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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 16, 2017

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SPOKANE COUNTY, a municipal
corporation and political subdivision of the
state of Washington,

Plaintiff,

v.

U.S. DEP'T OF THE INTERIOR; RYAN
ZINKE, in his official capacity as
Secretary of the Interior; BUREAU OF
INDIAN AFFAIRS; MICHAEL BLACK,
in his official capacity as Acting Assistant
Secretary-Indian Affairs,

No. 2:17-cv-220-WFN

COMPLAINT

COMPLAINT – 1

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Defendants.

INTRODUCTION

1. Spokane County, Washington (“County”) brings this action seeking review of and relief from a June 15, 2015 decision by the Department of the Interior (“Department”) approving a proposal by the Spokane Tribe of Indians to build its third casino directly below Fairchild Air Force Base’s (“Fairchild AFB”) VFR traffic pattern for Fairchild’s primary runway.¹ The Department’s determination that this casino will not be detrimental to the surrounding community violates federal statutes governing such decisions, overrides the opposition of the vast majority of officials elected to represent the interests of the surrounding community, is belied by the record evidence and long-standing agency policy, and defies basic common sense.

2. By authorizing this casino, the Department will place thousands in harms’ way in an area of significantly heightened risk and will force the pilots who conduct training operations at Fairchild AFB to contend with additional hazards and distractions. Washington state land use laws prohibit development in the vicinity of a military installation, such as Fairchild AFB, which is incompatible with the installation and that impacts the installation’s ability to carry out its mission. *See* RCW 36.70A.530. The Washington Department of Transportation advises against any land use that attracts large concentrations of people—sports stadiums, multiplex theaters, large places of worship, shopping

¹ VFR refers to visual flight rules. The term refers to a set of rules created by the Federal Aviation Administration for flight in visual meteorological conditions.

1 centers, town centers, etc.—in areas where aircraft fly during the final phases of
2 flight. Areas underneath traffic patterns are most impacted by noise, light,
3 vibration, fumes, and low-flying aircraft and are acknowledged to have a
4 significantly elevated risk of accidents. The Department’s “no detriment
5 determination” runs counter to state policy, and federal policies, which were
6 established to protect military installations from encroachment, minimize light
7 pollution, and keep such areas as development-free as possible.
8

9 3. This is not a case where a tribe is entitled under existing law to
10 game on long-standing trust land. The Tribe purchased the Fairchild site long
11 *after* Congress prohibited gaming on lands acquired after October 17, 1988,
12 pursuant to Section 20 of the Indian Gaming Regulatory Act (“IGRA”), 25
13 U.S.C. § 2719. Section 20 includes an exception, however. If the Secretary, after
14 consulting with appropriate state, local, and tribal officials, determines that the
15 casino would not be detrimental to the surrounding community, and the
16 Governor concurs, gaming is permitted.
17

18 4. The majority of the surrounding community, represented by
19 Spokane County, the majority of state and local elected officials, Greater
20 Spokane Inc., and the Kalispel Tribe, oppose the casino. Most cited the public
21 health and safety risks created by building a casino and hotel beneath the flight
22 path of Fairchild AFB’s KC-135R tanker aircraft training exercises, often less
23 than 800 feet overhead. Most cited encroachment concerns, including potential
24 interference with future military missions and lowered rankings in Defense Base
25 Closure and Realignment Commission (“BRAC”) proceedings. Most were clear
26 that the casino would be detrimental to the community and that the impacts of
27 the casino were not and could not be adequately mitigated.
28

5. The Secretary, however, decided that all of these community leaders are wrong. The Secretary stated that the Department “has considered ... potential impacts to local governments and other tribes,” but the Department dismissed arguments the County made about the casino being located in an accident potential zone (“APZ”), encroachment concerns, and other environmental impacts. The Secretary also stated that the Department “has determined that potentially significant effects will be adequately addressed by the mitigation measures” described in the decision, without acknowledging that the impacts on the County will not be mitigated or that the Department does not require, nor enforce, mitigation at all.

6. Accordingly, Spokane County seeks a declaratory judgment under the Administrative Procedure Act (“the APA”), 5 U.S.C. §§ 701–706, that the Department abused its discretion and violated IGRA by failing to provide a reasoned explanation to support its decision that the casino would not be detrimental to the surrounding community. The County also seeks a declaration that the Department violated the National Environmental Policy Act (“NEPA”) 42 U.S.C. §§ 4321 *et seq.* by failing to take a hard look and consider a sufficient range of alternatives to the casino project. The County asks the Court to vacate and remand the June 15, 2015 decision, declare that gaming at the site is prohibited, and enjoin the Department from taking any action in reliance thereon.

PARTIES

7. Plaintiff Spokane County, Washington, is a political subdivision of the State of Washington, governed by its three-member Board of County Commissioners. The County Commissioners are elected to represent the

1 interests of almost 500,000 residents. Since 1999, the Board of County
2 Commissioners has opposed the development of a casino at the proposed site,
3 based on concerns regarding public health and safety, encroachment, and other
4 impacts. The Spokane Tribe's casino will cause substantial harm to the County's
5 economy, the safety of County residents, and to the continued vitality of
6 Fairchild AFB, which is a major economic driver for the entire region.
7

8 8. Defendant Ryan Zinke is the Secretary of the Department of the
9 Interior ("Secretary") and is responsible for overseeing and managing all
10 programs, activities, and operations of the Department relating to Indian lands
11 and affairs. The Secretary implements Section 20 of the IGRA, 25 U.S.C.
12 § 2719, the statute pursuant to which the Spokane Tribe's casino project was
13 authorized. He is sued in his official capacity only. His office is located at 1849
14 C Street, N.W., Washington, D.C. 20240.

15 9. Defendant Bureau of Indian Affairs ("BIA") is the federal agency
16 responsible for overseeing and managing all programs, activities, and operations
17 relating to Indian lands and affairs. BIA implements IGRA on behalf of the
18 Secretary. BIA's headquarters are located at 1849 C Street, N.W., Washington,
19 D.C.
20

21 10. Defendant Michael Black is the Acting Assistant Secretary for
22 Indian Affairs and is responsible for overseeing and managing all programs,
23 activities, and operations of the BIA. The Secretary has delegated authority
24 under Section 20 of IGRA to the Office of the Assistant Secretary. Mr. Black is
25 sued in his official capacity only. His office is located at 1849 C Street, N.W.,
26 Washington, D.C. 20240.
27
28

1 11. This complaint will refer to the Defendants collectively as the
2 “Department.”

3 **JURISDICTION AND VENUE**

4 12. This Court has subject matter jurisdiction over this action and
5 personal jurisdiction over the parties pursuant to 28 U.S.C. § 1331, 28 U.S.C.
6 §§ 2201–2202, and 5 U.S.C. §§ 702, 706.

7 13. The sovereign immunity of the United States has been waived by 5
8 U.S.C. § 702 because this is an action seeking relief other than money damages
9 and stating a claim that an agency or an officer or employee of the United States
10 acted or failed to act under color of legal authority.

11 14. There is an actual controversy between the parties that invokes the
12 jurisdiction of this Court regarding decisions by, and actions of, the Defendants
13 that are subject to review by this Court. There has been a final agency action
14 that is reviewable by this Court. 25 C.F.R. § 2.6(c); 5 U.S.C. § 704.

15 15. Venue is proper in the Eastern District of Washington under 28
16 U.S.C. § 1391(b)(2) and (e) and 5 U.S.C. § 703 because the Defendants are a
17 department and an agency of the United States and officers of the United States
18 acting in their official capacity, a substantial part of the events giving rise to the
19 claim occurred in this district, and the Plaintiff resides in this district.

20 **LEGAL AND FACTUAL BACKGROUND**

21 **A. Legal Framework**

22 16. Section 20 of the Indian Gaming Regulatory Act (“IGRA”)
23 generally prohibits gaming “on lands acquired by the Secretary in trust for the
24 benefit of an Indian tribe after October 17, 1988.” 25 U.S.C. § 2719(a).
25
26
27
28

1 17. The general prohibition on gaming on “after-acquired” lands does
2 not apply when:

3 the Secretary, after consultation with the Indian tribe
4 and appropriate State and local officials, including
5 officials of other nearby Indian tribes, determines that
6 a gaming establishment on newly acquired lands
7 would be in the best interest of the Indian tribe and its
8 members, and would not be detrimental to the
9 surrounding community, but only if the Governor of
10 the State in which the gaming activity is to be
11 conducted concurs in the Secretary’s determination.

12 25 U.S.C. § 2719(b)(1)(A). The provision is generally referred to as the “two-
13 part determination” or “Secretarial Determination.”

14 18. The regulations that implement Section 20 require the Secretary to
15 “consider all the information submitted under 25 C.F.R. §§ 292.16–292.19 [e.g.,
16 the gaming application, the environmental review documents, comments from
17 the consultation process, etc.] in evaluating whether the proposed gaming
18 establishment is in the best interest of the tribe and its members and whether it
19 would or would not be detrimental to the surrounding community.” 25 C.F.R. §
20 292.21(a).

21 19. NEPA, 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations,
22 40 C.F.R. §§ 1500 *et seq.*, require federal agencies to evaluate the environmental
23 and socioeconomic impacts of any “major federal action” that significantly
24 affects the quality of the human environment. 42 U.S.C. § 4332; 40 C.F.R.
25 § 1508.14; *see generally* 40 C.F.R. §§ 1500 *et seq.*

26 20. A two-part determination is a “major federal action,” requiring an
27 environmental impact statement (“EIS”) under NEPA.
28

B. The Spokane Tribe and the Fairchild AFB Site

21. The Spokane Tribe has nearly 3,000 members. The Tribe's 159,000-acre reservation is located in Stevens County, Washington. The Tribe currently operates two casinos: the Two Rivers Resort Casino, which is located approximately 45 miles northwest of the City of Spokane, along State Route 25; and the Chewelah Casino, which is located approximately 42 miles north of the City of Spokane along U.S. 395. Both casinos are located on the Tribe's reservation.

22. In 1998, the Spokane Tribe filed an application with the Department to have an approximately 145-acre parcel of land located adjacent to Fairchild AFB acquired in trust for manufacturing/industrial purposes. The County filed comments opposing the trust application on February 9, 1999, raising concerns regarding gaming, jurisdictional, and traffic impacts.

23. At that time, the Tribe represented to the County that it was not planning on constructing a casino at the site. The Tribe stated that they "currently have no intentions of operating a gaming facility at this site. Our intentions are to explore various business opportunities that would be compatible with existing uses of surrounding property and economically viable. We also intend to work cooperatively with the county and local jurisdictions to provide a safe and secure environment for those who would use the property."

24. The Tribe represented to the County at the time that it had "no intentions of operating a gaming facility at this site," that its "intentions [were] to explore various business opportunities that would be compatible with existing uses of the surrounding property and economically viable," and that it "intended

1 to work cooperatively with the county and local jurisdictions to provide a safe
2 and secure environment for those who would use the property.”

3 25. The Department issued a decision on March 22, 2000 to acquire the
4 land in trust.

5 26. The County appealed the decision before the Interior Board of
6 Indian Appeals (“IBIA”) and stated that “[i]t was the County Commissioners[’]
7 understanding that the Spokane Tribe of Indians would not, under any
8 circumstance, conduct any gaming activities on the site.” The County asked the
9 Department to include in the conditions on the trust decision that “[n]o gambling
10 and/or gaming activities as that term is defined in applicable Washington State
11 legislation shall be allowed on the site without prior written approval from the
12 Board of County Commissioners of Spokane County.”

13 27. The Department acquired the land in trust on August 16, 2001 for
14 economic-development purposes.

15
16 **C. The Department’s Two-Part Determination Review**

17 28. On February 24, 2006, the Spokane Tribe requested that the
18 Department determine that the 145-acre parcel is eligible for gaming pursuant to
19 the Indian Gaming Regulatory Act (“IGRA”) by submitting a formal request for
20 the two-part determination set forth in IGRA Section 20, 25 U.S.C. §
21 2719(b)(1)(A).
22

23 29. On April 10, 2007, the County executed an agreement with the City
24 of Airway Heights and the Spokane Tribe called the “Intergovernmental
25 Agreement.” The purpose of the Intergovernmental Agreement was to extend
26 certain services—utilities, sewer, and water—to the Tribe in exchange for
27 compensation. In addition, the Intergovernmental Agreement required the Tribe
28

1 to obtain a traffic impact analysis and to create a master plan for the Fairchild
2 AFB site, and authorized the Site's annexation by Airway Heights.

3 30. On the same day, Airway Heights and the Tribe executed a
4 Memorandum of Agreement ("MOA"). The MOA addressed possible gaming
5 development on the Fairchild AFB site and established mitigation that the Tribe
6 would provide Airway Heights in exchange for its support in the two-part
7 determination process. The MOA indicated that the amounts to be paid by the
8 Tribe under the Interlocal Agreement would be supplanted by the amounts set
9 forth in the MOA in the event that gaming was authorized on the Fairchild AFB
10 site.
11

12 31. The Department published a Notice of Intent ("NOI") to prepare an
13 EIS for the casino project in the Federal Register on August 19, 2009 and a
14 corrected NOI on August 27, 2009. 74 Fed. Reg. 41,928 (Aug. 19, 2009); 74
15 Fed. Reg. 43,715 (Aug. 27, 2009).
16

17 32. On August 17, 2010, the County entered into an Interlocal
18 Agreement ("Interlocal Agreement") with the City of Airway Heights wherein
19 the City agreed to pay the County 20% of each quarterly payment it received
20 from the Tribe under the MOA. The Interlocal Agreement required the County
21 to remain silent with respect to the proposed casino project.

22 33. On April 8, 2011, the Department solicited comments from
23 Spokane County on the Spokane Tribe's gaming application. The County was
24 contractually obligated not to respond, pursuant to the Interlocal Agreement.

25 34. The Department published a Notice of Availability ("NOA") of the
26 draft EIS almost a year later, on March 2, 2012. 77 Fed. Reg. 12,873 (Mar. 2,
27 2012).
28

1 35. The draft EIS described the Tribe's proposed casino as entailing:

2 [T]he phased construction of a casino-resort facility,
3 parking facilities, 155,145 square feet of retail space, a
4 10,480-square-foot tribal cultural center, a 14,036-
5 square-foot tribal police and fire station, and a 41,633-
6 square-foot two-story commercial building

7 Under [the proposal], the gaming component of the
8 facility would consist of approximately 2,500
9 electronic gaming devices (EGDs), 50 table games,
10 and 10 poker room tables within a 98,442-square-foot
11 gaming floor area. Other facilities within the proposed
12 casino-resort include a 300-room hotel, a cafe, a
13 steakhouse, three restaurants, a food court, bars, a
14 convention/banquet area, 96,634 square feet of
15 lifestyle retail located on the southwest side of the
16 casino-resort facility, and a 107,490-square-foot
17 specialty retail box store. The 300-room hotel would
18 include a fully enclosed 71,719-square-foot indoor
19 swimming pool area, a spa/wellness center, and a
20 fitness center. The hotel tower would not exceed 145
21 feet above ground level. A four-story concrete parking
22 structure would be located on the west side of the
23 casino-resort facility and would include 1,500 parking
24 spaces. A total of 4,753 surface parking spaces would
25 be provided at the casino-resort.

26 36. On March 15, 2012, the County requested a 30-day extension to
27 provide comments on the draft EIS while it awaited a formal Attorney General
28 Opinion regarding whether the neutrality provision in the Interlocal Agreement
29 violated public policy. The Department granted an extension of the comment
30 period until May 16, 2012.

31 37. On May 1, 2012, the County adopted new regulations to protect
32 Fairchild AFB from encroachment from incompatible uses and the public from
33 noise and safety risks.

34 38. In May of 2012, the County sent a letter to the Department
35 acknowledging that the County remained contractually obligated not to

1 comment on the Tribe's application, but that the County was continuing to
2 explore options to participate in the public process to ensure that the 470,000
3 residents of the County had "the proper voice and role in what could be the most
4 meaningful decision confronting the future character and economy of our
5 community." The County also requested an additional 45 days to submit written
6 comments on the draft EIS, because the County was still awaiting the Attorney
7 General's Opinion.
8

9 39. On May 8, 2012, the Spokane Tribe submitted a Supplemental
10 Application for Secretarial Determination that included 59 supporting exhibits.

11 40. It became apparent in January of 2013 that the City of Airway
12 Heights would not release the County from the neutrality provision in the
13 Interlocal Agreement. The County voted to terminate the Interlocal Agreement
14 on January 25, 2013, thereby forfeiting all financial mitigation set forth in the
15 Interlocal Agreement. The County issued a resolution opposing approval of the
16 casino-resort at its current site, which it immediately sent to the Department.
17

18 41. Less than a week later, on February 1, 2013, the NOA for the final
19 EIS was published in the Federal Register and the public comment period
20 opened. 78 Fed. Reg. 7,448 (Feb. 1, 2013). The BIA subsequently extended the
21 30-day comment period to May 1, 2013. 78 Fed. Reg. 15,040 (2013).

22 42. Spokane County submitted comments on the final EIS along with
23 comments on the Secretary's proposed two-part determination. Spokane County
24 commented on the following inadequacies in the final EIS, among others: 1) the
25 FEIS did not consider a sufficient range of alternatives; 2) the FEIS' purpose
26 and need statement was too narrowly defined; 3) the FEIS failed to adequately
27 consider the impacts to Fairchild AFB; and 4) the FEIS failed to adequately
28

1 consider various impacts of the proposed casino-resort project on Spokane
2 County. In that same submission, Spokane County provided the following
3 comments on the Secretary's proposed two-part determination: 1) the Secretary
4 is required to defer to the surrounding community's position that the proposed
5 project will be detrimental to the surrounding community; 2) the opposition to
6 the project is overwhelming; and 3) the proposed project would have substantial
7 impacts on the region.
8

9 43. The County's 2013 comment letter also requested that the
10 Department prepare a supplemental EIS because: (a) the County had rescinded
11 the Interlocal Agreement; (b) that rescission eliminated all financial mitigation
12 set forth in the Interlocal Agreement (which was insufficient, as well); (c) the
13 County had joined the City of Spokane, Congresswoman McMorris Rogers, and
14 the numerous state and local officials in opposing the proposed casino; (d)
15 applicable local land use regulations had changed since the draft EIS was
16 prepared, but were not properly addressed in the final EIS; and (e) the draft EIS
17 did not include sufficient information on various topics, circumstances had
18 changed since the draft EIS, and analyses in the draft EIS were now stale.
19

20 44. On March 31, 2014, Spokane County again asked the Department
21 to prepare a supplemental EIS to address issues related to U.S. Air Force
22 guidance regarding accident potential zones and the risks associated with
23 building a casino and hotel beneath the final turn of Fairchild AFB's VFR traffic
24 pattern.
25

26 45. The Department did not prepare a supplemental EIS.
27
28

D. The Department's Approval

46. The Department issued its record of decision for a secretarial determination ("ROD") on June 15, 2015. The Department also issued its Secretarial Determination for the Spokane Tribe of Indians ("Secretarial Determination") on June 15, 2015 (collectively, "Decision Documents").

47. In the ROD, the Department concluded that the purpose and need statement was adequate; that the range of alternatives was adequate; and that with mitigation measures, the casino would not "encroach upon Fairchild AFB's available air space or impede its ability to implement [its] operational and training mission." The Secretarial Determination also concluded that the casino project, with mitigation measures, would not encroach upon nor impede Fairchild AFB's operations.

48. In the ROD, the Department also relied upon the U.S. Air Force's March 2014 final EIS for the KC-46A Formal Training Unit and First Main Operating Base (MOB 1) Beddown to conclude that the casino was compatible with Fairchild AFB, despite never having referenced that document or its conclusions during the Department's evaluation of the casino.

49. The Department, in the ROD, also concluded that none of the commenters on the EIS had "provided sufficient analysis that explains how the Preferred Alternative would result in a detrimental impact on their respective communities," despite the extensive comments the County and others provided about safety risks, the lack of enforceable mitigation measures, traffic impacts, light impacts on Air Force operations, economic impacts on the County and the Kalispel Tribe, and other impacts.

1 50. The Department also incorrectly concluded in the ROD that
2 impacts on Spokane County would be mitigated under the Interlocal Agreement,
3 despite the County's termination of that document.

4 51. The Department, in its Secretarial Determination, also
5 impermissibly violated IGRA's model of cooperative federalism by overriding
6 the County's view that the casino project would be detrimental to the
7 surrounding community, particularly Fairchild AFB.

8 52. The June 15, 2015 ROD and Secretarial Determinations are both
9 final agency actions pursuant to 25 C.F.R. § 2.6 and 5 U.S.C. § 704.

10 53. On June 8, 2016, Governor Jay Inslee concurred with the
11 Department's determination.
12

13 **CAUSES OF ACTION**

14 **FIRST CLAIM**

15 **The Department Violated IGRA and the APA**

16 54. The paragraphs set forth above are realleged and incorporated
17 herein by reference.

18 55. In order to allow gaming, pursuant to Section 20 of IGRA, the
19 Department must determine—among other things—that the proposed casino
20 “would not be detrimental to the surrounding community.”
21

22 56. In making that determination on behalf of the Spokane Tribe, the
23 Department incorrectly interpreted the standard, “not detrimental to the
24 surrounding community,” and abandoned without explanation its long-standing
25 policy requiring the support of the local jurisdiction's government to establish
26 “no detriment.”
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1 57. In making that determination, the Department also improperly
2 overrode the views of a local representative government in violation of
3 federalism principles.

4 58. The Department failed to provide a reasoned explanation for
5 dismissing the views of the officials elected to represent community interests
6 and improperly discounting their expertise on issues of local concern (including
7 land use, traffic, economic impacts, and capacity to respond to safety risks), the
8 value of which the Department has reaffirmed in more recent decisions.

9 59. The Department's decision as reflected in both the ROD and the
10 Secretarial Determination runs counter to the evidence in the record, relies on
11 inconsistent or incorrect information, and considers improper factors.

12 60. Accordingly, the Department's decision as reflected in both the
13 ROD and the Secretarial Determination is arbitrary, capricious, an abuse of
14 discretion, unsupported by substantial evidence, unwarranted by the facts, and
15 issued in a manner not in accordance with law, in violation of the APA. 5
16 U.S.C. §§ 702, 704, 706.

17 **SECOND CLAIM**

18 **The Department violated NEPA and the APA**

19 61. The paragraphs set forth above are realleged and incorporated
20 herein by reference.

21 62. The actions by the Department in issuing the ROD were in
22 violation of NEPA, 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations,
23 40 C.F.R. §§ 1500 *et seq.* Without limitation, Defendants' actions violate
24 NEPA and are therefore unlawful in the respects alleged below.
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65. The Department failed to take the “hard look” NEPA requires by
relying on incorrect assumptions and insufficient data regarding impacts, safety
risks, cumulative effects, land use, economic, and other impacts.

67. The ROD is arbitrary, capricious, an abuse of discretion,
unsupported by substantial evidence, unwarranted by the facts, and issued in a
manner not in accordance with law, in violation of the APA. 5 U.S.C. § 706.

17 WHEREFORE, Plaintiff Spokane County prays for the following relief:

B. That this Court enter a judgment and an order enjoining the Defendants from authorizing off-reservation tribal gaming on the trust land located adjacent to Fairchild AFB and enjoining Defendants from approving or

1 implementing any aspect of the project described in the ROD and Secretarial
2 Determination;

3 C. That this Court declare, adjudge, and decree that the ROD and
4 Secretarial Determination are contrary to law and order the Defendants to set
5 aside and vacate the ROD and Secretarial Determination and enjoin their
6 implementation;

7 D. That this Court declare, adjudge, and decree that the Department
8 acted in an arbitrary and capricious manner by issuing the Secretarial
9 Determination because the Secretarial Determination is legally inadequate under
10 IGRA and the APA;

11 E. That this Court declare, adjudge, and decree that the Department
12 acted in an arbitrary and capricious manner by issuing the ROD because the
13 final EIS is legally inadequate under NEPA and the APA;

14 F. That this Court require the Secretary to comply with NEPA by
15 preparing a new or supplemental EIS consistent with NEPA's requirements;

16 G. That this Court enter a judgment and an order awarding Plaintiff
17 Spokane County's costs and reasonable attorney's fees and costs to the extent
18 permitted by law;

19 H. That this Court award Plaintiff Spokane County such further and
20 other relief as the Court deems just and proper.
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Respectfully submitted,

s/ Meredith R. Weinberg

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