Vanya S. Hogen, pro hac vice
Colette Routel, pro hac vice
Leah Jurss, pro hac vice
HOGEN ADAMS, PLLC
1935 W. County Road B2, Suite 460
St. Paul, MN 55113
Phone: (651) 842-9100
vhogen@hogenadams.com
colette.routel@mitchellhamline.edu
ljurss@hogenadams.com

Michele Fukawa, WSBA #46592
Kalispel Tribe of Indians Legal Office
934 South Garfield Road
Airway Heights, WA 99001
Phone: (509) 789-7600
mfukawa@kalispeltribe.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

| | |
|---|---|
| KALISPEL TRIBE OF INDIANS and SPOKANE COUNTY,<br>Plaintiffs,<br><br>-vs-<br><br>UNITED STATES DEPARTMENT OF THE INTERIOR, et. al.<br>Defendants,<br><br>SPOKANE TRIBE OF INDIANS,<br>Intervenor-Defendant. | No. 2:17-CV-0138-WFN<br><br>KALISPEL TRIBE'S MOTION FOR SUMMARY JUDGMENT<br><br>Oral Argument Requested |

## Table of Contents

**I. Introduction.....1**

**II. Factual Background .....5**

**A. Rush to the Governor's Desk. .....6**

**B. Review of Impact to Kalispel Gaming Revenues. .....11**

**C. The Real Decision.....16**

**III. The Department failed to comply with IGRA, NEPA, and the Trust Responsibility. .....17**

**A. The Department violated IGRA by disregarding detriment to the surrounding community and prejudging Spokane's application.....18**

**1. Two-part determinations are to be rarely granted. .....18**

**2. The Department improperly evaluated the harm to the "surrounding community," and particularly to the Kalispel Tribe. .....21**

**B. The Department violated NEPA.....30**

**1. The Department created an unreasonably narrow purpose-and-need statement and failed to consider all reasonable alternatives because it had predetermined the process' outcome. .....34**

**2. The Department relied on inaccurate and incomplete data to determine the socioeconomic impact on the Kalispel Tribe and it failed to adequately supervise and independently evaluate its contractor. .....41**

**C. The Department violated its trust responsibility to the Kalispel Tribe...43**

**IV. Conclusion.....45**

The Administrative Record in this case reveals the Department of the Interior's pre-judged decision to allow the Spokane Tribe to develop a multi-million dollar gaming complex just two miles from the Kalispel Tribe's sole significant source of revenue for its tribal government. By predetermining the outcome, creating impossible standards, and ignoring all economic presentations of harm, the Department failed to comply with its statutory, regulatory, and trust-responsibility requirements.

## I. Introduction

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701–2721), as a carefully constructed compromise that balanced the competing interests of federal, state, and tribal governments. One way Congress balanced those interests was to limit Class III (Las Vegas-style) gaming to lands either within the boundaries of or contiguous to an Indian reservation, or lands held by the United States in trust for the benefit of a federally recognized Indian tribe or tribal member as of October 17, 1988, IGRA's enactment date. 25 U.S.C. § 2719(a). While it was believed that these geographic and temporal limitations would properly balance competing interests, Congress also realized that they might unintentionally restrict tribes that. at the time of IGRA's enactment, had a limited land base due to historical circumstances outside of their control. As a result, Congress included several

exceptions in IGRA that would authorize gaming on later-acquired trust lands. Exceptions were provided, for example, for tribes that had been terminated by the United States and later restored to federal recognition, tribes that had only recently become recognized by the federal government, or tribes acquiring land through a land-claims settlement. *Id.* § 2719(b)(1)(B).

The IGRA exception at issue in this case is the so-called "two-part determination." *Id.* § 2719(b)(1)(A). To qualify for this exception, the Secretary of the Interior must determine that allowing a gaming establishment on off-reservation lands acquired in trust after October 17, 1988 "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." *Id.* Even then, gaming is only permitted on those lands if the Governor of the State concurs in the Secretary's determination. *Id.* In light of the overall context of IGRA, federal officials have read this exception narrowly. As a result, two-part determinations have been sparingly granted, typically in special circumstances where a tribe does not possess lands that could support a gaming establishment, yet the tribe does not fit any of the other exceptions found in IGRA. Before the Spokane Tribe's application, only 13 two-part determinations had been granted by the Bureau of Indian Affairs ("Bureau" or "BIA"), and only five of those decisions had been concurred in by the State's Governor, resulting in a gaming establishment. AR0042252–53-UR.

One of the few two-part determinations granted by federal officials was for the Plaintiff Kalispel Tribe of Indians ("Kalispel" or "Kalispel Tribe"). While the Kalispel Tribe possesses a small reservation in Pend Oreille County, Washington, the reservation is virtually undevelopable because it is situated between a mountainside and a river, located almost entirely within a floodplain. AR0042244-UR; AR00042276–77-UR. Thus, in 1997, when the BIA agreed that Kalispel's 289-acre parcel in Airway Heights satisfied the requirements of Section 2719(b)(1)(A) of the IGRA, it did so out of necessity.[1] Kalispel had no on-reservation gaming facility, and no other means of pursuing economic development. AR0039935–36; AR0012004.

On February 24, 2006, nine years after granting Kalispel's two-part determination, the neighboring Spokane Tribe ("Spokane Tribe" or "Spokane") submitted a request for its own two-part determination. AR0012459–62. When Spokane filed its request, there seemed little chance of it being granted. Since the nineteenth century, the Spokane Tribe has possessed a reservation that is more than 157,000 acres, making it one of the largest Indian reservations in the Pacific

[1] The Bureau also issued a proclamation making Kalispel's Airway Heights lands part of its reservation. Proclaiming Certain Lands as Reservation for the Kalispel Tribe in Washington, 61 Fed. Reg. 55,992 (Oct. 30, 1996).

Northwest. AR0001701. And at the time of its request, the Spokane Tribe already operated two casinos: (1) Two Rivers Casino, located within its reservation, and (2) Chewelah Casino, located off-reservation on a parcel of land taken into trust before October 1988. AR0042248-UR; AR0012482; AR0017031. While Spokane could certainly increase its gaming revenue by opening a new casino in a more densely populated area, this is true for most federally recognized tribes; after all, many Indian reservations are located in rural areas with low population densities. This fact alone has never warranted granting a two-part determination.

Additionally, the Spokane Tribe proposed to build its new casino, hotel, convention center, and retail complex on a parcel of land adjacent, and later annexed to, the city of Airway Heights—just two miles from Kalispel's existing casino. *See* AR0012459–62; AR0042244-UR; AR0021341. The Bureau has never approved a two-part determination for an Indian tribe so close to an existing tribal casino because the approval cannot be "detrimental to the surrounding community." AR0042252–53-UR (listing prior two-part determinations and identifying the nearest tribal competitor as over 20 miles away from the applicant tribe's site); 25 U.S.C. § 2719(b)(1)(A). Spokane is a small, saturated gaming market; there are already six casinos within a two-hour drive of the city. AR0002833–34. Adults within a two-hour drive from the Airway Heights casino already spend, on average, hundreds of dollars each year at one of the area casinos,

and they are severely constrained in their ability to spend more due to their limited disposable income. *See id.* (noting that the approximately 654,000 adults in the market have a per capita income averaging $23,500, yet the casinos have gross gaming revenues of almost $329 million). While there is always some hope that congregating casinos in a particular location will result in increased tourism, even Spokane's overly generous projections anticipated just 10% of its new casino revenues would come from patrons outside the local gaming market. AR0036560.

In response to Spokane's request for a two-part determination, the Kalispel Tribe took the unprecedented step of hiring gaming experts to conduct market studies to quantify the expected impact on their gaming revenues, and the data underlying those studies was fully disclosed to the Bureau. AR0042223–24-UR. Those experts projected impacts on Kalispel's gaming revenues of catastrophic proportions. AR0005263, AR0005320, AR0005347. Despite this, the BIA granted Spokane's two-part determination. *See* AR0063807–10. In doing so, Bureau officials violated federal law by deciding from the beginning of the process—before any environmental or economic analysis—that they would not only support Spokane's request, but they would do whatever it took to fast-track the application through the review process required by the National Environmental Policy Act ("NEPA") and IGRA to ensure that it landed on the desk of a favorable Governor.

## II. Factual Background

**A. Rush to the Governor's Desk.**

Christine Gregoire became the Governor of Washington in January 2005. Apparently, contacts with the Governor's office led the Spokane Tribe to believe that she would respond favorably to a request for an off-reservation casino. As a result, Spokane submitted a letter in February 2006 requesting that the Bureau determine that its land in Airway Heights was eligible for gaming under 25 U.S.C. § 2719(b)(1)(B), AR0012459, and it hired a contractor to begin gathering information for the environmental review process, AR0012645.

But the Spokane Tribe did not follow the established process. Applications for two-part determinations require the submission of several documents designed to describe the proposed project in detail. AR0010623–37. This level of detail is necessary to ensure that nearby governments, including Indian tribes, can engage in meaningful consultation with the federal government regarding the project. *See, e.g.*, AR0012518; AR0012517. In fact, the Spokane Tribe did not submit the required documents for almost six years. AR0010541; AR0036535. At least some of this delay was because Spokane was not sure the size or type of facility it was proposing to build. *E.g.*, AR0012654.

As a result, there was widespread confusion over what project was being proposed, whether Spokane had a two-part application pending, whether the Northwest Regional Office ("NWRO") of the Bureau or the National Indian

Gaming Commission ("NIGC") would become the lead agency for the environmental-review process, and whether it was proper to publish a scoping notice in the Federal Register before receipt of a fully documented two-part determination petition. *E.g.*, AR0012499; AR0012464; AR0012480; AR0012473; AR0012484; AR0012487.

The Bureau did not receive a fully documented request for a two-part determination from Spokane until February 29, 2012, when the Spokane Tribe filed the paperwork required by Part 292 of the Code of Federal Regulations. *See* AR0036535. Despite this and over the objection of the Kalispel Tribe, the Bureau published notices that it was engaging in the NEPA scoping process in 2009, AR0012564, and the agency began working on the request in earnest in March 2011, after completing the scoping report, AR0021015.

By now, the Spokane Tribe was concerned that time was of the essence. Governor Gregoire's term would expire in January 2013, and there was no way to know whether the next Governor would be as favorable to their request. B.J. Howerton, Environmental Services Manager for the NWRO, decided to deviate from the agency's typical procedures to fast-track the Spokane application. Typically, the NWRO's realty personnel handle the two-part determination process, while Dr. Howerton coordinates the environmental review required by NEPA. *See* AR0010523. But Dr. Howerton decided to start the two-part

determination process on his own. He enlisted the help of Spokane's contractor–Analytical Environmental Services ("AES")–to conduct the government-to-government consultations required under Section 20 of IGRA, and in April 2011, he sent out government-to-government consultation letters under Stanley Speaks' signature. AR0010522; AR0010534.

Dr. Howerton never informed Sherry Johns, the Realty Specialist for the NWRO, that he was proceeding with Spokane's request for a two-part determination. In fact, she was not aware that a formal request had been made until April 30, 2012, after a Draft Environmental Impact Statement ("DEIS") had already been issued and more than one year after the Section 20 consultation process had begun. AR0010521; AR0010399. When Dr. Howerton's deception was eventually discovered, he dishonestly claimed that he had been authorized to conduct the process by Gregory Argel because Sherry Johns was on medical leave. AR0010521–22; AR0010521; AR0010511.

Howerton candidly admitted, however, that his main goal was to expedite the NEPA and two-part determination process because the Spokane Tribe had indicated that the current Governor was favorable to their application, and a subsequent Governor might not be. In an email to Sherry Johns, Howerton stated that he "need[ed] to keep the process moving forward on an expedited pace" because he knew time was of the essence given the necessity of obtaining the

Governor's concurrence. AR0010512. He told Ms. Johns: "[t]hat is one reason why I was doing your work in your absence and keeping the 2-part determination process moving forward on an expedited pace." *Id.* Sherry Johns confirmed that this was her goal as well. In an email requesting documents from Howerton she explained: "[i]f I do not receive the [documents] in a timely manner, I will not be able to expedite the 2-part determination recommendation memorandum and the Tribe stated that time is of the essence because of Governor's concurrence. The current Governor is favorable; however, the next Governor may not be." AR0010513.

The record is replete with references to the Governor's position on Spokane's application (both favorable and neutral), and the need to expedite the process so that it would land on her desk before the end of her term. *E.g.*, AR0012650; AR0010696 (email from AES contractor Ryan Lee to B.J. Howerton referring to a conference call where an "accelerated" version of the NEPA schedule and a "typical" schedule were discussed); AR0010697 (accelerated schedule showing delivery of the Record of Decision ("ROD") package on September 10, 2012); AR0010698 (typical schedule showing delivery of the ROD on February 10, 2013, which would be after Governor Gregoire left office); AR0010599 (email from Douglas Wolf in the Interior Solicitor's Office stating that the Spokane Tribe "has worked hard to convince ASIA, OIG, and SOL that they need to have [the]

most expedited schedule possible").

A decision would never be put to the Governor, however, if the BIA did not approve the two-part determination in the first instance. *Cf.* 25 U.S.C. § 2719(b)(1)(A). Yet this fact was never discussed, or in doubt, in the correspondence found in the Administrative Record. In fact, by April 2012, federal officials had already begun drafting a favorable two-part determination. *See* AR0010511 (noting that one of the questions to be answered in the two-part determination memorandum would be whether "a gaming establishment on the newly acquired land [would] not be detrimental to the surrounding community?" and indicating that "the Contractor and I have already made a rough draft on this topic"). They did so before receiving any comments from the Kalispel Tribe or other interested parties. Comments on the DEIS were not due until May 16, 2012. AR0010557. By August 2, 2012, the NWRO was already asking if it could forward the two-part-determination recommendation, or if it was required to wait until the EIS was complete. AR0065818.

Because the outcome of the Spokane Tribe's application was predetermined from the very beginning, and because federal officials knew that the Kalispel Tribe would oppose the project, they tried to limit Kalispel's involvement. Kalispel asked that the scoping process be reinitiated with sufficient detail about the project that was being proposed, and that another off-reservation location—one not within

two miles of Kalispel's existing casino (which would draw from exactly the same market)—be considered. *See* AR0012518; AR0012517 (September 15, 2009 memorandum from Kalispel requesting meeting regarding deficiencies in the Notice of Intent to Prepare an Environmental Impact Statement); AR0012482 (May 12, 2010 briefing paper noting Kalispel's desire for an alternative site that would have less detrimental effects on the surrounding community). But when Spokane, which had aggressively pushed to get the scoping notice published in the first instance, AR0012613, heard that the BIA was suggesting a second scoping hearing, it balked, and the BIA decided to move forward, AR0012484.

Kalispel was not offered the ability to be a cooperating agency for NEPA purposes even while every other local government was extended such an opportunity. AR12419. Because Kalispel was denied cooperating-agency status, it generally only had access to information and data contained in the Scoping Report, DEIS, the Final EIS ("FEIS"), and other public documents. *E.g.*, AR0012517. Yet nearly all of the work on the project was done through conference calls, email exchanges and behind-the-scenes meetings that cooperating agencies participated in. *E.g.*, AR0005691; AR0065545; AR0012311; AR0043850. In fact, reporters had more access to information regarding the timing and status of the Spokane project than Kalispel did. AR004194; AR0005699; AR0006425; AR0009609; AR0009667.

**B. Review of Impact to Kalispel Gaming Revenues.**

Not realizing that federal officials had long ago decided to grant Spokane's request, Kalispel expended resources to hire gaming industry-experts to analyze the impact that the proposed Spokane casino would have on their revenue. The analysis established that Kalispel's gaming revenue and profit would dramatically fall if the Spokane casino opened. AR0005299 (indicating a very significant decrease in 2020 revenues). In addition, Kalispel had just expanded its casino operations and taken on a significant bank loan. The financial analysis indicated that Kalispel would default on the financial covenants contained in its bank loan if Spokane's casino in Airway Heights were to open. AR0005323; AR0005353. Finally, Kalispel would not have sufficient gaming revenues to fund existing tribal services and programs because gaming was its sole significant revenue source. AR0005324, AR0005331.

AES, the contractor hired by Spokane to complete the environmental assessment for the project, hired the Innovation Group to respond to Kalispel's comments. The Innovation Group projected a smaller—but still dramatic—decrease in Kalispel's gaming revenues in 2020. AR0063870 (projecting major loss in gaming revenues). The Innovation Group claimed, however, that the decline would be temporary, because the market would "grow" with the addition of a new casino.

The Bureau has a legal obligation to independently evaluate the work of

contractors it hires to conduct the environmental review process. To this end, early in the process, Steven Payson, a BIA economist, was consulted. Payson reviewed the administrative FEIS and sent an email to which he attached his "[t]houghts on the Spokane gaming issue," which he noted was probably "not quite what any of you expected" and he suspected they would find it "interesting" or "different." AR0008982. Paula Hart then forward this email and document to others, noting that it was indeed "interesting," and "[o]n the last page Steve is making the argument that Kalispell [*sic*] is making some very interesting policy suggestions." *Id.* It seems then that Payson agreed with Kalispel's analysis, but we will never know, because the agency has refused to release the attachment being discussed, claiming that it is protected by deliberative-process privilege, even though it was completed almost three years before the two-part determination was finalized. *See* ECF No. 70 at 1–2. Regardless, the BIA did not ask Payson to do any more work on the project; no further correspondence was sent to him that appears in the administrative record. *See* AR0007761 (email from Payson two months later asking, "Did you want me to do more analysis?").

It was not until 2014, more than a year after the FEIS was issued, that the BIA consulted its own on-staff financial analyst, Tom Hartman. Hartman had been sent early emails about whether the NIGC or BIA would serve as the lead agency during the environmental-review process, AR0012473, but he had not otherwise

been involved in the project. Now, in February 2014, an email sent to Hartman from Troy Woodward established the dilemma that was before the agency:

> the Kalispel Tribe, which has a very large casino within 2 miles of the proposed Spokane casino in Airway Heights, WA, has alleged that if Spokane opens then Kalispel will necessarily default on its debt obligations.
>
> Similar to the Menominee application, Spokane counters that the Kalispel economic data is flawed because they assume Kalispel's gaming is 100% of the available market and that the methodology of the study is flawed because it does not adequately analyze the available gaming market. Spokane further alleges that Kalispel would not default on its debt and would not have to cut back on tribal government services because they have a financial cushion, as evidenced by the per capita payments they make to their members.

AR0004833–34. Hartman responded by noting that the agency was "back to the gray area" of what was and was not "'detrimental'" to the local community, but he agreed to review the documentation and submit his analysis. *Id.*

Hartman sent the BIA a two-page memorandum in June 2014, claiming that "[f]inancial projections based upon distance and demographic data are not an accurate technique for analyzing competitive results" even though they were "commonly used." AR0003574. In Hartman's opinion, such projections depend on too many assumptions and small changes in the assumptions would completely change the result. Notably, Hartman did not endorse the analysis prepared by the Innovation Group, which relied on such data and assumptions. Instead, he stated:

> The Kalispel Tribe has presented an analysis, and the Spokane Tribe has responded with challenges to many of the assumptions. If the OIGM went through the assumptions item by item, accepting some and rejecting others,

> the resulting financial analysis might not be a more reliable prediction of the future. Some assumptions regarding total market growth would dominate the end result, yet there would be little basis for deciding on a prediction for market growth other than guessing.

*Id.* In other words, the Innovation Group's claims that the opening of a new Spokane casino in Airway Heights would expand the market were, in Hartman's opinion, simply based on guesswork.

Elsewhere, Hartman concluded that "[n]ew entrants [into the market] did not regularly cause established casinos to *fail*." *Id.* (emphasis added) He also says: "I do not think that the likely outcome of a casino in Airway Heights developed by the Spokane Tribe will be a *devastating impact* on the existing casino owned by the Kalispel Tribe." *Id.* (emphasis added). The test established by IGRA, of course, does not require that Kalispel's multi-million-dollar gaming enterprise fail for the off-reservation gaming request to be considered "detrimental" to the surrounding community. Hartman also based his analysis on markets such as Las Vegas, Nevada, and Connecticut, and concluded that "[c]learly the distance from a residence to a casino is not the dominate factor in these customer's decision to gamble." *Id.* In doing so, however, he failed to acknowledge that these locations are in or near major metropolitan areas that attract millions of tourists each year; Airway Heights is simply not a comparable market.

The BIA apparently did not like Hartman's analysis as it did not confirm the

supremacy of the Innovation Group's position. As such, it decided to ignore it. It did not go through Kalispel's and the Innovation Group's assumptions "item by item"—it just adopted the Innovation Group's analysis. Nowhere did the BIA acknowledge that both of its in-house experts disagreed with the analysis it relied on, which was submitted by Spokane's paid contractor. Hartman's memo never saw the light of day until this Court compelled its production. *See* ECF No. 38 at 6–7.

**C. The Real Decision.**

In the end, federal officials did not seriously consider any of the information Kalispel submitted. The process in the BIA NWRO was skewed to reach a particular result from the very beginning. When the matter was eventually sent to Washington D.C. for final approvals and Assistant Secretary of Indian Affairs Kevin Washburn was briefed on the matter (which happened through a series of one-page briefing memos, AR0000948; AR0000956, AR0007464; AR0007466; AR007643; AR0007644), he was informed that federal officials had previously granted Kalispel's request for a two-part determination and that that decision supposedly led to devastating impacts on the Spokane Tribe's existing gaming

facilities, cutting their revenues from $5 million to just $20,000 annually.[2] AR0007727–29; AR0007730; AR0007734–35. Apparently believing that two wrongs *do* make a right, the government decided that it was only fair that Spokane be granted a two-part determination virtually next door to Kalispel's casino, so that the two tribes could compete head-to-head for revenue. This, of course, is not the standard contained in IGRA.

## III. The Department failed to comply with IGRA, NEPA, and the Trust Responsibility.

Because neither NEPA nor IGRA provide separate standards of review, the Tribe's claims are reviewed under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701–706. In administrative record review cases, summary judgment is the "mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 770 (9th Cir. 1985); *see also Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224, 1231 (E.D. Wash. 2016) (reviewing cross-motions for summary judgment of alleged ESA and NEPA violations under the APA standard); Fed. R. Civ. P. 56.

Section 706(2) of the APA directs courts to consider whether an agency's

[2] There is no factual support for this allegation. Spokane's casinos have faced numerous dramatic revenue swings—both up and down—since Kalispel's Airway Heights Casino opened. AR0031318–45.

action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In establishing standards for the review of agency actions, the Supreme Court has directed courts to consider whether the agency

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Supreme Court has recognized that any other approach in evaluation of an agency decision "would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (internal marks removed). Despite deference owed to an agency, courts will not "rubber-stamp . . . administrative decisions that [they] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NRDC v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016) (quotation omitted).

**A. The Department violated IGRA by disregarding detriment to the surrounding community and prejudging Spokane's application.**

**1. Two-part determinations are to be rarely granted.**

While IGRA was enacted to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting "tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701(4), it generally bans off-reservation gaming and carefully circumscribes it to limited exceptions. For a two-part determination, the Secretary must determine that "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members *and would not be detrimental to the surrounding community*." 25 U.S.C. § 2719(b)(1)(A) (emphasis added). The Assistant Secretary, in an article penned before his appointment, wrote of this exception that "the discretion granted therein is quite limited, effectively to non-controversial applications." Kevin K. Washburn, *Agency Conflict and Culture: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice*, 42 Ariz. St. L.J. 303, 332 (Spring 2010).

The regulations implementing the two-part-determination language define a "nearby Indian tribe" to include "an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment." 25 C.F.R. § 292.2. Kalispel, whose trust land housing its Northern Quest Resort & Casino ("Northern Quest Casino") sits just two miles from Spokane's Off-Reservation Casino site, AR0063869, easily meets this definition.

Unfortunately, neither IGRA nor the regulations define what "detrimental to the surrounding community" means, *see* 25 U.S.C. § 2703; 25 C.F.R. Part 292, and the legislative history for IGRA is similarly silent. In promulgating the two-part-determination regulations, the Department indicated it would "consider detrimental impacts on a case-by-case basis, so it is unnecessary to include a standard." Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,456 (May 20, 2008).

Section 292.18 of the IGRA regulations requires that an application for a two-part determination contain seven categories of information, including the following:

> (a) Information regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA); . . .
>
> (c) Anticipated impacts on the economic development, income, and employment of the surrounding community; [and]
>
> (d) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them[.]

25 C.F.R. § 292.18.[3] The Assistant Secretary's decision here failed to properly

[3] Section 292.19 requires the BIA regional director to consult with "[a]ppropriate State and local officials" and "[o]fficials of nearby Indian tribes." The Secretary

consider at least these factors and established an impossible bar—that a nearby Indian tribe show that opening of the proposed casino would result in closure of an existing casino—to ever find that a new casino would be "detrimental to the surrounding community." *See* AR0063895.

**2. The Department improperly evaluated the harm to the "surrounding community," and particularly to the Kalispel Tribe.**

**a. The Department adopted a standard for "detrimental to the surrounding community" that can never be met.**

In the Assistant Secretary's decision analyzing 25 C.F.R. § 292.18(c) "[a]nticipated impacts on the economic development, income, and employment of the surrounding community," there is but one summary paragraph about Kalispel:

> The Tribe's Northern Quest Casino and Resort currently conducts class II gaming. Potential adverse impacts to the Kalispel Tribe's casino will be mitigated as described in the Final EIS. As discussed in more detail below, the Kalispel Tribe's Northern Quest Casino and Resort 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.

AR0063851. And Kalispel is literally not even mentioned in the Assistant Secretary's discussion of § 292.18(d) regarding "[a]nticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate

---

must then make a decision based on information received through these consultations along with the tribe's application. 25 C.F.R. § 292.21(a).

them." AR0063852–55.

Rather, the Assistant Secretary discusses Kalispel in a section of his decision regarding consultation with the surrounding community. *See generally* AR0063863–72. That section, which is simply a summary of the comments the various local governments (including Kalispel) submitted during the consultation process and the Department's response to them, shows that the Assistant Secretary was really just going through the motions—listing the back-and-forth between the Department and Kalispel and parroting language from prior decisions.

Case in point, the Department reiterated—as it has in several other two-part determinations—that "[m]ere competition to Kalispel's Northern Quest Casino from the Spokane Tribe's proposed casino in an overlapping gaming market is not sufficient, in and of itself, to conclude that it would result in a detrimental impact on the Kalispel Tribe." AR0063865 and n.296 (citing Two-Part Determinations for Enterprise and North Fork Rancherias). In those earlier decisions, the Department said, "The Department will not approve a tribal application for off-reservation gaming where a nearby Indian tribe demonstrates that it is likely to suffer a detrimental impact as a result." AR0042231-UR (quoting Enterprise and North Fork decisions). Notably, the Department left that language out of its decision in this case.

Instead, in its Record of Decision, the Department suggested that *closure* of

a nearby casino, or failure to generate any cash flow, would be the only measure of "detriment" when it comes to competitive effects:

> As concluded [in the FEIS], anticipated substitution effects would not result in the closure of any of the competing gaming facilities. In fact, it is likely that existing regional casinos would continue to generate positive cash flows.

AR0063895. But even under the Department's analysis, Kalispel's Northern Quest Casino is expected to dramatically decline.

Because neither Congress nor the Department has defined "detriment," it must be given its ordinary meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning."). "Detriment" means "[a]ny loss or harm suffered by a person or property." *Black's Law Dictionary* 515 (9th ed. 2009). And while the D.C. Circuit has held that a new casino need not have "no unmitigated negative impacts whatsoever," *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1187 (D.C. Cir. 2018) ("*Stand Up III*") for it to not be "detrimental to the surrounding community," the record shows that the impacts of the Spokane casino on Kalispel are far greater—and have been shown with far greater evidence—than in any prior case.

In *Stand Up for California!*, the Department had issued a decision to take land into trust for the North Fork Rancheria and a two-part determination to permit the North Fork Rancheria to place a casino on that land, which is 39 miles from the

existing casino of the Picayune Tribe. *Id.* at 1180; *Stand Up for California! v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 267 (D.D.C. 2016) ("*Stand Up II*"). Along with several community groups, the Picayune Tribe challenged the Department's two-part determination. The Circuit Court upheld the decision, giving less weight to the Picayune Tribe's concerns regarding detriment to its existing casino because it was outside the 25-mile range to be considered a "nearby Indian tribe" by the Department. *Stand Up III*, 879 F.3d at 1189. The District Court also quoted the ROD approvingly: "It is rational and in keeping with congressional intent to accord weight to an entity's concerns in proportion to the entity's physical proximity to the development in question." *Stand Up II*, 204 F. Supp. 3d at 270.

Under that same framework, the Kalispel Tribe's concerns should be given great weight. Kalispel's Northern Quest Casino is far closer to the proposed new casino than in any other two-part determination. AR0042228–29-UR. In fact, before this case, the closest nearby casino impacted by a two-part determination was 11 times further away—or 22 miles. *Id.* Here, Northern Quest Casino is so close to the Spokane Tribe's proposed casino that a person could literally *walk* from one to the other.

In the North Fork case, the Picayune Tribe's casino was in an "overlapping gaming market" with the proposed North Fork casino. *Stand Up III*, 879 F.3d at 1189. The Department had "concluded that the Picayune's casino could

successfully absorb the expected competitive effects," and the Court of Appeals found that "[g]iven the reduced weight the Department permissibly assigned the Picayune's concerns, it concluded—appropriately in our view—that the casino's potential effects on the tribe were insufficient to render the casino detrimental to the surrounding community overall." *Id.* at 1190.

Despite the Assistant Secretary's repetition of the "overlapping gaming market" phrase here, AR0063865, Northern Quest Casino is in the *same* gaming market as the proposed Spokane casino, *see* AR004690; AR0063869. Unfortunately, as Assistant Secretary Washburn pointed out in testimony before the House Natural Resources Committee when he was an academic:

> [T]he economic well-being of many tribes depends on having a monopoly or a quasi-monopoly in the market they serve. From an economic standpoint, new casinos often cannibalize the business of existing casinos. While competition is generally a positive value in business because it leads to a higher quality product (or a higher quantity of product at a lower price), competition is not necessarily advantageous in gaming.

*Department of the Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and its Ramifications, Oversight Hearing Before the H. Comm. on Natural Res.*, 110th Cong. 68 (2008) (prepared statement of Prof. Kevin Washburn).

The fact is that even under the Innovation Group's calculations, Northern Quest Casino is predicted to suffer a major loss in gaming revenues. AR0063870. Using those same calculations, that loss, in turn, will result in a cut to the Kalispel

Tribe's government budget of *all payments to tribal members*, which are specifically contemplated by IGRA, 25 U.S.C. § 2710(b)(3), *plus* a significant cut in other government funding. AR0063870; *see also* AR0007511.[4]

In *Stand Up II*, the Court agreed with the Secretary that Picayune's casino was in an "overlapping" market with the proposed North Fork's casino, rather than the same market, 204 F. Supp. 3d at 271, and reiterated its view from the preliminary-injunction proceedings earlier in the case that the "Picayune Tribe had 'offered no concrete alternative analysis of [the preferred alternative's] economic impacts that would suggest that a gaming complex on the Madera Site would impair the Picayune Tribe's ability to remain profitable and self-sufficient,'" and that "'absent any evidence supporting the prediction that development of the [North Fork] site would have a destructive competitive impact upon the Picayune Tribe, the plaintiffs are unlikely to succeed in arguing that the Secretary's analysis of the economic effects on the Picayune Tribe was improper." *Id.* The Court concluded that the Picayune Tribe had "pointed to no alternative analysis concluding that the proposed casino would put [the Picayune casino] out of business or have any 'destructive competitive impact' on the Picayune Tribe." *Id.*

[4] Under the analysis submitted by Kalispel, the preferred alternative will result in a >50% cut to the Tribe's governmental revenue. AR0005339.

at 272. Kalispel, conversely, has pointed to credible "alternative analysis" that shows the proposed Spokane casino will have a "destructive competitive impact" on the Kalispel Tribe. *See* AR0005320–46; AR0005263–319; AR0005347–64; AR0006427–32; and AR0002832–53.[5] And the Department's own analysis demonstrates a "destructive competitive impact."

The reality is that if the demonstrable impacts to the Kalispel Tribe's casino are not enough to render the Spokane casino "detrimental to the surrounding community overall," no Tribe will ever be able to demonstrate detriment, and Congress's direction will be meaningless. Closure is not the only—or even a reasonable—measure of detriment, and because the Department imposed that standard on Kalispel, the Court should vacate the Decision.

**b. The Department relied on factors it was not intended to consider.**

A full look at the record (or as full a look as the Kalispel Tribe has been given) shows that the Department had made its decision to grant Spokane's application long before it even received and rejected Kalispel's detailed economic

[5] This analysis formed the basis of an article later published in a peer-reviewed journal. *See* Clyde W. Barrow, David R. Borges, and Alan P. Meister, *An Empirical Framework for Assessing Market Saturation in the U.S. Casino Industry*, 20 Gaming L. Rev. & Econ. 397 (2016).

analysis. Indeed, the fix was in even before Spokane submitted its formal application. What really drove the Department's decision was a factor nowhere referenced in IGRA or the Department's implementing regulations, namely the Department's sense that it *had* to grant the Spokane Tribe's application because it had granted one for the Kalispel Tribe:

> We note that it would be deeply ironic to allow the Kalispel Tribe to develop a casino within the Spokane Tribe's aboriginal area, while denying the Spokane Tribe the opportunity to use its own aboriginal lands for the same purpose.

AR0063809.

This "deep irony" is not part of the calculus for a two-part determination under IGRA, however. A tribe *does not have to have a historical connection* to the land for a two-part determination. 73 Fed. Reg. at 29,368 ("The two-part Secretarial Determination does not require a tribe to have an ancestral tie to the lands they seek to acquire."); *see also* AR0063838. Thus, although Kalispel *did* have historical ties to the Northern Quest site, AR0063839, the fact that the Spokane Tribe has greater ties to the Airway Heights area than Kalispel does should not have been considered. And reliance on a "'factor[] Congress did not intend it to consider'" is a basis to set aside an agency's decision, *Club One Casino, Inc. v. U.S. Dep't of the Interior*, 328 F. Supp. 3d 1033, 1041 (E.D. Cal. 2018) (quoting *Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1256-57 (9th Cir. 2017)). Moreover, "if the record shows that the agency prejudged the issues, then

deference to the agency's decision is diminished." *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1245 (D. Colo. 2012).

The day he issued the Decision, ASIA Washburn called the Kalispel Tribal Chairman to tell him the bad news. In that call, Mr. Washburn told Chairman Nenema "you knew I was going to approve," Decl. of Glen Nenema at ¶ 5, and "I can't disapprove after another Tribe was approved for gaming on their ancestral lands," *id.*[6] The administrative record backs up what the Assistant Secretary said:

[6] Although the "focal point for judicial review should be the administrative record already in existence," *Camp v. Pitts*, 411 U.S. 138, 142 (1973), courts may consider additional evidence when "supplementation is necessary to determine if the agency has considered all factors and explained its decision." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) (quotations omitted). Chairman Nenema's declaration references communications from the Department that demonstrate its prejudgment in this matter, and the Court may consider the declaration to properly evaluate what factors the Department considered and the reasoning for its decision. *See Menominee Indian Tribe of Wisc. v. U.S. Dep't of Interior*, No. 09-C-496, 2010 WL 4628916, at *3 (E.D. Wis. Nov. 4, 2010) (quoting *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996)).

the Department was acting all along to help Spokane get an off-Reservation casino and it really didn't matter how thorough the Kalispel's comments and analysis were. *See* Factual Background, *supra* at II.A. The Department's consideration of factors outside those Congress directed it to consider provides another basis to vacate the Decision.

**B. The Department violated NEPA.**

The National Environmental Policy Act ("NEPA") requires that before a federal agency engages in any "major Federal actions significantly affecting the quality of the human environment," it must evaluate the environmental and socioeconomic impacts of the proposed action. 42 U.S.C. § 4332; *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2004). The environmental impact statement ("EIS") is the "detailed statement" that must "provide [a] full and fair discussion" of significant project impacts. 40 C.F.R. § 1502.1; 42 U.S.C. § 4332(C); *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 936 (9th Cir. 2010). The EIS is designed to serve two purposes:

> First, [i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

*Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

NEPA is a procedural statute. It requires an analysis of impacts to the human environment, but it does not compel a particular decision once those impacts have been analyzed. Thus, NEPA's efficacy is entirely dependent on gathering information on potential impacts early on, so that this information can influence decision-making. *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (confirming that the NEPA analysis must occur at the "earliest possible time to insure that planning and decisions reflect environmental values"); 43 C.F.R. § 46.400 (Department's regulations requiring an EIS to be prepared "before making a decision on whether to proceed with the proposed action"). Courts must be vigilant to ensure that NEPA does not become a meaningless paper-pushing activity designed to justify "prejudged political conclusion[s]." *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1261 (D. Wy. 2004). It must be pursued "objectively and in good faith, not as an exercise in form over substance, and *not as a subterfuge designed to rationalize a decision already made*." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (emphasis added); *see also* 40 C.F.R. § 1502.2(g) ("[EIS] shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.").

The NEPA process begins with a statement of purpose and need that the proposed action seeks to address. While agencies have some discretion in defining a project's purpose and need statement, the agency cannot use "unreasonably

narrow terms." *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *see also Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066–67 (9th Cir. 1998) (evaluating statement of purpose and need using a reasonableness standard). An agency cannot "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). Rather, the purpose and need statement must be broad enough so that the agency can "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a).

The alternatives analysis is described as the "heart of the environmental impact statement." 40 C.F.R. § 1502.14. The Ninth Circuit has explained that the EIS must "[d]evote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits." *Southeast Alaska Conservation Council v. FHA*, 649 F.3d 1050, 1058 (9th Cir. 2011). The "touchstone" for courts reviewing challenges to an EIS under NEPA "is whether an EIS's section and discussion of alternatives fosters informed decision-making and informed public participation." *Or. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1143 (9th Cir. 2008).

Federal agencies may work with outside contractors to gather the information necessary to prepare an EIS. But the agency must "independently

evaluate" all information and "take responsibility for [the] scope and contents" of the EIS. 40 C.F.R. § 1506.5(c). Outside contractors are typically funded by the project proponent, and agency oversight of the contractor's work is necessary to "ensure[] the objectivity and integrity of the NEPA process." *Alliance for the Wild Rockies v. Pena*, No. 2:16-CV-294-RMP, 2018 WL 4760503, at *8 (E.D. Wash. Oct. 2, 2018).

The Department of Interior violated these core principles of NEPA here. While the scoping process identified a reasonable purpose and need statement, the agency did not consider all reasonable alternatives. Even though it was apparent from the very beginning that the largest impacts of the proposed project would be caused by the chosen site's close proximity to both the Kalispel Tribe's Northern Quest Casino, and to the Fairchild Air Force base, the agency never seriously considered a different off-reservation location. To the contrary, the agency redrafted the purpose and need statement *after* the scoping report was complete, simply to confirm that the agency would only consider the Airway Heights location. It improperly redefined the project's purpose and need statement so "that only one alternative would accomplish the goals of the project," *HonoluluTraffic.com*, 742 F.3d at 1230, because the agency had already decided to approve Spokane's request and place that decision on Governor Gregoire's desk before the end of her term.

The entire NEPA process was used "as a subterfuge designed to rationalize a decision already made." *Metcalf*, 214 F.3d at 1142. It failed to achieve its goal of providing decisionmakers and the public with a description of impacts for all reasonable alternatives. And when Kalispel submitted several economic analyses demonstrating the devastating impacts the project would have on its ability to provide governmental services to its members, the Department relied on a hired contractor – the Innovation Group – to analyze those impacts. The Department did not exercise "oversight" over the Innovation Group's analysis. Instead, it claimed that it did not have anyone on its staff that could analyze this data, and it hid from public view the opinions of two Department employees that it did consult.

**1. The Department created an unreasonably narrow purpose-and-need statement and failed to consider all reasonable alternatives because it had predetermined the process' outcome.**

When the BIA released its scoping report for the Spokane Tribe's proposed project in March 2011, the purpose and need statement was as follows:

> The purpose and need for the Proposed Action is to improve the Tribe's short-term and long-term economic condition and promote its self-sufficiency, both with respect to its government operations and its members.

AR0021025. Despite this relatively broad statement, the scoping report proposed only three alternative projects, along with the statutorily-required no-action alternative. AR0020125–27. Alternative 1 was a "Proposed Casino and Mixed Use Development" that would include a 118,687 square foot casino, 300-room hotel, a

spa, restaurants, convention space, retail development, and other amenities. AR0021026. Alternative 2 was a "Reduced Casino and Mixed Use Development, which would eliminate the hotel and spa facilities and include a smaller, 73,000 square-foot casino, as well as restaurants, a convention center, retail development and other amenities. *Id.* Alternative 3 would not include any casino and would be limited to a hotel, convention center, indoor water park, spa, retail space, and other amenities. There was also a fourth, no-action alternative. *Id.*

The scoping report only considered three other potential projects, which it quickly eliminated. Two of those projects involved proposed expansions of the Spokane Tribe's existing Two Rivers and/or Chewelah Casinos. The other considered and rejected alternative was for an alternative off-reservation location. Because Kalispel's Northern Quest Casino is just two miles from the Spokane Tribe's Airway Heights location, these casinos would necessarily draw from the exact same market, making it very likely that approval would be "detrimental to the surrounding community." The harm to Kalispel, however, would likely decrease as the distance between the two casinos increased. Yet the Department never seriously considered such an alternative. Nowhere is there a discussion, for example, of the Spokane Tribe purchasing land. Furthermore, Spokane was working with a third-party casino developer/ manager, yet even though it is fairly common for the developer/ manager to purchase the land on which the casino will

be built, the Department did not inquire into the land owned by the developer/ manager or land that they could acquire.

Even though a significant alternative to the proposed project was a casino at another off-reservation location, separated from both Fairchild Air Force Base and the Northern Quest Casino, the BIA chose to eliminate this possibility rather than attempt an analysis. By this time, two years had passed since Spokane submitted its first letter requesting a two-part determination, and while this delay was largely caused by the Tribe's lack of concrete development plans and decision to change environmental contractors, Governor Gregoire only had one year left of her term. AR0012459, AR0012654. Spokane believed that she would approve their two-part determination request, and the Department was prepared to ensure that it would land on her desk in time. AR0010512; AR0010513; AR0010599.

Because "[t]he range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project." *Laguna Greenbelt, Inc. v. U. S. Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994), the Department simply rewrote the purpose and need statement. In January 2012, when the Department issued its DEIS, the purpose and need statement had been dramatically altered from the Scoping Report. The federal government's purpose remained broad: to support tribal self-sufficiency. But the Spokane Tribe's need was now limited to the particular parcel in Airway Heights. It included the

"[d]esire to further develop the Tribe's property adjacent to the City with tribal economic enterprises," and the "[p]otential profitability of Class III gaming in Airway Heights." AR0033241, AR0033275.

The FEIS retained the Spokane Tribe's narrow purpose and need. In response to comments claiming that this was unduly restrictive, the Department claimed:

> The Tribe, as the applicant, has preferences as to the means of providing an adequate revenue source. When a proposed action is triggered by an application from a private applicant, it is appropriate for the lead agency to give substantial weight to the goals and objectives of that private actor. . . . It would not be consistent with the government-to-government relationship, or the basic fiduciary responsibilities of the federal government, for the BIA to ignore the purposes of the tribal government and substitute purposes that it feels are more appropriate. In addition for the need of a reliable and significant revenue source, the Tribe expressed the need to further develop the proposed project site . . .

AR0016290. The Department admitted that it rejected off-reservation locations because "the Tribe expressed the need to further develop the proposed project site," and "[a]ny off-site alternative would inherently fail to meet that need." AR0016291–92.

The Department's position is wrong as a matter of law. Even when a project is being proposed by a private party, it is the *agency* that must define the purpose and need, and it cannot do so based solely on private goals. 46 Fed. Reg. 18,027 (Mar. 23, 1981) ("Reasonable alternatives include those that are *practical or feasible* from the technical and economic standpoint and using common sense,

rather than simply *desirable* from the standpoint of the applicant"). In *Nat'l Parks & Conservation Ass'n v. BLM*, the Ninth Circuit held that the agency should consider the project proponent's objectives, but "[r]equiring agencies to consider private objectives . . . is a far cry from mandating that those private interests define the scope of the proposed project." 606 F.3d 1058, 1070 (9th Cir. 2010); *see also Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 670 (7th Cir. 1997) ("An agency cannot restrict its analysis to those alternative means by which a particular applicant can reach *his* goals") (emphasis in original); *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1988) ("[T]he evaluation of 'alternatives' mandated by NEPA [must] be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.") (emphasis in original). While other agencies have decided, through regulation, to provide a private proponent's goals with more weight, "the Department of Interior has promulgated no regulations emphasizing the primacy of private interests." *Nat'l Parks*, 606 F.3d at 1071 (citing 40 C.F.R. § 1502.13). Additionally, the Bureau' NEPA Guidebooks from 2005 and 2012 do not indicate that the agency will give increased weight to a project proponent's purpose and need. *E.g.*, Indian Affairs NEPA Guidebook, 59 IAM 3-H (August 2012).

The Ninth Circuit recently reminded agencies that "in defining the purposes

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*, 742 F.3d at 1230. But that is precisely what the BIA did in crafting the Spokane Tribe's purpose and need statement. By including the "[p]otential profitability of Class III gaming in Airway Heights" within the statement, the federal defendants eliminated the possibility that any economic development other than gaming, and any location other than Airway Heights, could accomplish the goals of the project.

In contrast, in *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. Zinke*, 889 F.3d 584, 603–04 (9th Cir. 2018), where the Ninth Circuit held that the purpose-and-need statement was not unreasonably narrow, the statement itself considered a wide range of goals for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria's project, including restoring an equal amount of lost trust land (without naming a specific location), providing employment opportunities, improving the socioeconomic status of the tribe, allowing tribal-member self-sufficiency, funding local agencies and services, making donations, and "[e]ffectuat[ing] the Congressional purposes set out in [IGRA]." *Id.* at 603. A purpose of effectuating the purposes of IGRA, as one of many expected purpose-and-needs, is far broader than the BIA's purpose here to specifically consider the potential profitability of "*Class III* gaming" on a *particular* tribal property in

Airway Heights. AR0033241, AR0033275

Because the BIA unreasonably restricted its purpose-and-need statement, it failed to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). It prematurely eliminated reasonable alternatives from the detailed study otherwise required, including the development of a project elsewhere on the Spokane Tribe's 157,376-acre reservation, expansion of existing facilities, or, development of another off-reservation location. *See NRDC v. U.S. Forest Serv.*, 421 F.3d 797 (9th Cir. 2005) (finding that because inadequate measurements were used to determine market demand, and certain alternatives had been rejected based on the faulty data, especially because the agency had been aware of its own misinterpretation of a key report it was relying upon, the EIS was "inadequate in its consideration of alternatives, violating NEPA"). Because "an agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action, and sufficient to permit a reasoned choice," *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1502 (9th Cir. 1992), "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *NRDC*, 421 F.3d at 813 (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)).

Also because of the narrowly drawn purpose-and-need statement, the non-gaming alternative and no-action plan were inappropriately excluded from full

consideration, because if the potential profitability of Class III gaming was a stated need for the project, then a non-gaming, or no action alternative, could never meet the project's stated needs. Thus, while the FEIS purports to evaluate three alternatives, plus a no-action plan, in actuality, it only considered two[7] that would actually meet the project's stated needs. By manipulating the alternative analysis in this way, the Department acted arbitrarily, capriciously, and in violation of its requirements under NEPA.

**2. The Department relied on inaccurate and incomplete data to determine the socioeconomic impact on the Kalispel Tribe and it failed to adequately supervise and independently evaluate its contractor.**

The Ninth Circuit has specifically cautioned that because any agency has a responsibility to ensure its action is "fully informed and well considered," "[a]n EIS that relies upon misleading economic information may violate NEPA if the errors subvert NEPA's purpose of providing decisionmakers and the public an accurate assessment upon which to evaluate the proposed project." *Natural Res. Def. Council*, 421 F.3d at 811(quoting *Nat'l Wildlife Fed'n v. NMFS*, 235 F. Supp.

[7] And even then, the Department did not conduct a proper analysis since while it provided a specific percentage for the decline in Kalispel revenues for the preferred alternative, it did not engage in this analysis for the other alternatives. *See California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

2d 1143, 1157 (W.D. Wash. 2002)). Additionally, the agency cannot rely solely on paid contractors to perform the NEPA analysis. It must "engage in adequate independent oversight over the preparation of . . . the DEIS or the FEIS." *Cachil Dehe Band*, 889 F.3d at 608 (9th Cir. 2018); *see also* 40 C.F.R. § 1506.5(c).

With respect to the impact that the West Plains project would have on the Kalispel Tribe, the Department adopted the economic conclusions of the Innovation Group, a paid subcontractor, in its DEIS and FEIS. It was only *after* the publication of the FEIS that the Department decided to submit the materials to its own in-house financial experts. In 2014, Tom Hartman, a financial analyst for the Department, was presented with the materials submitted by both Kalispel's experts, and the Innovation Group. Even though the Innovation Group claimed that any impact to Kalispel would dissipate over time due to growth in the market, Hartman concluded it was impossible to confirm this and that there was "little basis for deciding on a prediction for market growth other than guessing." AR0003574. He opined that if the Office of Indian Gaming Management "went through the assumptions item by went through the assumptions item by item, accepting some and rejecting others, the resulting financial analysis might not be a more reliable prediction of the future." *Id.* In doing so, Hartman made clear that the Department *had not already engaged in this analysis*; it had instead adopted the Innovation Group's analysis by whole cloth.

When Kalispel submitted a Market Saturation Analysis in 2015 to further demonstrate the fallacy in the Innovation Group's market growth claims, the Department did not submit this study to Hartman or any other financial analyst to conduct an independent evaluation. Instead, subsequent emails made it clear that the Department lacked the expertise to appropriately review the analysis. An email, from Troy Woodward to B.J. Howerton, "suggest[s] your office work with the contractor to provide a review and assessment because we do not have a financial analyst on staff in DC that can do the analysis." AR0002830. Later, it was an AES contractor that replied, stating that the Innovation Group would prepare the response. AR0002789. Just nine days letter, the AES contractor sent the Innovation Group response to the Department, specifically noting that B.J. Howerton had "not yet reviewed this draft." AR0002774. When the ROD was issued, it relied on the Innovation Group's analysis. Because of this lack-of-oversight and wholesale acceptance of its contractors' analyses, the Department has failed to comply with its duties under NEPA, this Court should overrule the findings as arbitrary, capricious, an abuse of discretion, and not in accordance with the law. 5 U.S.C. § 706(2).

**C. The Department violated its trust responsibility to the Kalispel Tribe.**

"[A] trust relationship exists between the United States and Indian Nations," *Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 921 (9th Cir. 2008), and the

trust responsibility is "one of the primary cornerstones of Indian law," *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001) (quotation omitted). "It is fairly clear that any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes." *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (citing *Seminole Nation v. United* States, 316 U.S. 286, 297 (1942)). When tribal resources are involved, "the most exacting fiduciary standards" are required, especially where the government has been given "pervasive control" over that resource. *Seminole Nation*, 316 U.S. at 297; *Blackfeet Housing Auth.*, 540 F.3d at 922.

By failing to complete the two-part determination under IGRA using its identified standards, and by pressing through the NEPA analysis with an unreasonably narrow purpose-and-need statement and an inadequate alternatives analysis, the Department's decisions cannot withstand judicial scrutiny under the APA. When considered in light of the trust responsibility, this failure becomes abundantly clear. "Actions that might well be considered within an agency's discretion because not 'arbitrary or capricious,' as stated in the APA, may nevertheless be held to violate the Secretary of the Interior's trust responsibility to tribes." Cohen's Handbook of Federal Indian Law, § 5.05[3][c] (2012 ed.)

Because of this trust responsibility, when analyzing Spokane's two-part determination application, the Department should have given special weight to the

detrimental effects that Kalispel Tribe would suffer as a result of the proposed project. Similarly, a key component of NEPA's alternative analysis is an evaluation of the environmental consequences of a project, 40 C.F.R. § 1502.15–16, which in this case included the socioeconomic effects of the decision on Kalispel, AR0017204; AR0017216–17. By failing to give any greater weight to these provisions than would be for any other community member or agency, the Department has violated its trust responsibility to the Kalispel Tribe. *Cf. Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 n.10 (9th Cir. 2006); *Nance*, 645 F.2d at 711; *Northern Cheyenne Tribe v. Lujan*, 851 F.2d 1152, 1154 (9th Cir. 1988); *Northern Cheyenne Tribe v. Lujan*, 804 F. Supp. 1281, 1285 (D. Mont. 1991).

## IV. Conclusion

Kalispel requests that this Court grant its motion for summary judgment by declaring that both the two-part determination and the ROD were arbitrary, capricious, an abuse of discretion, not in accordance with the law, under IGRA and NEPA, and in violation of the Department's trust responsibility to Kalispel. This court should thus "hold unlawful and set aside agency action" by issuing a permanent injunction vacating the two-part determination and ROD until compliance with IGRA, NEPA, and the trust responsibility. 5 U.S.C. § 706(2).

FOR THE PLAINTIFF KALISPEL TRIBE OF INDIANS

/s/ Michele Fukawa
Michele Fukawa, WSBA #46592
Kalispel Tribe of Indians Legal Office
934 South Garfield Road
Airway Heights, WA 99001
Phone: (509) 789-7600
mfukawa@kalispeltribe.com

Vanya S. Hogen, pro hac vice
Colette Routel, pro hac vice
Leah K. Jurss, pro hac vice
Hogen Adams, PLLC
1935 W. County Road B2, Suite 460
St. Paul, MN 55113
Phone: (651) 842-9100
vhogen@hogenadams.com
colette.routel@mitchellhamline.edu
ljurss@hogenadams.com

## CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018, I electronically filed the foregoing with the Clerk of 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 identifies recipients of electronic notice.

Dated: December 14, 2018

/s/ Michele Fukawa
Michele Fukawa, WSBA #46592
Kalispel Tribe of Indians Legal Office
934 South Garfield Road
Airway Heights, WA 99001
Phone: (509) 789-7600
mfukawa@kalispeltribe.com