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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-00138-WFN

SPOKANE TRIBE'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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GLOSSARY OF KEY ABBREVIATIONS

AES	Analytical Environmental Services
APA	Administrative Procedure Act
APZ	Accident Potential Zone
AICUZ	Air Installation Compatible Use Zone
BIA	Bureau of Indian Affairs
EIS	Environmental Impact Statement
FAFB	Fairchild Air Force Base
IGA	Intergovernmental Agreement
IGRA	Indian Gaming Regulatory Act
ILA	Interlocal Agreement
JLUS	Joint Land Use Study
MIA	Military Influence Area
MOA	Memorandum of Agreement
NEPA	National Environmental Policy Act
NIGC	National Indian Gaming Commission
NWRO	Northwest Regional Office
ROD	Record of Decision

INTRODUCTION

As the nearly 66,000-page record in this case demonstrates, the Department of the Interior exhaustively studied the relevant issues and reasonably determined that the Spokane Tribe's project would be (1) in the best interest of the Tribe and (2) "not … detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). In addition to supplying urgently needed economic development for the Tribe, the project will create hundreds of millions of dollars in economic output, thousands of jobs, and millions of dollars in state, county, and local tax revenue. That unrebutted record more than satisfies the highly deferential standard of review applicable to the Department's predictive judgments.

Plaintiffs have no persuasive response. Kalispel doubles down on its claim that *any* competitive harm to its existing casino barred a two-part determination in favor of the Tribe. In its view, the Department was required to disregard every other fact and equity—including vast benefits to the larger community; the fact that the harm will be temporary and will not prevent Kalispel from delivering essential government services to its members; and Kalispel's own two-part determination, which authorized Kalispel to game in the heart of the Tribe's ancestral homeland and siphon revenue from the Tribe's more remote casinos.

IGRA's plain text, the Department's unchallenged regulations, and common sense refute Kalispel's argument. IGRA does not require a finding that the project will not be detrimental to nearby tribes, but a determination that the project will "not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Substantial unrebutted record evidence supports that determination here.

The County's response is equally meritless. The County complains that it was not adequately consulted about the project, but it received two consultation letters and submitted no substantive response, despite a 30-day extension of time to do so. The County also insists that, as a local government, it should receive deference, but ignores that other local governments—including Airway Heights, where the project is located—expressed strong support for the project. Under its own prior leadership, the County acknowledged that the project would provide "numerous employment opportunities and other economic benefits." AR20469. And the concerns the County ultimately and belatedly raised were about impacts on the Air Force, which has never opposed the project and has worked collaboratively with the Tribe to ensure adequate mitigation.

In sum, the two-part determination was the product of a rigorous decade-long process that adequately addressed Plaintiffs' concerns and reached an eminently fair and reasonable result with voluminous record support. None of Kalispel's or the County's scattershot arguments justifies second-guessing that judgment here.

ARGUMENT

I. THE DEPARTMENT PROPERLY ADDRESSED THE TEMPORARY COMPETITIVE HARM TO KALISPEL UNDER IGRA

A. IGRA Requires A Single Holistic Determination Of Detriment

The undisputed record in this case shows that the project would bring numerous benefits to the Spokane region—among them, $300 million in economic output and more than 2,200 jobs during the construction phase alone; an additional $250 million in annual spending and employment for 2,800 local residents after the

casino and mixed-use development is fully operational; and millions of tax dollars for local governments as a result. AR63850-63852; AR49623-49630. Throughout the application process, the Tribe also engaged closely with local jurisdictions and the Air Force to put in place measures to mitigate potential impacts. Tribe Br. 18-21 (Dkt. 106-2). At the time of the agency's decision, the project had thus garnered significant support within the local community. AR63836.

Kalispel challenges none of that. Rather, it argues that under IGRA, *any* unmitigated competitive harm to a nearby tribe with an existing casino—however minor—overrides *all* benefits to the larger community—however significant. According to Kalispel, the temporary reduction in its gaming revenues that the Department predicted *required* a finding that the project would "be detrimental to the surrounding community," 25 U.S.C. § 2719(b)(1)(A), regardless of the project's benefits. That self-serving reading of IGRA cannot be sustained.

The Department has always interpreted IGRA, as it did here, to require a determination whether a project would "be detrimental to the surrounding community" *as a whole*. 25 U.S.C. § 2719(b)(1)(A). It thus "evaluate[s] detriment on a case-by-case basis based on the information developed in the application and consultation process." 73 Fed. Reg. 29,354, 29,373 (May 20, 2008). And the Department's regulations mandate that it "consider *all* the information submitted … in evaluating … detriment." 25 C.F.R. § 292.21(a) (emphasis added). That interpretation is firmly grounded in the statute's text and purpose.

Kalispel claims (at 8-9) that the Department ignored the plain meaning of "detriment," arguing that because Congress did "not include a qualifier like

'severe,'" it clearly meant "'*[a]ny* loss or harm suffered by a person or property'" to be sufficient. But that ignores the plain textual limitation Congress did impose—the detriment must be "*to the surrounding community*." 25 U.S.C. § 2719(b)(1)(A) (emphasis added). If Congress had intended that a nearby tribe's loss of casino revenues, by itself, would forbid a two-part determination, it would have said so. IGRA directs the Department to consider whether a project would be detrimental to the *entire* surrounding community, not to any one entity within the community.

Reading IGRA to grant a veto to any nearby tribe with a competing gaming facility would also thwart IGRA's "overarching intent" to "'promot[e] tribal economic development'" by creating a framework for Indian gaming. *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 468 (D.C. Cir. 2007) (quoting 25 U.S.C. § 2702(1)). And it would lead to absurd results. No community is of a single mind when it comes to casinos, and every casino, like any new commercial development, "entail[s] *some* costs." *Stand Up for California! v. Department of Interior*, 919 F. Supp. 2d 51, 74 (D.D.C. 2013). To be sure, as Kalispel stresses (at 9), a two-part determination is "an exception" to the general bar on gaming on after-acquired lands, but it "obviously was not Congress' intent" for that provision to "effectively describ[e] a null set," *DePierre v. United States*, 564 U.S. 70, 82 (2011).

That is why no court has ever endorsed Kalispel's reading. To the contrary, courts have uniformly upheld holistic determinations like the one here over similar claims of competitive harm by objecting tribes. *E.g.*, *Stand Up for California! v. Department of Interior*, 879 F.3d 1177, 1188, 1190 (D.C. Cir. 2018) ("*Stand Up*

III") (agency "permissibly view[ed] the casino's net effects holistically," assessing detriment to "surrounding community overall" rather than single group); *Stand Up for California! v. Department of Interior*, 204 F. Supp. 3d 212, 264 (D.D.C. 2016) ("*Stand Up II*") (detriment to surrounding community "necessarily requires a holistic evaluation"); *accord Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) (neighboring casinos' lost profits are only part of the "economic impact of proposed gaming facilities on the surrounding communities").[1]

Under IGRA's regulations, a nearby tribe is "part of the surrounding community," 73 Fed. Reg. at 29,356, but it is only a part. Kalispel objects (at 13) that the Department has never specified how a nearby tribe can prevail under a holistic standard. But, as IGRA's implementing regulations make clear, the necessary determination that the project "would not be detrimental to the surrounding community" requires the Department to "consider all the information" from the entire community, rather than allowing a single part of the community to speak for the whole. 25 C.F.R. § 292.21(a). As in *Stand Up III*, Kalispel "never even challenges" the regulations dictating this holistic approach, which reflect a "perfectly reasonable reading" of IGRA entitled to deference. 879 F.3d at 1187.

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[1] Kalispel falsely claims (at 14) that the analysis of detriment to the surrounding community in *Stand Up III* is dictum. The plaintiffs there advanced precisely the interpretation of IGRA Kalispel advocates here, and the D.C. Circuit's rejection of that interpretation was necessary to its judgment. *Stand Up III*, 879 F.3d at 1186-1187 (rejecting plaintiffs' "'cramped reading' of IGRA").

Kalispel's reading would also invalidate longstanding agency policy that competitive impact on an existing casino, by itself, does not require a finding of detriment to the surrounding community. AR63808. While Kalispel objects to that policy here, it had no objection to benefiting from that policy when it received a two-part determination allowing it to game on land far from its reservation and in the heart of the Tribe's ancestral homeland. Tribe Br. 28-29. Indeed, it is only because of that trust land that Kalispel is part of the surrounding community.

Kalispel emphasizes (*e.g.*, at 2, 10, 15-19, 33) that the temporary competitive harm to its casino—unlike, for example, potential increased costs to local utility and emergency service providers—is not being offset by mitigation payments. As an initial matter, IGRA does not require every individual detriment to be mitigated. The Department's regulations—which, again, Kalispel does not challenge—direct the applicant tribe to identify sources of mitigation and invite consulted local entities to do the same only so that the information may be considered as part of the Department's holistic determination. *See, e.g.*, 25 C.F.R. §§ 292.18(d), 292.20(b).

In *Stand Up III*, the D.C. Circuit considered and rejected the argument that every detriment must be mitigated: "[N]othing in IGRA … forecloses the Department, when making a non-detriment finding, from considering a casino's community benefits, even if those benefits *do not directly mitigate a specific cost* imposed by the casino." 879 F.3d at 1187 (emphasis added); *see id.* ("defer[ring] to Department's "perfectly reasonable reading" of IGRA's regulations "as authorizing it to consider a casino's community benefits—even those that do not directly remediate a specific detriment").

In any event, the notion that IGRA requires a new gaming facility to reimburse an existing one for any decline in revenues is absurd. IGRA does not entitle Kalispel to undiminished profits for eternity. Rather, it entitles both Kalispel and Spokane to operate gaming facilities that benefit them and do not cause a detriment to the surrounding community, if the State's Governor agrees. Kalispel may have gotten there first, but that gives it no right to block Spokane's facility or demand a share of Spokane's revenues. The Tribe pursued, and IGRA authorized, the project here in order "to lift the Tribe's members out of poverty," AR63808, not to subsidize Kalispel, which never provided any "mitigation" to the Tribe for the revenue losses resulting from Kalispel's project, and which in recent years has spent *thirty times* as much per member as the Tribe.

B. The Department Applied The Correct Standard

Kalispel also claims (at 12) that even assuming the holistic standard is correct, the Department did not actually apply it here. The record unequivocally refutes that claim. The Department based its finding of no detriment to the surrounding community on the project's *net* effect, factoring in "substitution effects" in the gaming market—that is, the "drop in [Kalispel's] annual revenue due to competition," AR63869-63870. For example, in its analysis of anticipated tax revenues, the Department stated that "[w]hile tax revenues generated by existing gaming facilities would temporarily be reduced proportional to the estimated substitution effect …, the net impact to tax revenues as a result of the Project would be positive." AR63851. The Department similarly found that the "net impact to employment … would be positive," even with a brief projected decrease in job

opportunities at Kalispel's casino. AR63896. That is the same standard the Department applied, and the D.C. Circuit upheld, in *Stand Up III*. 879 F.3d at 1187 (IGRA requires "on balance" that a new casino "have a positive or at least neutral net effect on the surrounding community").

In short, the Department analyzed likely substitution effects at length. *E.g.*, AR63869-63871; AR49624-49627; AR7497, 7501-7512; AR4694-4697. It incorporated that analysis into its holistic evaluation of community benefits. *E.g.*, AR49623-49630; AR63869-63872. And it was very explicit in this case that its conclusion—the project "would not be detrimental to the surrounding community, *including nearby Indian tribes*," AR63872 (emphasis added)—reflected the likely competitive harm to Kalispel as part of the community in question.

Kalispel's remaining claims that the Department improperly held it to a different standard are baseless. At various points (*e.g.*, at 10, 13, 22-23), Kalispel accuses the Department of applying the heightened standard applicable to tribes outside a 25-mile radius—which would have required Kalispel to show it would be "directly, immediately and significantly impacted" to be considered part of the surrounding community, 25 C.F.R. § 292.2. But the Department never required any such showing. Kalispel's sole basis for suggesting that anyone even *considered* requiring it is an email (AR65808-65809) by one agency employee. But Kalispel admits (at 23) that this was a "draft analysis," penned almost three years before the challenged agency decision was issued. The final two-part determination applied the same standard to Kalispel as to all consulted government entities—analyzing competitive harm to Kalispel at length and taking that potential impact into

consideration in virtually every aspect of the decision. *E.g.*, AR63863-63873; AR63895-63896; AR49625; AR33442; AR4671-4702.

Kalispel now abandons (at 23-24) any claim that IGRA barred consideration of history and basic fairness in light of Kalispel's own two-part determination. Instead, it argues (at 24) that the Department considered these factors in an allegedly improper "manner," allowing sympathy for the Tribe to color the agency's analysis of harm to Kalispel. Its only new evidence for that claim (at 24-25) is a statement—in the same employee's email—that Kalispel "should practice what it preaches" to the Tribe by pursuing other forms of economic development. AR65809-65810. Kalispel concedes (at 24) that this statement was "removed" from any agency decision. In any event, a stray observation of the patent inequity in Kalispel's attempt to block the Tribe from enjoying the same benefits Kalispel has enjoyed within the Tribe's ancestral lands for decades does not make Kalispel the victim of agency bias.

C. The Department's Analysis Of Detriment Was Reasonable

The Department reasonably rejected Kalispel's deeply flawed economic analysis of the gaming market. Among other critical errors, Kalispel's analysis misdefined the relevant gaming market and made faulty assumptions about capture and participation rates. Tribe Br. 32-33. The Department thus reasonably relied on independent analyses to reach its predictive judgment that the initial impact on Kalispel would be lessened due to the time necessary to build out the Tribe's casino and that revenue at Kalispel's casino would thereafter resume normative growth. AR63851.

Kalispel challenges (at 16-17) those findings as arbitrary and capricious, but ample record evidence supports them. As to the initial decline, the record showed that in light of the lengthy build-out of the Tribe's casino, the impact on Kalispel "would be mitigated by five years of population and income growth," which Kalispel's own expert estimated to be 15.8% over that period. AR7501-7502. And as to the resumption of normative revenue growth, the Department's study collected multiple examples of revenue growth in other gaming markets after the introduction of a competitor, substantiating the Department's conclusion that "revenue growth typically resumes after approximately 12 months of impact." AR7507-7511.

Kalispel recites (at 17) the Hartman memo's discussion of the difficulty of predicting market growth. But Kalispel responds to none of the Tribe's points regarding the memo and again omits its central conclusion: "In most cases," a new gaming competitor "improve[s] business for everyone," and there are "almost no examples of casinos failing because of new competition." AR3574-3575; Tribe Br. 33-34. In any event, the difficulty of forecasting the future is the reason the "'arbitrary and capricious' standard is particularly deferential in matters implicating [the agency's] predictive judgments.'" *Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584, 602 (9th Cir. 2018). The Department's painstaking analysis of the competitive harm to Kalispel easily clears that low hurdle.

II. THE DEPARTMENT ADEQUATELY RESPONDED TO THE COUNTY'S CONCERNS

A. The Department Consulted With The County

IGRA requires the Department to "consult[] with … local officials" before issuing a two-part determination. 25 U.S.C. § 2719(b)(1)(A). The Department did

so here. The County does not dispute that the Department took the affirmative steps its regulations require: identifying relevant local officials and government entities and sending consultation letters describing the project and soliciting their input on anticipated impacts. Tribe Br. 38. Nor does the County dispute that it received the Department's two consultation letters and failed to submit any meaningful response to either letter—despite being granted a 30-day extension of the second consultation period. *Id*. at 40. Those undisputed facts are fatal to the County's claim that it was not properly consulted.

"The plain meaning of the term 'consult' [is] to seek advice or information." *Masseth v. Hartford Life & Accident Ins. Co.*, 60 F. App'x 51, 52 (9th Cir. 2003); *accord* Black's Law Dictionary (10th ed. 2014) (defining "consultation" as "[t]he act of asking the advice or opinion of someone"); Tribe Br. 39. That is precisely what the regulations require, and precisely what the Department did. The County offers (at 4) no concrete alternative to that ordinary meaning of "consult," instead vaguely claiming that "'consultation' connotes a bilateral exchange." But the Department's letters to the County sought to initiate such a bilateral exchange. It is nonsensical to suggest that the County's failure to respond to letters "seek[ing] [its] advice" means that the Department has not consulted it and thus precludes a two-part determination. IGRA does not give local officials that kind of veto.

Moreover, even if IGRA's "consultation" requirement were ambiguous—and it is not—the Department's regulations implementing that requirement are reasonable and entitled to deference. The County wrongly claims (at 7-8 n.2) that deference does not apply because IGRA gives rulemaking authority to another

Department subagency, the NIGC. But IGRA grants the Secretary—not the NIGC—the power to make a two-part determination, and the rules here were duly promulgated pursuant to the Secretary's delegation of that authority. 73 Fed. Reg. at 29,354 (citing 5 U.S.C. § 301; 25 U.S.C. §§ 2, 9, 2719).

The County also suggests (at 9) that the Department should have accommodated the possibility that new County officials would renege on the County's commitment to remain neutral on the project. But the Department did accommodate the County by extending the second consultation period, and the County still gave no substantive response. Nothing in IGRA requires consultation to be endless. The Department's regulations set a more than fair 60-day timetable that can be—and was here—extended by 30 days. *See* 25 C.F.R. § 292.19.

In any event, there is no question that when the County raised its concerns as part of the EIS process, the Department engaged with them. *See* AR63848-63850; AR49663-49671. The County quibbles (at 10) that agency officials met with the County only twice. But, as the Tribe explained, courts have uniformly held that IGRA's consultation requirement is satisfied by far less. *See* Tribe Br. 41 (citing cases). The County's real complaint is that the Department did not agree with its views. But IGRA requires consultation—not agreement. The County's views were both solicited and heard in this case. IGRA does not require more.

B. The Department's Analysis Of Encroachment On Fairchild Was Both Thorough And Reasonable

The Department and the Tribe worked closely with the Air Force throughout the EIS process to address concerns about potential impacts on Fairchild and ways

to mitigate those impacts. Tribe Br. 13, 20-21, 42-46. When the County belatedly raised similar concerns, the Air Force found them to be baseless, concluding that the accident potential zones are correct; the Tribe's project lies outside them; and the Tribe's mitigation adequately safeguards base operations. AR2824-2825; AR3433. The Department was thus well justified in determining that concerns about encroachment had been adequately addressed.

Nor was the Department required to give "deference" to the County's views. County Br. 15. While the County concedes that IGRA does not grant it "a veto," its claim to deference rooted in "federalism" (at 15-16) amounts to the same thing. IGRA incorporates federalism by mandating *consultation* with local officials and *concurrence* by the State's governor—both of which occurred here. "Consultation" does not require "obtain[ing] permission." *United States v. Board of Cty. Comm'rs*, 184 F. Supp. 3d 1097, 1129 (D.N.M. 2015), *aff'd*, 843 F.3d 1208 (10th Cir. 2016); Tribe Br. 39-40. Had Congress wanted the Department not merely to consult with local officials but to obtain their consent, it would have required their concurrence in addition to the Governor's. Congress chose not to do so.

The County claims (at 12-14) that the Department was required to, and did not, respond specifically to the County's argument that it was entitled to deference. But that argument added nothing substantive, nor did it raise a significant aspect of the problem that the Department failed to consider. *American Mining Cong. v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992) ("The failure to respond to comments is grounds for reversal only if it reveals that the agency's decision was not based on consideration of the relevant factors."). By the County's reasoning, *every* local

government entity is entitled to deference. Even if that were correct—and it is not—the County has not explained why its opposition should override the "substantial support from [other] local governments," including "Airway Heights, which is the closest to and most affected by the Project." AR63835-63836.

The County's claim to deference is particularly strained here, since the harm the County alleges is to the Air Force, which has never opposed the project. The County tries (at 28) to discount that lack of opposition by ascribing it to the Air Force's desire to avoid conflict. Whatever its motive, however, the Air Force provided "fact-based" "analysis and information," detailing a variety of mitigation measures designed to preserve base operations and patron safety. AR2824. And the Tribe, for its part, "committed to implement" those measures. AR2828. The Department's conclusion that the project would not impair the "operational and training mission" at Fairchild was thus firmly rooted in the record. AR63848.

Contrary to the County's meritless attacks on the Department's independence (at 20-30), it was completely reasonable for the Department to rely on the Air Force in responding to the County's request for a supplemental EIS. As the County does not dispute, the whole premise for its request was that the APZs must "be modified" "to reflect actual [base] operations." AR3668. But the Air Force concluded otherwise, AR3433, and ensuring the accuracy of APZs is a task entrusted to the Air Force—not the Department. The Department was in fact required by NEPA regulations to utilize the Air Force's analysis "'to the maximum extent possible'" in light of the Air Force's jurisdiction and special expertise. Tribe Br. 44 (quoting 40 C.F.R. § 1501.6(a)(2)). And while the County says (at 23) the Air Force's response

is unreasoned, the Air Force explained that its relevant divisions "reviewed and evaluated" the County's request, and their "consensus" was that the APZs were properly drawn. AR3433. The County cites no authority holding such an explanation legally insufficient, and the Department reasonably relied on it.

Nor does the record support the County's contention (at 25) that the Department "'blindly adopt[ed]'" the Air Force's reasoning to the exclusion of its own considered judgment. The Department thoroughly considered all the information before it, which included substantial comments from Airway Heights. *E.g.*, AR6687-6695; AR54739-55245. The Department thus took into account several facts independent of the Air Force's response: Redrawing the APZs as the County proposed would halt the City's growth; the City had already adopted laws protecting Fairchild as a result of the joint land use study, in which the City, County, Tribe, Defense Department, and others participated; and that group therefore decided *not* to recommend altering the APZs. *See* AR63849-63850. The Department's actual analysis does not at all resemble the County's caricature of an agency abdicating its responsibilities.

Finally, the County points (at 26-28) to state guidance on APZs, as well as remarks by a consultant to the Tribe, to suggest that it was arbitrary and capricious for the Department not to investigate further. But the Air Force's designation of APZs is not subject to state guidance, as even the County concedes. And the consultant's remarks, far from bolstering the County's case, undercut its only basis—supposed radar tracks in an unofficial presentation—which the consultant argued could not plausibly be read to find that the project would encroach on base

operations. *See* AR3710-3712; AR4985-4986. As the Air Force made clear in its official response to the County's request, there was simply no "new information" here to warrant a supplemental EIS. AR3433.

C. The Department's Finding That Impacts On The County Would Be Mitigated Was Reasonable

The County does not deny that the Tribe has committed to making significant financial contributions to offset casino impacts as part of its gaming compact with the State. Tribe Br. 18, 46; *see* AR20506-20635. The Tribe's support of an "Impact Mitigation Fund"—among other sources of mitigation—is one reason the Department found that impacts on the County would be mitigated. AR63848.

The County singles out (at 36) a citation from the Department's brief to suggest—incorrectly—that such contributions are limited to problem gambling and "do not address other impacts to the County, like the casino's drain on emergency resources and adverse effects on transportation." However, the text of the compact is clear: The Impact Mitigation Fund will "provid[e] assistance to non-tribal law enforcement, *emergency services*, and/or service agencies (*including those agencies responsible for traffic and transportation*, as well as those that provide services to support problem or pathological gambling)." AR20541 (emphases added); *see also* AR63846-63847 ("Pursuant to the Tribal-State Compact[,] … annual payments would be made by the Tribe to the State and local governments to provide support for public services, community benefits and utilities."). Indeed, as the Tribe noted in response to the final EIS, "available impact mitigation funds under the Compact will exceed the 20% MOA annual payment apportionment figure the County agreed

was sufficient compensation under the … ILA." AR53832-53833. That substantial and unrebutted evidence is independently sufficient to sustain the Department's finding here that impacts on the County would be mitigated.

Ignoring that, the County claims (at 30-34) that the Department unreasonably relied on payment-sharing between the Tribe, the County, and the City even after the County terminated the ILA providing for a 20% share of the Tribe's annual mitigation payments. The County's decision to terminate the ILA, however, did not nullify the Tribe's obligation to make mitigation payments. Nor did it negate the Tribe's right to request a renegotiation of the MOA with the City "if there is a significant change in circumstances." AR20489. And the Tribe has stated that if "demonstrated impacts to the County are not fully compensated for under the Gaming Compact," it "would view the County's failure to receive any portion of the MOA annual payment" as triggering the "reopener" clause "to ensure" adequate mitigation of County impacts. AR53833. On this record, it was reasonable for the Department to conclude that termination of the ILA did not preclude renegotiating the MOA or other agreement to further mitigate impacts to the County.

The County emphasizes (at 33) its acknowledgment that the City "has no further obligation" to share mitigation payments. But all of this was the County's choice: It was the County's choice not to receive payments directly from the Tribe, and instead to enter a side agreement with the City for a 20% share in exchange for neutrality on the Tribe's casino. It was the County's choice to cancel that agreement and forgo payments. And it is the County's *continuing* choice not to renegotiate mitigation of any uncompensated impacts. The Tribe did everything in

its power to ensure the existence of funds to mitigate community impacts. It cannot force the County to cash a check.

III. THE DEPARTMENT SATISFIED ITS OBLIGATIONS UNDER NEPA

Even assuming Plaintiffs have standing to raise their NEPA claims, *but see* DOI Br. 37-38 (Dkt. 98), those claims fail on the merits.[2] The NEPA claim that Kalispel *brought* is that the Department allegedly "predetermined" the outcome of the EIS process. Opening Br. 34 (Dkt. 79). Kalispel now all but concedes (at 25) that its "claim of formal precommitment" was "unfounded," recasting the alleged defect as instead an informal "taint." Kalispel cites no standard for such a claim—because there is none. Actual "predetermination" requires that the Department "made an 'irreversible and irretrievable commitment of resources'" before analyzing the environmental consequences of its action. *Stand Up II*, 204 F. Supp. 3d at 304. That is a "high" standard that Kalispel does not even try to meet. *Id*.

Under NEPA, the Department was required to produce an EIS to inform its decisionmaking, not to dictate a given decision. Tribe Br. 48. Here, the agency process lasted the better part of a decade: The Department considered several off-site options early in the process before ruling them out as infeasible, and it produced a detailed evaluation, spanning hundreds of pages, of four on-site alternatives (including two non-gaming options) before concluding that the proposed casino and mixed-use development would best "promot[e] the Tribe's

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[2] The County's NEPA claim—that the Department erred in finding mitigation—fails for the same reasons above. *Supra* pp. 16-18.

self-governance capability." AR49416; Tribe Br. 11-13, 22-23, 48-51. All of that forecloses any claim that the outcome in this case was predetermined.

Kalispel repeats (at 29-30) its conclusory assertion that the purpose and need statement here was overly narrow—in contrast to the one upheld in *Cachil Dehe*. But, as the Tribe explained, there is no meaningful distinction between the two: As in *Cachil Dehe*, the final EIS here featured a number of broad goals, including to advance tribal self-determination and "'to effectuate the purpose of IGRA.'" Tribe Br. 49. Kalispel has no response.

Kalispel also criticizes (at 31-33) the Department for failing to consider the help of a third-party casino developer on an off-site location. But that possibility would still have "require[d] the [agency] to defer meeting the Tribe's urgent needs, while speculating that the Tribe could [work with the developer to] successfully purchase, acquire into federal trust, and develop these parcels." AR48712. It would not have rendered off-site gaming any more feasible as an alternative to gaming on land already acquired by the Tribe in Airway Heights.

IV. THERE WAS NO BREACH OF FEDERAL TRUST DUTIES TO KALISPEL

The Department's trust duties to Kalispel were discharged by its compliance with its statutory obligations. Tribe Br. 51 (citing *Lawrence v. Department of Interior*, 525 F.3d 916, 920 (9th Cir. 2008)). Although Kalispel does not contest that a breach-of-trust claim requires a statute to focus the trust relationship, it has no persuasive argument that any statutory provision creates that focus here. *See* Tribe Br. 51-52. Kalispel asserts (at 19) that IGRA confers a special benefit on nearby tribes by requiring the Department to consult with them, but unlike the County,

Kalispel is not arguing that it was not consulted; it is arguing that the Department erred in granting a two-part determination to the Tribe in the face of temporary competitive harm to Kalispel's existing casino. That claim fails for all the reasons already given. *See* Tribe Br. 27-35; *supra* pp. 2-10.

Kalispel cites (at 20) *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). But there, Congress had enacted a statute reaffirming "longstanding and substantial trust obligations" to plaintiffs, who were beneficiaries of certain trust accounts. *Id*. at 1098. The D.C. Circuit thus held that the Department, by unreasonably failing to provide an accounting, had breached its duty to account. *Id*. at 1107-1110. There is nothing similar in IGRA that would provide a basis for Kalispel's claim for relief.

And the Department's trust obligation flows equally to the Spokane Tribe. Kalispel's breach-of-trust claim is in reality nothing but a way to bolster its meritless reading of IGRA as granting a veto to nearby tribes—a reading that would allow Kalispel to block vital economic development for the Tribe after Kalispel's own two-part determination took needed gaming revenue away from the Tribe. Cognizant of its trust obligations to all tribes, the Department has long rejected that construction, as have the courts that have considered it. *See, e.g.*, *Sokaogon*, 214 F.3d at 947 ("[I]t is hard to find anything in [IGRA] that suggests an affirmative right for nearby tribes to be free from economic competition."). This Court should do the same.

CONCLUSION

This Court should grant summary judgment to the Department and the Tribe.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System, which will send a notice of filing to all counsel of record.

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