

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

Jul 11, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KALISPEL TRIBE OF INDIANS and
SPOKANE COUNTY,

No. 2:17-CV-0138-WFN

Plaintiffs,

ORDER

-vs-

UNITED STATES DEPARTMENT
OF THE INTERIOR, et al.,

Defendants,

SPOKANE TRIBE OF INDIANS,

Intervenor-Defendant.

A motion hearing was held June 17, 2019. Kalispel Tribe of Indians [Kalispel] was represented by Zackary Welcker; Spokane County was represented by Jennifer MacLean; Federal Defendants were represented by Steven Miskinis, with Devon McCune participating telephonically; and Spokane Tribe of Indians was represented by Danielle Spinelli, James Barton, Kevin Lamb, and Scott Wheat. The Court addressed the parties' cross Motions for Summary Judgment as well as the Federal Defendants' Motion to Strike. ECF Nos. 79, 82, 96, 97, and 98. For the reasons detailed below, the Court grants Defendants' Motions for Summary Judgment.

BACKGROUND

Located a few miles west of Spokane in Spokane County, Airway Heights is home to Fairchild Air Force Base, Northern Quest Casino, and, more recently, the Spokane Tribe's casino. Though Airway Heights falls within Spokane Tribe's aboriginal land, the

1 Kalispel Tribe obtained trust land within Airway Heights and successfully obtained
2 permission to build the Northern Quest Casino twenty years ago. Northern Quest Casino
3 has proved lucrative for the Kalispel, bringing in profits that benefited the Kalispel tribal
4 members by funding local governmental interests as well as providing direct payments to
5 tribal members. In 2001, the United States acquired land in trust for the Spokane Tribe
6 nearby the Northern Quest Casino. Five years later, the Spokane Tribe sought Department
7 of the Interior [Department] approval for gaming on the trust land with a proposed casino
8 within two miles of the Northern Quest Casino. Permission for gaming on the property
9 required a two-part determination by the Department of the Interior.

10 Over the course of the next ten years the Department examined the Spokane Tribe's
11 request. The Department consulted an expert to assess how an additional gaming facility
12 would affect the surrounding community including the Kalispel. Local officials engaged
13 with the Department to address concerns about the proposed casino. The Department
14 initiated the processes required under the National Environmental Policy Act [NEPA] to
15 assess the environmental impact. On June 15, 2015, the Department found in favor of
16 Spokane Tribe; just shy of a year afterward, Governor Jay Inslee concurred, marking the
17 conclusion of the approval process. In 2018, twelve years after the Spokane Tribe first
18 requested a two-part determination, the casino opened for business with plans for further
19 development into the future.

20 ANALYSIS

21 The "court shall grant summary judgment if the movant shows that there is no
22 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
23 of law." Fed. R. Civ. P. 56. Judicial review for APA actions is based on the agency's
24 administrative record. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883–84 (1990).
25 The court's role is to determine whether the agency's record supports the agency's decision
26 as a matter of law under the APA's arbitrary and capricious standard of review. Review of
27 a final agency determination under the Administrative Procedure Act "does not require fact
28 finding on behalf of this court. Rather, the court's review is limited to the administrative

1 record" *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th
2 Cir.1994). Consequently, the parties agree that the Court's analysis is limited to the record
3 with no disputed material facts.

4 "The Administrative Procedure Act, 5 U.S.C. § 551 et seq., which sets forth the full
5 extent of judicial authority to review executive agency action for procedural correctness
6 permits . . . the setting aside of agency action that is arbitrary or capricious, 5 U.S.C. §
7 706(2)(A)." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (internal
8 citations omitted).

9 A reviewing court must consider whether the decision was based on a
10 consideration of the relevant factors and whether there has been a clear error
11 of judgment. Although this inquiry into the facts is to be searching and
12 careful, the ultimate standard of review is a narrow one.

13 *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)
14 (internal citations omitted). "[A] court is not to substitute its judgment for that of the
15 agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. U.S. Dep't of Agric.*, 463 U.S. at 43.
16 "The agency must articulate a rational connection between the facts found and the choice
17 made." *Bowman Transp., Inc.* at 285.

18 Indian Gaming Regulatory Act [IGRA]

19 Gaming is prohibited on trust lands unless "the Secretary after consultation with
20 the Indian tribe and appropriate State and local officials, including officials of other
21 nearby Indian tribes, determines that a gaming establishment on newly acquired
22 lands would be in the best interest of the Indian tribe and its members, and would not
23 be detrimental to the surrounding community" 25 U.S.C. §2719(b)(1)(A). Bureau of
24 Indian Affairs [BIA] regulations define "surrounding community" as "local governments
25 and nearby Indian tribes located within a twenty-five-mile radius of the site of the
26 proposed gaming establishment." 25 C.F.R. § 292.2. The regulations also specify the
27 mechanics of the consultation process which involves sending a letter to the relevant
28 parties and sharing any comments with the applicant tribe, then the applicant tribe must
respond to comments. 25 C.F.R. § 292.19. The letter must include several key details

1 about the proposed gaming establishment and must request comments from recipients.
2 25 C.F.R. § 292.20.

3 *Detriment to the Community*

4 Though the Kalispel tribe likely will suffer some detrimental impacts through loss of
5 revenue, the Department's determination that the new casino would not be detrimental to
6 the surrounding community was not arbitrary and capricious. After exhaustive review, the
7 Secretary permissibly weighed the benefits and detriments to the community concluding
8 that approval of the new casino would not be a detriment to the surrounding community.
9 The BIA spent ten years investigating the application, seeking expert review, and working
10 with local officials and governments prior to issuing a decision. The BIA squarely
11 addressed Kalispel's concerns regarding lost profits at the Northern Quest Casino. *See*
12 *e.g.*, AR4694 – 97, AR54728. The Department's expert concluded that while the Kalispel
13 may suffer in the short term, eventually the profits would rebound and both tribes would
14 benefit. *Id.* Though this conclusion differs from the Kalispel's own expert, reliance on the
15 agency expert was not arbitrary and capricious.

16 In weighing detriment to the community, the Department need not find that the
17 casino has no unmitigated negative impacts whatsoever, but instead the Secretary must
18 weigh the benefits and possible detrimental impacts as a whole, "even if those benefits do
19 not directly mitigate a specific cost imposed by the casino." *Stand Up for California! v.*
20 *United States Dep't of Interior*, 879 F.3d 1177, 1187 (D.C. Cir. 2018), *cert. denied sub*
21 *nom. Stand Up for California! v. Dep't of the Interior*, 139 S. Ct. 786, 202 L. Ed. 2d 629
22 (2019). "Although the IGRA requires the Secretary to consider the economic impact of
23 proposed gaming facilities on the surrounding communities, it is hard to find anything in
24 that provision that suggests an affirmative right for nearby tribes to be free from economic
25 competition." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000).

26 *Consultation with Spokane County*

27 The Department met its statutory obligations for consultation. The parties do not
28 dispute that the Secretary followed the applicable regulations regarding consultation, but

1 the County argues that the consultation process laid out in the regulations is legally
2 insufficient. *Chevron* deference applies to regulations which are "binding in the courts
3 unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary
4 to statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). The consultation
5 regulations are not manifestly contrary to statute. Though the Court recognizes that
6 consultation requires more than providing notice and accepting comments, *see California*
7 *Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1088 (9th Cir. 2011), the
8 County's lack of response to either of the Department's consultation letters curtailed any
9 opportunity for a more robust consultation process. As illustrated by the Department's
10 response to concerns raised by the City of Spokane, the Department was willing to engage
11 in a meaningful consultation process if issues were raised in a timely manner.

12 Linked to the County's concerns regarding consultation is the County's complaint
13 that the Department failed to give due consideration to the County's objections to the
14 project. The County argues that the Department should have given the County's objections
15 "substantial weight." The IGRA does not require unanimous approval from local
16 governments, but rather the agency must examine effects on the surrounding community
17 and the Governor of the state must approve. There is no basis in law that would afford
18 more weight to the opinions of the County than those of the cities of Airway Heights and
19 Spokane, or of the Governor of the State of Washington.

20 *Effects on Fairchild*

21 The County further charges that the Secretary failed to follow the Joint Land Use
22 Study [JLUS] as it pertains to growth surrounding Fairchild Airforce Base. The County
23 hoped to avoid growth that would negatively affect ongoing or future operations of
24 Fairchild due to the importance of the base to the local economy. Though these concerns
25 are valid, the record reflects that the Secretary sought feedback directly from the Air
26 Force. The Air Force expressed no qualms about the proposed casino. In consideration of
27 concerns raised regarding the proposed development, the Spokane Tribe agreed to restrict
28 building height to 60 ft, despite being permitted to build higher. The self-imposed

1 restriction is binding and illustrates the Tribe's commitment to following the guidelines in
2 the JLUS. Further, the building height restriction represents the fruits of the consultation
3 process showing Spokane Tribe's willingness to compromise and adjust in response to
4 concerns raised by local governments. The Secretary considered both opposition and
5 support from the Kalispel Tribe, local governments, as well as the Air Force, and based on
6 the record, the Court cannot conclude that the Secretary's decision was arbitrary and
7 capricious.

8 Environmental Impact Statement- NEPA

9 "NEPA imposes only procedural requirements on federal agencies with a particular
10 focus on requiring agencies to undertake analyses of the environmental impact of their
11 proposals and actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756–57 (2004).

12 NEPA's implementing regulations require that an EIS contain a statement
13 describing the "purpose and need" of the project, which "shall briefly
14 specify the underlying purpose and need to which the agency is responding in
15 proposing the alternatives including the proposed action," 40 C.F.R.
16 § 1502.13. Further, in the EIS, the agency must "[r]igorously explore and
17 objectively evaluate all reasonable alternatives, and for alternatives which
18 were eliminated from detailed study, briefly discuss the reasons for their
19 having been eliminated." 40 C.F.R. § 1502.14. While agencies enjoy
20 "considerable discretion," to define the purpose and need of a project, *Friends*
21 *of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998), in doing so
22 "an agency cannot define its objectives in unreasonably narrow terms," *City of*
23 *Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir.
24 1997). "Courts evaluate an agency's statement of purpose under a
25 reasonableness standard . . . and in assessing reasonableness, must consider
the statutory context of the federal action at issue . . . [while] [a]gencies enjoy
considerable discretion in defining the purpose and need of a project . . . they
may not define the project's objectives in terms so unreasonably narrow,
that only one alternative would accomplish the goals of the project."
HonoluluTraffic.com v. Fed. Transit Admin., 742 F.3d 1222, 1230 (9th Cir.
2014) (citations and internal quotation marks omitted).

26 *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 603
27 (9th Cir. 2018). Those seeking to challenge an Environmental Impact Statement [EIS]
28 must show that their interest falls within the zone of interests Congress intended to protect.

1 *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939-40 (9th Cir. 2005). Parties
2 asserting purely economic injuries do not have standing to challenge an agency action
3 under NEPA. *Id.*

4 The scope of the purpose and need statement in the Environmental Impact Statement
5 was reasonable. The EIS defined the purpose and need as follows:

6 The purpose for the Proposed Action is to advance the BIA's 'Self
7 Determination' policy of promoting the Tribe's self-governance capability,
8 and to promote opportunities for economic development and self-sufficiency
9 of the Tribe and its members. The Tribe's need for the Proposed Action is
based on:

- 10 • Lack of a sufficient and sustained income source, which hinders the
11 Tribe's ability to maintain programs and services necessary to improve
12 the overall condition of the tribal membership;
- 13 • Desire to become a completely self-sufficient entity and eliminate
14 reliance on grant funds (soft money);
- 15 • Lack of employment opportunities for tribal members (approximately
16 47 percent are unemployed, and 43 percent of the employed are below
17 the federal poverty level);
- 18 • Desire to further develop the Tribe's property adjacent to the City with
19 tribal economic enterprises;
- 20 • Potential profitability of Class III gaming in Airway Heights;
- 21 • Desire to re-establish cash reserves to ensure the stability of the Tribe
22 through tough economic times in the future.
- Desire to improve services and quality of life for tribal members and
their families
- Desire to contribute towards improving local communities through job
creation and economic opportunities.

23 AR 0048663 – 64. Though the statement of purpose does discuss the possibility of a
24 Class III gaming facility, the overall stated purpose is sufficiently broad to allow
25 consideration of the other alternatives discussed in the EIS.

26 The EIS sufficiently addressed socio-economic impact on the Kalispel tribe. "Under
27 CEQ regulation 40 C.F.R. § 1500.8(a)(3)(ii) (1978), an EIS must assess and discuss
28 the secondary (socio-economic) effects of the project in question." *Stop H-3 Ass'n v.*

1 *Dole*, 740 F.2d 1442, 1461 (9th Cir. 1984). The EIS addressed and discussed the
2 Kalispel's likely loss of revenues. AR0048676. The Kalispel dispute the findings of
3 the Department's experts and complain that the Department should have exercised
4 more control of the contracted expert's conclusions. The Government can rely on an
5 outside expert "so long as the agency objectively evaluates the qualifications and
6 analysis of the expert." *Anderson v. Evans*, 371 F.3d 475, 489 (9th Cir. 2004). "The rule
7 in such cases is that delegation to a private consultant is not a *per se* violation of
8 NEPA. The plaintiff must show the agency actually disregarded its role by failing to
9 review adequately the study it commissioned." *Friends of Endangered Species, Inc. v.*
10 *Jantzen*, 589 F. Supp. 113, 119 (N.D. Cal. 1984), *aff'd*, 760 F.2d 976 (9th Cir. 1985). The
11 administrative record reflects that the Department reviewed the independent expert's
12 conclusions. *See, e.g.* Tom Hartman Memo AR58300 – 01, AR 63871; AR48368;
13 AR48312; AR29437.

14 "[O]ne important ingredient of an EIS is the discussion of steps that can be taken to
15 mitigate adverse environmental consequences." *Robertson v. Methow Valley Citizens*
16 *Council*, 490 U.S. 332, 351 (1989). While mitigation must be addressed, there is no need
17 to have a formal mitigation plan in place. *Id.* "Since it is those state and local
18 governmental bodies that have jurisdiction over the area in which the adverse effects need
19 be addressed and since they have the authority to mitigate them, it would be incongruous
20 to conclude that the Forest Service has no power to act until the local agencies have
21 reached a final conclusion on what mitigating measures they consider necessary. *Id.*
22 at 352-53.

23 The EIS addressed mitigation and discussed the Intergovernmental Agreement's
24 approach to mitigation. The County argues that the EIS misrepresents mitigation because
25 the County withdrew from the agreement. However, the EIS accurately represented the
26 agreement for mitigation. The Department had no obligation to interfere in the local
27 government's agreements even though the County may have undermined its claim to
28 mitigation payments by withdrawing from the agreement.

1 The District Court Executive is directed to file this Order and provide copies to
2 counsel.

3 **DATED** this 11th day of July, 2019.

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7 WM. FREMMING NIELSEN
8 SENIOR UNITED STATES DISTRICT JUDGE

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