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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KALISPEL TRIBE OF INDIANS and SPOKANE COUNTY,

Plaintiffs,

v.

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

Defendants,

SPOKANE TRIBE OF INDIANS,

Intervenor-Defendant.

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

PLAINTIFF SPOKANE COUNTY'S MOTION FOR SUMMARY JUDGMENT

May 1, 2019
ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

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TABLE OF AUTHORITIES

Page(s)

CASES

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TABLE OF AUTHORITIES

Page(s)

STATUTES

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TABLE OF AUTHORITIES

Page(s)

REGULATIONS

OTHER AUTHORITIES

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TABLE OF AUTHORITIES

Page(s)

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I. INTRODUCTION

When Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988, it barred casino development on later acquired lands to limit the proliferation of casinos and reduce community conflicts. Section 20 of the Act allows tribes with reservations acquired by 1988—like the Spokane Tribe—to open casinos on their existing trust lands, but it prohibits them from acquiring new lands for gaming. The only exception to this rule is if the Secretary of Interior determines, "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes," that gaming on the newly acquired land would not be detrimental to the surrounding community and the governor agrees.[1] The rule was intended to "demonstrate[] a respect for local community views and for the responsibility of State government."[2]

The Secretary's decision to approve the Spokane Tribe's request to build a *third* casino immediately beneath the traffic pattern for Fairchild Air Force Base (FAFB) over the objections of the surrounding community has the effect of negating Section 20's consultation requirement. Every day, pilots train in KC-135 Stratotankers between 500-850 feet above the site, practicing "touch and

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[1] The Secretary must also determine that gaming would be beneficial for the tribe. 25 U.S.C. § 2719(b)(1)(A).

[2] 134 Cong. Rec. 25,380 (Sept. 26, 1988) (statement of Rep. Bereuter).

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go's," night training, and visual flight rules (VFR) operations.[3] By any metric, building a casino designed to attract thousands of visitors immediately below a VFR training pattern *for fuel tankers*, exposing them to heightened safety risks, noise, fumes, and exhaust, is—at best—irresponsible. But doing so over the objections of the surrounding community, which has worked for decades to protect FAFB from encroachment and to minimize community conflicts, is arbitrary, capricious, unwarranted by the facts, and contrary to law.

Spokane County (County) repeatedly informed the Bureau of Indian Affairs (BIA) of its firm opposition to the Tribe's proposed casino. That opposition is based on the County's almost eight-decade-long relationship with FAFB, the importance of FAFB to the half-million people living in the Spokane region, the County's deep knowledge of its infrastructure and emergency resources, and its responsibilities to its residents. Yet BIA decided, without properly consulting with the County, that *it* knew better what was detrimental to the community the County represents. BIA not only demonstrated a remarkable lack of respect for local community views, it violated IGRA.

In fact, BIA failed to address or erred on several key issues, including the lack of mitigation for the County, a legally sufficient analysis of the appropriate

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[3] VFR is a series of regulations that dictates how a pilot must be able to operate an aircraft (i.e., with visual reference to the ground, and by visually avoiding any obstructions or other aircraft). *See* 14 C.F.R. Part 91.

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safety zones for FAFB, and its determination that the casino is compatible with protections for FAFB. BIA based its decision substantially on the Air Force's apparent "neutrality," even though BIA knew that the Air Force was neutral only because it wanted to avoid getting "caught between the folks for and against the development." AR3576.

The Court should vacate the Secretary's decision authorizing gaming as arbitrary, capricious, and contrary to law and enjoin all gaming on the land to protect the community from heightened safety risks and FAFB from encroachment. Alternatively, the Court should enjoin the Tribe from expanding the existing facility beyond its current size to minimize detrimental impacts to the community and FAFB and order the Tribe to comply with the mitigation requirements set forth in the record of decision.

II. FACTUAL BACKGROUND

A. Location of the Casino Site Beneath FAFB VFR Traffic Pattern

In 2006, the Spokane Tribe filed an application with BIA seeking authorization to build its third casino on a 145-acre parcel of land (Site) located approximately a half mile from FAFB and 0.8 miles from the end of FAFB's single runway (designated 5 or 23, depending on direction). AR53138 (map). Every hour, day and night, military aircraft fly between 500 and 850 feet directly over the Site as pilots conduct military maneuvers and VFR training, including touch and go's, acrobatics, recovery operations, and other activities. AR52719, AR53138; AR53069 (see Figure 1 below); AR53071.

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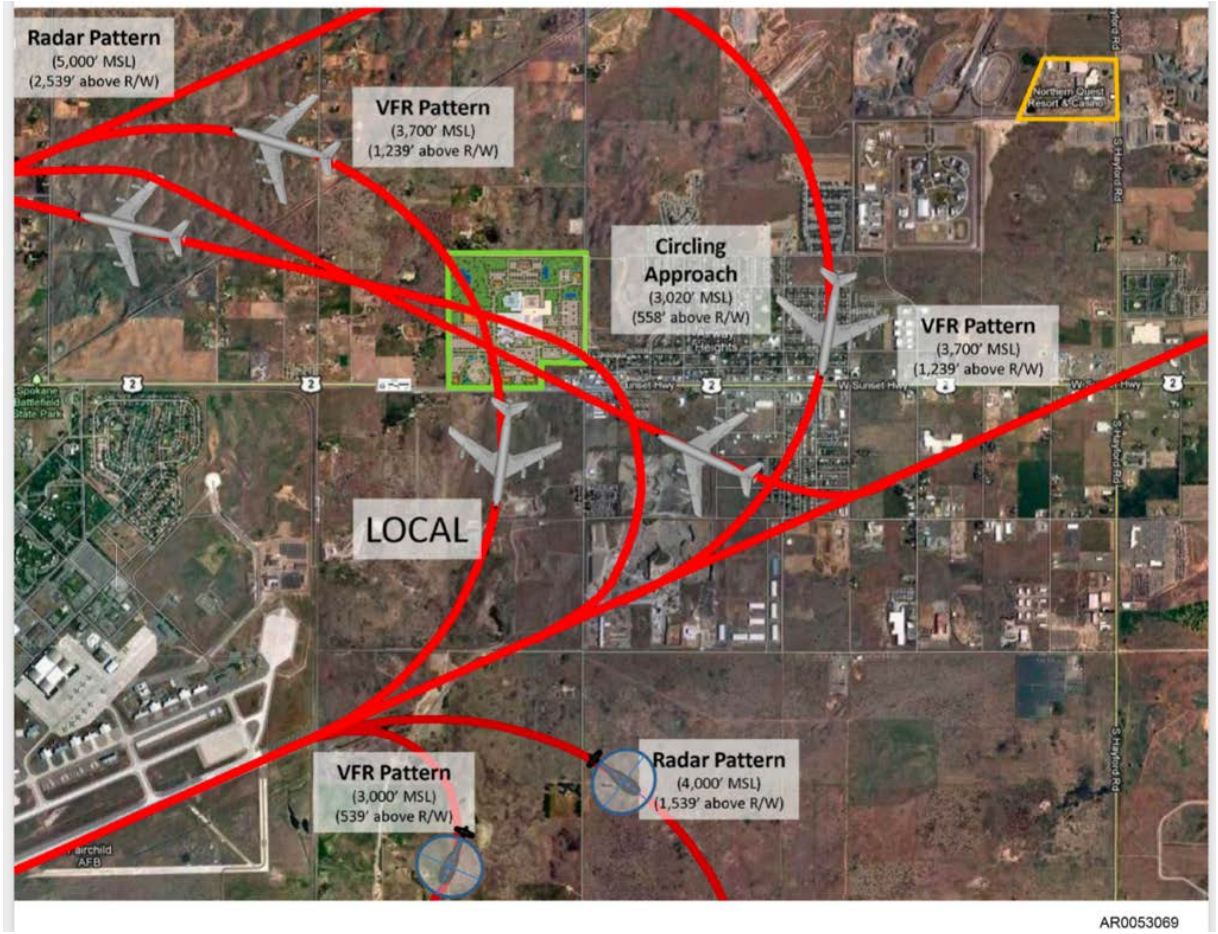
Figure 1



AR53069 (green area depicting the Site).

The Site is located less than 4,400 feet from an "Accident Potential Zone"—an area surrounding a base's runway that has a measurably higher potential for aircraft accidents. AR52729; AR48721. There is also a higher potential for aircraft accidents when VFR applies, and over half of the flights from FAFB are VFR flights. AR52729-30. Although major accidents are infrequent, there have been several fatal crashes on and near FAFB. AR53099;

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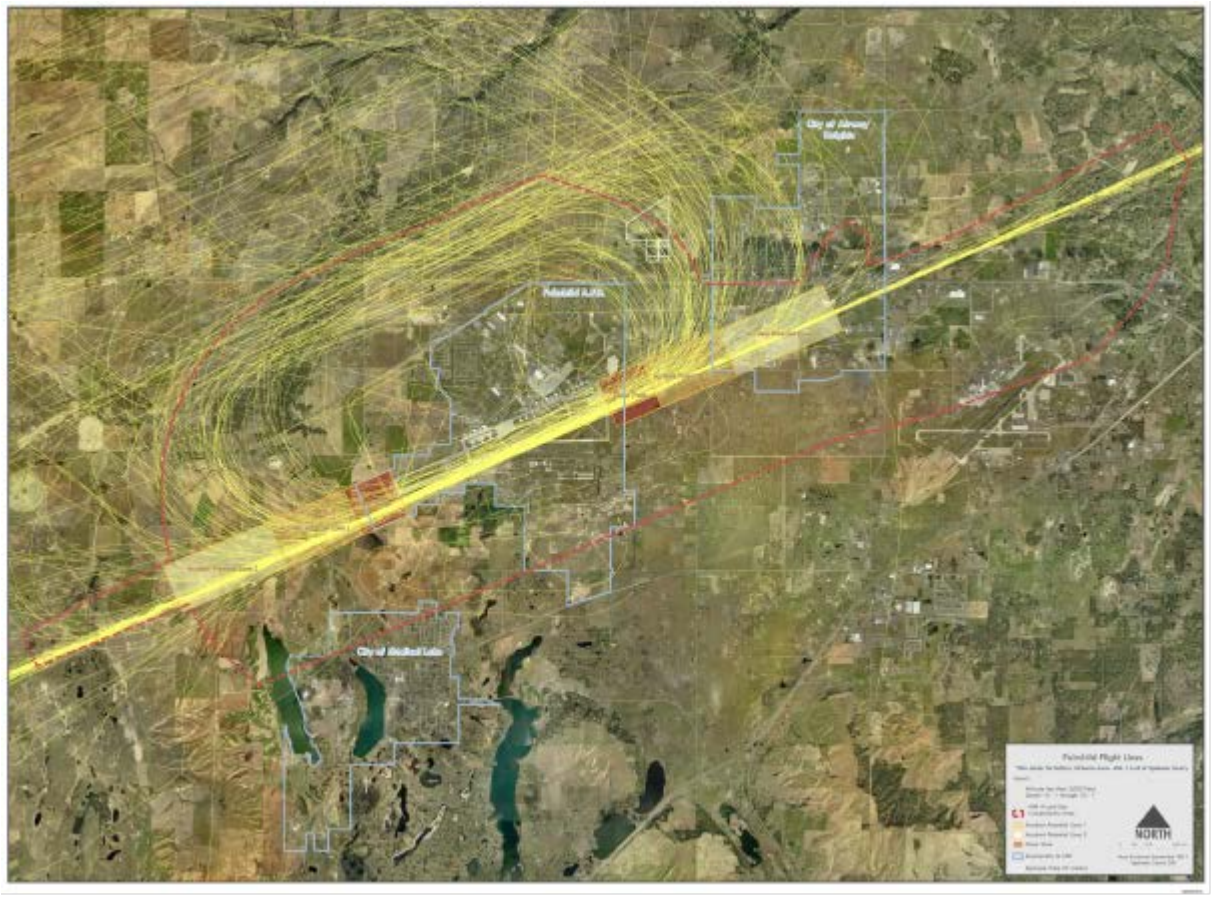
AR50384-86. Figure 2 below, originally produced by the Air Force, shows flight paths at FAFB for the month of October 2010 alone. AR31215. The race track pattern are VFR flights. AR53089.

Figure 2



AR31215.

In 2013, the General of Air Mobility Command stated that if FAFB's VFR training flight path were no longer available, the Air Force would need to relocate VFR training to another base, which would render FAFB a "fly-in/fly-out" base with little prospective value. AR52726. The General emphasized that

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he "didn't have a base in his inventory that was limited only to fly-in, fly-out operations." *Id.*

B. The History and Importance of Fairchild Air Force Base

The site for FAFB "was chosen for its strategic position within the northwest United States (US). Located 300 miles from the Pacific coast and protected by the Cascades Mountain range, the installation is well positioned to provide support for national defense while remaining protected against attacks by a natural barrier."[4] The Base "is also extremely important to the Spokane County economy, security, and social fabric of the Spokane region and the State of Washington." *Id*. As the largest employer in Spokane County, FAFB employs more than 5,700 personnel and supports 17,000 retirees, with an annual impact on the County and surrounding areas of more than $1 billion. AR52729, 53058, 53090-91. Based on 2011 economic data, closure of FAFB would cause up to 12,085 job losses, a decline in population of 27,244, and an estimated loss of

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[4] The County was unable to locate the JLUS in the administrative record. BIA, however, relies heavily on the JLUS in its environmental impact statement and obviously considered the document throughout the process. Accordingly, the County has cited directly to the document when the material cited does not appear in the record. https://www.spokanecounty.org/DocumentCenter/View/887/Section-1-Introduction-PDF?bidId= at 1.1.

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over $1.29 billion in total economic output to the County. AR53081. The County considers protecting FAFB from encroachment to ensure its future viability a top priority.

FAFB is currently home to a variety of missions, the most prominent of which is the Northwest aerial refueling hub for the Air Force. AR52728-29. The Base's air refueling mission has two wings, one active, the 92d Air Refueling Wing, and one national guard, the 141st Air Refueling Wing. Both fly the Boeing KC-135 Stratotanker. *Id.* Other units include the Air Force Survival, Evasion, Resistance and Escape school, medical detachments, a weapons squadron and the Joint Personnel Recovery Agency. *Id.*

The County has worked closely with FAFB since it was established in 1942, using contributions from the community itself to buy the land, to serve as a repair depot for damaged aircraft returning from the Pacific theater during World War II. AR52728. After the war ended, the base was transferred to the Strategic Air Command and assigned to the 15th Air Force to home various bomber groups, including those flying the Boeing B-29 Superfortress and the Convair B-36 Peacemaker. *Id*. In 1956-57, FAFB transitioned from the B-36 to the Boeing B-52 Stratofortress heavy bomber. The bomber groups remained until 1993-94, when the B-52 Stratofortresses were assigned to other bases. The 92d Bomb Wing was re-designated the 92d Air Refueling Wing, and FAFB was transferred to Air Mobility Command in a ceremony marking the creation of the largest air refueling wing in the Air Force with five active duty air refueling

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squadrons with over 60 KC-135s assigned.

In 2001, the Air Force began a procurement program to replace the oldest KC-135s, eventually selecting the Boeing KC-46A Pegasus. The Air Force initiated the selection process to determine two of four "Main Operating Bases" (MOB) in 2013: (1) MOB 1, which would be assigned eight KC-46A aircraft to train personnel to fly, operate, and maintain the KC-46A and 36 KC-46A aircraft to provide worldwide refueling, cargo, or aeromedical evacuation support, 78 Fed. Reg. 18325 (Mar. 26, 2013); and (2) MOB 2, which would be assigned 12 KC-46A aircraft to replace an existing fleet of KC-135R aircraft, 78 Fed. Reg. 29121 (May 17, 2013). FAFB was considered for MOB 1, but McConnell Air Force Base was selected. 79 Fed. Reg. 25587 (May 5, 2014).

In 2016, the Air Force announced that it was initiating the selection process for MOB 3, which would be assigned 12 KC-46A aircraft in one squadron, 81 Fed. Reg. 15510 (Mar. 23, 2016), and MOB 4, which would be assigned 24 or 36 KC-46A aircraft in two or three squadrons, 81 Fed. Reg. 93905 (Dec. 22, 2016). FAFB is listed as a candidate for MOB 4. *Id*.

C. Preventing Encroachment at FAFB

Protecting FAFB from encroachment is essential to its future viability, including its ability to attract new missions, such as the KC-46A. AR52729; 52737, 53058-060. Encroachment, which the Air Force defines "as any human activities or decisions that impair or may potentially impair the current or future operational capability of an installation complex or may have an adverse effect

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on nearby communities," AR53083, is an important factor the Air Force considers when assigning missions. "Limit[ing] development intensity within noise and aircraft approach/departure zones" is an important mechanism for preventing encroachment. AR53129. Washington State legislation has also identified as a major priority preventing encroachment of incompatible land uses such as high density uses near and around airports. AR52789-811; *see also* 49 RCW 37.70.547.

Encroachment is also an important factor in Base Realignment and Closure (BRAC) reviews. AR53083. The BRAC process determines which missions are moved and which bases are closed in order to reduce excess capacity. *Id.* Because encroachments preclude certain missions, restrict others, and raise operating costs, they are a significant factor for BRAC to consider in choosing which bases to close and where to move missions to save costs. *Id.*

As part of the effort to protect the Base, the County applied for a grant from the Department of Defense (DOD) to prepare a Joint Land Use Study (JLUS) with FAFB, the City of Spokane, Spokane County, the Cities of Airway Heights and Medical Lake, and Spokane County International Airport to develop strategies to "protect FAFB from encroachments by incompatible land uses and to protect [FAFB]'s present and future missions." AR52737; AR53116-121; AR53047. A JLUS is a voluntary collaborative planning effort involving local communities, federal officials, residents, business owners, and the military to identify compatible land uses and growth management guidelines

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near active military installations.

After an almost two-year process, the JLUS identified four Military Influence Areas (MIAs) to define where certain strategies in the JLUS should be applied. AR52741; AR48894, 51828-29. MIAs are geographic planning areas where military operations may impact local communities, and conversely, where local activities may affect the military's ability to carry out its mission. AR48912-13, 51828. MIA boundaries were established within the JLUS based on the primary areas of aircraft overflight and potential for exposure to noise and vibrations from aircraft under existing conditions and possible future mission scenarios at FAFB. AR51828; AR52741-42. MIA 4 includes "areas of primary aircraft over flight (closed pattern flight) and areas potentially exposed to noise levels of 70 dB Ldn and above." AR51829; AR52742. "[S]ensitive uses" and high-density developments (150 persons per acre) are prohibited in MIA 4. AR52742. In MIA 3, strategies focus on noise attenuation and an enhanced level of notification of the noise and safety hazard issues due to flight operations from FAFB. AR51828.

The City of Spokane and the County adopted identical land use regulations to implement the JLUS recommendations and strategies in 2012. AR53047, 53149-70. The County's regulations, entitled FAFB Overlay Zone, discourage or prohibit certain types of development in the area surrounding FAFB by adopting the MIAs described in the JLUS and combining MIAs 3 and 4. The proposed site for the casino resort is one-half mile from FAFB, within

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MIA 3 and MIA 4. AR52737. Under the FAFB Overlay Zone, "[n]ew or expanding commercial and industrial uses that result in a net density exceeding 180 persons per net acre are not permitted as higher densities and are deemed incompatible uses with [FAFB]." AR53161.

D. BIA's Review of the Proposed Casino

1. The Acquisition of the Site in 2003 for non-gaming purposes

The Spokane Tribe has approximately 2,705 members. AR52727; AR49450. Approximately 1,954 members live within 40 miles of the Site and 962 members live on the Tribe's reservation in Stevens County. AR52727-28; AR49450.

In 1998, the Spokane Tribe asked BIA to acquire the Site in trust. AR53187-89. From the outset, the County opposed the application, objecting to any plan to use the land for gaming, which the County considered "detrimental to our citizens' quality of life." AR53183. The Tribe repeatedly stated that it had no plans at the time to develop a casino on the Site—it already operated two on its Reservation[5]— representing instead that it "desperately require[d] alternative economic development to generate additional revenue to fund governmental

[5] The two casinos that the Tribe operated as of 1998 are the Two Rivers Resort Casino, located approximately 45 miles northwest of the City of Spokane along State Route 25; and the Chewelah Casino located approximately 42 miles north of the City of Spokane along US Highway 395. AR49450.

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operations." AR53188; AR53191.

BIA issued its decision to acquire the land on March 22, 2000, with the explanation that there were no land use conflicts and no local concerns requiring greater weight. AR53203, 206. The County appealed the decision on May 24, 2000, arguing that BIA's explanation regarding land use conflicts was arbitrary and capricious. AR53203-07. As the County explained, its initial understanding during the application process was "that the Spokane Tribe of Indians would not, under any circumstance, conduct any gaming activities on the site," but the Tribe refused to confirm that understanding. AR53205-06. On June 9, 2000, the Tribe argued to the County that "the Council could not permanently foreclose certain uses for its property on into the unforeseen future," but that "there were no current plans for casino development" and the parties should "enter into an MOU to address areas of mutual concern." AR53210-11.

The Interior Board of Indian Appeals vacated the decision at the request of the Regional Director and remanded the matter to BIA in July. *Spokane County v. Northwest Regional Director*, 35 IBIA 109 (Jul. 5, 2000). Ten months later, BIA again decided to acquire the land in trust. AR53194. The April 30, 2001, decision states, "***This property will not be used for gaming purposes***." AR53199 (emphasis added). The land was taken into trust on June 8, 2003. AR12666. The County and the Tribe did not enter an MOU to address areas of mutual concern. In 2006, the Tribe asked BIA to authorize gaming on the Site. AR12661; AR12664.

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2. The Tribe's request to conduct gaming on the Site

The Tribe's February 24, 2006 request that the Secretary make a determination that the Site be eligible for gaming required that the Secretary determine, after consulting with the Tribe and appropriate state and local officials, "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). *See* AR12664. The governor of the affected state must concur in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A). This determination is commonly referred to a "Two-Part Determination."

The Tribe began working with Airway Heights on its casino plans sometime in 2006 or 2007. On April 10, 2007, the Tribe executed an Intergovernmental Agreement (IGA) with Airway Heights to annex the Site so that the City could provide certain utilities, including sewer and water services, in exchange for annual payments. AR20464; AR52758. The County was not a party to the IGA, AR20470, § 11.2, and was not involved in negotiating the annual payment schedule set forth in the IGA. Airway Heights and the Tribe concurrently executed a Memorandum of Agreement (MOA), pursuant to which Airway Heights promised to support the Tribe's casino application, subject to certain conditions. AR20478-493. The MOA provided that the annual payments set forth in the IGA would be supplanted by the higher payment schedule in the MOA if the Secretary authorized gaming. AR20491, § 10.1.1. The MOA also

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states that the City would be responsible for payments to the County under a separate agreement upon the commencement of gaming. AR20483, § 3.2-3.3. BIA initiated the review process after these agreements were executed. *See* 74 Fed. Reg. 43715 (Aug. 27, 2009) (scoping notice); *see also* AR12489.

In 2010, Airway Heights and the Tribe approached the County to seek its agreement to the 2007 IGA. At that time, the County did not know that the Tribe intended to propose a major casino resort at the Site. Instead, the County understood that the Tribe was considering "a proposed mixed-use development and corresponding master plan" that "may include a casino resort and hotel, commercial retail uses, offices, medical facilities, recreational, cultural, and entertainment facilities, and related parking," based on BIA's public notice. 74 Fed. Reg. at 43715-16. Accordingly, the County agreed to execute the IGA, but only with an amendment requiring the Tribe to comply with the more restrictive of City or County Airport Overlay Zone regulations, AR20475, § 4.1, which the County and Airway Heights were in the process of updating after the completion of the JLUS.[6]

The County separately executed an "Interlocal Agreement" with Airway Heights, requiring the County to remain "neutral" regarding the proposed casino

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[6] The County executed an Amendment to the MOA acknowledging that any mitigation funds the County might receive under the Tribal-State gaming Compact would not offset MOA payments. AR20494-96.

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in exchange for 20% of the City's MOA payments. AR20498, 20500, §§ 2, 4.

3. BIA's NEPA review process

On March 22, 2012, BIA published notice of a draft EIS (DEIS), describing a far larger project—a "casino-resort facility [that] would have a gross footprint of 986,366 square feet at buildout (excluding the parking structure)." 42 Fed. Reg. 12873 (Mar. 2, 2012); AR53046; AR33289. When the County learned of the scale of the development the Tribe was proposing, it immediately began to research how to eliminate the "neutrality" provision in Section 3 of the Interlocal Agreement, which contractually prohibited the County from "submitting any written communication to any official of the United States Department of the Interior, the Office of the Governor or any other entities taking a position in support or in opposition to gaming activities on the Trust Property." AR53046. For the next nine months, the County sought extensions from BIA and investigated whether the Interlocal Agreement violated public policy. *See, e.g.*, AR48525; AR1777; AR10619.

A number of parties filed comments in opposition to the project, including—but not limited to—U.S. Rep. Cathy McMorris Rodgers, the Mayors of the Cities of Spokane and Cheney, numerous state senators and representatives, Secretary of State Sam Reed, and former State Governor Mike Lowry. *See* AR52756 n.20; *see also* AR52222 (map of opposition). The County remained unable to comment.

By January of 2013, the County had contacted Airway Heights to

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eliminate the neutrality provision in the Interlocal Agreement, but Airway Heights refused. AR53048. On January 29, 2013, the County terminated the Interlocal Agreement in its entirety and immediately informed BIA that it opposed the casino. AR53040-50. Because Airway Heights refused to eliminate the neutrality provision from the Interlocal Agreement, the County's only option was to terminate the entire agreement, forfeiting all financial mitigation. AR53048; *see also* AR52083 (Airway Heights stating that the County has "chosen to oppose the development and forfeit the 20% payments"); AR53040 (County letter explaining that it forfeited rights to mitigation payments). The County informed BIA that its only agreement with the Tribe "addresses the limited issue of the annexation of the PROPERTY by the CITY and that the TRIBE has not sought to negotiate or enter into an intergovernmental agreement with the COUNTY to address or mitigate any impacts associated with its proposed development, as described in the Draft EIS of March 2, 2012." AR53050.

Three days later, BIA issued the final EIS (FEIS) for public comment. 78 Fed. Reg. 7448 (Feb. 1, 2013). The County filed comments opposing the project on May 1, 2013. AR52715-53696. Among the issues the County raised were: (1) the need to prepare a supplemental EIS (SEIS) to address the County's termination of the Interlocal Agreement forfeiting any right to mitigation payments and the adoption of new regulations implementing JLUS and amending the Airport Overlay Zones, AR52734-38; (2) BIA's arbitrary and

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capricious consideration of the project's impacts on FAFB, AR52738-746; (3) the requirement that BIA defer to the views of local governments and representatives regarding community impacts, many of which are strongly opposed, AR52751-53; and (4) that the Tribe does not have any mitigation agreement related to a casino with the County, AR52757-59.

After the FEIS, the County continued to study the impacts of the casino on FAFB. After reviewing Department of Defense (DOD) guidance on encroachment and safety issues, the County wrote to BIA asking it to consider whether the generic accident potential zones (APZs) were appropriate for FAFB, given the VFR traffic pattern. AR3668-712. Where APZs are located is very important because high density functions are not considered appropriate for APZ II and are unacceptable in APZ I for safety reasons. AR3683. The County provided BIA with DOD guidance that indicates that modifications to APZs may be appropriate when flight tracks show significant numbers of aircraft operations are on multiple flight tracks, as the FAFB radar track map indicates. AR3684 (citing DOD Instruction 4165.57 (May 2, 2011)). The Washington Department of Transportation recommends a similar approach: "It is essential to adjust safety zones to fit the airfield configuration, usage characteristics, and other factors." AR3686. As Figure 2 above shows, the radar tracks FAFB produced from October 2010 show numerous flight tracks overflying the Site. AR4308-09. If the APZs were modified to conform to actual operations per DOD guidance, the Site would fall entirely within APZ II, an area of measurably

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higher risk that is unsuitable for a casino. AR3691; AR3675-76. The County requested that BIA deny the project or prepare an SEIS to address these concerns. AR3668, 678.

On July 29, 2014, the Air Force responded to BIA apparently to address the County's letter; the Air Force stated that "[i]t was the consensus of all the organizations that the Fairchild APZs are appropriately aligned in according to the Air Force AICUZ policy and the AICUZ DODI."[7] AR3433. The Air Force did not provide any explanation for its conclusion, but acknowledged that "there is a greater chance of having an aircraft incident on a site located in close proximity to an airfield, such as the [proposed] site, than for locations away from the airfield even if the site is outside the geographic areas of highest accident potential." *Id.*

E. Two-Part Determination and Record of Decision

On June 15, 2015, the Assistant Secretary-Indian Affairs (Assistant Secretary) issued a positive Two-Part Determination and a Record of Decision (ROD) approving the development of 986,366 square feet of casino, hotel, restaurant, retail, recreational, and governmental space, plus parking for 6,253

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[7] AICUZ refers to an Air Installation Compatible Use Zone program, the purpose of which is to achieve compatibility between air installations and neighboring communities. A DODI is a Department of Defense issuance of guidance.

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vehicles. AR65422-542. Both were attached to a cover letter to Governor Inslee that says nothing about the County's opposition to the project. AR65422-25. The letter also states that "[t]he U.S. Air Force, which operates Fairchild AFB, did not submit comments opposing the project." AR65425.

The Two-Part Determination states that the project will "have direct and indirect benefits to the Tribe and its members, as well as to the surrounding community," and claims that the casino "enjoys substantial support from local governments in the area, as well as the business community." AR65450-51. It also states "that the Spokane Tribe, the City of Airway Heights, and Spokane County entered into an agreement to mitigate impacts that may arise from the Project's development," AR65451, and that Airway Heights is "obligated to provide a share of MOA annual payments to the County." AR65467 n.230. The Assistant Secretary also concludes that the casino "would remain compatible with local zoning and land use policies, as well as policies related to land use in the vicinity of [FAFB] and Spokane International Airport" and "is consistent with JLUS recommendations." AR65459, 5463, 5514. The ROD provides the same explanation with respect to County impacts. AR65501-02.

None of these assertions is accurate.

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F. Post-Decision Developments

The Governor concurred with the Two-Part Determination on June 8, 2016.[8] FAFB lost in its bid to be MOB 4 for the new generation of aerial refueling tankers—the KC-46A—seven months later.[9]

After the completion of the selection process, the County filed this case challenging the Two-Part Determination on June 16, 2017. Complaint, No. 17-00220, ECF No. 1. The Kalispel Tribe filed its complaint on April 12, 2017. Complaint, No. 17-00138, ECF No. 1. The cases were consolidated on October 12, 2017. ECF No. 30.

In January 2018, the Tribe opened a 38,000 square foot casino with 12 game tables and 450 slot machines.[10] Although an additional one million square feet of retail, dining, entertainment, hotel, and convention center are planned for construction through 2026, no construction has begun. *Id.*

III. LEGAL BACKGROUND

Under the Administrative Procedure Act (APA), agency action may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in

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[8] https://www.governor.wa.gov/news-media/inslee-concurs-federal-determination-regarding-spokane-tribe-proposal-new-gaming-facility.

[9] http://www.spokesman.com/stories/2017/jan/12/fairchild-wont-get-next-round-of-new-tankers/.

[10] https://www.500nations.com/casinos/waHardRockSpokane.asp.

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accordance with law." 5 U.S.C. § 706(2)(A). Courts must determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004) (internal quotation marks and citation omitted). An agency violates the APA if it 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. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Section 20 of the Indian Gaming Regulatory Act (IGRA) prohibits gaming on trust lands acquired after October 17, 1988, unless the Secretary of the Interior, "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines 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(a); *id.* at (b)(1)(A). The governor of the affected state must also concur. *Id.* § 2719(b)(1)(A). In evaluating whether gaming is in the best interest of the tribe and not detrimental to the surrounding community, the Secretary must evaluate all the information submitted under the regulations, including but not limited to the gaming application, the environmental review documents, and comments from the consultation process.

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25 C.F.R. § 292.21(a).

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(h), requires federal agencies to (1) take a "hard look" at all environmental impacts of their decisions, and (2) disclose and provide an opportunity for public comment on such environmental impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 350 (1989). NEPA ensures that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and "guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience." *Id.* at 349. Agencies are obligated to respond to comments, by—*inter alia*—supplementing, improving, or modifying their analyses, making factual corrections, or explaining why the comments do not warrant further agency response. 40 C.F.R. § 1503.4.

IV. ARGUMENT

A. BIA violated IGRA by failing to consult with the County

Soliciting comments is not "consultation." Consultation requires engagement, and the record demonstrates that BIA did not consult with the County in any meaningful respect.

Under Section 20, gaming is allowed on newly-acquired lands only if the Secretary, "*after consultation with the Indian tribe and appropriate State and local officials*, . . . determines that a gaming establishment on newly acquired lands . . . would not be detrimental to the surrounding community." 25 U.S.C. §

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2719(b)(1)(A) (emphasis added). IGRA plainly requires the Secretary to consult with state and local officials. In statutes where Congress has not defined "consultation"—as is the case with IGRA—the Ninth Circuit construes the term "'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1085 (9th Cir. 2011) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). When a statute also requires an agency to provide an opportunity for public comment—again, as IGRA does, *see* 25 U.S.C. § 2704 (b)(2)(B) (requiring the Secretary to "allow a period of not less than thirty days for receipt of public comment")—the context "indicates that Congress intended consultation to be more than responding to comments." *Id.* at 1087.

The conclusion that Section 20 requires more than merely an opportunity to comment is consistent with fulfilling its purpose to prohibit gaming on newly acquired land except in rare cases when certain conditions are satisfied. AR52751. As Representative Douglas Bereuter explained in 1985 when debating precursor language to Section 20, gaming would only be permitted "where *all parties involved*, including the tribe, city and county government, and the governor will concur that such trust status and enterprise would be

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acceptable."[11] By requiring consultation, Congress sought to ensure that the Secretary authorized gaming on newly-acquired land only when the affected governmental entities all agreed to the proposal.[12] *See* AR52751-52 (discussing legislative history behind Section 20).

BIA failed to meet its statutory obligation. The Ninth Circuit has discussed what types of activities satisfy the duty to consult—which is a determination for which no agency deference is due. *See Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 118 (1st Cir. 2002) ("an agency cannot make a binding determination that it has complied with specific requirements of the

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[11] H.R. 3130, 99th Cong., § l(b), reprinted in Indian Gambling Control Act: Hearings on H.R. 1920 and H.R. 2404 Before the Comm. on Interior and Insular Affairs, Part II, 99th Cong., 1st Sess. 18, 24 (1985).

[12] In 1998, the Assistant Secretary testified before Congress "that Indian tribes should not be deprived of the economic opportunity a gaming establishment in a more economically advantageous market can provide, *as long as State and local officials, neighboring tribes, and the Tribe all agree that the gaming establishment will be of mutual benefit*." Gaming Regulatory Improvement Act: Hearing on S. 1870 Before the Select Comm. on Indian Affairs to Amend the Indian Gaming Regulatory Act, 105th Cong., 2d Sess. 1 (1998) (emphasis added).

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law," and "[i]nterpretation of the word 'consult' is "purely a legal question for the courts."). In *Environmental Defense Center v. EPA*, for example, the court found EPA's duty to consult the states in conducting certain studies was satisfied when EPA met with a committee that included the states "fourteen times over three years and state and municipal representatives provided substantial input regarding the draft reports, the ultimate Phase II Rule, and the supporting data." 344 F.3d 832, 864 (9th Cir. 2003). In *California Wilderness Coalition*, by contrast, no such similar efforts were made by DOE, which was statutorily obligated "to conduct a study of electric transmission congestion 'in consultation with affected States.'" 631 F.3d at 1085, 1088 (quoting 16 U.S.C. § 824p(a)(1)). DOE offered states the opportunity to comment and responded to those comments, but that did not satisfy consultation requirements. *Id.* at 1086-88 (also noting that consultation was not achieved at events where DOE met with certain state entities, because evidence did not show that these events "provided meaningful opportunities for dialogues between the states and DOE"). *See also In Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 475 (9th Cir. 1984) (holding that giving notice to agencies and Indian tribes as not sufficient because "consultation obligation is an affirmative duty"); *U.S. Steel Corp. v. United States*, 29 C.I.T. 33, 40 (Ct. Int'l Trade 2005) (simply soliciting and receiving comments did not equate to consultation; requiring agencies to "give those comments meaningful consideration" and engage "in good faith consultations, in a timely fashion").

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In fact, the Ninth Circuit observed that meaningful consultation is particularly important when federal legislation "circumscribe[s] somewhat the States' traditional authority." *California Wilderness Coalition*, 631 F.3d at 1087. "A recognition of the sensitivity of these issues supports our determination that where, as here, Congress has directed an agency to consult with States before taking action that may curtail traditional State powers, we must require that the agency heed Congress's direction." *Id.*

Meaningful consultation under Section 20 is imperative, particularly in a case such as this where there are very serious safety questions and where BIA represented in its April 30, 2001, decision that the Site "will not be used for gaming purposes," inducing the County not to appeal BIA's original trust decision. AR53199. All that BIA did under IGRA was to solicit the County's comments about the casino's impact on the surrounding community. BIA did not affirmatively engage with the County; to the contrary, the County had to request meetings, to which it received a mixed response.[13] When the County requested a meeting with the Assistant Secretary on April 12, 2013, AR6792, it received no response until April 23, after Senator Cantwell's office requested the meeting on behalf of the County. AR6785 (Assistant Secretary directing staff that it was "urgent" that they arrange a meeting because he would "be in front of Cantwell early in the afternoon"). Then, the Assistant Secretary did not

[13] *See also* Exhibit 1, Declaration of Al French (Dec. 14, 2018) (French Decl.).

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show up for the meeting. French Decl. ¶ 7. And when the County requested another meeting with Interior officials on July 22, 2014, the Department refused. AR3448 ("I am recommending no for Mike on this [meeting] request - unless you have a different recommendation."). French Decl. ¶¶ 8, 9. In fact, the Assistant Secretary had no recollection of whether anyone had met with the County, indicating how little weight it gave to the County's concerns. *Id*. (Assistant Secretary asking "Had I not met with the County before?").[14]

The consultation duty is an affirmative duty, *see In Confederated Tribes*, 746 F.2d at 475, and BIA did not meet it. Participating in the EIS process is no substitute for meaningful consultation. *See Campanale & Sons*, 311 F.3d at 188 (holding consultation "mean[s] something more than general participation in the public comment process on [EISs], otherwise the consultation requirement would be rendered nugatory"). IGRA requires the Secretary to consult with appropriate State and local officials, not just the applicant tribe. BIA's obvious failure to do so violates IGRA.

B. BIA did not accord the County's concerns any weight, violating IGRA

1. BIA was required to defer to the views of local governments

[14] By contrast, BIA met with the Tribe many times. *See, e.g.*, AR12629 (7/14/09); AR12614 (7/30/09); AR12243 (2/15/11); AR12488 (3/30/10); AR10974 (11/17/11); AR10723 (1/11/12); AR48381 (11/19/12); AR6796 (4/10/13).

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Congress did not intend for Section 20's consultation requirement to be meaningless. It expected the Secretary to give weight to the comments of the local governments consistent with federalism principles, which are particularly strong in the land use planning context. Thus, even if IGRA did not require consultation, BIA's dismissal of the County's comments would still be arbitrary and capricious.

As the Supreme Court observed a few years before Congress enacted IGRA, "[t]he power of local governments to zone and control land use . . . *is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities*." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (emphasis added). A year later, the Court confirmed that "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982). Other courts have opined that "[l]and use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong." *Izzo v. Borough of River Edge*, 843 F.2d 765, 769 (3d Cir. 1988)). These principles, combined with IGRA's prohibition of gaming on newly acquired lands except where the local governments and tribes all support it, underscore the Secretary's obligation to defer to the views of local governments.

When the largest jurisdictional government strongly opposes gaming for non-frivolous reasons, overriding the County's views without cogent explanation as to why its opposition is irrelevant violates IGRA.

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2. BIA also acted arbitrarily and capriciously by dismissing the County's concerns

Deference to the views of local government makes sense also because local governments have expertise in community impacts, not BIA officials. *See* AR52751-53. FAFB has been part of the Spokane community for over 75 years; the County—which helped to bring FAFB into existence with land donations—knows far better than BIA about safety issues related to FAFB, having seen a number of fatal accidents (AR53084-85); encroachment, having participated for many years on committees evaluating land use concerns, (AR52737-39); community conflicts, having navigated many; and infrastructure concerns (AR52760-63).

Although BIA offers no explanation for dismissing the County's opposition, it seems to take the position that the Air Force's lack of opposition is dispositive. The Assistant Secretary's cover letter to Governor Inslee, for example, notes that the "Air Force, which operates [FAFB], did not submit comments opposing the project." AR65425. BIA knew, however, that FAFB's lack of opposition was not based on the merits of the application; it was based on its desire to stay out of the community conflict. James McDevitt—who served at FAFB as a KC-135 instructor, KC-135 squadron commander, the state Director of Operations, and Chief of Staff/Vice Commander of the Washington Air National Guard, retiring as a Brigadier General—said as much in 2013, when he explained that the Air Force's neutrality is "no surprise, since it is the

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practice and policy of the Air Force to refrain on taking sides on contentious local issues." AR53106-07. BIA's primary contact within the Air Force on its Encroachment Management team confirmed: "This is exactly why the AF went with the neutral statement (well conditionally neutral). We don't want to get caught between the folks for and against the development." AR3576. BIA also knew that the Air Force did not speculate on BRAC closures, including whether the casino would influence any such considerations. AR9275.

Nor can BIA credibly dismiss the County's concerns by relying on Airway Heights' support. The County, the largest jurisdictional body in the region, has an obligation to represent *all* of its nearly half million residents, not the slightly over 6,000 residents Airway Heights represents, of which 2,500 are in prison. AR52720. The County, unlike Airway Heights, has no direct financial interest in the outcome of the review process. Airway Heights, by contrast, stands to earn up to $2 million in annual payments, with the possibility of more. AR8003. In fact, the County so opposed the project that it forfeited any share of those payments it might have enjoyed in order to oppose the project. AR53040-41. And its opposition has been consistent since 1999, when it suspected that the Tribe might ultimately use the Site for gaming. AR52754. The only reason the County did not appeal BIA's trust decision was because BIA represented that "[t]his property will not be used for gaming purposes." AR53199.

BIA did not meet the County's opposition head-on; it downplayed its existence. The Assistant Secretary's cover letter to Governor Inslee, for

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example, fails to mention the County's opposition. AR65422-25. The Determination itself ignores, downplays, or misrepresents County impacts. BIA, for example, asserts that "[t]here is local support for the Project," and discusses the Annexation IGA the County has with the Tribe, AR65451, without acknowledging that the Annexation IGA only addresses annexation of the Site, not casino impacts, or the County's opposition. *See* AR65426-65542. BIA similarly asserts that the "increase in visitors to the City of Airway Heights and Spokane County will have direct and indirect benefits to the Tribe and its members, as well as to the surrounding community." AR65450. The County, however, explained that the project would not benefit it and provided reasons why. *See, e.g.*, AR52747-48. In virtually every instance, the Two-Part Determination downplays or dismisses the County's opposition, which is impermissible. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

BIA, in fact, does not even address the County's argument that BIA is obligated to accord the County's opposition—and the opposition of most of the surrounding community[15]—substantial weight. *See* AR53733-36. In its response to the County's comments regarding federalism concerns and deference on the

[15] The County also cited the opposition of the City of Spokane, Congresswoman Rogers, the Kalispel Tribe, and many others. AR52756 n.20; *see also* AR52222.

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FEIS, BIA states, "The comments submitted by the surrounding communities, including Spokane County, have been considered by the Secretary in his determination on the Preferred Alternative." AR63970. It also quotes language from the Annexation IGA, as if the purpose to "partner in the development of the Tribe's property in a manner that best serves the interests of the parties and the interests of the public health and safety," *id.*, negates the County's opposition or answers the County's argument. And—it is worth noting—BIA does not seem to hold the *Tribe* to that partnership. In any case, BIA's cursory response to the County's opposition—which is largely a vastly summarized description (AR65477)—does not explain why the agency apparently believes the County's opposition is irrelevant or answer why it has no obligation to defer to the County's concerns. Its failure to do so violates the APA. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (stating that failure "to consider an important aspect of the problem" violates APA); *see also Butte County, Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706).

C. BIA arbitrarily and capriciously concluded that County impacts would be mitigated on the basis of a terminated agreement

In January of 2013, the County terminated the Interlocal Agreement it had with Airway Heights in order to oppose the project. In doing so, it forfeited any share of "mitigation payments" it might have been entitled to. In its Two-Part

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Determination and the ROD, however, BIA cites to the various governmental agreements to conclude that (1) there is local support for the project, AR65451, and (2) casino impacts will be mitigated, AR65467. Both conclusions were factually incorrect when the ROD was issued.

BIA incorrectly asserts in the Two-Part Determination and the ROD that the County's impacts will be mitigated. In the Two-Part Determination's discussion of "*Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them*," BIA identifies the MOU as providing for payments to compensate "the County for additional costs incurred as a result of the gaming component of the Proposed Project." AR65467 n.230 (25 C.F.R. § 292.18(d)). BIA also concludes that the County's termination of the Interlocal Agreement with Airway Heights does not affect Airway Heights' obligation under the MOA "to provide a share of MOA annual payments to the County." *Id.* According to BIA, "Airway Heights and the County are expected to negotiate an agreement" three months after the Tribe opens its casino "to ensure that the County will receive sufficient funds from the annual payments set forth in Section 6.0 of the MOA to mitigate impacts from the Proposed Project associated with law enforcement services and transportation planning and funding." *Id.*

That conclusion is refuted by the County's January 29, 2013, Resolution opposing the casino, AR53040-50, the County's acknowledgments that it forfeited mitigation payments, AR53048, AR5220; and Airway Heights'

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acknowledgment that the County forfeited mitigation payments, AR52083. BIA's conclusion that "Airway Heights remains obligated to provide a share of MOA annual payments to the County," AR65467 n.230, has no basis in law or fact. Section 3.3 of the MOA between the Tribe and Airway Heights only provides that the "City shall be responsible for payments to the County pursuant to an agreement between the City and the County." AR20483. The Interlocal Agreement between the County and Airway Heights fulfilled that obligation. When the County terminated the Interlocal Agreement so that it could express its opposition to the project, Airway Heights' responsibility to the County ceased. The County has no rights under the MOA because it is not a party to the MOA. Indeed, the MOA makes that clear; the MOA provides that it "is not intended to, and will not be construed to, confer a benefit or create any right on a third party, or the power or right of any third party to bring an action to enforce any terms of this MOA." AR20491, § 10.3. And as a factual matter, Airway Heights has not approached the County to negotiate any agreement to ensure that the County's impacts are mitigated. *See* French Decl. ¶ 13. BIA's reliance, therefore, on an MOA that the County cannot enforce to conclude that the project's impacts on the County will be mitigated is wrong. Moreover, that error is separate from BIA's failure to address the County's objections that the mitigation payments—which the County was not involved in negotiating—were insufficient to mitigate impacts in the first place. *See, e.g.*, AR52746 (discussing the inadequacy of the payments and citing expert report).

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BIA cites to the IGA between the County, Airway Heights, and the Tribe to conclude that impacts on utilities and traffic will be mitigated, but the IGA was negotiated for purposes of annexation, not casino gaming, as the far lower mitigation payments reflect. AR65468-69. The County told BIA that the only agreement it had with the Tribe "addresses the limited issue of the annexation of the PROPERTY by the CITY and that the TRIBE has not sought to negotiate or enter into an intergovernmental agreement with the COUNTY to address or mitigate any impacts associated with its proposed development, as described in the Draft EIS of March 2, 2012." AR53050. BIA ignored the County.

BIA's NEPA documentation and the ROD make the same errors. The ROD states that the casino "is reasonably expected to result in beneficial effects for Spokane County" because of "[s]ubstantial annual and one-time revenues to the City of Airway Heights and Spokane County through the IGA and MOA," AR65540-41, but that is wrong. So too is BIA's statement that Airway Heights will negotiate an agreement with the County that "would ensure that the County will receive sufficient funds from the annual payments set forth in Section 6.0 of the MOA to mitigate impacts from the Proposed Project associated with law enforcement services and transportation planning and funding." AR65502.

There is no factual basis in the record for BIA's conclusions above, and it is arbitrary and capricious for BIA to rely on clearly incorrect assumptions. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005). When an agency only considers the best-case scenario for environmental

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harm, the agency skews the data and impedes a full and fair discussion of the potential effects of the project. *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 504 (9th Cir. 2014). By assuming that the County's impacts would be mitigated because Airway Heights would compensate the County—putting aside the insufficiency of the mitigation in the first case—BIA committed both errors. Its decision violates NEPA and the APA.

D. BIA did not independently consider the County's safety concerns regarding the location of the APZs or seek a reasoned explanation from the Air Force

On March 31, 2014, the County wrote to BIA to question whether the FEIS accurately depicted the risks of building a casino below the final turn of FAFB's VFR traffic pattern where aircraft would regularly fly only 500 feet above ground level. AR3668-712. The County cited guidance issued by the DOD in 2011 and by Washington State, which both recommend that "Accident Potential Zones" (APZs) for military installations be modified to reflect actual operations at specific air installations for safety and encroachment purposes. AR3668. DOD's guidance states that APZs may be modified to conform to actual lines of flight when multiple flight tracks exist and significant numbers of aircraft operations are on multiple flight tracks. AR3671. Washington State guidance provides that "[e]ach airport is unique. Thus, it is essential to adjust safety zones to fit the airfield configuration, usage characteristics, and other factors associated with a specific airport." AR3672.

BIA did not address the County's comments; it merely forwarded the

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County's letter to the Air Force. The Air Force responded that it was the "consensus" of "18th Air Force, the HQ AMC Safety Office, the HQ AMC Directorate of Operations and the HQ AMC Directorate of Installations and Mission Support, and HQ Air Force" that the FAFB APZs "are appropriately aligned in according to the Air Force AICUZ policy and the AICUZ DODI." AR3433. The Air Force did not explain its reasoning, though it did remark that "there is a greater chance of having an aircraft incident on a site located in close proximity to an airfield, such as the STEP site." *Id.*

This response does not satisfy basic APA requirements for two reasons. First, the explanation is conclusory and does not satisfy the APA's requirement of a "reasoned explanation." *See, e.g., Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Agencies may not be required to provide a lengthy explanation of its decision, but they must—at least—explain their actions "with such clarity as to be understandable." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The Air Force did not do so here.

Second, BIA cannot "blindly adopt the conclusions of the consulting agency, citing that agency's expertise." *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006). The "ultimate responsibility" for the decision "falls on the action agency." *Id*. BIA could have asked the Air Force for a reasoned explanation, but it did not. *See also Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 610 (4th Cir. 2018) (EPA's reliance on facially flawed DOE recommendation was arbitrary and capricious). Accordingly, its refusal to

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consider the County's request for an SEIS or denial based on whether the APZs accurately reflect areas of heightened risk at FAFB was arbitrary and capricious.

The location of the APZs under DOD guidance is only part of BIA's error. The County also cited guidance from Washington, which states that "it is essential to adjust safety zones to fit the airfield configuration, usage characteristics, and other factors associated with a specific airport." AR3672. The County follows guidance from California, which warns that "[t]he safety compatibility criteria suggested in AICUZ guidelines tend to represent minimum standards (more so with respect to noise than safety)." AR3685. Accordingly, in Washington "[a]djustments are made based on runway length, approach type, fleet mix, traffic pattern location." AR3686; *see also* 49 RCW 36.70A.530(1) ("Military installations are of particular importance to the economic health of the state of Washington and it is a priority of the state to protect the land surrounding our military installations from incompatible development."). BIA failed to address guidance for Washington, as well. As the D.C. Circuit held in *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001), an agency must explain why it decided to act as it did, and its explanation must be one of "reasoning," not merely a "conclusion." BIA did not meet this basic standard.

E. The conclusion that the proposed project is compatible with the JLUS is arbitrary and capricious

Key to the Assistant Secretary's no detriment determination is his conclusion that the proposed project "is consistent with JLUS

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recommendations." AR65463. A contrary conclusion would require denial because the "overall objective of the JLUS program is to limit encroaching land uses and development densities that are incompatible with the current and future military mission of the [FAFB]." AR33381. Encroachment, by definition, is detriment. Accordingly, the Assistant Secretary's conclusion that the proposed project is consistent with JLUS, AR65478, is critical to the decision. His conclusion is wrong.

More than half of the Site falls within an area designated MIA 4. AR33380. "MIAs are geographic planning areas where military operations may impact local communities, and conversely, where local activities may affect the military's ability to carry out its mission." [16] AR33382. The shape of MIA 4 is based on numerous inputs that encompass the areas of primary aircraft overflight (closed pattern flight) and areas potentially exposed to noise levels in excess of 70 dB Ldn. *Id.* MIA 4 contains strategies that restrict land uses that can be located near FAFB. *Id*.

JLUS Strategy 50 is applicable to MIA 4. The purpose of Strategy 50 is "to prevent large concentrations of people … within areas impacted by aviation

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[16] The County was unable to locate the JLUS in the administrative record. BIA cites the JLUS as a reference in Chapter 8 of the EIS, however, and it obviously considered the document in some detail in the document. Accordingly, the County will cite to the sections of the JLUS attached as exhibits to this motion.

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operations." AR16300. It provides, "Non-residential uses in MIA 4 can have a maximum occupancy of 150 persons per gross acre. Gross acreage is measured based on the site for a given use. In other words, the building or structure and land area associated with that development (parking, storage, etc)." AR33383.

The Site is roughly 145 acres. By excluding areas reserved for wetlands and the existing fuel station, BIA calculates the area proposed for development within that site as approximately 121 acres. AR17045; AR33480. BIA calculated that under full build-out conditions, the Site could be expected to have 9,821 people (2,087 employees and 7,734 patrons) at a given time, based on employment rates and anticipated visitors. AR33481. Thus, according to BIA, the proposed project will not exceed the 150 persons per gross acre because 18,150 (122 acres X 150 person per acre) people are permitted to be on the Site—almost double what BIA calculates would be there at any time. *Id*.

BIA's interpretation defeats Strategy 50's purpose of "prevent[ing] large concentrations of people … within areas impacted by aviation operations." AR16300-01. The proposed project will have a gross footprint of 986,366 square feet—approximately 22 acres. AR33289. The facility will be surrounded by a remarkable 6,253 parking spaces, AR33289-90, which suggests that the Tribe anticipates significantly more than 9,821 people visiting at a single time.[17]

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[17] BIA's estimate of daily patrons is not a maximum number of patrons; it is only an average based on an estimated 2,823,056 visitors annually. AR33441.

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Even if one were to assume that half of the estimated average 7,734 daily patrons stood milling outside in the Tribe's expansive parking lots, there would still be 5,954 people concentrated within the 22-acre footprint—or 270 persons per acre. There is no way to avoid the conclusion that the project will result in large concentrations of people within an area impacted by aviation operations.

The simple fact is that a casino resort is the type of high density use of land that is inappropriate in MIA 4. Indeed, it is telling that BIA initially determined that Strategy 50, among others, was not applicable to the proposed project.[18] AR52334 (*see* AF comment #19). BIA only added Strategy 50 when the Air Force questioned the omission. *Id*.

The County raised these concerns in its comments on the FEIS, as did others. AR52738 ("Clearly the baseline in determining compliance with intensity standards must be the project area, not the acreage of the surrounding countryside."); AR6535 (City of Spokane). The County also cited the decision

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[18] In the FEIS, BIA represents that the project "is consistent with the *applicable* strategies listed in Section 5.0 of the Fairchild JLUS." AR17246 (emphasis added). Section 5 of the JLUS provides 57 strategies that may be pursued to assure that development in the vicinity of the FAFB is compatible with current and future base operations. BIA stated that only 10 of those strategies were "applicable" to the project, but did not explain why the others were not. AR17248-250.

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of the Steering Committee, which "increased the maximum density restriction from 150 to 180 people per acre and clarified that this maximum was 'per acre' and could not be aggregated across acres so as to cluster development." AR52738 n.15. BIA's response was simply to repeat its calculation without further explanation. AR16324-25; *see also* AR63953.

Agency decisions deserve deference only when "the agency is making predictions within its area of special expertise." *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (alteration omitted). Safety impacts associated with Air Force operations are clearly not within BIA's expertise. There is no reason to defer to the BIA, particularly given that the County and the City of Spokane—both of which raised the same concerns—have far greater expertise as members of the JLUS committee in understanding the purposes behind Strategy 50. BIA's inability to provide a reasoned explanation only underscores the seriousness of the issue. An agency must, at least, "[e]xplain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position." 40 C.F.R. § 1503.4(a)(5). An agency must "articulate a satisfactory explanation" for its action. *Tourus Records*, 259 F.3d at 737.

More generally, BIA repeatedly glossed over what any rational reader would understand to be obvious concerns about the project. While its public position may have been "neutral," the Air Force's internal comments indicate otherwise. The Air Force raised concerns regarding airspace restrictions,

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repeatedly noting that it cannot change flight patterns. AR10440. It urged that BIA take into account the Air Force's "concerns with flight patterns and noise relative to the proposed site development." AR31197; *see also* AR31207-08. The Air Force stressed that current military flying operations intersect with the underlying land," and that "[c]losed pattern training operations (JLUS, 2009) occur directly overhead and aircraft are, on average, about 500' above ground level," while raising concerns about hearing damage. AR31201.

To comments raising concerns of incompatibility, the Air Force recommended that BIA respond that the Tribe will not ask FAFB to alter its flight activities and that FAFB will not change its flight operations even if "new aircraft are assigned or the mitigation described in this chapter proves ineffective." AR10441. Concerns about the potential for noise complaints and light impacts on night training were repeatedly discussed. AR53756-57; AR31199. Yet BIA refused to acknowledge the obvious—that the proposed project raises serious safety and conflict concerns.

While a court must accord an agency deference when examining factual disputes that "implicate[ ] substantial agency expertise," *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376-77 (1989), that rule has no application here. BIA has no expertise regarding safety and encroachment issues, which is why it should have deferred to the views of those who do, including the County. The Air Force insisted that "a site located in close proximity to an airfield, such as this, has a greater aircraft incident on the property that locations away from the airfield."

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AR53757. BIA never explains why placing thousands of people in a location of higher risk is not a detriment. And that alone is ample reason to vacate this decision.

V. CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court grant the County's motion for summary judgment.

DATED: December 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

Dated: December 14, 2018

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