No. 26-96

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

A. The decision below is incorrect 3
B. This case is sufficiently important to warrant the Court's review 6
C. Review is appropriate now 10

TABLE OF AUTHORITIES

Cases:

Department of Agric. Rural Dev. Rural Hous. Serv. v. *Kirtz*, 601 U.S. 42 (2024) 4
Herrera v. *Wyoming*, 587 U.S. 329 (2019) 5
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 2, 12

Statutes and regulations:

Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744 (43 U.S.C. 1701 *et seq.*) 1, 3-9, 11
43 U.S.C. 1702(e) 7
43 U.S.C. 1702(e)(2) 9
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 11
Act of Mar. 2, 1889, ch. 412, § 13, 25 Stat. 1005 10
Act of June 6, 1900, ch. 813, 31 Stat. 672:
§ 1, 31 Stat. 674 4
§ 5, 31 Stat. 676 ..... 3-8, 10
Act of Apr. 23, 1904, ch. 1495, § 9, 33 Stat. 304 ..... 8, 9
Act of Feb. 14, 1913, ch. 54, § 10, 37 Stat. 678 9
43 C.F.R.:
Section 2372.1(a) 7
Section 2372.3(a) 7

Miscellaneous: Page

Henry Campbell Black, *A Dictionary of Law* (1891) 10
Cong. Research Serv., *Land Exchanges* (Nov. 7, 2016), https://perma.cc/6ZLX-UB2Z 9
Paul W. Gates, *History of Public Land Law Development* (1968) 8
H.R. 880, 119th Cong., 2d Sess. (2026) 11
Stephen M. Shapiro et al., *Supreme Court Practice* (11th ed. 2019) 11
William Howard Taft, *Proclamation 874* (May 22, 1909), https://perma.cc/4XAX-8S34 8

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Over seven judges' dissent from the denial of rehearing en banc, the Ninth Circuit upended an important land exchange decades in the making, on a novel theory that threatens federal authority over millions of acres across the West. The court construed a 126-year-old statute, which specified the *pre-existing* laws that the government could invoke to dispose of particular federal lands, as precluding disposal of those lands under *later-enacted* statutes, including the marquee modern federal-land statute, 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.*). That decision risks a return to the chaos that prompted FLPMA, and it threatens the government's ability to dispose of more than four million acres governed by dozens of similar statutes that were long thought defunct.

Respondent describes (Br. in Opp. 22) this case as affecting "only" 72,000 acres (an area five times the size of Manhattan), on the theory that the dozens of other statutes are distinguishable. Respondents' distinctions are tenuous. But even if some hold water, this Court's review is warranted in light of the substantial uncertainty and litigation risk for the federal government that the decision below creates with respect to future land disposals, as well as the significant practical consequences for Idaho of the ruling below.

Respondent also emphasizes that the decision below is interlocutory; that the district court previously offered alternative grounds for blocking the exchange; and that Congress may soon enact legislation ratifying the exchange. But the decision below conclusively resolved the merits, leaving only remedial proceedings that have no bearing on the question presented. The district court's alternative holdings are also no reason for delay. They were rejected by all six of the court-of-appeals judges who addressed them below, and they involve purported procedural defects that the agency could cure administratively if this Court corrects the Ninth Circuit's central error. And the pending legislative proposal at most warrants a brief deferral of action by this Court to see whether Congress enacts the proposed law during its current session. If Congress moots this case by enacting legislation that ratifies the exchange, the Court should grant the petition and vacate the judgment below under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

On the merits, respondent largely repeats the court of appeals' central error. Respondent takes as a given that by authorizing settlement "under the homestead, town-site, stone and timber, and mining laws of the

United States only," Congress imposed a forward-looking *restriction* on the *future* laws the government could invoke to dispose of the relevant lands. Act of June 6, 1900 (1900 Act), ch. 813, § 5, 31 Stat. 676. But properly read, the 1900 Act did no such thing. It instead *granted* authority to invoke specific then-existing disposal statutes, while leaving future Congresses free to provide additional authorities—as Congress did 76 years later in enacting FLPMA.

A. The Decision Below Is Incorrect

1. The court of appeals erred in reading the 1900 Act to prohibit a land exchange that FLPMA undisputedly authorizes. Instead, the 1900 Act is best read as a limited *authorization* that FLPMA supplements. Pet. 13-20.

In arguing otherwise, respondent, like the court of appeals, largely assumes its conclusion. Respondent presumes (Br. in Opp. i, 2, 10-11, 21, 27, 30) that the 1900 Act imposed permanent "disposal restriction[s]," and it frames the disputed question (*id.* at 23-27) as whether FLPMA displaces those restrictions. But numerous textual and contextual clues signal that the 1900 Act governs disposal only under then-existing laws—a logical focus for a Congress that could not have predicted what statutes future Congresses might enact. Among other things, Congress used the definite article "the" to refer to the existing homestead, town-site, stone and timber, and mining laws. And it established a reticulated disposal scheme focused on the initial sale. See Pet. 14-17.

Respondent's lengthy discussion (Br. in Opp. 23-29) of the presumption against implied repeals, FLPMA's repeal of other statutes, and the specific-governs-the-general canon is thus largely irrelevant. No one dis-

putes that the 1900 Act remains on the books and has continuing force in its field. The key question is what that field is. The 1900 Act, for example, authorizes respondent's members to hunt and fish on the ceded lands so long as those lands remain in the public domain. See § 1, 31 Stat. 674. Because FLPMA did not repeal that provision, all agree that respondent's members retain those rights unless and until the federal government disposes of particular Fort Hall lands. But the 1900 Act's disposal provision never limited the government's power to invoke later-enacted statutes that separately authorize conveyances of federal lands. Congress's failure to repeal that provision therefore did not preclude the government from invoking FLPMA's land-exchange mechanism as an alternative means of disposal. Pet. 17-19.

Instead, FLPMA and the 1900 Act operate harmoniously as "separate and independent grants of authority." Pet. App. 46a (Bumatay, J., dissenting). Where, as here, "two laws are merely complementary," this Court's "duty lies not in preferring one over another but in giving effect to both." *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 63 (2024). The court of appeals' and respondent's fundamental error lies in assuming a conflict where none exists.

Contrary to respondent's assertion (Br. in Opp. 29-30), treating the 1900 Act and FLPMA as separate grants of authority would not "read[] the word 'only' out of the 1900 Act." That word did meaningful work by making clear that the 1900 Act authorized disposal only under specified existing laws, so that the 1900 Act did not authorize disposal under (for example) the existing coal-land laws. Pet. 14, 17. The 1900 Congress logically limited the government to the existing laws that it found

most relevant, without addressing the application of future statutes that were then merely hypothetical.

For similar reasons, respondent is incorrect in arguing (Br. in Opp. 24) that, on the government's reading, Congress would have had no reason to later authorize disposal of the ceded lands under the desert-land laws and an isolated-tracts statute. Those laws *predated* the 1900 Act, so Congress needed to amend that Act to authorize disposal of the ceded Fort Hall lands under those statutes. See Pet. 9 n.1, 21 n.3. FLPMA, by contrast, was enacted 76 years *after* the 1900 Act.

The court of appeals spent pages discussing a purported "clear statement canon," under which "any federal statute that abrogates a Tribe's treaty rights must clearly express Congress's intent to do so." Pet. App. 27a; see *id.* at 27a-29a; see also *id.* at 103a (Friedland & Kennelly, JJ., respecting the denial of rehearing en banc). Respondent devotes (Br. in Opp. 27) one brief paragraph to that principle, insisting that any ambiguity should be resolved in a way that preserves tribal members' right to use the ceded lands. But as respondent acknowledges (*ibid.*), under the 1898 cession agreement, tribal members retain that right only while the lands "remain in the public domain." Here, that "termination point identified in the treaty itself has been satisfied" through the land's conveyance to Simplot pursuant to the FLPMA-authorized exchange. *Herrera* v. *Wyoming*, 587 U.S. 329, 341 (2019); see Pet. App. 92a-93a (Tung, J., dissenting from the denial of rehearing en banc). Thus, while this Court's resolution of the question presented would have a practical effect on tribal members' continuing ability to use the ceded lands, acceptance of the government's position could not plausibly be thought to *abrogate* any rights in the 1898 agreement.

2. Even if the 1900 Act is construed as limiting the *future* laws the government may invoke to dispose of the ceded lands, the land exchange here would be authorized because FLPMA is the modern equivalent of the listed laws. Pet. 20-23. Respondent all but ignores that independent basis for reversal, offering (Br. in Opp. 30) only the *ipse dixit* assertion that FLPMA is a "broad land-management statute * * * not a homestead, town-site, stone and timber, or mining law." But precisely because FLPMA comprehensively reformed the Nation's scattershot land laws, it is the modern successor to the statutes listed in the 1900 Act. Pet. 21-22.

B. This Case Is Sufficiently Important To Warrant The Court's Review

Respondent does not meaningfully dispute that the decision below affects the entire 72,000 acres of ceded Fort Hall lands, with consequences that the State of Idaho considers "catastroph[ic]." Amicus Br. 5; see Pet. 24, 28. Nor does respondent deny that its position leaves the government with no "viable method for disposing of the ceded lands." Pet. App. 114a. Respondent notes the Ninth Circuit's assertions that it was addressing only "this particular exchange," and that the court might permit exchanges for different purposes, Br. in Opp. 17 (quoting Pet. App. 30a); but respondent does not endorse any such potential limitations on the court's holding. See Pet. 26-27.

The Ninth Circuit's decision also sweeps far beyond the ceded Fort Hall lands, threatening federal land-disposal authority over more than four million acres governed by 35 similar turn-of-the-century statutes.* Pet.

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* Respondent questions (Br. in Opp. 20) whether all of this land is administered by the Bureau of Land Management, as required to

24-26. Respondent does not dispute that a controversy affecting such a significant portion of the West would warrant this Court's review. See Br. in Opp. 21. But based on various distinctions between the 1900 Act and the other statutes, respondent asserts (*id.* at 22) that this case involves "only" 72,000 acres.

Even assuming that some of respondent's distinctions are plausible, the uncertainty and litigation risk engendered by the Ninth Circuit's decision would justify this Court's review. Respondent emphasizes (Br. in Opp. 17) the absence of judicial precedents construing the 35 statutes. But that only underscores the novelty of respondent's theory. Respondent never disputed the government's authority to dispose of the ceded lands to facilitate projects, like a college campus, that respondent apparently found unobjectionable. See Pet. 28. And respondent challenged *this* project on various *other* grounds for 13 years before first raising its 1900 Act-based objection. See Pet. 6-7. Now that the Ninth Circuit has endorsed respondent's theory, other opponents of federal projects will presumably be swifter.

The decision below will greatly complicate the process by which the government disposes of federal lands in the Ninth Circuit, resurrecting the chaotic pre-FLPMA regime under which the government was required to comb through a web of overlapping, potentially dormant restrictions before it could dispose of particular tracts. Pet. 27. Respondent minimizes (Br. in Opp. 21) that bur-

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invoke FLPMA. See 43 U.S.C. 1702(e). The majority of the land satisfies that requirement, but some is managed by the Bureau of Reclamation, another subagency of the Department of the Interior. To dispose of that land under FLPMA, Interior would first transfer it administratively to the Bureau of Land Management. See 43 C.F.R. 2372.1(a), 2372.3(a).

den by observing that the 1976 Congress was able to identify the old land laws that FLPMA repealed. But producing FLPMA's list of repealed laws took years of work by a 19-member commission with dozens of professional staffers. See Pet. App. 19a; Paul W. Gates, *History of Public Land Law Development*, at xii-xiii (1968). Congress's ultimate success in performing that task provides no basis for minimizing the burdens on individual federal land-management decisions that the court of appeals' decision would impose.

In any event, respondent's distinctions largely focus on only eight of the 35 statutes identified in the petition, and those distinctions are largely unpersuasive on their own terms:

- *Proclamations*. Respondent contends (Br. in Opp. 18) that eight of the laws do not directly limit the government's disposal authority but instead require that the "manner" of entry comply with a presidential proclamation. Those laws, however, incorporated limitations similar to the 1900 Act's. One such law authorized portions of the Flathead Reservation to "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." Act of Apr. 23, 1904, ch. 1495, § 9, 33 Stat. 304. Five years later, President Taft opened the land to "settlement and entry under the general provisions of the homestead laws." William Howard Taft, *Proclamation 874* (May 22, 1909), https://perma.cc/4XAX-8S34. The statute, like the others identified by respondent, made that proclamation exclusive: "[N]o person shall be permitted to settle upon, occupy, or enter any of said lands,

except as prescribed in such proclamation." Ch. 1495, § 9, 33 Stat. 304.

- *Cash sale*. Respondent notes (Br. in Opp. 18) that some of the proclamation laws authorized the cash sale of land that remained unsold after a particular period. Respondent appears to assume that the disposal authorities identified in those statutes would not limit later cash sales, and that the government therefore could invoke those sale provisions today. Even if that reading is correct, the sale provisions would not authorize land *exchanges*—a critical tool for consolidating public lands given "checkerboard" land ownership in the West. Cong. Research Serv., *Land Exchanges* 4 (Nov. 7, 2016), https://perma.cc/6ZLX-UB2Z; see Pet. 25.
- *Trusteeship*. Respondent observes (Br. in Opp. 18-19) that many of those same eight statutes describe the United States as a "trustee." Respondent asserts that the lands are thus "held for the benefit of Indians" and not subject to FLPMA. 43 U.S.C. 1702(e)(2). But the cited provisions simply direct the United States to "act as trustee for [the] Indians to *dispose* of said lands and to expend and pay over the proceeds received." *E.g.*, Act of Feb. 14, 1913, ch. 54, § 10, 37 Stat. 678 (emphasis added). That language at most makes the United States a trustee for purposes of any *sale*; it does not transform the covered lands into lands "held for the benefit of Indians."
- *Entry or location*. Moving beyond those eight statutes, respondent contends (Br. in Opp. 19) that other laws "restrict only settler entry or mining 'location'"—not necessarily disposal. But "entry"

and "location" are simply land-law terms of art for disposal. "Under the provisions of the land laws of the United States, the term 'entry' denote[d]" the process for making a claim under the homestead laws. Henry Campbell Black, *A Dictionary of Law* 424 (1891). And a "location" was "[t]he act of appropriating a 'mining claim.'" *Id.* at 730. By limiting "entry" or "location" to specific land laws, Congress identified the specific pre-existing laws under which disposal was authorized.

- *Actual settlers*. Respondent notes (Br. in Opp. 19) that under some laws only "actual settlers" could acquire federal lands. It is unclear why that additional limitation would distinguish those laws from the 1900 Act. If anything, those laws are *more* restrictive, authorizing the use of specific laws to transfer lands to specific types of people. *E.g.*, Act of Mar. 2, 1889, ch. 412, § 13, 25 Stat. 1005 ("to actual settlers under the homestead laws only").

- *Military reservations*. Respondent notes (Br. in Opp. 20) that some statutes involve former military reservations to which the Indian canon would be "inapplicable." But respondent relegates (*id.* at 27) that canon to one cursory paragraph at the end of its merits argument. If respondent is right (*ibid.*) that the statutory text is unambiguous, then those laws are indistinguishable from the 1900 Act.

C. Review Is Appropriate Now

Respondent's arguments for delay lack merit.

First, respondent notes (Br. in Opp. 31-32) that the decision below is interlocutory and that this Court frequently denies review in that posture. But that practice is often justified by the prospect that further proceed-

ings may promote judicial efficiency by clarifying or mooting the controversy. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 4-54 to 4-57 (11th ed. 2019). Here, by contrast, the Ninth Circuit has conclusively held on purely legal grounds that the government may not invoke FLPMA as authority for the land exchange. Further proceedings to determine the appropriate remedy will not change or clarify that result, but this Court's intervention could promote efficiency by obviating the need for those proceedings. Where a lower court has decided "some important and clear-cut issue of law that is fundamental to the further conduct of the case and would otherwise qualify as a basis for certiorari," there is no sound reason for delay. *Id.* § 4.18, at 4-55.

Second, respondent emphasizes (Br. in Opp. 32-33) the district court's alternative holdings that the land exchange here was invalid because the government failed to comply with the procedural requirements of FLPMA and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* But Judge Bumatay's dissent from the panel decision thoroughly dismantled those holdings, and no judge on the en banc Ninth Circuit endorsed them. See Pet. App. 58a-67a; see also *id.* at 81a n.1 (Tung, J., dissenting from the denial of rehearing en banc) (five more judges agreeing with Judge Bumatay). In any event, the agency could cure those purported defects through additional administrative proceedings. Pet. 30.

Finally, respondent notes (Br. in Opp. 33) that the Senate version of the 2027 National Defense Authorization Act would expressly ratify the land exchange. That congressional attention only underscores this case's importance. The counterpart House bill lacks such language, moreover, see H.R. 880, 119th Cong., 2d Sess.

(2026), and it remains unclear what course Congress will take.

If Congress enacts legislation that ratifies the exchange and thereby moots the case, the Court should grant the petition and vacate the Ninth Circuit's judgment, given the "legal consequences" for other cases that the decision below would otherwise produce. *Munsingwear*, 340 U.S. at 41. The Court could grant the petition now and vacate the judgment later if Congress ratifies the exchange. Alternatively, the Court could briefly hold the petition until the current congressional session ends on January 3, 2027. If Congress does not act, the Court could then grant plenary review and hear the case this Term.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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