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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KALISPEL TRIBE OF INDIANS and SPOKANE COUNTY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants

SPOKANE TRIBE OF INDIANS,

Intervenor-Defendant.

No. 2:17-CV-0138-WFN

KALISPEL TRIBE'S REPLY IN SUPPORT OF ITS SUMMARY JUDGMENT MOTION AND RESPONSE TO SUMMARY JUDGMENT MOTIONS BY FEDERAL DEFENDANTS AND SPOKANE TRIBE

Hearing Date: June 17, 2019

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## INTRODUCTION

In its Motion for Summary Judgment, the Kalispel Tribe of Indians ("Kalispel") asserts that the U.S. Department of the Interior ("Department") violated the Indian Gaming Regulatory Act ("IGRA") and its trust obligation to Kalispel by approving a nearby casino for the Spokane Tribe ("Spokane") that would result in detrimental impacts on Kalispel. Kalispel also claims that the Department violated the National Environmental Policy Act ("NEPA") by relying on an improperly constrained purpose-and-need statement and a deficient alternatives analysis.

In response, Defendants avoid the threshold legal question of what "detrimental" means under IGRA because the Department's decision is patently unlawful when viewed against the plain meaning of that term instead of the severe misinterpretation applied by the Department. When evaluated against the clear standard that Congress imposed, the undisputed facts establish that Spokane's casino would be impermissibly detrimental to Kalispel's government, membership, and self-sufficiency. These detrimental impacts were not mitigated as required by IGRA and the Department's trust obligation to Kalispel thereunder, or through a proper alternatives analysis under NEPA. The federal decision must accordingly be vacated and remanded for mitigation of Kalispel's detriment.

## BACKGROUND

Defendants' characterization of the relevant background perpetuates a false narrative that this case boils down to a choice between approving Spokane's casino or granting Kalispel a gaming monopoly. *See* AR63809; ECF No. 96 at 9-10, 24, 30, 60; ECF No. 98 at 10, 16, 23-24. Kalispel built its casino in a region with four existing casinos. AR65834. It therefore has no basis to and does not contend that IGRA precludes competition or entitles Kalispel to a monopoly. AR48268.

The correct narrative is that IGRA and the Department's own regulations preclude unmitigated detrimental impacts to nearby Indian tribes, like Kalispel. *See* 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. §§ 292.18(d), 292.21(a). Although Spokane extols its "Commitment to Mitigate Impacts," ECF No. 96 at 25-28, the Department recognized that Spokane only will provide mitigation payments to the City of Airway Heights ("City") and Spokane County ("County"). AR20462-638, AR63860-61. Those amount to about $1 million annually over the first decade and none of those payments are passed along to Kalispel. AR20466-67, AR20474 (payments of about $120,000 over 15 years), AR20480, AR20487 (payments of about $900,000 over seven years). Spokane did not offer any mitigation for the detrimental impacts of its new casino on Kalispel—a glaring omission that the Department did not acknowledge either in its decision making or before this Court. Also, the Department's decision did not address whether Spokane's mitigation

payments to the City and the County or added local employment would inure to Kalispel or somehow offset or mitigate the detrimental impacts to Kalispel from Spokane's casino. *Cf.* AR63856-58. Rather, the Department determined that approval of the Spokane casino "would not be detrimental to the surrounding community, including nearby Indian tribes," in relevant part because the new casino "would not result in the closure of . . . competing gaming facilities" and "would not prohibit the Kalispel tribal government from providing essential services and facilities to its membership." AR63870-72, AR63895-96.

That latter conclusion was factually unfounded because the Administrative Record established that federal approval of the Spokane casino would impose substantial detriment on Kalispel. Kalispel's Airway Heights Reservation "is dedicated to one overarching purpose: the generation of revenue to fund the Kalispel government and the tribal programs on which Kalispel's tribal members rely." AR42232-UR. Under the Department's own analysis, full build out of the Spokane casino will decrease revenue at Kalispel's Northern Quest Resort and Casino at the Airway Heights Reservation by approximately 33%. AR7497-99, AR7502, AR63870. This equates to a loss of nearly $50 million. *Compare* AR4695-96 (projecting $65 million revenue loss at Northern Quest) *with* AR 7497-98 (updating analysis but not quantifying loss). Kalispel provided evidence of more dire detrimental impacts, including a $58 million annual lost profit, AR5322,

AR63866-67, which would decrease Kalispel governmental revenue by 52%, AR5338, cause Kalispel to default on its credit facility, AR5357, and leave just $728,000 in non-grant governmental revenue, AR5340, AR63867.

These impacts are not small or "fleeting" as Defendants assert. ECF No. 96 at 10, 30; ECF No. 98 at 27. To the contrary, they strike at the heart of Kalispel's government: Because Northern Quest transfers its profits to the Kalispel, "any casino profit lost as a result of the introduction of the proposed Spokane Tribe casino directly translates into lost government revenue to the Kalispel Tribe." AR10319. Because 85% of Kalispel's governmental budget comes from Northern Quest, AR5331, this loss will directly and negatively impact Kalispel's ability to provide numerous essential services. This includes "public safety, including police, fire, and emergency medical services; housing; social services; health care; educational assistance; child care; elderly care; public transportation; judicial and legal services; [and] community planning and development," AR5341.

A full build-out of the Spokane casino also would eliminate all per capita and elder payments ("PCEPs") to Kalispel members, AR7511, even though IGRA expressly authorizes and recognizes the benefits of those for "the health, education, or welfare" of tribal members, 25 U.S.C. § 2710(b)(3); 25 C.F.R. § 290.12(b)(3). Kalispel has been making PCEPs to its members under a Department-approved Revenue Allocation Plan since 2001. AR63865, AR5333. These PCEPs help "cover

tribal members' basic needs not covered by tribal programs or services, including the cost of tribal member life and dental insurance." AR5333. PCEPs are not a gratuity. For instance, the Department's estimated PCEPs for 2014, AR7511-12, are nearly double the average annual income of $8,888 on the Kalispel Reservation before construction of Northern Quest, AR42282-UR. Elimination of PCEPs thus increases demand for tribal services, such as the housing assistance program the PCEPs replaced. AR5333. Kalispel's government will see at least a 7% increase in its tribal services budget to compensate for the loss of tribal PCEPs. *See* AR5333.

The Department's finding that the Spokane casino will only result in a 16.7% reduction to the Kalispel government budget after elimination of the PCEPs improperly assumes that PCEPs can be eliminated without harming Kalispel's government or services. *Compare* AR63870 *with* AR5333. That calculated impact also is improperly understated by comparing Kalispel's prior revenue to its future revenue, with the latter decreased by Spokane's casino but also increased by market growth, rather than by comparing that future impacted revenue to future revenue growth in the absence of Spokane's casino. *See* AR63870. The Department also compounds this impropriety in its opening brief by asserting that the 16.7% loss is a scrivener's error. ECF No. 98 at 32 & n.7. But the cited reference for the 16.7% stated in the Secretarial Determination does not address impacts to Kalispel's government or elimination of Kalispel PCEPs. *See* AR63870 (citing Final EIS

Appendix V page 25 instead of page 35 where analysis is located). The actual underlying federal analysis establishes that the Spokane casino will cause Kalispel to completely eliminate its PCEPs and to reduce its total annual government budget by over $28 million, or almost 32%. AR7511. That governmental impact corresponds to the 33% revenue loss referenced in the Department's analysis given the Kalispel government's dependence on that revenue. AR5331, AR7497-502, AR63870. It also far exceeds and is not offset by the average $1 million annual mitigation payments to the City and the County.

Finally, the Department's approval here relied on the 1997 approval of Kalispel's casino despite Spokane's concerns that that project would negatively impact Spokane's existing casinos. AR63808. But there, all three of Spokane's casinos were located more than 45 miles away from Kalispel's gaming site, AR65828-29, whereas Kalispel's casino is just two miles from Spokane's current casino site, AR63808. Also, Spokane did not submit any evidence documenting its allegation of detrimental effects, even though it could have submitted whatever report or study it deemed necessary to support its claim. AR65835. In addition, the Department there found that, absent a state compact change, Spokane would maintain a local monopoly on slot machines, which have a greater customer appeal, so that the proposed Kalispel gaming facility "should have little impact on the Spokane slot revenues at its casinos." AR65834-35. That is not the situation here.

## ARGUMENT

The Department's determination that the Spokane casino would not be detrimental to the surrounding community including Kalispel was arbitrary, capricious, and contrary to governing law and established facts. That decision rests on an unlawful interpretation of an unambiguous statutory term, misapplication of IGRA's and NEPA's analytic frameworks, and a breach of the Department's fiduciary obligations to Kalispel. These errors cannot be remedied by Defendants' post-hoc rationalizations or their misplaced reliance on out-of-circuit cases involving different circumstances. Therefore, that decision must be vacated.

### I. THE DEPARTMENT UNLAWFULLY DISREGARDED OR MISAPPLIED IGRA'S CATEGORICAL REQUIREMENT THAT GAMING ON NEWLY ACQUIRED LANDS MUST "NOT BE DETRIMENTAL TO THE SURROUNDING COMMUNITY."

#### A. The Department Failed to Apply IGRA's Unambiguous Meaning When Evaluating Evidence of Kalispel's Detriment.

In its Motion for Summary Judgment, Kalispel explained that the Department erred in concluding that Spokane's proposed casino would not be preclusively "detrimental" under IGRA on the basis that it would neither "result in closure" of Kalispel's casino nor "prohibit" Kalispel from providing essential governmental services to its members. ECF No. 79 at 21-29 (addressing, *inter alia*, 25 U.S.C. § 2719(b)(1)(A), AR63870, and AR63895). In response, Defendants contend that these findings satisfy the legal standard for no preclusive detriment under IGRA,

that the impacts to Kalispel if "any" would not be acute, and that casino competition alone is insufficient to establish detriment. *See, e.g.*, ECF No. 96 at 28-31, 33; ECF No. 98 at 22-24, 33. Defendants also assert that the assessment of detriment should be applied to the surrounding community as a whole, and that the Department's decision merits deference. ECF No. 96 at 32-34, 37; ECF No. 98 at 22, 25, 31. None of these defenses has merit because the Department misconstrued or failed to apply the unambiguous meaning of "detrimental" in IGRA.

The Ninth Circuit recently reiterated that,

> [i]n interpreting IGRA, we apply "traditional tools of statutory construction." We begin with the statute's language, which is conclusive unless literally applying the statute's text demonstrably contradicts Congress's intent. "When deciding whether the language is plain, courts must read the words in their context and with a view to their place in the overall statutory scheme."

*Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1151 (9th Cir. 2019) (citations omitted). And where an agency's regulations parrot the underlying statute, the legal question "is not the meaning of the regulation but the meaning of the statute." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

As explained in Kalispel's opening brief, the plain meaning of the relevant statutory term may be derived from the dictionary. ECF No. 79 at 25; *United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017). Here, "detriment" is defined as "[a]ny loss or harm suffered by a person or property; harm or damage." *Black's Law Dictionary* (10th ed. 2014). Notably, this definition does not include a qualifier like

"severe." Also, the breadth of this definition does not make it ambiguous. *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 557 (9th Cir. 2016). The term thus must be "accorded [its] full and fair scope," *id.* (quotation marks omitted), "unless there is clear evidence to the contrary that Congress intended a different meaning," *Amalgamated Sugar Co. v. Vilsack*, 563 F.3d 822, 831 (9th Cir. 2009).

This interpretation is consistent with the context in which the term appears in IGRA. Congress did not modify "detrimental" with an amplifying adjective as it did with "*best* interest" of the applicant tribe in the first part of the relevant two-part determination. 25 U.S.C. § 2719(b)(1)(A) (emphasis added). If Congress had intended to prohibit only a certain degree of detriment, it would have said so, because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Moreover, the term "detrimental" appears in an exception to IGRA's general prohibition on off-reservation gaming. *Compare* 25 U.S.C. § 2719(b)(1)(A) *with id.* § 2719(a). If "detrimental" were construed to require a higher showing of harm, the exception could impermissibly swallow the rule. *Cf. Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985). Contrary to Spokane's assertion, ECF No. 96 at 35, the Department's "policy is to narrowly apply the off-reservation exception to the general prohibition on the conduct of tribal gaming on trust lands acquired after . . . 1988," AR42231-UR (quoting prior decisions).

The Department's Part 292 regulations reinforce the plain meaning of "detrimental" in IGRA. The Department specifically referenced its "definition and understanding of detriment" during the rulemaking process, but it did not provide an additional definition. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,369, 29,373 (May 20, 2008) (hereafter "*Gaming on Trust Lands*"). If the Department had understood "detrimental" to be ambiguous, it would have provided clarification as it did by defining "surrounding community" to mean "local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment." 25 C.F.R. § 292.2.

Also, the Department's Part 292 regulations do not establish a heightened standard of detriment for nearby tribes as they do for distant tribes petitioning for consultation. A tribe located outside the 25-mile radius for the "surrounding community" may obtain consultation only by establishing that its governmental functions, infrastructure, or services will be "*directly, immediately and significantly* impacted by the proposed gaming establishment." *Id.* (emphasis added). By contrast, the only regulatory clarification for the detriment of a nearby tribe is that such detriment must be mitigated. 25 C.F.R. §§ 292.18(d), 292.21(a). Thus, the Department's own regulations preclude the *ultra vires* heightened standard applied here of not "resulting in closure" of an existing tribal casino or not "prohibiting" governmental services. *See* AR63870; AR63895.

As the meaning of "detrimental" in IGRA is plain, the intent of Congress is clear and "'that is the end of the matter.'" *United States v. Turner*, 689 F.3d 1117, 1119 (9th Cir. 2012) (citation omitted). And because IGRA is neither silent nor ambiguous, this Court "must give effect to the plain language that Congress chose." *United States v. Geyler*, 949 F.2d 280, 283 (9th Cir. 1991). Kalispel's evidence of detriment easily satisfies IGRA's standard, and far exceeds that which Spokane willingly mitigated for other local governments. *See supra* at 2-6. While there are benefits and mitigation to other governments within the surrounding community, the Department failed to identify or explain how any of that will inure to Kalispel or offset or eliminate its detriment.

Instead of acknowledging the depth and breadth of detriment to Kalispel, the Department discounted it without factual support and mischaracterized Kalispel's evidence as "fear" of competition. AR63808-09. The Department also irrationally disregarded Kalispel's detriment based on aboriginal territory. AR63809. Due to the Department's misinterpretation or misapplication of the unambiguous meaning of "detrimental" in IGRA and Part 292, its decision is not entitled to deference under either *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984) or *Auer v. Robbins*, 519 U.S. 452 (1997). *See also Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (granting certiorari to consider overruling *Auer*); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring) (noting interest in reconsidering *Auer*).

### B. Defendants' Post-Hoc Rationalization for the Department's Deficient Decision Is Not Supported by the Administrative Record and Is Based on Unpersuasive Dicta from Another Circuit.

In lieu of addressing the dispositive issue of statutory interpretation, Defendants dissemble by reframing the question as whether the Spokane casino would be "detrimental to the surrounding community '*as a whole*.'" ECF No. 96 at 34 (quoting *Stand Up for California! v. Dep't of Interior* ("*Stand Up II*"), 204 F. Supp. 3d 232, 269 (D.D.C. 2016) (emphasis added); *see also* ECF No. 98 at 22. There are no less than six reasons to reject that red herring here.

First, the Department did not use the currently proffered standard. The Department never analyzed whether the benefit to other portions of the surrounding community as a whole offset Kalispel's detriment because it misinterpreted the law and the facts to conclude that Kalispel would not suffer cognizable detriment under IGRA. *E.g.*, AR63870, AR63895. In addition, there was no analysis of how local construction, Spokane casino jobs, or payments to the City or the County would remedy Kalispel's governmental losses or help Kalispel elders who will lose PCEPs and the ability to pay for dental insurance. *See, e.g.*, AR5333. Furthermore, as noted in Kalispel's opening brief, ECF No. 79 at 24, the Department analyzed Kalispel impacts in a different section of the Determination regarding consultation instead of detriment. AR63863-72. This Court owes no deference to what amounts to a

"convenient litigating position and a *post hoc* rationalization." *Cal. Pub. Utilities Comm'n v. Fed. Energy Regulatory Comm'n*, 879 F.3d 966, 976 (9th Cir. 2018).

Second, the purported standard does not explain what "detrimental" means. It is impossible to determine "whether [the proposed gaming establishment] would or would not be detrimental to the surrounding community," 25 C.F.R. § 292.21(a), without articulating the legal standard for "detrimental." *Cf. U.S. Steel Grp. v. United States*, 123 F. Supp. 2d 1365, 1369 (Ct. Int'l Trade 2000). Courts do not defer to this type of "tautological reasoning." *Geyler*, 949 F.2d at 283. Also, detriment cannot be evaluated "overall" or "on the whole" when there is no basis to compare or evaluate the different aspects of it. For example, how could City or County mitigation payments or casino construction help harmed Kalispel elders?

Third, the Department did not adopt this standard in its own rulemaking:

> The definition of "nearby Indian tribe" is made consistent with the definition of "surrounding community" because we believe that the purpose of consulting with nearby Indian tribes is to determine whether a proposed gaming establishment will have *detrimental impacts on a nearby Indian tribe that is part of the surrounding community* under section 20(b)(1)(A) of IGRA.

*Gaming on Trust Lands*, 73 Fed. Reg. at 29,356 (emphasis added). Even though the Department misinterpreted or misapplied "detriment" here by imposing an unauthorized heightened threshold, it at least looked at detriment to Kalispel itself, AR63863-72, as it did previously in considering Spokane's objection to Kalispel's casino, AR65835. If the Department here applied the standard now asserted by

Spokane, ECF No. 96 at 34, this decision would have been arbitrary and capricious for failure to justify that different, standardless standard. *See id.*at 44 (citing *Org. Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015)).

Fourth, Defendants' purported standard is merely unpersuasive dicta from another circuit. Courts in the Ninth Circuit are not bound by dicta, *United States v. Pinjuv*, 218 F.3d 1125, 1129 (9th Cir. 2000), particularly when it comes from another circuit, *Fid. Nat'l Fin., Inc. v. Friedman*, 855 F. Supp. 2d 948, 969 (D. Ariz. 2012). The cases from which Defendants import their asserted standard concern a tribe that was indisputably not "nearby" under the Part 292 IGRA regulations. *Stand Up for California! v. United States Dep't of Interior* ("*Stand Up III*"), 879 F.3d 1177, 1188 (D.C. Cir. 2018) (noting that Picayune Tribe at issue "is located outside the relevant 25-mile radius"); *Stand Up for California! v. U.S. Dep't of Interior* ("*Stand Up I*"), 919 F. Supp. 51, 75 (D.D.C. 2013) (same); *Stand Up II*, 204 F. Supp. 3d at 267 (same). The *Stand Up* courts' analyses of detriment to the surrounding community were dicta because "the Secretary was not required to consider the Picayune Tribe's concerns at all, because . . . it is *not* a 'nearby Indian tribe' or 'part of the surrounding community' under the applicable regulations." *Stand Up II*, 204 F. Supp. 3d at 266-67 (citations omitted). As the Department itself recognized in the relevant rulemaking, "[i]f the tribe is outside the definition [of 'nearby Indian tribe'], the effects will not be considered." *Gaming on Trust Lands*,

73 Fed. Reg. at 29,356. The *Stand Up* decisions thus "hold nothing beyond the facts of that case." *Cf. Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010).

Fifth, the *Stand Up* detriment dicta lacked statutory analysis. Those courts did not analyze the plain meaning of the term "detrimental" despite acknowledging that deference should not be given to an agency's interpretation of its own regulations if contrary to the regulations' plain language. *Stand Up III*, 879 F.3d at 1187. By failing to analyze the plain meaning of "detrimental" under IGRA and the Part 292 regulations, the *Stand Up* courts unlawfully substituted their view for Congress's. Even more notable, they did that despite acknowledging that courts may not "rewrite a statute because they might deem its effects susceptible of improvement." *Stand Up II*, 204 F. Supp. 3d at 262 (quoting *Badaracco v. C.I.R.*, 464 U.S. 386, 398 (1984)); *Stand Up I*, 919 F. Supp. at 74 (citing same).

Sixth, because Picayune was not a nearby Indian tribe, the *Stand Up* cases did not hold that the Department may use benefits to other parts of the surrounding community to offset detriment to a nearby tribe. While it is reasonable to offset some community harms with community benefits, it does not follow that all community benefits will offset detriment to a nearby tribe. For instance, the agreements with the City and the County mitigate the new casino's impacts to those local governments, but they provide no mitigation for Kalispel. Allowing the

Department to disregard impacts to nearby tribes because of benefits to separate local governments would defeat IGRA's distinct protection for nearby tribes.

### C. The Department's Determination that Spokane's Casino Would Not Be Detrimental to Kalispel was Arbitrary and Capricious.

When viewed against the legal standard in IGRA, the Department improperly concluded that a 33% decrease and nearly $50 million loss in gaming revenue, the elimination of all tribal per capita and elder payments, and the loss of an indeterminate number of jobs would not be detrimental to Kalispel. Defendants' downplaying of Kalispel's detriment as "decreased profitability" or a "potential loss of revenue" are gross mischaracterizations. ECF No. 96 at 36; ECF No. 98 at 23.

Defendants admit that tribal casino revenues are directly related to tribal governments' ability to provide essential services to their membership. ECF No. 96 at 8; ECF No. 98 at 11. Dismissing Kalispel's detriment here as merely a competitive harm would make sense only if it were based on an unsupported allegation of competitive harm like that claimed by Spokane in opposing Kalispel's two-part determination. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941 (7th Cir. 2000). But there, Spokane "did not submit any evidence documenting its allegation of severe detriment." AR65835. That is not the case here since the Administrative Record contains evidence of demonstrable detrimental impacts to Kalispel. *See supra* at 4-6. No tribe could show detriment under IGRA's actual standard if Kalispel's evidence is not sufficient here. *See* ECF No. 79 at 29.

The Department's findings that all these impacts will be mitigated by market growth over time and the "length of time it takes to construct and develop the Spokane Tribe's Project" are also unwarranted and immaterial. AR63851. That is like saying that a broken leg will be mitigated by healing over time, or that flightpath encroachment will be remedied by evolving control technology. Potential later resolution does not eliminate the fact and duration of current harm. Those findings are also undercut by the Department's own analyst, who wrote that "there is little basis for deciding on a prediction for market growth other than guessing" and then only ruled out "devastating impact[s]" based on generalizations. AR3574.

Finally, the Department's finding of no detriment to Kalispel here is belied by the significant losses at Spokane's casinos that it blames on Northern Quest without analysis. AR4678-80. If Northern Quest really has had such adverse impacts on casinos located more than 40 miles away, it is irrational to conclude that Spokane's nearly adjacent casino will not have at least as much detrimental impact on Northern Quest. In sum, the Department's explanation for its decision impermissibly runs counter to the evidence before the Department and cannot be ascribed to a difference in view or the product of agency expertise. *See San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). Thus, the decision to approve Spokane's casino despite its unmitigated detrimental impacts on Kalispel was arbitrary and capricious under IGRA.

## II. THE DEPARTMENT VIOLATED TRUST DUTIES TO KALISPEL AS A NEARBY INDIAN TRIBE WITH TRUST LANDS BY IMPROPERLY DISCOUNTING DETRIMENTAL IMPACTS AND FAVORING SPOKANE.

### A. The Department Failed to Comply With IGRA's Mandate to Protect Nearby Indian Tribes from Unmitigated Detrimental Impacts Caused by New Off-Reservation Casinos.

Defendants assert that Kalispel's breach-of-trust claim fails because the Department complied with IGRA, which benefits all tribes and does not confer a specific benefit on Kalispel. ECF No. 96 at 58-60; ECF No. 98 at 56. That contention is misleading. By crafting the post-IGRA, off-reservation gaming exception as a two-part determination, Congress avoided a fiduciary challenge that a balancing test could have presented. But the result is not that the trustee "can merely ask tribal nations to try to work together for the good of both" as the Department asserted. AR63809.

Instead, IGRA's two-part determination requires that the Department first satisfy fiduciary obligations to an applicant tribe under the part-one "best interest" requirement and then separately also satisfy fiduciary duties to "other nearby Indian tribes" under the part-two "would not be detrimental" requirement. 25 U.S.C. § 2719(b)(1)(A). These dual trust duties are imposed because "'[t]he government owes the same trust duty to all tribes'" under Section 2719 and "cannot favor one tribe over another." *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015). Also, "[i]t is fairly clear that *any* Federal government action is subject to the United

States' fiduciary duty responsibilities toward the Indian tribes." *Nance v. E.P.A.*, 645 F.2d 701, 711 (9th Cir. 1981). Additionally, "'[w]hen there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.'" *Fredericks v. United States*, 125 Fed. Cl. 404, 420 (2016) (quoting Restat. (Second) of Trusts § 183). Consistent with all this, the Department itself recognizes that it has duties of loyalty and to support Indian beneficial owners' use of trust assets when taking actions that potentially affect those trust assets. Dep't of the Interior, Departmental Manual, Part 303, §§ 2.6(C)(3), 2.7(B). Accordingly, there may be a claim for breach of fiduciary duties for federal interference with beneficial use of existing trust lands. *See Stand Up I*, 919 F. Supp. 3d at 83 n.28.

Defendants also are mistaken that IGRA does not confer a special benefit on Kalispel. It does, by expressly providing that the Department shall consult with "officials of other nearby Indian tribes" to determine whether gaming on newly acquired lands "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). In addition, the Part 292 regulations define "surrounding community" to include "nearby Indian tribe[s]" and require that applicant tribes provide information on "[a]nticipated costs of impacts to the surrounding community and . . . sources of revenue to mitigate them." 25 C.F.R. §§ 292.2, 292.18(d). Collectively, these statutory and regulatory directives impose a fiduciary duty on the Department to ensure that a proposed casino does not result in

unmitigated detriment to a nearby tribe. *See United States v. Mitchell*, 463 U.S. 206, 216-19 (1983) (regulations can create enforceable trust duties). IGRA accordingly creates an "actionable fiduciary obligation" by conferring a special tribal benefit on Kalispel. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 924 (9th Cir. 2008).

Where the Department "is obligated to act as a fiduciary . . . [its] actions must not merely meet the minimal requirements of administrative law but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001). In this, the Department "is required to exercise the greatest care in administering its trust obligations" and is bound by "the same trust principles that govern the conduct of private fiduciaries." *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont.*, 792 F.2d 782, 794 (9th Cir. 1986). Thus, the Department's standard of behavior is the "punctilio of an honor the most sensitive." *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1942).

Under these exacting standards, the Department's evaluation of Kalispel's detriment fell far short of the mark. The Department improperly disregarded the mechanism that IGRA and Part 292 created to protect nearby tribes and inappropriately discounted the documented detriment to Kalispel in order to favor and advance the interests of Spokane. Contrary to Defendants' assertions, this case does not present a trust claim precluded by a conflicting fiduciary duty to another

tribe, ECF No. 96 at 59 (discussing *Nance*); ECF No. 98 at 56 (same). Here, the Department was required to fulfill duties to both tribes under Section 2719 and *Redding Rancheria*, and could have done so by requiring mitigation for Kalispel's detriment. *Cf. Stand Up I*, 919 F. Supp. 2d at 76 (noting compact requiring millions of dollars in annual intertribal mitigation payments). By contrast, the statutory provision in *Nance* did not confer a special benefit on the objecting tribe. *Adm'r, State of Ariz. v. E.P.A.*, 151 F.3d 1205, 1211 (9th Cir. 1998), *amended on denial of reh'g*, 170 F.3d 870 (9th Cir. 1999). Also, in *Nance*, the objecting tribe failed to lodge a protest as required to activate a full panoply of protections, and there was a "strong possibility" that the concerned tribe "would not be prejudiced at all" by the approval. *Nance*, 645 F.2d at 711.

The facts in *Nance* are therefore more akin to Spokane's position in the Department's prior two-part determination for Kalispel. When viewed against the backdrop of today's regulations and case law, Spokane was outside the surrounding community and therefore not protected by IGRA's prohibition of unmitigated detriment on nearby tribes. Moreover, Spokane had failed to submit "any evidence" supporting its objection to the Kalispel casino even though it "could have submitted" whatever it deemed necessary to support its claim. AR65835. Finally, the Department reasonably concluded there that the Kalispel casino "should have little impact on the Spokane slot revenues at its casinos" because of an undisputed

compact limitation. AR65834-35. Comparisons with *Nance* and the 1997 Kalispel casino approval thus bolster Kalispel's claim here.

### B. The Department Improperly Evaluated Kalispel's Detriment by Viewing It Against the Higher Standard For a Distant Tribe Petitioning for Consultation.

In its Motion for Summary Judgment, Kalispel criticized the Department for analyzing Kalispel's harm in the consultation section of the Secretarial Determination instead of the section on detriment to the surrounding community. ECF No. 79 at 23-24. In response, the Department does not explain this; it merely suggests that the length of its discussion about Kalispel in the consultation section is indicative of thoughtful consideration. ECF No. 98 at 28-29. The length is irrelevant given the improper high standard applied to Kalispel's detriment.

Like the Department's avoidance of the threshold question of statutory interpretation described above, this evasion masks the Department's improper evaluation of Kalispel's harm. The Department previously analyzed Spokane's alleged detriment in the detriment section of its two-part determination for Kalispel, AR65833-35, and the Department likewise analyzed Kalispel's detriment in the detriment section of its draft decision here, AR65808-09. However, the Department disregarded its own regulations to analyze Kalispel's detriment in the consultation section of its final decision, since those require that detriment to nearby tribes be

considered in the same manner as detriment to other parts of the surrounding community. *Compare* 25 C.F.R. §§ 292.2, 292.18(b)-(d) *with* AR63845-55.

This maneuver was no accident. In its draft analysis, the Department analyzed Kalispel's detriment in the correct section but used the standard of harm applicable to tribes petitioning for consultation. AR65808-09. Tribes outside the 25-mile radius of the surrounding community must establish that they will be "directly, immediately and significantly impacted by the proposed gaming establishment" in order to obtain consultation. 25 C.F.R. § 292.2. That is a much higher standard of harm than the "detrimental" standard applied to nearby tribes and other members of the surrounding community. By shifting analysis of Kalispel's detriment to the consultation section, the Department employed a higher standard of detriment without expressly saying so. That may be why the Department improperly rejected the Kalispel concerns because the Spokane casino would not force closure of the Kalispel casino or wholly prohibit Kalispel government services. AR63870; AR63895. This violated IGRA and the Department's fiduciary duty to Kalispel.

### C. The Department Improperly Favored and Used Spokane's Interests to Discount Kalispel's Detriment.

Defendants misconstrue Kalispel's claim that the Department improperly considered Spokane's historical connection to Airway Heights. ECF No. 79 at 30-31. Kalispel does not contend that IGRA prohibits this consideration as Federal

Defendants suggest. ECF No. 98 at 35-36. Nor does Kalispel maintain that IGRA prohibits the Department from considering its favorable two-part determination for Kalispel as Spokane suggests. ECF No. 96 at 43-44.

Kalispel's complaint is that the Department considered this information in a manner not authorized by IGRA by mixing instead of separately satisfying each of the two separate parts of the two-part determination exception. Just as IGRA does not allow the Department to use detrimental impacts to a nearby tribe to offset benefits to an applicant tribe in part one of its determination, neither can the Department offset detriment to a nearby tribe in part two based on the interests of an applicant tribe. *See* 25 U.S.C. § 2719(b)(1)(A). The Department heeded this structural boundary in part one of its analysis, but it did not in part two. For instance, the Department itself downplayed the impacts to Kalispel by highlighting benefits to Spokane, AR63808-10, and the analysis relied on by the Department repeatedly compared Kalispel's detriment to Spokane's revenue and government spending, AR75477, AR7512.

The Department also manipulated the process to achieve a favorable result for Spokane. The Department removed the blatant bias against Kalispel from the draft detriment analysis, which would have asserted that Kalispel "should practice what it preaches . . . [and] consider[] other economic development projects and goals . . . instead of expending so much time and money in fighting the Spokane

Tribe's proposed project." AR65809-10. However, rather than fulfill its statutory and fiduciary duties to Kalispel, the Department applied the wrong standard, mischaracterized the facts, improperly mixed the two-part analysis, and claimed that its hands were tied and it had no other obligation. *See* AR63808-09. This improper consideration of the wrong factors in reviewing detriment to a nearby tribe under IGRA and the Department's trust duties to Kalispel warrant vacating this decision. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The problem here is not an unfounded claim of formal precommitment before issuance of the decision as the Department asserts. ECF No. 98 at 36-37. Rather, the Department improperly allowed support for Spokane's best interest under the first part of the two-part determination to taint its consideration of Kalispel's detriment under the second part of IGRA's two-part determination. *See* ECF No. 79 at 29-30.

For instance, the Department improperly discounted Kalispel's projected revenue loss by stating that the remaining revenues would still exceed Spokane's, AR7477; improperly discounted a $64,000 decrease in Kalispel governmental spending per tribal member because that would still allow Kalispel to spend more money per capita than Spokane, AR7512; and improperly offset Kalispel's job losses with Spokane's gains. AR7499. Also, the Department's choice of the contractor to review Kalispel's evidence of detriment indicates pro-Spokane bias

because the contractor previously represented Spokane on the same matter. AR29441 (concerning AES); *see also* AES Clients, Analytical Envtl. Servs., http://www.analyticalcorp.com/clients/ (last visited Apr. 16, 2019) (listing Spokane as a tribal client); *supra* at 17 (discussing AES subcontractor's inconsistent conclusions regarding development of the Kalispel and Spokane casinos in order to benefit Spokane); AR49635 (diminishing Kalispel's detriment from the Spokane casino by comparing reductions in Kalispel's future revenue to existing revenues rather than projected future revenue if the Spokane casino were not built). That contrasts with the Supreme Court's concern about federal consultants that have been communicating with the Government on behalf of another group whose interests might be affected by the federal action addressed by the consultant. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001).

In addition, the Department improperly used its prior approval of Kalispel's two-part determination to offset detrimental impacts from Spokane's proposed facility. *See* AR63808-09. Remedying any competition-related financial harm and furthering Spokane's interests within its aboriginal territory may be appropriate considerations when evaluating the benefits of Spokane's proposed gaming facility under the first part of the two-part determination. However, those factors have no bearing on the separate, second part.

Furthermore, Defendants' asserted inequity to Spokane here from the prior Kalispel casino decision is misleading because of the geographic and evidentiary distinctions noted in the Background section above. Based on those factual distinctions, the Department was under no obligation to consider, much less mitigate, Spokane's alleged detriment under IGRA, especially under the subsequently promulgated Part 292 regulations. Spokane's three casinos were all more than 45 miles away from Kalispel's proposed casino site and therefore clearly outside the surrounding community. 25 C.F.R. § 292.2; *see Stand Up I*, 919 F. Supp. 2d at 75 (concluding that DOI had no obligation under IGRA to consider the concerns of a tribe located 39 miles away from the proposed gaming site); *Stand Up II*, 204 F. Supp. 3d at 266-67 (same); *Gaming on Trust Lands*, 73 Fed. Reg. at 29,356. DOI would have also dismissed Spokane's claimed detriment as "[m]ere competition" because it was based on allegation rather than evidence. *See* AR63865 & n.296 (quoting Enterprise Rancheria Determination and making same point here). Regardless, the comparison confirms that the Department here improperly mixed the separate parts of IGRA's two-part determination and improperly subverted protection of Kalispel to support for Spokane by using Spokane's interests to offset Kalispel's detriment. *See State Farm*, 463 U.S. at 43.

## III. THE DEPARTMENT VIOLATED NEPA BY EXCLUDING ALTERNATIVES THAT WOULD HAVE HELPED MITIGATE KALISPEL'S HARM.

### A. Kalispel's NEPA Claims Can Be Considered Because They Are Not Purely Economic and Relate to Protected Governmental Interests.

The Department alleges that because Kalispel has raised economic issues, all of its NEPA claims must be dismissed. ECF No. 98 at 46-47. However, courts properly consider NEPA claims that implicate economic issues. Even the *Cachil Dehe* case cited by the Department considered NEPA claims challenging the purpose-and-need statement and the alternatives analysis that heavily involved "economic consequences" while refusing to consider claims of purely economic harm. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 603-06 (9th Cir. 2018). In contrast, the *Ashley Creek* case cited by the Department dismissed a chemical company's NEPA challenge to a mining project because the company's interest was a "purely economic injury that is not intertwined with an environmental interest." *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 945 (9th Cir. 2005).

The Department's standing-related defense overlooks the scope of Kalispel's concerns and the allowable scope of standing for NEPA claims. A plaintiff has standing to assert a procedural harm under NEPA when it claims that the agency violated procedural rules, those rules protect a concrete interest of the plaintiff, and it is reasonably probable that the challenged action threatens that concrete interest.

*Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1160 (9th Cir. 2017). Also, governments' broad range of interests provide standing to assert claims under NEPA "'as varied as' [their] 'responsibilities, powers, and assets.'" *Id.* at 1161 (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004)); *see also California ex rel. Imperial County Air Pollution Control Dist. v. Dep't of the Interior*, 781 F.3d 781, 790 (9th Cir. 2014). Kalispel's interest here is not purely economic, but broadly concerns its ability to provide essential governmental services for the welfare of its members. *See supra* at 3-6. These concerns are interrelated with the location and scope of the proposed casino and are therefore cognizable under NEPA. 40 C.F.R. 1508.14 ("When . . . economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment."). To the extent the Department believes Kalispel's injury is strictly economic, the Department's determination that adverse impacts to Kalispel would be mitigated under NEPA was unwarranted and improper. *See* AR63851.

### B. The Department's Purpose-And-Need Statement Was Not Broad Enough To Adequately Consider Alternative Developments.

As Kalispel detailed in its opening brief, the Department's purpose-and-need statement, by specifically including the "[p]otential profitability of Class III gaming in Airway Heights," unreasonably limited the alternatives that could satisfy the statement. ECF No. 79 at 39. The Department's assertion that this objective "did

not preclude a non-gaming option," ECF No. 98 at 49, is nonsensical. A purpose-and-need statement that specifically includes Class III gaming cannot possibly allow for proper consideration of alternatives that do not include Class III gaming, even under the Ninth Circuit's "rule of reason" standard. *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). The Department's statement in response to comments that "a non-gaming alternative would be a reasonable alternative," ECF No. 98 at 49 (quoting AR48711), does not transform the narrow purpose-and-need statement into one that allowed the Department to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a).

The Department's citation to *Cachil Dehe* on this point supports Kalispel. There, the Ninth Circuit found that the purpose-and-need statement identified several goals, including "the Congressional purposes set out in [IGRA,]" to be sufficiently broad. 889 F.3d at 603-04; *see also* ECF No. 79 at 41-42. There is no question that "the Congressional purposes set out in [IGRA]" encompass far more than "Class III gaming in Airway Heights." *See, e.g.*, 25 U.S.C. §§ 2701-02 (IGRA's congressional findings and policy sections). For this reason, the *Cachil Dehe* decision does not support the Department regarding the appropriate scope of its purpose-and-need statement. Rather, as explained previously, agencies "'may not define the project's objectives in terms so "unreasonably narrow," that only one alternative would accomplish the goals of the project.'" ECF No. 79 at 41 (quoting

*HonoluluTraffic.com v. Federal Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014)). Had the purpose-and-need statement here included advancing Congress's intent in enacting IGRA like the one in *Cachil Dehe*, the ensuing alternatives would have necessarily required some mitigation of detrimental impacts to Kalispel.

**C. The NEPA Alternatives Analysis Was Legally Insufficient.**

Kalispel has sufficiently raised its off-site alternatives arguments to allow full consideration by this Court. In *Cachil Dehe*, which the Department cites to assert otherwise, ECF No. 98 at 52-53, the Cachil Dehe Band had failed to participate in or otherwise comment on the Enterprise Rancheria's application to take land into trust until it commented on the final environmental impact statement ("EIS"). *See Cachil Dehe*, 889 F.3d at 591-92. In contrast, Kalispel has been involved—and, indeed, tried to be more involved than the Department ultimately allowed—in commenting on this project from its earliest stages. *See* AR12419, AR12518.

In fact, Kalispel in its May 2012 comments on the Draft EIS raised the issue that the Department "artificially limit[ed] the evaluation of off-site alternatives." AR39979. Kalispel also specifically commented that the Department's "analyses of the other off-site locations for the proposed casino on the reservation or on two properties in the City of Spokane" did not include an objective assessment. AR39984. Kalispel sufficiently raised this issue during the administrative process to alert the agency to its contentions, and the agency had the opportunity to give the

"issue meaningful consideration," but it did not. *Dep't of Transp. v. Pub. Citizens*, 541 U.S. 752, 764 (2004). Thus, this Court can consider Kalispel's arguments on the point. *See* ECF No. 79 at 37-38.

As detailed in its opening brief, the Department failed to adequately discuss the reasons for eliminating certain alternatives, and it failed to "rigorously explore" the alternatives it considered, but rejected. 40 C.F.R. § 1502.14(a); ECF No. 79 at 42-43. The Department did not consider off-site gaming alternatives because it assumed those would "defer meeting the Tribe's urgent needs" and would be only speculation "that the Tribe could successfully purchase, acquire into federal trust, and develop those parcels." AR48712. Contrary to Spokane's assertions, ECF No. 96 at 55-56, Kalispel identified why this conclusion was unreasonable: it failed to account for the possibility of working with a third-party casino developer or manager, ECF No. 79 at 37-38. In addition, development would need to occur on any parcel used for the project—not just non-Airway Heights parcels—making the Department's objection to an alternative development location an unreasonable basis for limiting the alternatives analysis.

The Department likewise failed to "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14(b). As detailed above, because the purpose-and-need statement was unduly narrowed, other realistic,

feasible alternatives were not considered for the project. Even the smaller casino alternative did not receive a full analysis. *See* ECF No. 79 at 43 & n.7. Thus, in addition to the failures under IGRA itself and the Department's own IGRA regulations and trust responsibilities, this matter must be remanded for a proper NEPA alternatives analysis.

## CONCLUSION

The Department violated IGRA and its trust responsibility to Kalispel by approving Spokane's casino despite substantial evidence of unmitigated detrimental impacts on Kalispel's government, members, and self-sufficiency. The Department also violated NEPA by unreasonably narrowing the project purpose and need, and by failing to adequately consider project alternatives that would still allow Spokane the economic development it seeks, but without the unmitigated detrimental impacts on Kalispel. The Department impermissibly favored the Spokane Tribe's application, created an impermissibly high standard of detriment for Kalispel to meet, and discounted the considerable evidence of economic, governmental, and social harms that Kalispel presented. For all these reasons, the Court should grant Kalispel summary judgment and accord it the relief requested in its Complaint. That must include a remand for proper analysis and mitigation.

Respectfully submitted,

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Dated: April 26, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on April 26, 2019, true and correct copies of the foregoing filing have been served on all counsel of record via filing with the Court's CM/ECF system.

*s/Zachary L. Welcker*
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