Jennifer A. MacLean (admitted *pro hac vice*)
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211
JMacLean@perkinscoie.com

Meredith R. Weinberg, WSBA No. 45713
Julie Wilson-McNerney, WSBA No. 46585
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
MWeinberg@perkinscoie.com
JWilsonMcNerney@perkinscoie.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KALISPEL TRIBE OF INDIANS and SPOKANE COUNTY,

Plaintiffs,

v.

U.S. DEP'T OF THE INTERIOR, et al.,

Defendants,

SPOKANE TRIBE OF INDIANS,

Intervenor-Defendant.

Case No. 2:17-cv-00138-WFN

PLAINTIFF SPOKANE COUNTY'S OPPOSITION TO DEFENDANTS' CROSS-MOTIONS AND REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

May 1, 2019
ORAL ARGUMENT REQUESTED

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Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

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Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

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Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
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700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
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700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

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Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

INTRODUCTION

Congress prohibited gaming on lands acquired in trust after October 17, 1988. 25 U.S.C. § 2719(a). It included a narrow exception to this prohibition: gaming can be permitted only if the Secretary determines, after consulting with appropriate State, local, and tribal officials, that gaming would not be detrimental to the surrounding community and the governor concurs. 25 U.S.C. § 2719(b)(1)(A). Congress made the policy determination that, as a rule, off-reservation gaming was harmful enough to prohibit it. When a tribe seeks an exception to that rule, the Secretary's starting presumption must be that casino is prohibited because it is harmful. The Secretary should not start with the question, "Is there any way I can justify it?"

But that is exactly what the Secretary did here. The Secretary asked, "Is there any way I can justify authorizing the Spokane Tribe to build a casino-resort beneath Fairchild Air Force Base's primary traffic pattern over the committed opposition of the largest representative government in the region, a nearby tribe, and numerous other governmental officials?" Somehow, he concluded yes, that it would not be detrimental to congregate many thousands of people 500 feet beneath refueling tankers conducting training operations day and night, exposing employees and visitors to heightened safety risks, aircraft fumes, noise, and other impacts.

If a decision as obviously irresponsible as this one is permissible,

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

Congress's prohibition against off-reservation gaming will become meaningless. The narrow exception Congress intended would swallow the rule. The fact is that the Secretary did not start with the presumption against off-reservation gaming, and he did not credit the views of the State and local officials if those officials opposed the casino. And the Secretary did not recognize that the Air Force's neutrality, which was not based on the merits of the project, but rather on its desire not to get "caught between the folks for and against the development," AR3576, does not negate the objections raised by the surrounding community because the *Air Force took no position*. That is what neutrality means. The Secretary heard what he wanted to hear and ignored what he did not. As a result, he made a number of errors that cumulatively led him to make a potentially catastrophic mistake.

The Court should vacate the Record of Decision (ROD) and the Two-Part Determination authorizing gaming as arbitrary, capricious, and contrary to law. Nothing in the Bureau of Indian Affairs' (BIA) or the Spokane Tribe's Cross-Motions for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment refutes the County's arguments that these decisions were arbitrary, capricious, and contrary to law.

A. BIA violated IGRA by failing to comply with its statutory duty to "consult" with the County.

Section 2719 of the Indian Gaming Regulatory Act (IGRA) prohibits gaming on lands acquired in trust after 1988, unless "the Secretary, *after*

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

consultation with . . . appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands . . . would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A) (emphasis added). BIA does not claim that it engaged in meaningful consultation with the County regarding the casino's impacts on the community the County represents. Nor does it claim that it attempted to work with the County to address the casino's adverse impacts. Rather, BIA argues that it interpreted "consultation" as requiring it only to ask the County for comments, which it was entirely free to disregard. *See* ECF 98 at 38. That is not consultation, and it does not satisfy the plain language of IGRA.

1. According to BIA, the word "consultation" in Section 2719 is ambiguous because Congress did not specify how the Secretary is to carry out his consultation duties. ECF 98 at 41-42. BIA asserts it may interpret Section 2719's consultation requirement as only requiring an opportunity to comment. ECF 98 at 38 (citing 25 C.F.R. §§ 292.19, 292.20). The "consultation" requirement in Section 2719, however, is not ambiguous, and equating "consultation" with an opportunity to provide comments is not a reasonable or permissible construction of the Act.

When interpreting a federal statute, courts must start with the plain words. *King v. Burwell*, -- U.S. --, 135 S. Ct. 2480, 2489 (2015). "[W]hen 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*.'" *Id.* at 2483 (quoting

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)) (emphasis added). Deference to an agency's interpretation is appropriate only if the court concludes—after conducting its analysis—that the statute is silent or ambiguous and the agency's interpretation "is a permissible construction of the statute." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 866 (1984).

Because Section 2719's "consultation" requirement is not ambiguous, deference to BIA's interpretation is not appropriate. The word "consultation" connotes a bilateral exchange. BIA's understanding of "consultation"—at least with respect to *tribal consultation*—is illustrative. BIA describes "consultation" to be a "deliberative process that aims to create effective collaboration and informed Federal decision-making . . . [and] is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility."[1]

When read in context within the overall statutory scheme, it is plain that Congress intended "consultation" to be the sort of meaningful exchange BIA offers tribes, not the comment period BIA provided by regulation. The language Congress chose in enacting IGRA establishes a distinction by requiring a period

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[1] Department of the Interior Policy on Consultation with Indian Tribes, https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf (last visited April 25, 2019).

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

for "public comment" in one provision and mandating "consultation" in two other provisions. Congress required the National Indian Gaming Commission (NIGC) to "allow a period of not less than thirty days for receipt of public comment" on nominees to the Commission. 25 U.S.C. § 2704(b)(2)(B). And a public comment period of limited duration makes sense in that context because nominees are political appointees already vetted by the Attorney General. *See id.* § 2704(b)(2)(A). By contrast, Congress mandated that the Secretary engage in "consultation": (1) with a tribe, when the Secretary prescribes gaming procedures to govern class III gaming in lieu of a tribal-state compact during litigation, *id.* § 2710(d)(7)(B)(vii); and (2) "with . . . appropriate State and local officials, including officials of other nearby Indian tribes" when determining whether an off-reservation casino will be detrimental to the surrounding community, *id.* § 2719(b)(1)(A). The two situations in which Congress mandated consultation involve circumstances where the consulting parties are uniquely qualified to determine detriment to their communities, and the Secretary is making a decision that will directly impact the consulting parties.

When Congress mandates consultation in one section of a statute and requires the opportunity to comment in another, it has distinguished between the processes such that equating the two "would render Congress's choice of language meaningless." *California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1086 (9th Cir. 2011). The Court must consider IGRA as a whole; its "duty, after all, is 'to construe statutes, *not isolated provisions*.'" *Burwell*,

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

135 S. Ct. at 2489 (quoting *Graham Cty. Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (emphasis added)).

BIA objects that IGRA's "legislative history says nothing about how the Department is to carry out consultation." ECF 98 at 42. That Congress did not prescribe the precise steps the Secretary must follow does not mean that "consultation" is ambiguous or that BIA can circumvent its duty by promulgating a regulation that merely offers a comment period instead. BIA also weakly suggests that Congress's selection of "consultation" in one section and "comment" in another only matters when the statutory requirements are "in close proximity" ECF 98 at 41, and in IGRA, they are not. It is true that the two provisions in question in *California Wilderness Coalition* were in close proximity. 631 F.3d at 1087 (discussing that the statute "use[s] distinct language in § 824(a)(1) and § 824(a)(2)"). But the court's decision did not turn on their proximity, and nothing in the case suggests that the terms "consultation" and "comment period" suddenly become ambiguous when separated by other sections. To the contrary, courts are required "to give effect, if possible, *to every clause and word of a statute*." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation omitted) (emphasis added); *see also King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (noting "the cardinal rule that a statute is to be read as a whole"). The Tribe takes the position that because Congress did not define "consultation" in IGRA, BIA was free to define it as a comment period by regulation, ECF 96 at 45, but the Ninth Circuit rejected that argument in

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

California Wilderness Coal. Here, giving effect "to every clause and word" of IGRA is easy. Because "consultation" and "comment period" are not synonymous in IGRA, it was impermissible for the Secretary to treat them as synonymous by agency regulation.

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A.*, 467 U.S. at 842-43. Congress plainly intended for the Secretary to engage in consultation with the County, not just offer it an opportunity to comment.[2] The statute makes that clear by requiring

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[2] Contrary to BIA's arguments, ECF 98 at 42, its regulations would not be entitled to deference because BIA is not tasked with implementing IGRA. Congress expressly granted rulemaking authority to NIGC, not the Secretary. 25 U.S.C. § 2706(b)(10) (identifying the powers of the Commission to include "promulgat[ing] such regulations and guidelines as it deems appropriate to implement the provisions of this chapter"). *See also Amador Cty., Cal. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011) (noting that NIGC is the regulatory body created by IGRA with rulemaking and enforcement authority); *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1265 (10th Cir. 2001) (concluding that because "neither the Secretary nor the Department of the Interior in general is charged with administering IGRA," the Secretary's

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

consultation in two instances and public comment in another. The Secretary's failure to engage in meaningful consultation with the County renders his decision arbitrary, capricious, and contrary to law.

2. BIA attempts to deflect the Court's attention from IGRA's unambiguous "consultation" requirement by blaming the County for submitting comments belatedly.[3] ECF 98 at 37-40; *see also* ECF 96 at 47. The fact is that BIA had no intention of engaging with the County in any meaningful fashion. BIA knew early on that the Interlocal Agreement contained a gag provision because it included a copy in the draft EIS. AR33279 (discussing Interlocal Agreement). BIA tries to trivialize the County's efforts to participate by only telling the Court that the County responded on May 16, 2012, "that it was unclear whether it would participate in the consultation." ECF 98 at 39 (citing

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interpretations of the statute are not entitled to deference); *but cf. Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015) (according deference without analysis).

[3] What BIA calls a "nearly ten-year decision process," ECF 10 at 66, began with a 2011 scoping report, *id*. at 14, and ended with a Two-Part Determination in June 2015, AR65422—a total of four years. When it became clear that BIA would proceed regardless of whether it consulted with the County and Airway Heights refused to eliminate the neutrality provision without terminating the entire agreement, the County agreed to termination. *See infra*, Section D (discussing BIA's arbitrary and capricious reliance on non-existent mitigation).

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

AR9727). It doesn't explain that the County asked BIA on March 15, 2012 for a 45-day extension while the Washington Attorney General considered whether the "neutrality" provision of the agreement violated state public policy, AR10619, or that the County was working "to ensure that the 470,000 residents of Spokane County—the people [the County] was elected to represent—have the proper voice and role in what could be the most meaningful decision confronting the future character and economy of our community," AR9727-28. *See also* AR48528-29 (Dec. 19, 2012 letter from County Commissioner stating concerns regarding Interlocal Agreement and detrimental impacts of project); AR1777-784 (attaching May 15, 2012 Attorney General opinion).

Given that the Secretary had an affirmative obligation to consult with "appropriate State and local officials" regarding a proposed casino's detrimental impacts on the community, the Secretary might himself have concluded that the gag provision in the Interlocal Agreement was contrary to IGRA or at least acknowledged that the agreement raised problems in his fulfilling his statutory responsibilities. *See Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 475 (9th Cir.1984) (noting that the "consultation obligation is an affirmative duty"). Yet BIA was entirely unconcerned that the Interlocal Agreement prevented the County from providing information that the Secretary needed to make a fully informed decision or that its termination required the County to forego mitigation. *See supra* Sec. D (discussing BIA's erroneous mitigation assumptions). In fact, BIA now labels the County's

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

decision to forego mitigation so that it could participate in consultation a "self-inflicted wound," EFC 98 at 63, rather than a reflection of the County's concerns regarding the serious environmental, safety, and economic impacts of the project.

The County's wound was "self-inflicted" to the extent that it trusted the Secretary would honor his consultation obligations and seriously consider the County's concerns. He did not. The County submitted comments in April 2013—more than *two years* before BIA issued its decision—and BIA never contacted the County regarding its concerns or sought to meet with County officials. The Spokane Tribe represents that BIA "held multiple meetings with County officials" to address the County's concerns, ECF 96 at 48, but that is not accurate. The County requested multiple meetings, but BIA granted only two, one of which it agreed to only after Senator Cantwell contacted the Assistant Secretary on the County's behalf—a meeting the Assistant Secretary ultimately skipped. ECF 82 at 32-33 (describing BIA's lack of response to the County). Yet BIA willingly met or communicated with the Spokane Tribe many times during that period. *See, e.g.*, AR3326, AR5062, AR5212, AR5688, AR5829, AR6334, AR6797, AR7746. BIA was indifferent to the County's concerns when the County was contractually barred from participating, and it was indifferent to the County's views after the Interlocal Agreement was terminated.

In fact, BIA's consultation was so devoid of meaningful interaction that BIA resorts to citing unrelated processes as evidence of consultation. *See* ECF

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

98 at 39-40. BIA claims that the City of Spokane "substantively engage[d] with the Department's consultation outreach," *id*. at 39, which only means that the City submitted a comment letter in response to BIA's invitation—a letter that stated the City's opposition to the casino and raised safety, zoning, encroachment, and other substantive concerns. The Joint Land Use Study (JLUS) process BIA then tries to claim as part of its consultation had nothing to do with BIA or the two-part determination. *See id*. It was a collaborative land use planning process funded by a grant *the County applied for* and the County participated in *for years*. ECF 82 at 15-16 (describing JLUS). BIA also suggests that the City of Spokane rescinded a resolution opposing the project as a "result of the consultation," which is untrue. *See id*. The City rescinded its resolution after the 2013 election substantially changed the composition of the Council.[4] It is also worth noting that the City never withdrew its comments on the EIS or the two-part determination, which outlines numerous detrimental impacts associated with the casino. AR06534-39. Yet the Secretary quickly dismisses the substance of those comments by citing the Council's rescission of its opposition.

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[4] Jonathan Brunt, "*14 Spokane City Council votes that would have been different under new majority*," The Spokesman-Review (Nov. 6, 2013), http://www.spokesman.com/blogs/spincontrol/2013/nov/06/we-hardly-knew-ye-republican-leaning-spokane-city-council/ (noting the new council would likely not have voted to formally oppose the Spokane Tribe proposed casino).

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

Congress required more when it mandated that the Secretary engage in consultation with State and local officials. It assigned the Secretary an affirmative obligation and expected the Secretary to engage meaningfully with local governmental officials, even if they opposed the project. The Secretary failed entirely to fulfill that obligation.

B. BIA's explanation for failing to address the County's argument that it should defer to the views of the local government is an impermissible post-hoc justification.

In its motion, BIA argues it did not have to respond to the County's deference arguments because "[t]he County's comments regarding deference were not reasonable and did not require a specific response." ECF 98 at 45. It further claims that IGRA does not require BIA to "defer to [the County's] views or even give them substantial weight" in determining whether the project would be detrimental to the surrounding community. *Id*. at 43. According to BIA, "neither NEPA nor the APA requires such a response, and the County does not show otherwise." *Id*. at 44. BIA is incorrect.

First, BIA's failure to address the County's argument violates the APA's mandate that agencies give a reasoned explanation for the actions they take. *Am. Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 921 (D.C. Cir. 2017) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42-52 (1983). The D.C. Circuit addressed precisely this point in *Butte Cty., Cal. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010). In that case, BIA—as it is wont to do—dismissed another county's arguments and evidence by explaining

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

that it was "not inclined to revisit" a prior determination by NIGC that proposed trust land in that case would be eligible for tribal gaming. *Id.* at 193-94.

The D.C. Circuit explained that two "straightforward propositions of administrative law" required vacatur of the decision. *Id.* at 194. First, the court explained that "under § 555(e) [of the APA], the agency must provide an interested party . . . with a 'brief statement of the grounds for denial' of the party's request," and "must 'articulate a satisfactory explanation' for its action." *Id.* (quoting 5 U.S.C. § 555(e); *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)). The court also explained that when an agency refuses to consider arguments and evidence before it, that refusal "constitutes arbitrary agency action within the meaning of § 706." *Id.* (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009)). BIA's dismissal of Butte County's material with the explanation that it was "not inclined to revisit" the gaming determination "had all the explanatory power of the reply of Bartelby the Scrivener to his employer: 'I would prefer not to.'" *Id.* at 195.

Here, BIA did not even inform the County that it was "not inclined" to consider the County's arguments; BIA simply ignored them. Now it offers an explanation: "[t]he County's comments regarding deference were not reasonable and did not require a specific response." ECF 98 at 45. But there are two problems with BIA's "explanation." First, it was not articulated prior to briefing in this litigation and is an impermissible post-hoc justification that the Court

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

cannot consider. *See Sec. and Exch. Comm'n v. Chenery Corp*., 332 U.S. 194, 196 (1947) (a reviewing court may not affirm an agency ruling for reasons not articulated by the agency in its decision).

Second, BIA's description of the County's deference argument as "unreasonable" only proves the County's argument that BIA's so-called "consultation" was not meaningful. There is nothing unreasonable about the County's view that local governmental officials know more about the communities they are elected to represent than a federal bureaucrat in Washington, D.C., or that the Secretary cannot disregard the County's opposition. The County's argument is fully consistent with principles of federalism embodied in the U.S. Constitution—principles for which BIA holds no regard. Presidential Executive Order 13132, for example, directs federal agencies to be guided by "fundamental federalism principles," including the principle that "[f]ederalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people." 64 Fed. Reg. 43255 (Aug. 4, 1999). It also provides that federal agencies "should be deferential to the States"—which are defined to include units of local government—"when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government." *Id.* at 43256.

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700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

It is also consistent with principles of deference. In an argument against the Kalispel Tribe, BIA claims that because Congress tasked the Secretary with implementing the two-part determination, the "detriment analysis falls within its area of expertise." ECF 98 at 25-26. But Congress required the Secretary to consult with local officials precisely because the Secretary has *no expertise* in local affairs. When the Secretary concludes that the County will not be detrimentally impacted, and the County concludes the opposite, it is the County that has the expertise and it is the County's views that are entitled to deference. *See, e.g., Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (discussing land use control as "essential aspect of achieving a satisfactory quality of life").

BIA incorrectly characterizes the County's argument as insisting that the law grants it a veto. *See* ECF 98 at 44-45; *see also* ECF 96 at 46 (arguing that the Assistant Secretary's interpretation of 2719 requiring that "affected governmental entities all agree[] to the proposal" was just "one Department officials' statement"). But IGRA does require that "consultation" entail a meaningful exchange, and the APA does require the Secretary to address the County's argument and explain why its concerns about the community it represents were disregarded. *See* ECF 82 at 34 ("When the largest jurisdictional government strongly opposes gaming for non-frivolous reasons, overriding the County's views without cogent explanation as to why its opposition is irrelevant violates IGRA.").

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700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

Reading Section 2719 to allow the Secretary to ignore the strong objections of the local government without seriously considering its arguments is not exercising the "greatest caution"; it is arbitrary and capricious. Doing so is inconsistent with the federalism principles the County described, *see* AR53734-35, and with the Departmental policy the Assistant Secretary described to Congress: "Indian tribes should not be deprived of the economic opportunity a gaming establishment in a more economically advantageous market can provide, as long as State and local officials, neighboring tribes, and the Tribe *all agree* that the gaming establishment will be of mutual benefit." *Hearing on S. 1870 Before the Select Comm. on Indian Affairs to Amend the Indian Gaming Regulatory Act*, 105th Cong., 2d Sess. 1 (1998) (emphasis added).

Section 2719 prohibits gaming on lands acquired in trust after 1988. 25 U.S.C. § 2719(a). The two-part determination in Section 2719(b)(1)(A) is the only exception to that prohibition for tribes that already had lands in 1988. Exceptions to a general prohibition are to be construed narrowly to avoid negating the general rule. *Cf. Atl. Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286-87 (1970) (explaining in the context of an anti-injunction act challenge that when a legislative policy "expressed in a clearcut prohibition qualified only by specifically defined exceptions . . . , exceptions should not be enlarged by loose statutory construction"). The Department asserts that nothing in IGRA requires two-part determinations to be rarely granted, ECF 98 at 35, but the Department has stated repeatedly—in

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700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

decisions and before Congress—that two-part determinations are disfavored. *See* AR53738-39 (explaining in the decision for the Enterprise Rancheria that "the Department will apply heavy scrutiny to tribal applications for off-reservation gaming" and "will seek to avoid upsetting the intent of Congress, which favors tribal gaming on existing and former reservations"). The overarching purpose of the Executive Order on Federalism is to protect "the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution" by ensuring that agencies carefully consider how their actions impact issues of traditionally local concern and meaningfully involve local governments in such actions. 64 Fed. Reg. 43255. The County's argument that principles of federalism require the Department to accord it more deference than it did is not unreasonable; it is an argument based on the U.S. Constitution. *See* AR53734-35 (discussing Supreme Court cases addressing federalism principles and the role of local government). BIA's argument that IGRA did not require it to "defer to [the County's] views *or even give them substantial weight*" violates all of those principles. ECF 98 at 43 (emphasis added).

The Department is perfectly willing to give the views of local government substantial weight—*as long as they support BIA's decision*. BIA essentially admits that it places little weight on community *opposition*, noting that it "has *on occasion* considered community opposition." ECF 98 at 45 (emphasis added). In the actual 2011 two-part determination for the Enterprise Rancheria

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700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

BIA cites, *id.*, BIA notes the advisory vote essentially in passing, but states that "[notwithstanding that vote], the Tribe's proposed Resort enjoys strong local support," but concluded that the intergovernmental agreements and continuing relationships the county and city had with the tribe outweighed the advisory vote.[5] The County had nothing comparable with the Tribe, including no continuing relationship, yet that is not considered at all.

When the local community supports gaming, however, BIA makes much of their support. For example, BIA emphasized "the firm support of the residents, governments, and organizations in the surrounding community" in its 2011 "no detriment" finding for the North Fork Tribe.[6] It cited the "[m]any letters of support expressing affirmative support for the Resort and the benefits to the surrounding community and *thereby helping to confirm* that the Resort would not have a detrimental impact on the surrounding community" in the

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[5] Secretary's Determination for the Enterprise Rancheria of Maidu Indians of California at 25, 30-32 (Sept. 1, 2011), https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc015015.pdf.

[6] Secretary's Determination for the North Fork Rancheria of Mono Indians of California at 42-43 (Sept. 1, 2011), available at https://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/north-fork-rancheria-of-mono-indians-of-california/idc015016.pdf/view.

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700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

record.[7] When BIA approved a two-part determination for the Shawnee Tribe on January 19, 2017, it emphasized that the "strong support from the local government *is strong evidence of the lack of detriment to the surrounding community*," and that its "ultimate conclusion [of no detriment was] based on the support of the local officials who are elected to represent the City of Guymon and tribes in Oklahoma."[8] Yet the numerous letters opposing the Spokane Tribe's casino did nothing, apparently, to cast doubt on the Tribe's proposal here. *See* ECF 82 at 21 (listing examples of opposition to casino).

Assigning substantial weight to the views of the local governments when they support a project but dismissing their concerns when they do not is the epitome of arbitrary and capricious decisionmaking. An "[u]nexplained inconsistency" between agency actions is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005). BIA was obligated to address the County's arguments, but it did not. The County's arguments regarding federalism and deference were not unreasonable. They were based on

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[7] *Id*. at 42 (emphasis added).

[8] Secretary's Determination for the Shawnee Tribe at 40, 43 (Jan. 19, 2017), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/gaming-applications/2017.01.19%20Shawnee%20sigd%20%28cover%20letter%20with%202%20Part%29.pdf (emphasis added).

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

the constitutional structure the founders intended. It should have given the County's opposition significant weight, but it did not. By failing to address the County's arguments or give the County's opposition any weight, BIA violated the APA.

C. BIA's failure to independently consider the County's APZ argument and its reliance on the Air Force was arbitrary and capricious.

A basic requirement of the APA is that agencies provide a "reasoned explanation" for their decisions. *See, e.g., Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. BIA's "reasoned explanation" for not analyzing the County's arguments about accident potential zones (APZs) is that the Air Force disagreed with the County (without explanation) and BIA is entitled to rely on the Air Force's expertise. There are two failings with BIA's position. First, if an agency can blindly adopt another agency's conclusion when that conclusion is not itself supported by a "reasoned explanation," there would be a gaping hole in APA review. That is not the law. Second, the County's APZ arguments were not limited to the Air Force's designation. The County also raised other questions that BIA failed to address.

1. BIA has no credible response to the argument that it failed to consider the County's concerns regarding the proper location of FAFB's APZs, so it resorts to mischaracterizing the County's arguments. BIA claims that "the County is not arguing that the Department 'failed to consider an important aspect of the problem,' because the Department did consider the Air Force's

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

APZs in its decision." ECF 98 at 58 (citation omitted). But that is not correct. The *heading* of the County's argument states, "*BIA did not independently consider the County's safety concerns regarding the location of the APZs* or seek a reasoned explanation from the Air Force." ECF 82 at 42 (emphasis added); *see also id.* ("BIA did not address the County's comments").

BIA also claims that "the Department did consider the Air Force's APZs in its decision," ECF 98 at 58, but contradicts itself in its facts where it states that it "referred the County's concerns to the Air Force, which disagreed about the need for new APZs," ECF 98 at 17 (citing AR3433). There is nothing in the record that demonstrates that BIA independently considered the County's safety concerns regarding the location of FAFB's APZs, and BIA has failed to cite to evidence demonstrating otherwise.

2. BIA describes the County's letter as if it were limited to information provided by the Air Force in response to a FOIA request, ECF 98 at 57, but the County's letter was based on much more than that. In addition to the Department of Defense (DoD) guidance recommending modification of APZs when there are multiple flight tracks, the County cited other guidance and studies. *See* AR36689673. The County did, of course, cite DoD guidance recommending that "[w]here multiple flight tracks exist and significant numbers of aircraft operations are on multiple flight tracks, modifications may be made to create APZs that conform to the multiple flight tracks." AR3671. But the County also brought to BIA's attention Washington State guidance that provides that "*it*

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

is essential to adjust safety zones to fit the airfield configuration, usage characteristics, and other factors associated with a specific airport." AR3672 (emphasis in original); *see also* AR3668 (noting that the JLUS adopted FAFB's 2007 APZs in 2011 without taking into account actual FAFB operations or the 2011 DoD guidance such that safety risks might be underestimated). And the County cited the California Airport Land Use Planning Handbook, which states that APZs for military runways for large aircraft are based on the assumption that flight routes are predominately straight-in and straight-out flight routes, which the planner "*must modify* for turning routes and traffic pattern activity." AR3672 (emphasis added).

If FAFB's APZs were modified to conform to existing traffic patterns based on the data the FAFB produced under FOIA, the casino would be encompassed in APZ II, an area of measurably higher risk unsuitable for casino development. AR3676. The County also noted four major accidents that had occurred within two miles of the casino site, including one mid-air collision of two bombers that rained pieces of debris in the immediate vicinity of the proposed location, and resulted in one of the bombers crashing to the ground just blocks away from the proposed location. *Id*. And the County also questioned comments from the Spokane Tribe's aviation safety consultant that doubted the authenticity of FAFB's radar tracks. AR3677. According to the Tribe's consultation, FAFB's radar data, "if flown as shown, . . . is *both unsafe and blatantly dangerous*. The depicted pattern, which is shown to overfly the

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

property, would require a very 'tight' pattern with a turn to final/base leg far too close to the runway." *Id*. (emphasis added). The County raised several more issues than BIA describes, none of which BIA addressed or independently considered.

3. The sum total of BIA's effort was to refer the matter to the Air Force. The Air Force made two points in response without explanation. First, it noted that there is a "greater chance of having an aircraft incident on a site located in close proximity to an airfield, such as the STEP site, than for locations away from the airfield even if the site is outside the geographic areas of highest accident potential." AR3433. Second, the Air Force stated that "[i]t was the consensus of all the organizations that the Fairchild APZs are appropriately aligned in [accordance with] the Air Force AICUZ policy and the AICUZ DODI" without further analysis. *Id.*

This response does not constitute the sort of "reasoned explanation" the APA requires. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The Air Force did not explain why it concluded that the APZs were properly aligned, despite the fact that DoD issued guidance recommending APZ modification, four years after the Air Force completed the 2007 FAFB AICUZ study. AR3673. The Air Force also did not explain why the tens of thousands of banking approaches and departures hundreds of feet above the casino site somehow present less significant safety risks than straight-in/straight-out approaches. *See* AR3674 (explaining that casino "is directly below FAFB's most heavily used training flight pattern," and

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

"directly below the downwind turn, the most hazardous portion of the pattern, especially during takeoffs and landings").

BIA argues that the Air Force did provide a reasoned explanation for its decision—namely that the Air Force explained "[t]he briefing does not contain any new information." ECF 98 at 59 (citing AR3433). The "briefing," however, only refers to the Air Force's briefing to BIA. That briefing did not discuss the DoD guidance document or why the APZs should not be modified in light of the guidance. In fact, there are a number of possible reasons why the Air Force might have decided not to modify the APZs, including several that have nothing to do with safety. It is possible that the Air Force determined that modifying the APZs at FAFB would create problems at other bases, where the local communities are in conflict with the bases. It is also possible that the Air Force was concerned that modifying the APZs could potentially expose the Air Force to liability.[9] *See, e.g.*, Major Walter S. King, *The Fifth Amendment Takings*

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[9] The government operation of aircraft can be subject to takings claims when "[f]lights over private land ... are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *United States v. Causby*, 328 U.S. 256, 266 (1946); *see also Griggs v. Allegheny Cty.*, 369 U.S. 84, 87-90 (1962) (finding a taking when "[r]egular and almost continuous daily flights . . . directly over and very, very close to [the] plaintiff's residence" made conversations and sleep in the residence difficult, rattled windows, caused

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

Implications of Air Force Aircraft Overflights and the Air Installation Compatible Use Zone Program, 43 A.F. L. Rev. 197, 235-36 (1997).

BIA also argues that the County's objections are misplaced because the Air Force is not a party to this action. ECF 98 at 58. Nor could it be, given that there was not any final agency action on the Air Force's part. The County did not ask the Air Force to reconsider its APZs; it asked *BIA* not to issue a decision until a new AICUZ was prepared and a supplemental EIS evaluated the safety questions. AR3678. BIA did not rely on Air Force expertise because there is nothing in the record that indicates that the Air Force exercised its expertise. BIA cannot rely on unsupported conclusions because such reliance is arbitrary and capricious. Agencies cannot "'blindly adopt the conclusions of the consulting agency, citing that agency's expertise.'" ECF 82 at 43 (quoting *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006)). Agencies "may not turn a blind eye to errors and omissions apparent" from another agency's analysis because doing so ignores important aspects of the problem. *Ergon-West*

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plaster to fall from walls and ceilings, and negatively impacted residents' health). The Federal Circuit outlined three factors in evaluating whether overflights constitute a taking: (1) whether the planes flew directly over the plaintiff's land; (2) the altitude and frequency of the flights; and (3) whether the flights directly and immediately interfered with the plaintiff's enjoyment and use of the land. *Brown v. United States*, 73 F.3d 1100, 1102 (Fed. Cir. 1996).

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

Virginia, Inc. v. Envtl. Prot. Agency, 896 F.3d 600, 612 (4th Cir. 2018) (internal citation omitted). The Air Force offered no analysis for its decision. Turning a blind eye to the Air Force's omissions, BIA ignored important aspects of the problem and left the record devoid of any reasoned explanation.

4. The Spokane Tribe counters that the County "offers no reason why the Department should have doubted the expert opinion of the agency tasked with assessing the risk of flight accidents." ECF 96 at 51. Not so. The County cited three guidance documents, including one from DoD, all of which indicate that APZs should be modified to conform to actual operations. AR3671-72. The County cited FAFB radar tracks showing actual operations over the casino site, of which there are tens of thousands annually. *Id.* The County noted the Tribe's consultant's concerns about the "unsafe and blatantly dangerous" operations at FAFB, if the radar tracks were accurate. *Id.* These are all reasons why BIA, at a minimum, should have asked for explanation.

In any case, BIA could not simply defer to the Air Force because some of the questions the County raised do not relate to the Air Force's expertise. BIA did not explain any of its conclusions on these questions because it did not consider them. The Washington and California guidance are not within the Air Force's expertise. Even if the Air Force legitimately determined that it was unnecessary to revise its APZs under *DoD guidance* for purposes of the AICUZ, the APZs a surrounding community chooses to apply for zoning purposes can differ. The Air Force's identification of APZs does not preempt state and local

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

decisionmakers from establishing their own APZs for zoning purposes. In fact, state policy decisions control outside base boundaries—which is precisely why encroachment is a major concern for the Air Force. The Spokane Tribe claims that the Air Force has jurisdiction by law and special expertise, ECF 96 at 51, but in reality, the state and local governments have jurisdiction and expertise over safety and zoning considerations off-base. The fact that the Air Force applied its default APZ designation in its 2007 AICUZ for FAFB does not excuse BIA from considering whether Washington State guidance (which follows California guidance) recommends a different approach in areas surrounding military bases. There is no evidence in the record that anyone considered that issue or whether doing so might have affected the analysis.

Nor did BIA address questions the Tribe's consultant raised about the radar tracks FAFB provided. The Tribe's expert insisted that if FAFB's radar tracks were accurate, the pattern flown at FAFB was both "unsafe and blatantly dangerous." AR3676-77 (arguing that FAFB's radar tracks "do[] not accurately portray flight paths, flight activity, and normal adherence to aircraft operational parameters"); *see also id*. (describing the radar tracks as depicting a "highly aggressive pattern that would leave no room for error or unexpected occurrences, such as a stronger crosswind than was forecast or expected" and requesting an analysis of the true risks).

The Air Force did not address this question and neither did BIA. It does not require an aviation expert to realize that building a casino-resort

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

immediately beneath the final approach/initial turn of a traffic pattern for refueling tankers and other military aircraft training 500 feet above poses safety risks for pilots and the public. Even the Tribe's expert suggested the training operations at FAFB depicted by the radar tracks was particularly aggressive and unsafe. BIA was required to consider this issue and the guidance the County cited, but it did not. Not only did it fail to provide a "reasoned explanation" for its decision, it did not—as BIA argues—"consider an important aspect of the problem." ECF 98 at 58 (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

5. The Spokane Tribe argues that "[t]he Air Force itself never opposed the [casino] or suggested that the project would impede operation of the base." ECF 96 at 49. But the Air Force very succinctly explained to BIA its neutrality: "We don't want to get caught between the folks for and against the development." AR3576. The Air Force may be "fully capable of speaking for itself if it opposed the project," ECF 96 at 53, but BIA knew that *in this case*, the Air Force's neutrality was based on its desire to avoid the dispute.

To the extent that the Spokane Tribe claims that the Air Force never suggested that "the project would impede the operation of the base," ECF 96 at 49, the Air Force warned BIA that it "does not hypothesize or take positions (pro/con) as to whether or not a base would be impacted by a (potential) future round of BRAC" in the context of responding to concerns regarding the casino. AR9275. The Tribe claims the Air Force "never once suggested that any such safety issues existed," ECF 96 at 50, but that is not true. The Air Force expressly

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

stated there is a "greater chance of having an aircraft incident on a site located in close proximity to an airfield, such as the STEP site, than for locations away from the airfield even if the site is outside the geographic areas of highest accident potential." AR3433. In its comments on the draft EIS, the Air Force asked, "Is there a safety risk for overflights?" AR31208. No clear answer to that appears in the record, apart from the Air Force's admission that accident risks are higher at a site in close proximity to an airfield, like the casino site.

The County is not substituting its judgment for the Air Force's—as the Tribe argues, ECF 96 at 53—because the Air Force *never made any judgment*. Neutrality is not a judgment, and the Air Force's neutrality does not foreclose the County or the Court from considering the numerous concerns Air Force personnel noted regarding the overflights, noise, vibrations, exhaust, potential hearing impacts, light and glare problems and still reaching their own conclusions. AR 31196-31209.

For its part, the Tribe asserts that the County did not argue that the casino violated the terms of the JLUS's recommendations. ECF 96 at 51. That is obviously not correct. The County argued that the casino violated Strategy 50, the purpose of which is "to prevent large concentrations of people . . . within areas impacted by aviation operations." ECF 82 at 46-51. The Tribe can quibble with the County's attempt to calculate the acreage of the places where people might actually be (e.g., the casino and parking lots), but at any given time, thousands of people will congregate in the approximately 22-acre casino-resort,

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

not space themselves out evenly across 122 acres. Relying on a technical interpretation that entirely defeats the purpose of Strategy 50 illustrates again the lengths to which the Secretary will go to find no detriment.

D. NEPA and the APA require the Department to properly reflect that the County impacts would not be mitigated, regardless of whether the County's "wound was self-inflicted."

The Department and the Tribe seek to make much of the County's withdrawal from the Interlocal Agreement between the City of Airway Heights and the County. That decision cost the County a share of the payments that Airway Heights receives from the Tribe under their Memorandum of Agreement (MOA), but it gained the County the ability to represent the interests of its over 460,000 residents. ECF 98 at 62-64; ECF 96 at 54.

The Department and the Spokane Tribe deride the County's decision to terminate the Interlocal Agreement, labeling it a "self-inflicted wound." ECF 98 at 63; ECF 96 at 47. Regardless of its cause, the Department was legally obligated to acknowledge and take into consideration in the final EIS and the Two-Part Determination that the County would not receive any mitigation. It did not do so, and that violates NEPA and the APA. *See, e.g.*, AR65467 n.230 (stating that Airway Heights was obligated to provide a share of its mitigation to the County in Two-Part Determination). When an agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency"—as the Department did here—its decision is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

The Department attempts to deflect attention from its arbitrary and capricious decision by downplaying the dilemma the County faced and implying that it simply chose not to comment. The Department knows that is not accurate. The Interlocal Agreement imposed a quid pro quo on the County requiring it to remain "'neutral'" about the Tribe's application, which "mean[t] not submitting any written communication to any official of the United States Department of the Interior, the Office of the Governor or any other entities taking a position in support or in opposition to gaming activities on the Trust Property." AR20500. In exchange for the County's silence, Airway Heights promised to pay the County 20 percent of the quarterly payments Airway Heights was to receive under its MOA with the Tribe. *Id.*

If the Secretary were actually concerned about making a fully-informed Two-Part Determination, one would expect him to question an agreement that gags the largest representative government in the region or at least respond to the County's concerns regarding the Interlocal Agreement. The County notified BIA on multiple occasions that it was trying to eliminate the neutrality provision from the Interlocal Agreement. AR53047-48; AR1777-78; AR7638. The Department, however, did not question the Interlocal Agreement or acknowledge the County's efforts. AR1777-84. And it continued to treat County impacts as mitigated even after being informed that the City and the County terminated the Interlocal Agreement. AR65467; AR53052.

The Department again tries to justify its arbitrary and capricious decision

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

by accusing the County of "seek[ing] to use its self-inflicted wound as a basis to overturn the Department's decision on the ground of unmitigated impacts." ECF 98 at 63. That is not correct; the County argues that the Department failed to accurately reflect in the ROD and Two-Part Determination that the County's impacts would not be mitigated because Airway Heights and the County terminated the Interlocal Agreement. To be clear, the Department stated in the ROD for the final EIS that "[u]nder Section 3.3 of the MOA, Airway Heights remains obligated to provide a share of MOA annual payments to the County" and that "Airway Heights and the County would negotiate an agreement no later than the first full calendar quarter subsequent to the commencement of any gaming activities on the Site." AR65502. The Department concludes that "[s]uch an agreement would ensure that the County will receive sufficient funds from the annual payments set forth in Section 6.0 of the MOA to mitigate impacts from the Proposed Project associated with law enforcement services and transportation planning and funding." *Id.* The Department made the same assertion in the Two-Part Determination. *See, e.g.*, AR65467 n.230.

Those statements are false. Yet the Secretary and the Spokane Tribe persist in making arguments that ignore this material fact. ECF 98 at 63 ("The Tribe is still obligated to make payments to the City pursuant to the MOA and Intergovernmental Agreement ("IGA")"); ECF 96 at 54 ("And the City remains obligated, under its Memorandum of Agreement with the Tribe, to 'be responsible' for sharing the Tribe's mitigation payments with the County

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

'pursuant to an agreement between the City and the County'" (citing AR20483)). The Termination of Interlocal Agreement Between the City of Airway Heights and Spokane County expressly states that "the COUNTY and the CITY desire to mutually terminate, in its entirety, the Interlocal Agreement and the COUNTY desires to acknowledge *the CITY has satisfied and has no further obligation to the COUNTY under Subparagraph 3.3 of the MOA*." AR52173-74 (emphasis added).[10]

The Department may lay blame for the termination of the Interlocal Agreement wherever it wishes, but that does not excuse it from complying with NEPA and the APA. Under NEPA, mitigation must "be discussed in sufficient detail to ensure that environmental consequences have been *fairly evaluated*." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) (emphasis added). The Department claims that County impacts will be mitigated by payments under Section 3.3 of the MOA, but that is not true. "[A]n agency may not rely on incorrect assumptions or data in an EIS." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005). *Cf. South Fork Band Council of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d

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[10] The letter from Airway Heights—to which the Termination of Interlocal Agreement is attached—also states that the 20 percent share the City agreed to pay the County was consideration "for gaming impacts occurring on the property and [the County's] neutrality." AR52085.

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700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

718, 726-27 (9th Cir. 2009) ("An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective."). Where a decision "runs counter to the evidence before the agency," courts must reverse the decision as arbitrary and capricious. *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010) (internal quotations omitted).

Here, it is undisputed that Airway Heights would not agree to release the County from the neutrality provision in the Interlocal Agreement. *See* AR53047-48. The only reasonable option available to the County was mutual termination of the agreement in its entirety. *Id*. There is no dispute that Airway Heights and the County agreed to terminate the Interlocal Agreement in its entirety, AR52173, and that the Department was informed of its termination on several occasions. In fact, termination of the Interlocal Agreement occurred in January 2013, *two years before* the Department issued the Two-Part Determination and the ROD. AR65422-5542. The Department's continued reliance in the EIS, ROD and Secretarial Determination on mitigation that does not exist in order to conclude that County impacts were mitigated and that the County would not be detrimentally affected was arbitrary and capricious.

Even if the County had remained a party to the Interlocal Agreement, and had received mitigation payments from the City, those payments would not have been sufficient to mitigate the effects of the casino—as the County made clear. ECF 82 at 38-42. Payments to the County cannot mitigate the serious safety

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

risks building a casino at that location poses to the community, Air Force pilots, and visitors. *See id*. at 42-44. The City and the County negotiated the Interlocal Agreement to address the City's annexation of the site and the mitigation payments were for that purpose—not casino gaming. AR65468-69; AR53050. The County had no role in negotiating the increased mitigation payments Airway Heights separately worked out with the Tribe for casino gaming, nor any knowledge of the size of the development the Tribe was contemplating. Safety risks aside, the County would not have agreed that those payments were sufficient to mitigate community impacts. County impacts would not have been mitigated *even if* the Interlocal Agreement had not been terminated.

The Department now argues that even if the County will not receive mitigation payments, the Department's statements were not unreasonable. ECF 98 at 54. The Department's position appears to be that it is not unreasonable for it to base its decision on information that is demonstrably false. That is not the law. The Department also seems to suggest that because the Tribe worked closely with Airway Heights, its conclusion that the *County's* impacts will be mitigated pursuant to a terminated agreement was not arbitrary and capricious. *Id*. The suggestion seems to be that the City knew better than the County what impacts the County needed to have mitigated. *Id*. That is mistaken. Airway Heights represents only a small portion (6,000 residents) of the nearly half-million residents of the County, and it cannot and does not have the same concerns about finances, infrastructure, or services as the County. AR52720.

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

The Department also argues that it reasonably found that the County will benefit from the casino, so mitigation (apparently) isn't even necessary. ECF 98 at 54-55 (citing expected revenue for the County from construction costs and creation of construction and other jobs). Unsurprisingly, the Department does not cite to the record for this conclusion, since there is no factual basis for it. *See, e.g.*, AR0052747 (County comments noting that final EIS contains no formal analysis relating to the conclusion that County impacts would be offset by, among other things, revenues resulting from construction, and as a result, cannot properly be relied on by the Department). The Department also asserts that the County is entitled to revenues through the Tribal-State Gaming Compact, but the language the Department cites relates to the Spokane Tribe's gaming revenues set aside for problem gambling support services (per the Compact), the wager limit that the Tribe must determine under the Compact, and the age limit that the Tribe must set under the Compact. ECF 98 at 55 (citing AR65470). While these payments may address an aspect of problem gambling, they do not address other impacts to the County, like the casino's drain on emergency resources and adverse effects on transportation. AR52746-49.

E. The County's NEPA claims were not purely or even primarily economic.

BIA attempts to defend its NEPA compliance by taking undue liberties with the facts. BIA argues that the County's NEPA claims must fail because the County has only alleged "purely economic interests that are not cognizable

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

under NEPA." ECF No. 98 at 46-47 (representing that the County's NEPA arguments "are purely economic, stemming either from . . . potential economic harms to FAFB"). That is not so. The County's claims clearly identify impacts that are not "purely economic" and, in any event economic interests are cognizable under NEPA.

First, in its comments on the EIS, the County raised a variety of concerns, including the casino project's impacts on transportation (including traffic and transit) and public services. *See* AR52731-52750. These impacts fall within the categories recognized under NEPA's implementing regulations. *See* 40 C.F.R. § 1508.8 (recognizing "ecological . . ., aesthetic, historic, cultural, economic, social, or health" implications as impacts that must be carefully considered during NEPA review). Most significantly, the County identified serious safety impacts, including the risks posed by congregating a large number of people immediately beneath FAFB's VFR traffic pattern, as well as impacts on Air Force operations due to noise, light, and glare caused by the casino. AR52745-46. Public safety is one of the key considerations under NEPA. *See*, *e.g.*, 42 U.S.C. § 4331(b) (stating that NEPA provides that agencies should "assure for all Americans *safe, healthful*, productive, and esthetically and culturally pleasing surroundings" and "attain the widest range of beneficial uses of the environment *without* degradation, *risk to health or safety*, or other undesirable and unintended consequences") (emphasis added).

The County raised NEPA arguments related to safety impacts, ECF 82 at

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

35-36, 42-44; compatibility with land use laws, *id.* at 44-50; and BIA's failure to recognize that the County would not receive mitigation generally, *id.* at 36-37, 38-42. Not only are safety impacts and land use compatibility core NEPA impacts, the mitigation impacts the County raised relate to *all of the impacts* the County identified during the NEPA process.

Second, BIA supports its claim that economic impacts are not cognizable under NEPA with cases relating to Article III standing, which is not at issue in this case. The courts in those cases held that "[a] plaintiff who asserts purely economic injuries does not have *standing* to challenge an agency action under NEPA." *Arizona Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100, 1107-08 (D. Ariz. 1998) (quoting *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989)) (emphasis added). While purely economic interests do not fall within NEPA's zone of interests sufficient for prudential standing, the Ninth Circuit has recognized that "[a] plaintiff can … have standing under NEPA even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are 'causally related to an act within NEPA's embrace.'" *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1103 (9th Cir. 2005), as amended (Aug. 17, 2005) (quoting *Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 476 (9th Cir.1979)).

To the extent that BIA relies on *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, it mischaracterizes the court's decision. 889 F.3d

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

584 (9th Cir. 2018). In that case, the Ninth Circuit upheld the district court's decision to strike extra-record evidence that post-dated the challenged agency decisions—economic data that the Colusa Tribe claimed was proprietary and never provided to BIA during the review process or to the court during litigation. *Id.* at 606. The court's analysis focused on the principle that the administrative record is limited to the materials before the agency at the time of decision, unless a specific exception applies. *Id.* While the Ninth Circuit also noted that "purely economic interests do not fall within NEPA's zone of interests," that language relates to prudential standing requirements and does not support BIA's argument. *Id.* (internal citations omitted).

BIA has not challenged the County's standing, so presumably it hopes that the Court will refuse to consider the County's economic concerns based on standing precedent. But BIA has not cited any case that prohibits courts from considering economic impacts under NEPA. To the contrary, NEPA regulations identify economic impacts as impacts that must be considered in an EIS. 40 C.F.R. § 1508.8. Courts regularly review the sufficiency of an agency's economic analysis and are required to do so where "economic impacts . . . are interrelated with or caused by natural or physical impacts flowing from a major federal action." *Morris v. Myers*, 845 F. Supp. 750, 754 (D. Or. 1993). When economic and environmental impacts are connected, the economic impacts are a critical part of the NEPA review. *Id.*; *see also* 40 C.F.R. § 1508.14 (when "economic or social and natural or physical environmental effects are

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

interrelated," the agency must discuss *all* of these effects on the human environment in its EIS).

The economic impacts alleged by the County are obviously intertwined with safety, encroachment, and land use impacts. They are also related to the mitigation, which BIA attempts to rely on to justify its "no detriment" determination. *See* AR52719. In its comments on the final EIS, the County said that its "obligations include, first and foremost, protecting the public health and safety," and it noted that the County must "provid[e] important public services, including transportation planning, road development, controlled urban growth, environmental preservation, *considered economic development*, recreational opportunities, and other services." *Id*. (emphasis added). Its motion for summary judgment emphasizes many of the same issues. ECF 82 at 12-13, 35-36, 42-44. The County's NEPA arguments are not and never have been purely economic. They are not even primarily economic, and BIA's efforts to characterize them as such to avoid judicial scrutiny fails.

CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court grant the County's motion for summary judgment and deny defendants' cross-motions for summary judgment.

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211

DATED: April 26, 2019

Respectfully submitted,

s/ Meredith R. Weinberg
Meredith R. Weinberg, WSBA No. 45713
MWeinberg@perkinscoie.com
Julie Wilson-McNerney, WSBA No. 46585
JWilsonMcNerney@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000

Jennifer A. MacLean (*pro hac vice*)
Perkins Coie LLP
700 Thirteenth Street, NW, Suite 600
Washington, DC 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211
JMacLean@perkinscoie.com

Attorneys for Plaintiff Spokane County

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

Dated: April 26, 2019

s/ Meredith R. Weinberg
Meredith R. Weinberg, WSBA No. 45713

Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Phone: 202.654.6200
Fax: 202.654.6211