agency. *See* 43 U.S.C. §§ 1701(10), 1716(a). This case is an apt illustration. The land exchange at issue here enables Simplot to continue its fertilizer business, which supports the Nation's food industry and food security. *Cf.* 43 U.S.C. § 1701(12) (recognizing that "the Nation's need for domestic sources of . . . food . . . from the public lands" is one consideration in federal land management); U.S. Dep't of Agriculture, Economic Rsch. Serv., Selected Charts from Ag and Food Statistics 4–5 (Feb. 2023).[7] The district court's decision undermines these critical interests by reintroducing the confusion, delay, complexity, and restrictiveness of an obsolete set of land disposal laws that Congress fully replaced.

More generally, landowners—businesses and individual citizens alike—should be able to rely on comprehensive federal statutes like FLPMA. It should take more than a single word in a century-old, uncodified statute to frustrate the efforts of a subsequent Congress to arrive at a comprehensive grant of authority based on a unified set of federal policies. This Court's interpretation should be one that carries into effect Congress's years of work, as reflected in the broad textual grant of authority. The district court's contrary reading undermines FLPMA's very purpose and the ability of public and private interested parties to rely on

[7] https://primary.ers.usda.gov/webdocs/publications/105882/ap-111.pdf?v=1109

decisions made under it.

The legal uncertainty caused by unpredictable loopholes in comprehensive federal laws like FLPMA has tangible impacts on the economy. Legal uncertainty adds risk to business decisions, especially those involving large capital investments and land transactions. In plain terms, legal uncertainty harms economic investment. And that common-sense conclusion rings true in the context of land management.

The specter of legal uncertainty raises another concerning possibility: the unreliability of legal title to lands subject to previous FLPMA land exchanges. Even worse is the upheaval and costliness of potential legal remedies to land exchanges that courts deem unauthorized, especially if those exchanges must be unwound, as the district court opined may be necessary in this case. *See* 1-ER-18 ("[I]t seems the only remedy is vacating the ROD and issuing an injunction. At the same time . . . unwinding the deal is no simple matter."). Consider that between fiscal year 2006 and 2015, BLM patented or deeded out 159,130 acres of land by exchange, which were worth $86.7 million. *See* Carol H. Vincent, Cong. Rsch. Serv., R41509, Land Exchanges: Bureau of Land Management (BLM) Process and Issues 1 (2016).[8] Between fiscal year 1989 and 1999, BLM completed approximately 2,600 exchange transactions. *Id.* at 2.

[8] https://crsreports.congress.gov/product/pdf/R/R41509/6

Another equally grave concern is that accepting the district court's interpretation would potentially freeze land exchanges throughout the West. As Simplot points out (Br. 4, 27, 51), the district court's interpretation affects statutes governing millions of acres of public land. And although the district court relied on the Indian canon of construction (incorrectly, *see* pp. 14, *supra*), its interpretation is not limited to lands ceded by Tribes. *See, e.g.*, Act of May 14, 1890, ch. 204, 26 Stat. 107 ("That the lands embraced in the former military reservation known as the Fort Sedgwick, in the States of Colorado and Nebraska, . . . shall, from and after the passage of this act, be subject to disposal, to actual settlers thereon, as lands held at the minimum price, according to the provisions of the homestead laws only . . . ."); Act of October 1, 1890, ch. 1240, 26 Stat. 561 ("That the lands embraced in [two] former military reservation[s] . . . in the State of Colorado, shall, from and after the passage of this act, be subject to disposal, to actual settlers thereon, as lands held at the minimum price, according to the provisions of the homestead laws only . . . ."); Act of December 22, 1892, ch. 12, 27 Stat. 408, 408–09 ("That all public lands now remaining undisposed of within the abandoned military reservations in the State of Wyoming . . . are hereby made subject to disposal under the homestead law only."); Act of May 19, 1900, ch. 484, 31 Stat. 180 ("That all public lands now remaining undisposed of within the abandoned military reservation in the States of North Dakota and Montana,

formerly known as Fort Buford Military Reservation . . . are hereby made subject to disposal under the homestead, town-site, and desert-land laws.").

In short, by undermining FLPMA, the district court's interpretation cuts into the heart of BLM's authority to manage federal land. That is no small matter. BLM manages approximately 244.4 million acres of land, more than any other federal agency. *See* Vincent, Cong. Rsch. Serv. R42346, at 4. And 99% of that land is located in the western United States and Alaska. *Id.* The stakes are high. An interpretation that hamstrings the federal government's ability to manage one of the nation's most precious resources—its land—should be carefully scrutinized.

The scope of the problem created by the district court's interpretation of the 1900 Act accentuates the implausibility of that interpretation. There is nothing in the text, structure, or history of the relevant statutes to conclude that Congress decided in 1900 to embrace the negative consequences that would result from handcuffing future Congresses and Administrations in this way—and every reason to conclude that Congress intended no such thing.

CONCLUSION

This Court should reverse the district court's holding that FLPMA's express authorization to conduct land exchanges is inapplicable to land governed by the 1900 Act's disposal provision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5), 32(a)(7)(B), and Circuit Rule 32-1(a) because it contains 5,190 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 24, 2024. I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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