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UNITED STATES DISTRICT COURT
FOR THE 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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Hearing Date: June 17, 2019

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I. INTRODUCTION

Both the Kalispel Tribe of Indians ("Kalispel") and Spokane County ("County") rely primarily on the argument that the Department of the Interior's ("Department") decision approving gaming by the Spokane Tribe ("Spokane Tribe") conflicts with the plain language of the Indian Gaming Regulatory Act ("IGRA"). ECF Nos. 113, 114. Kalispel argues that any loss due to competition to an existing tribal casino requires the Department to find a new gaming facility will be "detrimental to the surrounding community" in making a Secretarial Determination pursuant to 25 U.S.C. § 2719. But IGRA requires a holistic analysis of detriment to the "surrounding community," not just one neighboring tribe. And Kalispel's self-serving reading of the statute prioritizes protection of the market share of existing tribal casinos at the expense of other tribes seeking access to a gaming market—all in disregard of IGRA's purpose of promoting the tribal self-government of all tribes. As for the County, having declined to participate in consultation until the last minute, it now argues the Department had to do more than solicit information regarding potential impacts of the proposed gaming facility. Nothing in IGRA requires the kind of heightened conferral obligation that the County advocates. These arguments, along with Plaintiffs' remaining arguments, lack merit. The Court should uphold the Department's decision.

II. ARGUMENT

A. The Department properly found impacts to Kalispel do not support a finding that the proposed gaming facility is detrimental to the surrounding community.

1. IGRA does not treat competition as "detrimental to the surrounding community."

Kalispel's purported plain meaning interpretation of "detrimental" requires extracting the word from its statutory context. Kalispel asserts that detriment means harm and any loss of revenue to Kalispel from competition mandates a finding that gaming will be detrimental to the surrounding community under Section 2719(b)(1)(A). This reading effectively nullifies the "two part" determination because "all new commercial developments are bound to entail *some* unmitigated costs." *Stand Up for Cal.! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1187 (D.C. Cir. 2018) (citation and brackets omitted). No tribe can meet this standard, including Kalispel whose own application for a two-part determination was approved with full understanding that there would likely be impacts from "intense competition" on the Spokane Tribe. AR65834. Nothing in IGRA allows a gaming tribe to unilaterally bar competition by other tribes.

To ascertain a statute's plain meaning, a court "must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation and internal quotations omitted); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The context here is a

provision that tasks the Department with analyzing whether a proposed gaming establishment will "be detrimental to the surrounding community" and that clearly contemplates the possibility of finding no detriment.[1] Kalispel's reading of IGRA precludes that. *See Holloway v. United States*, 526 U.S. 1, 9 (1999) (a statute must be viewed as a whole, rather than by isolating a particular word).

The Department, in contrast, takes a common sense, holistic approach and does not treat competition as detrimental. *See Stand Up for Cal. v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 264 (D.D.C. 2016) (determining detriment "necessarily requires a holistic evaluation of the impact of the proposed development"). Doing otherwise turns IGRA into a means to protect gaming monopolies instead of promoting tribal gaming as an economic mechanism for all tribes. The Department's analysis of detriments focuses on impacts caused by a new gaming facility—increases in problem gambling, environmental impacts deriving from construction and operation of the facility, etc. 25 C.F.R. § 292.18.

[1] Kalispel is correct that the two-part determination provision allows a limited exception to IGRA's general ban on gaming on newly acquired trust lands, 25 U.S.C. § 2719(a). But the limited nature of the exception derives from the requirement of the state governor's concurrence in any finding of no detriment made by the Secretary. *Id.* at § 2719(b)(1)(A).

But a shift in market share due to competition is not necessarily a detriment to the surrounding community and can be remedied by the affected neighboring tribe by more effectively competing against the new market entrant. AR63870 (noting initial impacts from new competition will diminish after "local residents experience the casino and return to more typical spending patterns"). As discussed in Federal Defendants' opening brief, courts considering this question have agreed. ECF No. 98 at 14-15.[2]

Nevertheless the Department does not ignore the financial impacts of competition on other tribes in its consideration of detriment. Instead, the Department addresses competitive impacts, consistent with its approach to

[2] Kalispel attempts to distinguish these cases on the ground that they offer dicta, considered tribes not similarly situated to Kalispel, and failed to undertake a statutory analysis. ECF No. 113 at 14-16. Only because courts understand and reject the implications of Kalispel's reading of Section 2719 can they assert that "it is hard to find anything in that provision that suggests an affirmative right for nearby tribes to be free from economic competition." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000). These courts' interpretation of Section 2719 holds true regardless of whether said as dicta or not and without regard to a particular tribe's circumstances.

detriment in general, "on a case-by-case basis." Department of the Interior, *Gaming on Trust Lands Acquired After October 17. 1988*, 73 Fed. Reg. 29354, 29356 (May 20, 2008); *see N.L.R.B. v. U.S. Postal Serv.*, 827 F.2d 548, 553 (9th Cir. 1987) (agency may develop administrative policy on a case by case basis). Here, the Department concluded that there is no detriment to the surrounding community as a whole where impacts from competition to Kalispel's government budget will dissipate over time with market growth and will not at any point preclude the provision of "essential services and facilities to [Kalispel's] membership." AR63870. That approach, contrary to Kalispel's claim, does not demand closure of a competing facility before finding detriment. Kalispel disagrees with the judgment but Congress tasked the Department, not Kalispel, with implementing IGRA.[3]

[3] To the extent the Department must determine how to implement IGRA in specific circumstances and the plain language does not control, the Court should defer to the Department's judgments. *See Garfias-Rodriguez v. Holder*, 702 F.3d 504, 515 (9th Cir. 2012) (en banc) (courts defer to agency construction of statute, as applied through administrative decisions, because "there are gaps in the statutory scheme that cannot be filled through interpretation alone, but require the exercise of policymaking judgment").

Kalispel complains that other impacts to the surrounding community were mitigated, but impacts to its gaming were not. ECF No. 113 at 11. Section 2719 does not require mitigation of all impacts. *Stand Up*, 879 F.3d at 1187. Nor do Department regulations require mitigation for all impacts on the surrounding community and nearby tribes. *See* ECF No. 113 at 10. The cited regulations only require that an applicant provide any information about how impacts will be mitigated and that the Department will consider all submitted information in making its determination. 25 C.F.R. §§ 292.18(d), 292.21(a). Nevertheless, Department regulations do provide that efforts to mitigate impacts will be considered. *Id.*

The Department, as part of its National Environmental Policy Act ("NEPA") obligations, did require "[a]ll practicable means to avoid or minimize environmental harm" resulting from the decision to allow the Spokane Tribe to operate a gaming facility on its trust land. AR63906. And the Spokane Tribe provided further mitigation payments to local governments to compensate them for the provision of public services to the facility. AR63852-53. In fact, the Department proposed that "the best solution to the problem of a potentially diffused market share for each Tribe involves the negotiation toward a model that benefits both Tribes." AR63809. However, the Department noted it could not impose such an arrangement on the tribes. *Id.* Moreover, requiring later tribes to

compensate earlier tribes for lost market share would amount to protection of first-comer monopolies.

Kalispel is right that each lost dollar of profit can impact the provision of government services and that loss of per capita payments to members is not to be dismissed. But IGRA treats per capita payments differently from the provision of essential government services, requiring sufficient funding for the latter before permitting the former.[4] 25 U.S.C. § 2710(b)(3)(B); 25 C.F.R. § 290.12. And Kalispel is correct that the Department noted the disparity in financial resources available to each tribe. AR63871 n.335 (even with new competition, Kalispel will have fourteen times as much revenue as the Spokane Tribe per tribal member).

[4] The Final Environmental Impact Statement ("FEIS") concluded that the projected 2020 impact from competition on Kalispel's budget, after subtracting per capita payments, was 6.7 percent. AR49635. The Record of Decision ("ROD") tracks that analysis but inflates the impact through a scrivener's error. AR63871. Kalispel argues that the citation for the ROD's number is wrong, which the Department does not dispute since the source is clearly the FEIS. Kalispel suggests a different cite that results in completely different numbers, ECF No. 113 at 5-6, but the ROD, like the FEIS, expressly uses 2020 revenue projections, and Kalispel's suggested cite uses 2014 projected impacts. AR7511.

But that observation, in a footnote, was contextual, not dispositive for the conclusion stated above the line in the analysis of impacts on Kalispel. Kalispel also objects to comparisons in the introductory letter to Governor Inslee, AR63808-10, but the comments are just that: introductory. ECF No. 113 at 24. The same goes for references to the consideration of competition in Kalispel's own 1997 Secretarial Determination. They show that Kalispel is being held to the same standard as the Spokane Tribe when it complained of new competition—but again, that is contextual, not dispositive. And the same goes for the Department's observation that it would be "ironic" to preclude Spokane from gaming in its aboriginal territory after allowing Kalispel to do so. AR63809. That remark was made in the context of discussing how economic competition is "one of the most difficult issues facing a Federal trustee," and the Department explained it would treat competition here, as it had in prior decisions, as not constituting, in itself, a detriment. AR63808-09. The Department did not ignore impacts to Kalispel's ability to provide government services.[5]

[5] Kalispel also objects to comparisons in technical reports. ECF No. 113 at 24, 25 (objecting to AR7512, AR7477, AR7499). But technical reports, while considered in the decision, are not the decision itself.

2. The Department has not breached any trust duty and did not show bias.

Kalispel's invocation of *Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015), in support of its breach of trust claim is misplaced. There the Ninth Circuit refused to apply a canon that requires Indian statutes to be interpreted liberally in favor of Indians where a tribe advocated a reading of IGRA that, while benefitting itself, would "not necessarily benefit other tribes engaged in gaming," because the government "cannot favor one tribe over another." *Id.* at 713. The Department here has treated competition the same way it did when considering Kalispel's application for a Secretarial Determination. Kalispel now seeks to re-interpret IGRA to benefit itself. Kalispel suggests dual trust duties in a Secretarial Determination: (1) to pursue the best interests of the applicant tribe, and (2) to ensure no detriment to any tribes already gaming in a given market. But practically speaking, Kalispel argues that the second duty trumps the first and the trust responsibility to applicant tribes ranks below that accorded nearby tribes already gaming in a given market. That is unworkable and not required by IGRA.

Kalispel argues that IGRA imposes on the government the kind of exacting trust responsibility described in *United States v. Mitchell*, 463 U.S. 206 (1983). ECF No. 113 at 19-20. Not so. The "general trust relationship between the United States and the Indian people" only gives rise to specific fiduciary duties "to the extent [the government] expressly accepts those responsibilities by statute."

United States v. Jicarilla Apache Nation, 564 U.S. 162, 176-77 (2011) (internal quotation marks omitted). IGRA assigns the Department federal oversight and approval authority over certain activities but not "a comprehensive managerial role" over those activities giving rise to specific fiduciary duties to a given tribe. *See United States v. Navajo Nation*, 537 U.S. 488, 507 (2003); *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 927 (9th Cir. 2008) (no liability for breach of trust where government not tasked with directly managing tribal property). Such a duty, the breach of which may subject the government to monetary damages, only arises where the government assumes "elaborate control over . . . property belonging to Indians," as it did in *Mitchell* where the Department controlled every aspect of the tribe's timber resources. *See* 463 U.S. at 225, 219-23. IGRA does not task the Department with managing Kalispel's casino or ensuring it will not be impacted by the gaming of other tribes.

Kalispel takes issue with the organization of the Secretarial Determination. In its discussion of anticipated economic impacts to the surrounding community, the ROD explained that, "[a]s discussed in more detail below," Kalispel "will experience some market decline, but that decline will be mitigated by the length of time it takes to construct and develop the Spokane Tribe's Project, and will likely recover over time as the market grows with the introduction of a second casino in the area." AR63851. The fact that the Department reserved the extensive

discussion of the various expert reports assessing the impacts of competition to a later section is substantively insignificant.

Kalispel argues that reserving the discussion of competitive impacts to the consultation section allows an inference that the Department did not treat Kalispel as part of the surrounding community. The regulations treat all local governments and tribes within twenty-five miles of a proposed gaming establishment as the surrounding community and require tribes and governments outside that radius to petition for consultation by showing they will be "directly, immediately and significantly impacted" the new establishment. 25 C.F.R. § 292.2 (defining "surrounding community"). The Department did not require Kalispel to petition for consultation and did not require a showing of direct, immediate, and significant impacts prior to considering its submissions. The cursory draft section of the ROD Kalispel cites to suggest otherwise is in an email drafted by a Department realty specialist dated August 2, 2012, almost three years before the decision issued. AR65808-18. Draft material by its very nature is preliminary and the email here is nothing more than one employee's "opinions and recommendations" which was part of the "give-and-take" of the deliberative process. *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1121-22 (9th Cir. 1988). Kalispel later argues this email shows bias. ECF No. 113 at 24-25. Even assuming that were true, the email reflects only the view of one employee, not that of the Department.

Kalispel also alleges bias on the part of the NEPA contractor. ECF No. 113 at 25-26. But Kalispel provides no evidence, simply claiming that the contractor should have considered lost future revenues (i.e., how much Kalispel's budget would grow over the years in the absence of new competition) instead of just impacts to its current budget due to competition. That is not bias. The Department's purpose in analyzing the impacts of competition is to determine how essential government services will be impacted, not to discern the profit a tribe stands to lose. Moreover, as discussed in the Department's opening brief, the contractor was supervised by the Department. ECF No. 98 at 44-46. That is enough to dispel any claim of contractor bias. *Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998) ("the degree of supervision exercised by [the agency over the contractor] protected the integrity and objectivity of the EIS in this case").

B. The Department Complied with NEPA.

1. Plaintiffs fail to assert environmental harm, as required by NEPA.

"The Ninth Circuit has repeatedly made clear that a plaintiff [who] asserts only 'purely economic injuries[,] does not have standing to challenge an agency action under NEPA.'" *Thompson Metal Fab, Inc. v. U.S. Dep't of Transp.*, 289 F.R.D. 637, 642 (D. Or. 2013) (citing *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939–40 (9th Cir.2005) (citations omitted); *see also Nev. Land Action*

Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)). Kalispel asserts no interest that is not solely economic. It argues an interest in providing governmental services for its members, but this is an economic, not an environmental, harm. As in *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. Zinke*, the Court should disregard Kalispel's NEPA arguments because they are based on its claim that Kalispel will experience economic harm as a result of the casino project. *See* 889 F.3d 584, 606 (9th Cir. 2018).

2. The Department's purpose and need statement was sufficiently broad.

Kalispel asserts that "by specifically including the '[p]otential profitability of Class III gaming in Airway Heights,'" the Department unreasonably limited the alternatives that could satisfy the purpose and need statement. ECF No. 113 at 30. But the record belies this statement. The Department engaged in a substantial evaluation of four different alternatives, including a non-gaming alternative. None of the action alternatives was rejected for not meeting the purpose and need of Class III gaming in Airway Heights. The Department fully explained that the adopted alternative was selected because it "will best meet the purpose and need for the Proposed Action by promoting long-term economic tribal self-sufficiency, self-determination, and self-governance." AR65493. "Implementing the Preferred Alternative will provide the Tribe with the best opportunity for developing and maintaining a sufficient, stable, long-term source of governmental revenue," and

give the Tribe the best opportunity to improve government services and programs. AR65493–94.

Further, the purpose and need statement is broader than simply "the potential profitability of Class III gaming in Airway Heights." It encompasses many ideas, but focuses generally on "enabl[ing] the Tribe to meet its need for economic development, self-sufficiency, and self-governance, and to provide its rapidly growing Tribal member population with employment, educational opportunities, and needed social services." AR65497; *see also* AR49451. Class III gaming in Airway Heights was just one of several considerations and did not unreasonably limit the alternatives considered. As in *Cachil Dehe*, the Department identified a wide range of purposes and sought to effectuate IGRA's purpose of tribal self-determination and self-reliance. *See Cachil Dehe*, 889 F.3d at 603–04.

3. The Department considered appropriate alternatives.

Kalispel also argues that the Department did not adequately explain why it rejected off-site alternatives, such as an on-reservation casino or other properties the Spokane Tribe owns. The Department, however, explained that the Spokane Tribe's reservation is "far from a profitable gaming market," and that the Tribe's existing on-reservation casino has had declining revenues. AR49480; AR65499. The FEIS also explained that the two other properties the Spokane Tribe owns are not feasible sites for a casino, given "the limited area for development, potentially

significant traffic and circulation restraints, and displacement of existing charitable programs currently located at the sites," and the fact that the sites are not currently held in trust for the tribe. AR49481; *see also* AR48712, AR65500. Those alternatives would not further the Spokane Tribe's objectives of utilizing its existing trust land for tribal economic development and government purposes. AR48712. The Department gave these objectives "substantial weight and deference in light of the Spokane Tribe's role as applicant." *Id.* "Consideration of off-site alternatives would require BIA to defer meeting the Tribe's urgent needs, while speculating that the Tribe could successfully purchase, acquire into federal trust, and develop these parcels." *Id*. The Department thus acted reasonably in not exploring these suggestions further. *See HonoluluTraffic.com v. FTA*, 742 F.3d 1222, 1231 (9th Cir. 2014) (agency need not "consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives.") (citation omitted).

Kalispel argues that the Department erred by not "account[ing] for the possibility of [the Spokane Tribe] working with a third-party casino developer or manager." ECF No. 113 at 32. First, Kalispel waived this issue by failing to raise it before the Department during the NEPA process. *See Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553–54 (1978) (holding that plaintiffs must raise issues during administrative process). But in any event, Kalispel speculates that

the Spokane Tribe could have worked with a developer to acquire land that would then be taken into trust, but this would have added another step to the process with no guarantee that land would be taken into trust. The Department's conclusion that off-site alternatives would be both speculative and delay meeting the Tribe's needs therefore is reasonable. AR48712.

Finally, Kalispel argues that the Department "[d]id not devote substantial treatment to each alternative considered in detail" so that the comparative merits could be evaluated. ECF No. 113 at 32. On the contrary, the FEIS contains detailed analysis of each alternative, including a summary matrix of the potential adverse and beneficial effects of each alternative. AR49419–46. Kalispel's argument seems to be that the alternatives that were rejected from further study were not discussed in depth, but NEPA regulations require only a brief discussion of the reasons for eliminating alternatives from further study. 40 C.F.R. § 1502.14(a) (requiring agencies to "briefly discuss the reasons" for eliminating alternatives from detailed study). The Department therefore complied with NEPA's requirements.

C. The County's arguments lack merit.

1. The Department's consultation regulation governs consultation pursuant to Section 2719.

The County concedes the Department followed the relevant consultation regulations, 25 C.F.R. §§ 292.19-292.20, but argues that IGRA requires more.

First, and contrary to the County, the regulations do not simply allow public comment. They require the Department to solicit, by letter, information from state, local government and tribal officials of the surrounding community. 25 C.F.R. § 292.19(a). The letters are required to provide detailed information about the proposed gaming establishment and to identify and solicit comments on five specific kinds of impacts or costs the project may impose on the community. 25 C.F.R. § 292.20. That more than distinguishes the Section 2719 consultation from the public comment requirement in 25 U.S.C. § 2704(b)(2)(B), which requires identification of nominees to the National Indian Gaming Commission ("NIGC") in the Federal Register with notice of a thirty-day public comment period. *Id.*

The County relies on *California Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072, 1080 (9th Cir. 2011), to argue that where a statute provides for both public comment and consultation, the latter has to mean face-to-face conferral. That must be the case, the County argues, even if the comment and consult provisions have no relation to each other beyond appearing in the same statute. ECF No. 114 at 6. The Ninth Circuit disagrees, having distinguished *California Wilderness* based on the close interrelation of the comment and consult requirements: "*both* relevant provisions of the Energy Policy Act at issue in *California Wilderness* are substantive and distinct because the opportunity to comment provision applies to the issuing of a report based on the congestion study

previously subject to consultation." *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 988 (9th Cir. 2015) (citation, brackets and ellipses omitted).

Finally, the County asserts that the Department's regulations do not deserve *Chevron* deference because only the NIGC is tasked by Congress with implementing the statute. ECF No. 114 at 7 n.2. That is wrong. The County's view "ignores . . . the Secretary's substantial role in administering IGRA, most relevantly here in determining whether an exception to IGRA's gaming ban applies." *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 465 (D.C. Cir. 2007). And the Tenth Circuit case relied upon by the County was overruled by congressional legislation the next year, "eliminating any doubt about the Secretary's authority" to interpret certain provisions of IGRA. *Id.*

2. The Department appropriately relied on the Air Force's decision not to designate new APZs.

The County continues to argue that the Department was required to suspend its decision process until the Air Force modified its current Accident Potential Zones ("APZ") around FAFB based on submissions made to the Department, not the Air Force. The County ignores the Department's cases indicating the contrary. These cases hold that an agency may rely on the opinion of another agency possessing expertise over an issue so long as a plaintiff can point to no new information not considered by the agency. *Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415 (1980); *Wild Fish Conservancy v. Salazar*,

628 F.3d 513, 532 (9th Cir. 2010). Here the Department forwarded the County's submissions to the Air Force and, lacking independent authority to modify FAFB's APZs, relied on the Air Force's decision not to modify the APZs. No more was required of the Department.

3. The Department's mitigation conclusions were reasonable.

The Department also reasonably concluded that any negative impacts on the County would be mitigated. The County argues that the Department's decision was unreasonable because the County has refused to accept funds from the City or negotiate a new agreement after terminating the Interlocal Agreement. ECF No. 114 at 31–36. This argument is specious. The County's political decisions do not impact the validity of the Department's conclusions. Nor did the Department rely solely on the Interlocal Agreement to conclude that impacts would be mitigated. *See* ECF No. 98 at 54–55; ECF No. 96 at 18–19, 46–47; AR 63848 (noting that Tribe will make various financial contributions to offset casino impacts, including contributions to "Impact Mitigation Fund" "for purposes of providing assistance to non-tribal service agencies").

Further, both IGRA and NEPA require the Department to consider mitigation, but neither requires that all impacts in fact be mitigated. 25 C.F.R. § 292.18(d); *Stand Up*, 879 F.3d at 1187 (approving district court's findings that "[a]ll new commercial developments are bound to entail some [unmitigated]

costs"). The Department discussed mitigation including "identification of sources of revenue to mitigate" impacts. 25 C.F.R. § 292.18(d). That the County refuses to accept revenue does not create an Administrative Procedure Act violation.

The County also now argues that the Department had an obligation to question the Interlocal Agreement in which the County agreed to remain neutral about the Tribe's proposed casino. ECF No. 114 at 31. Neither NEPA nor the APA contain any requirement for the Department to look behind an agreement into which the County voluntarily entered, and courts are not free to impose additional requirements beyond those in the statutes' plain language. *See Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1020 (9th Cir. 2012) ("As a general rule, courts should not impose new requirements on agencies not imposed by the APA or a substantive statute." (citing *Vt. Yankee*, 435 U.S. at 549); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 405–06 (1976) (holding that NEPA's only procedural requirements are those stated in plain language in the Act). The County's argument should be rejected.

III. CONCLUSION

For the above stated reasons, Plaintiffs' motions for summary judgment should be denied and Defendants' cross-motions should be granted.

Respectfully submitted on this 30th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, 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 identities recipients of electronic notice.

I hereby certify that there appear to be no non-CM/ECF participants not represented by counsel in this case who require service by mail.

DATED this 30th day of May, 2019.

/s/ Devon Lehman McCune
DEVON LEHMAN McCUNE
Senior Attorney