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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KALISPEL TRIBE OF INDIANS, and SPOKANE COUNTY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

SPOKANE TRIBE OF INDIANS,

Intervenor-Defendant.

No. 2:17-cv-00138-WFN

SPOKANE TRIBE'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Hearing Date: June 17, 2019

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1 **INTRODUCTION**

2 The Indian Gaming Regulatory Act was enacted to "promot[e] tribal
3 economic development, self-sufficiency, and strong tribal governments" by creating
4 a federal framework for gaming on Indian lands. 25 U.S.C. § 2702(1). Many
5 tribes, including the Spokane Tribe (the "Tribe"), rely heavily on gaming revenues
6 to fund the basic operations of government and to provide housing, education,
7 health care, and other critical services to their members. Accordingly, while IGRA
8 generally prohibits gaming on land taken into trust after its enactment, such gaming
9 is allowed if the Secretary of the Interior concludes that it is in a tribe's best interest
10 and not detrimental to the surrounding community and the Governor of the tribe's
11 State concurs. *Id.* § 2719(b)(1)(A).

12 Twenty years ago, the Kalispel Tribe obtained such a "two-part
13 determination" and opened a casino in the thickly populated area near the City of
14 Spokane on land outside its aboriginal territory—in fact, in the heart of the Tribe's
15 ancestral lands. Kalispel has reaped the benefits of that determination, and the
16 Tribe has suffered its detriments: Kalispel's casino has siphoned enough business
17 from the Tribe's two more remote casinos that the Tribe has been forced to
18 eliminate critical support services for its members and has been unable to address
19 its urgent financial, social, health, and environmental needs. Indeed, in recent
20 years, Kalispel has spent *thirty times* what the Tribe does on each tribal member.

21 After acquiring property in the City of Airway Heights—in the area where
22 the Tribe lived for centuries before being forced to relocate to its current
23 reservation—the Tribe sought a similar two-part determination. Following a

rigorous, decade-long administrative process that included preparation of a massive Environmental Impact Statement and careful consideration of the views of Kalispel, Airway Heights, the County of Spokane, the U.S. Air Force, and many other constituencies, the Department of the Interior granted the two-part determination. And Washington's Governor concurred in that determination, permitting the Tribe to proceed with its West Plains Development, a mixed-use development with a casino and hotel.

Kalispel and the County of Spokane now seek to block the Tribe's urgently needed economic development. Kalispel's motive is plain: It wants to keep the near-monopoly on the Spokane gaming market that it enjoyed for two decades at the Tribe's expense. The County's motive is more obscure, because it has no real complaint that it will be harmed by the project. It had already entered agreements with the Tribe and the City of Airway Heights ensuring that any detrimental impacts on the County would be mitigated, before abruptly changing its mind when it changed County commissioners. The County thus argues that the project will interfere with Fairchild Air Force Base—although the Air Force itself has lodged no such complaint. In any event, both Plaintiffs' arguments are meritless. The two-part determination easily satisfies the deferential standard of review here: It is not arbitrary or capricious, and it is supported by substantial record evidence.

Kalispel's primary argument is that the Department's finding of no detriment to the surrounding community was unreasonable because Kalispel would suffer a loss of gaming revenues if the Tribe were allowed to compete with it in the Spokane market. But competitive injury to an existing casino, by itself, does not

1 mean that a new casino would be detrimental to the surrounding community. The
2 tribe that got there first is not entitled to veto the tribe that comes later. As courts
3 have consistently held, IGRA charges the Department with evaluating all the
4 relevant evidence—including the many concrete benefits that such economic
5 development provides to the surrounding community—before determining whether
6 the new gaming facility will be detrimental to the surrounding community *as a*
7 *whole*. Here, the Department did just that. It took Kalispel's claims seriously and
8 conducted its own thorough economic analysis, concluding that Kalispel's claims of
9 injury were overblown, and projecting that Kalispel's casino would suffer only a
10 temporary downturn in revenues that would not significantly affect its ability to
11 provide government services. That fleeting harm to Kalispel was far outweighed by
12 the project's benefits to the surrounding community—which include thousands of
13 jobs and hundreds of millions of dollars a year in economic output.

14 Lacking stronger arguments, Kalispel resorts to accusations of impropriety
15 by the Department, claiming that the Department somehow predetermined the
16 outcome of the ten-year administrative process here. Kalispel lacks any evidence at
17 all for its assertions. And even minimal scrutiny of the record refutes them. For
18 example, while Kalispel claims (at 9) that the Department "expedited" the process
19 to ensure that the two-part determination would "land on [the] desk" of then-
20 Governor Gregoire before she left office, the two-part determination was in fact
21 presented to, and concurred in, by Governor *Inslee*. Kalispel misrepresents the
22 record, claiming (at 42), for instance, that an internal Department memorandum
23 contradicts the Department's analysis of the harm to Kalispel when the

memorandum in fact strongly supports the Department's conclusion. And while Kalispel strongly objects to the Department's consideration of Kalispel's own two-part determination, no legal principle forbids the Department from taking basic fairness into account in making its judgments.

For its part, the County primarily argues that the Department did not sufficiently consider whether the Tribe's proposed project would encroach on Fairchild Air Force Base. The administrative record contradicts that claim. The Department was well aware of the County's encroachment concerns, and both the Department and the Tribe were in regular contact with the Air Force to ensure that the Tribe was taking all necessary steps to mitigate the project's impact on Fairchild. Indeed, the Air Force has never opposed the Tribe's proposed development. And when the Department raised the County's belated safety concerns with the Air Force, the Air Force found those concerns unwarranted. The County offers no reason to believe that it is a better spokesperson for the concerns of the Air Force than the Air Force itself.

In short, the Department's two-part determination was reasonable and supported by substantial evidence, and the process it followed to reach its conclusion was thorough and anything but predetermined. The Court should deny Plaintiffs' motions for summary judgment and grant summary judgment to the Department and the Tribe.

BACKGROUND

A. Statistory Framework

1. The Indian Gaming Regulatory Act

In 1988, Congress enacted the Indian Gaming Regulatory Act to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Although IGRA generally prohibits gaming on lands not yet acquired in trust for a tribe at the time IGRA was enacted (often called "after-acquired lands"), it contains several exceptions to that prohibition. *Id.* § 2719. As relevant here, IGRA authorizes gaming on after-acquired lands if the Secretary of the Interior makes a two-part determination that "a gaming establishment on newly acquired lands [1] would be in the best interest of the Indian tribe and its members, and [2] would not be detrimental to the surrounding community," and "the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." *Id.* § 2719(b)(1)(A). A two-part determination requires "consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes." *Id.*

IGRA regulations promulgated in 2008 provide that the Department will consider multiple factors in determining whether a gaming project would be detrimental to the surrounding community. *See Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354 (May 20, 2008). Those factors include (1) "[a]nticipated impacts on the economic development, income, and employment of the surrounding community"; (2) "[a]nticipated costs of impacts to

the surrounding community and identification of sources of revenue to mitigate them"; (3) "[a]nticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment"; (4) "the impact on [the] traditional cultural connection to the land" of any "nearby Indian tribe [that] has a significant historical connection to the land"; and (5) "[a]ny other information that may provide a basis for" the Department's determination. 25 C.F.R. § 292.18(c)-(g).

2. The National Environmental Policy Act

The National Environmental Policy Act requires an agency evaluating a proposed "major Federal action[] significantly affecting the quality of the human environment" to prepare a detailed statement regarding "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided." 42 U.S.C. § 4332(C). This Environmental Impact Statement is "used by Federal officials in conjunction with other relevant material to plan actions and make decisions." 40 C.F.R. § 1502.1. An EIS is prepared in two stages. The agency prepares a draft EIS in consultation with designated "cooperating agencies" that have jurisdiction over or expertise regarding relevant environmental impacts and solicits comments on the draft EIS from relevant federal agencies, affected state and local agencies and Indian tribes, the applicant, and the public. *Id.* §§ 1502.9, 1503.1(a). The agency then considers any comments and responds to them in a final EIS. *Id.* § 1503.4(a).

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B. Historical Background

The Spokane Tribe is a federally recognized Indian tribe with 2,879 enrolled members as of May 2017. Spokane Tribe of Indians, http://www.spokanetribe.com (visited Mar. 6, 2019); AR63814 (noting 2,849 members as of January 2015). The Tribe's reservation, established by executive order in 1881, is located roughly forty miles northwest of the City of Spokane. AR63814; *see* AR36549. Historically, the Tribe lived on millions of acres stretching from the Idaho border to the confluence of the Spokane and Columbia rivers, sustaining itself by fishing in those rivers and holding community gatherings at Spokane Falls, located in what is now the City of Spokane's downtown commercial district. AR63815.

The site of the West Plains Development "lies in the heart" of the Tribe's ancestral homeland, AR36563, and the Tribe has an "extensively documented, deep historic connection to the Project Site and its immediate vicinity," AR36564. Indeed, the West Plains Development site is less than five miles from the Tribe's former fishing sites, its permanent villages, and its "historic camps." AR36578-36579; *see also* AR36563 ("The Spokane Tribe and its membership have maintained a continuous presence in the immediate area of the Project Site from time immemorial through the present."); AR63839 ("[W]ithin a 5-mile radius of the Site, there are over 60 documented sites of historic, archaeological, cultural, or spiritual significance to the Tribe."). Indeed, the Tribe's connection to the West Plains area was so ingrained that "many Spokane [refused] to relocate to the Reservation until well after its establishment." AR36564.

1 Over the past century, the Tribe has struggled to support itself economically
2 and to maintain its way of life. Construction of the Grand Coulee Dam in 1939
3 blocked the passage of salmon up the Columbia River, destroying not only the
4 Tribe's commercial salmon fisheries but also its primary source of food and a
5 critical part of its traditional culture. AR36550; AR63815. Timber production—
6 one of the Tribe's alternative sources of income—has declined substantially, with
7 revenues dropping by nearly two-thirds during the 2007-2009 housing market crash
8 and continuing to drop even after the market rebounded. AR36550; AR63270;
9 AR63274. And uranium mines on the reservation that had been operating since the
10 1950s closed in 1982—taking away revenue and employment opportunities while
11 saddling the Tribe with an acute uranium contamination problem. Uranium has
12 polluted the streams and wetlands on the Tribe's land, endangered its wildlife, and
13 sickened its people. The enormous and costly clean-up was delayed for decades
14 and is not yet complete. AR36550; AR63816-63818.
15 The environmental destruction and economic deprivation have left the Tribe
16 "in crisis." AR63311. At the time of the Department's decision, data regarding the
17 Tribe's unmet needs showed that one in five homes on the reservation had unsafe
18 drinking water; one in four members was waiting for medical treatment from a
19 clinic that could not adequately serve the Tribe's population; and a staggering 56%
20 of the Tribe's adult members were unemployed. AR63264; AR63271; AR63826.
21 Of the members who *were* employed, more than 45% earned so little that they fell
22 below the federal poverty line. AR63826. Nearly 25% of families on the
23

reservation were living in poverty—a rate three times greater than the rate for Spokane County or Washington State as a whole. AR63271.

The Tribe has grown increasingly dependent on gaming revenues to address these pressing needs and to provide much-needed services to its members. But both of the Tribe's preexisting gaming facilities—the Two Rivers Casino and the Chewelah Casino—are located in relatively remote areas distant from the population center in and around the City of Spokane. Accordingly, they have had increasing difficulty attracting customers—particularly after Kalispel's Northern Quest Casino opened in Airway Heights at the end of 2000. Gross annual gaming revenues plummeted, declining from $23.2 million in 1998 to $14.5 million in 2009. AR63819. During roughly the same time period, average gaming revenues in Washington State grew *by 21% annually*. AR63823. "The declining gaming revenue for the Spokane Tribe contrast[ed] sharply with the explosive growth at other tribal casinos in Washington." AR4682.

The decline in revenues has wreaked havoc on the Tribe's financial health. In 1998, the Tribe's casinos transferred over $5.7 million to the Tribe's general fund for services to members. AR4681-4682. By 2009, that number was less than $20,000. *Id*. The revenue deficit at the Two Rivers Casino in 2009 actually required the Tribe to transfer money out of its general fund to support the casino (which had remained open to provide seasonal employment to the Tribe's members on the reservation, but has now closed). AR63821; *see* Spokane Tribe Family of Businesses, http://www.two-rivers-casino.com/about (visited Mar. 6, 2019). By 2010, the Tribe faced a budget gap of $4.6 million, AR4684, and its cash reserves

in 2014 were barely half of what they were ten years earlier, AR63825. This shortfall forced deep cuts to the Tribe's support services, resulting in the elimination of disability- and energy-assistance programs, severe reductions to employee benefits, and the termination of tribal funding for certain education and business development programs. AR4684-4687.

In sharp contrast to the Tribe, Kalispel has flourished as a result of the two-part determination that authorized it to game on property in Airway Heights. Although Airway Heights is not in Kalispel's aboriginal territory—in fact, it is in *the Tribe's* aboriginal territory—the Department issued a two-part determination in 1997 authorizing Kalispel to build the Northern Quest Casino on trust land in Airway Heights. AR63856. Because of that determination, for almost twenty years, Kalispel has enjoyed an extremely lucrative near-monopoly in the Spokane-area gaming market. AR5273. The resulting gaming revenues have permitted Kalispel to open a community center, work towards key tribal cultural preservation priorities, and make substantial yearly per capita payments to its members (something the Spokane Tribe has never been able to do). *See* AR63808; *see also* AR42226 (explaining that, "[w]ithout the two-part determination [it] received in 1997, [Kalispel] would have been unable to begin addressing the profound socioeconomic disparities and disadvantages which undermined the strength of [its] tribal government"). Indeed, on a per capita basis, Kalispel has spent roughly *thirty times more* than the Tribe in recent years on government services and direct payments to its members. *See* AR8480.

C. The Administrative Review Process

In November 1998, the Tribe requested that the Department take a 145-acre parcel of land in Airway Heights—in the heart of the Tribe's aboriginal territory—into trust for the Tribe. The parcel was to be used for "general economic development." AR53187-53189. On August 16, 2001, the United States took the parcel into trust for the Tribe for "economic development purposes." AR63814; *see also* AR63830. Although the parcel was not originally taken into trust for gaming purposes, AR53199, the Tribe ultimately concluded that a mixed-use development including gaming—the "West Plains Development—would be the most effective way to close its budgetary gaps and provide essential services to its members, AR57269; AR53210-53211. On February 24, 2006, the Tribe formally requested a two-part determination that would authorize it to game on the trust property. AR12459-12462. The Department spent the next decade thoroughly scrutinizing the application, consulting with relevant parties, and considering and responding to the views of opponents, including Plaintiffs.

1. The Environmental Impact Statement process

In August 2009, the Department published a Notice of Intent to prepare an EIS in the Federal Register and invited public and agency comments. 74 Fed. Reg. 41,928 (Aug. 19, 2009). During this initial "scoping" stage, the Department identified seven cooperating agencies that it would consult throughout the EIS process, including the Tribe, the County, the Air Force, Airway Heights, and the Federal Aviation Administration; it collected public comments; and it held a scoping meeting in Airway Heights to gather additional feedback. AR63883. In

1 March 2011, the Department published a scoping report detailing the "major issue
2 areas" it would address in the EIS, AR21415, and establishing a schedule for next
3 steps in the process, AR21424; *see generally* AR21399-21734. The Department
4 also outlined the "purpose and need" for the West Plains Development, explaining
5 that a successful project would "improve the Tribe's short-term and long-term
6 economic condition and promote its self-sufficiency, both with respect to its
7 government operations and its members." AR21409.

8 As part of the scoping process, the Department generated four proposed
9 project alternatives that it committed to study in detail in the EIS: (1) a proposed
10 mixed-use development incorporating a casino, a hotel, multiple restaurants and
11 retail spaces, a tribal cultural center, and a parking structure; (2) a smaller mixed-
12 use development with no hotel or parking structure but still incorporating a casino,
13 retail space, and a tribal cultural center; (3) a non-gaming mixed-use development
14 similar to alternative 1—including a hotel and retail spaces but excluding a casino;
15 and (4) no action. *See* AR21410; AR49417-49418. Alternative 1 was later
16 established as the Department's Preferred Alternative. AR63881; AR63925.

17 The Department initially considered several alternative locations for a
18 gaming facility other than the Tribe's Airway Heights property, but "eliminated
19 [them] from further study" because they were "infeasible" or would "not fulfill the
20 stated purpose and need" of the project. AR49479; *see* AR21410-21411. For
21 example, the Department considered expansion of the Tribe's two preexisting
22 casinos, but determined that those casinos' substantial distance from a profitable
23 gaming market would not allow them to generate enough revenue to meet the

Tribe's needs. AR49480. The Tribe's existing reservation was likewise too "far from a profitable gaming market" to be an economically viable site for a new casino. *Id*. The Department determined that "detailed evaluation" of other off-site gaming alternatives would require "speculati[on] that the Tribe could successfully purchase, acquire into federal trust, and develop these parcels" and thus would not "add in expanding the range of reasonable or feasible alternatives." AR48712.

Throughout the EIS process, the Department was keenly aware that Airway Heights is home to Fairchild Air Force Base. Given Fairchild's importance to the regional economy—and concerns raised early in the EIS process regarding potential encroachment on base operations, *see, e.g.*, AR21422—both the Department and the Tribe worked closely with the Air Force to identify and address potential effects on Fairchild. *See, e.g.*, AR63848; AR63883; AR63810 (the Department worked with the Tribe and Air Force "to establish procedures to mitigate any potential encroachment and to ensure that the base will operate undisturbed"); AR57269 (the Tribe "met personally with Base command in Airway Heights and Air Force command at the Pentagon to ensure that the Base would not be negatively impacted"). In addition, the Tribe participated in a joint land use study ("JLUS"), commissioned by the County and funded by the Department of Defense, to develop recommendations designed to safeguard base operations. AR63848. The Tribe voluntarily incorporated those recommendations into the development code for the proposed West Plains Development. AR63849.

In May 2011, the Department circulated an administrative version of the draft EIS for review and comment by the cooperating agencies, including the County

1 (which did not comment at that time). AR63883. In March 2012, after
2 incorporating the agencies' feedback, the Department filed the draft EIS with the
3 Environmental Protection Agency and made it available for public comment. 77
4 Fed. Reg. 12,835, 12,873 (Mar. 2, 2012). The Department also circulated the draft
5 EIS to federal, state, local, and tribal authorities, whose input was expressly
6 solicited—Kalispel and the County among them (although, again, the County did
7 not comment). *See* AR36531-36532. Based on the hundreds of comment letters the
8 Department collected during the draft EIS comment period, it revised the EIS and
9 circulated an administrative version of the final EIS to cooperating agencies in July
10 2012. AR63883. In February 2013, after incorporating feedback from those
11 agencies, the Department made the Final EIS available for public review and
12 comment. 78 Fed. Reg. 7427 (Feb. 1, 2013).

13 The County raised no concerns about potential encroachment on Fairchild at
14 any point during this process. It was not until April 2013—during public comment
15 on the final EIS—that the County first raised the issue. AR52740-52746. In March
16 2014, the County requested that the Department deny the Tribe's application or
17 prepare a supplemental EIS for further study of potential impacts on Fairchild—
18 despite the Department's and Tribe's close coordination with the Air Force
19 throughout the EIS process and despite the lack of any similar request from the Air
20 Force itself. AR3669. The County claimed that a supplemental EIS was warranted
21 because of a purported need to modify the Accident Potential Zones ("APZs")
22 surrounding Fairchild to account for "actual operations at the Base." AR3672.
23 Airway Heights strongly opposed the County's request. As it explained, the West

1 Plains Development already complied with Airway Heights regulations that were
2 adopted as a result of the JLUS, and the County's proposed expansion of the APZs
3 would cover most of Airway Heights, thereby halting the city's growth altogether.
4 AR3578-3582; AR63849-63850.

5 The Department requested the Air Force's input on the County's request.
6 AR3433. In response, the Air Force explained that four of its offices had
7 independently "reviewed and evaluated the County's explanation of why the APZs
8 should" be modified, and "[i]t was the consensus of all [of those offices] that the
9 Fairchild APZs [we]re appropriately aligned in accord[ance] [with] Air Force …
10 policy." *Id.* As the Air Force noted, its objectives throughout the EIS process were
11 "[e]nsuring continued safe flight operations and protecting people living and
12 working in the vicinity of Fairchild," and the County's request did "not contain any
13 new information." *Id.* The Department accordingly did not grant the County's
14 request, concluding that it had "fully addressed [the Air Force's] issues through the
15 NEPA process and associated mitigation." AR63900.

16 In contrast to the County, the Air Force has never opposed the West Plains
17 Development and has repeatedly reaffirmed its intent to work collaboratively with
18 the Tribe to resolve any encroachment-related concerns. *See, e.g.*, AR2825 (letter
19 from Air Force to Department expressing the Air Force's "commitment to work
20 collaboratively with the Tribe" and praising the Tribe's "continued willingness" to
21 "monitor the mitigations and modify them if necessary").
22
23

1 **2. The IGRA consultation process**

2 Separately, the Department undertook the consultation process IGRA
3 requires before a two-part determination can be issued. *See* 25 U.S.C.
4 § 2719(b)(1)(A). In April 2011, the Department sent letters notifying almost eighty
5 different state, local, and tribal officials and governmental entities, including the
6 County and Kalispel, that it was initiating the consultation process. *See, e.g.*,
7 AR12669-12673; *see also* AR12688-12690 (list of consulted entities).

8 In March 2012, the Department sent another round of letters reinitiating the
9 consultation process in response to updated information provided by the Tribe. *See,*
10 *e.g.*, AR36531-36534. As the Department explained, after the draft EIS was issued,
11 the Tribe submitted an extensive supplement to its request for a two-part
12 determination. AR36531. At the Tribe's request, *see* AR10654, the Department
13 provided consulted parties with a copy of that supplement, which the Department
14 noted was "intended to specifically describe: the benefits and impacts of the
15 proposed gaming establishment to the Tribe and its members; any potential
16 detrimental impacts to the surrounding community; and proposed mitigation
17 measures," AR36531; *see generally* AR36531-37606.

18 The City of Airway Heights, where the project is located, "express[ed]
19 'unwavering support'" for the Tribe's request. AR63860; *see* AR11870-11873;
20 AR52083-52090. The Board of Commissioners for nearby Lincoln County stated
21 that "they did not foresee any adverse environmental impacts to Lincoln County,"
22 and noted their support for "economic development that creates employment and
23 housing, which in turn increases the tax base and stimulates the economy in Lincoln

County." AR63859-63860. The City of Spokane, which had initially opposed the project out of concerns related to encroachment on Fairchild, wrote a letter in February 2014 retracting its prior opposition and underscoring that the West Plains Development was "extremely important to the Spokane region" and that the region would "not likely have another opportunity for private investment similar to" it. AR63197. The Department and Tribe also received "many written expressions of support from local leaders, labor unions, and business interests." AR63836; AR62802-63192; AR57270.

Kalispel, however, opposed the project. It claimed that the Department's decision to allow competition in what had, until then, been a largely monopolistic market would reduce Kalispel's gaming revenues by more than 40%, AR5244, and could cause Kalispel to default on loans it had recently incurred to expand its facilities at Northern Quest, AR5234.

The Department took Kalispel's concerns seriously and commissioned multiple reports from Analytical Environmental Services, the Innovation Group, and Innovation Capital—third-party contractors with expertise in gaming markets and economic forecasting—to provide competitive effects studies and objective analysis of Kalispel's financial projections. *See, e.g.*, AR4673-4702; AR7474-7527; AR54721-54730; AR2237-2249. A 2011 report by the Innovation Group found that while Kalispel's gaming revenues would decrease in the first year after the Tribe's casino opened, "Spokane [wa]s sufficiently large to support" both tribes' gaming facilities, and "normative revenue growth" was "expected to resume" after twelve months. AR4694-4697. Analysis by Innovation Capital

likewise refuted Kalispel's assertion that the proposed casino would cause a loan default, finding that Kalispel could transfer a "reasonable level" of revenue from its casino to its general fund while still servicing its loans—even during the projected initial decline in revenue due to new gaming competition. AR54728.

For its part, the County submitted no substantive response to the Department's first or second IGRA consultation letters. Rather, as noted above, the County raised concerns about the West Plains Development only at the end of April 2013 during public comment on the final EIS—almost a year after the second IGRA consultation process had concluded.

D. The Tribe's Commitment To Mitigate Impacts

Throughout the two-part determination process, the Tribe committed to mitigating any adverse impacts on the surrounding community from the West Plains Development. In February 2007, as part of its gaming compact with the State, the Tribe agreed to establish an impact mitigation fund, to which it would contribute 2% of gross revenues generated by Class III table games, to assist affected "non-tribal law enforcement, emergency services, and/or service agencies." AR20541-20542. The Compact also contains several other commitments that supplement the Tribe's impact mitigation fund, including through non-tribal charitable contributions and contributions to address problem gaming and smoking cessation. *See* AR20551; AR20625.

Mitigation payments by the Tribe to the City of Airway Heights and Spokane County were the subject of three other agreements that are relevant here. *First*, in April 2007, the Tribe and the City executed an Intergovernmental Agreement (the

1 "IGA"). The County did not sign the IGA at that time. However, the IGA provided
2 that "[i]t is anticipated that Spokane County will be a party to and will execute this
3 Agreement," and it was therefore drafted to address mitigation payments to both the
4 City and the County. AR20470. (The agreement provided that if the County did
5 not execute it, it would still be binding on the Tribe and the City and would be
6 "interpret[ed] … by deleting references to Spokane County." AR20471.)

7 Under the IGA, Airway Heights agreed to annex the West Plains
8 Development site and to provide certain utility services. AR20464-20474. The
9 Tribe agreed to make escalating annual payments beginning upon annexation,
10 which were "intended to compensate the City and County for any direct or indirect
11 impacts caused to the City and County" by the West Plains Development.
12 AR20466. Once gaming began on the property, a higher payment schedule would
13 take effect. AR20469. The IGA provided that "[t]he City and County shall meet
14 and confer in order to determine a fair and equitable portion of the Annual Payment
15 that should be received by each party." AR20467. It further provided that "[t]he
16 City and the County acknowledge that Class III gaming on the Property potentially
17 will provide numerous employment opportunities and other economic benefits,"
18 and that "[t]he City and County agree to negotiate in good faith with the Tribe to
19 determine appropriate mitigation for any adverse impacts arising from gaming
20 activities." AR20469.

21 In 2010, the County executed the IGA. At the County's request, the IGA was
22 amended at that time to require the Tribe to "prepare a Master Plan" for the West
23 Plains Development that "compl[ied] with the County's Airport Overlay Zone …

1 and any similar applicable City regulation." AR20475. Otherwise, the language of
2 the IGA was unchanged. Accordingly, since 2010, the Tribe, the City, and the
3 County have all been bound by the terms of the IGA, which remains in effect.
4 *Second*, in April 2007, when the Tribe and the City executed the IGA, they
5 also executed a Memorandum of Agreement ("MOA") setting out the higher
6 mitigation payment schedule to take effect once gaming began on the site.
7 AR20478-20493. The City agreed that, if the MOA's payment schedule were
8 triggered, the City would "be responsible" for sharing the mitigation payments with
9 the County "pursuant to an agreement between the City and the County."
10 AR20483. The MOA also remains in effect and binds the Tribe and the City.
11 *Third*, in 2010, when the County executed the IGA, the County and City
12 executed an interlocal agreement ("ILA") that entitled the County to 20% of the
13 Tribe's mitigation payments and required both parties either to support the Tribe's
14 application or remain neutral. AR20500; *see generally* AR20498-20504. In 2013,
15 after new County commissioners were elected, the County chose to repudiate the
16 ILA so that it could oppose the Tribe's application. That decision did not, however,
17 affect the parties' obligations under the IGA and MOA.
18 In addition, as noted above, the Tribe, the County, the Cities of Spokane and
19 Airway Heights, and several other governmental entities participated in a joint land
20 use study to "develop recommendations for land use restrictions designed to protect
21 the integrity of Base Operations at Fairchild." AR63848; *see supra* p. 13. The
22 Tribe then enacted the West Plains Development Code, which implemented land-
23 use restrictions consistent with JLUS recommendations. The Code also

1 incorporated additional mitigation measures identified in the Department's final
2 EIS to "ensure" the West Plain Development's "consistency with Fairchild …
3 operations." AR63849. These measures included working to control the
4 population of "birds and wildlife attractions" that might pose a risk to Fairchild
5 operations and developing "light and glare controls" to "reduce the amount of light
6 that spills into surrounding areas." AR49665-49668. And although the FAA's
7 aeronautical study twice approved a 145-foot-high proposed structure, concluding
8 that it would pose "no hazard to air navigation," AR5081, the Tribe voluntarily
9 agreed to limit the height of any structure built on the site to 60 feet, *see* AR57943.
10 The Tribe also acknowledged that the West Plains Development fell within
11 what the JLUS had designated as a Military Influence Area ("MIA") 4 zone, and it
12 took care to implement mitigation strategies consistent with the JLUS's MIA 4
13 recommendations. As relevant here, the JLUS sets a maximum occupancy rate of
14 150 people per gross acre for MIA 4 zones, and the Tribe adhered to that density
15 recommendation by ensuring that even under the most optimistic occupancy
16 estimates, the West Plains Development would remain well below that limit.
17 AR49667-49668.

18 **E. The Department's Two-Part Determination**

19 On June 15, 2015, the Department informed Washington Governor Jay Inslee
20 that it had completed its review of the Tribe's request and concluded that the
21 proposed casino would be in the Tribe's best interest and would not be detrimental
22 to the surrounding community. AR63807-63810. The Department requested the
23 Governor's concurrence in that determination. AR63810.

1 As the Department explained, the proposed casino "would provide a new
2 economic engine to lift the Tribe's members out of poverty." AR63808. The
3 Department noted that gaming revenues would enable the Tribe to address uranium
4 contamination on its reservation, provide better health care and education to its
5 members, and pursue cultural preservation programs. *Id.* Based on the nearly 500-
6 page analysis set forth in the final EIS, the Department concluded that the Tribe's
7 proposed mixed-use development, including gaming, would "allow the Tribe to
8 implement the highest and best use of the trust property" while "preserving the key
9 natural resources" of the West Plains site. AR63905-63906. The Department
10 found that each of the other alternatives would "materially restrict the Tribe's
11 ability to meet its needs and to foster Tribal economic development, self-
12 determination, and self-sufficiency." AR63926. The Department also concluded
13 that the project would be beneficial to the surrounding community—generating
14 significant economic output, jobs, and tax revenues for the Spokane region—and
15 highlighted the "substantial support from local governments in the area," including
16 "Airway Heights, which is the closest to and most affected by the Project."
17 AR63835-63836.

18 While recognizing the "importance of Fairchild to the regional economy,"
19 AR63809, the Department found that the proposed casino would not encroach on
20 Fairchild "or impede its ability to implement [its] operational and training mission."
21 AR63848. As the Department explained, it worked closely with the Air Force and
22 the Tribe "to establish procedures to mitigate any potential encroachment and to
23 ensure that the base will operate undisturbed." AR63810. And it stressed the

mitigation measures the Tribe had already implemented and agreed to implement in the future, noting that, when local stakeholders "raised concerns," the Tribe "listened, conducted studies, and/or altered its plans to address them." AR63809.

In the two-part determination, the Department cited its previous two-part determination authorizing Kalispel's Northern Quest Casino. It acknowledged that a new casino would create some competition for Northern Quest, but concluded that the competition was not a sufficient basis to deny the Tribe the ability to game on its own ancestral land. AR63864. As the Department explained, "IGRA does not … guarantee that tribes operating existing facilities will continue to conduct gaming free from both tribal and non-tribal competition." *Id.* The Department noted that it had reached the same result in 1997, when it concluded that although the Spokane "Tribe's existing casinos would experience intense competition from the new Kalispel operation," that "competition alone was not sufficient to conclude that [Kalispel's proposed casino] would be detrimental to the surrounding community." AR63808. The Department further noted that, as it had predicted at the time, its decision to permit Kalispel to open a casino in Airway Heights, close to the City of Spokane, had significantly reduced gaming revenues at the Tribe's more remote casinos. AR63821.

The Department also closely examined the impact that the Tribe's proposed casino would actually have on Kalispel's gaming revenues, concluding that the likely initial decline would be neither as sharp nor as durable as Kalispel contended and that the Spokane area was "sufficiently large to support three casinos of the magnitude" of Kalispel's existing facility. AR63863-63872. It found that while

lowered gaming revenue might require Kalispel to reduce its generous per capita payments to its members, it would not prevent Kalispel from "providing essential services and facilities." AR63870.[1] Moreover, even taking into account the "substitution effects" that would result from patrons visiting the Tribe's new casino rather than existing casinos, the Department determined that "existing regional casinos would continue to generate positive cash flows," and the construction and operation of the new casino "would generate substantial economic output for a variety of businesses in Spokane County" as well as "substantial tax revenues for state, county, and local governments." AR63895.

Governor Inslee concurred with the two-part determination in June 2016, and the casino opened its doors in January 2018. *See* Sokol, *Spokane Tribe Casino Opens to Much Fanfare on Monday Evening*, Spokesman-Rev. (Jan. 9, 2018). When construction of the hotel, cultural center, and retail spaces is fully completed, the West Plains Development is expected to support thousands of local jobs. *Id.*

STANDARD OF REVIEW

Under the Administrative Procedure Act, agency action may be set aside "only if it was arbitrary, capricious, … or otherwise contrary to law." *Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584, 594 (9th Cir. 2018); 5 U.S.C. § 706. "Th[at] standard is 'highly deferential, presuming the agency action to be valid and

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[1] As the Department explained, IGRA regulations authorize use of gaming revenues for direct per capita payments to tribal members only after "the tribal government and its services" are adequately "fund[ed]." AR63865.

1 affirming the agency action if a reasonable basis exists for its decision.'" *Yazzie v.*
2 *EPA*, 851 F.3d 960, 968 (9th Cir. 2017). The decision need only be "supported by
3 'substantial evidence on the record considered as a whole.'" *Motor Vehicle Mfrs.*
4 *Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983).
5 "Where the agency has relied on 'relevant evidence … a reasonable mind might
6 accept as adequate to support a conclusion,' its decision is supported by 'substantial
7 evidence.' Even '[i]f the evidence is susceptible of more than one rational
8 interpretation, [the court] must uphold [the agency's] findings.'" *San Luis & Delta-*
9 *Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Review of an
10 agency's decisionmaking "'is particularly deferential in matters"—like this one—
11 "implicating predictive judgments.'" *Cachil Dehe*, 889 F.3d at 602.

12 **ARGUMENT**

13 As the nearly 66,000-page administrative record in this case shows, the
14 Department thoroughly studied the relevant issues; it consulted with and considered
15 the views of the relevant parties; and its two-part determination was reasonable and
16 supported by ample evidence. Plaintiffs' contrary arguments fail.

17 Plaintiffs primarily contend that the Department acted arbitrarily and
18 capriciously in determining that the West Plains Development would not be
19 detrimental to the surrounding community. In fact, the Department's predictive
20 judgment—which is entitled to special deference—was supported by ample
21 evidence that the West Plains Development would bring important benefits to the
22 surrounding community and that any negative effects of the project would be
23 substantially mitigated. Indeed, the Department concluded that the West Plains

Development would generate over $300 million in economic output and more than 2,200 jobs in the County during the construction phase alone, along with approximately $250 million per year in economic output and more than 2,800 jobs from operations after completion of the project. AR63850-63852; AR49623-49630. Kalispel and the County do not mention, much less dispute, this substantial evidence supporting the Department's no-detriment finding.

Instead, Plaintiffs urge the Court to vacate the two-part determination without regard to the project's benefits for the broader community, claiming that the Department did not adequately consult with them or account for the project's potential effect on Kalispel's existing casino and on Fairchild Air Force Base. Those contentions are baseless. As to Kalispel, the Department reasonably concluded that competition from the Tribe's proposed gaming facility would not materially impede Kalispel's ability to provide governmental services and would not cause sufficient harm to Kalispel to render the project detrimental to the surrounding community overall. As to the County, the Department consulted with the Air Force and—reasonably—agreed with the Air Force's own conclusion that the West Plains Development would not impede base operations at Fairchild. Neither Kalispel nor the County offers any basis to second-guess the Department's informed judgment.

I. THE DEPARTMENT REASONABLY CONCLUDED THAT TEMPORARY COMPETITIVE HARM TO KALISPEL DID NOT MAKE THE TRIBE'S PROJECT DETRIMENTAL TO THE SURROUNDING COMMUNITY

A. The Department Applied The Correct Standard For Analyzing Detriment Under IGRA

Before issuing a positive two-part determination, the Department must find that the proposed gaming "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). While IGRA regulations do not define that phrase, the Department has stated that it "will evaluate detriment on a case-by-case basis based on the information developed in the application and consultation process." *Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354, 29,373 (May 20, 2008); *accord* 25 C.F.R. § 292.21(a) ("The Secretary will consider all the information submitted … in evaluating … detriment[.]"). Because "[a]ll new commercial developments are bound to entail *some* costs," *Stand Up for California! v. Department of Interior*, 919 F. Supp. 2d 51, 74 (D.D.C. 2013) ("*Stand Up I*"), the Department's evaluation does not require "any specific finding regarding the proposed casino's 'detrimental impact' on any single entity," *Stand Up for California! v. Department of Interior*, 204 F. Supp. 3d 212, 269 (D.D.C. 2016) ("*Stand Up II*"), *aff'd,* 879 F.3d 1177 (D.C. Cir. 2018), *cert. denied*, 202 L. Ed. 2d 629 (2019). Rather, the Department's task under IGRA is "'to make only a single determination' regarding whether the proposed facility would be detrimental to the surrounding community 'as a whole.'" *Stand Up II*, 204 F. Supp. 3d at 269. In doing so, the Department has broad discretion to "consider '[*a*]*ny* … information that may provide a basis for'" its determination, including "a casino's community

1 benefits," *Stand Up for California! v. Department of Interior*, 879 F.3d 1177, 1187
2 (D.C. Cir. 2018) ("*Stand Up III*") (quoting 25 C.F.R. § 292.18(g)), and to weigh an
3 entity's claims of particularized harm to itself against the project's benefits to "the
4 surrounding community overall," *id*. at 1189-1190.

5 Kalispel contends (at 18-21) that two-part determinations "are to be rarely
6 granted." But that is not the legal standard under IGRA. Nor does Kalispel explain
7 how the frequency of past two-part determinations is relevant to judicial review of
8 the two-part determination here—because it is not. IGRA sets forth a no-detriment
9 standard, which the Department faithfully applied in this case.

10 Kalispel claims (at 21) that the Department set "an impossible bar" for
11 detriment by allegedly requiring a showing that "the proposed casino would result
12 in the closure of [Kalispel's] existing casino." But the Department never suggested
13 that closure of a competitor's facility was required to show detriment, nor did it
14 apply a bright-line rule of any kind. Kalispel argued that the new casino would
15 inflict "catastrophic" competitive harm, undercutting its ability to service its loans
16 and finance its government. AR5222. The Department responded to Kalispel's
17 claims in two ways—both of which are wholly consistent with IGRA.

18 *First*, while acknowledging the potential impact on Kalispel, the Department
19 followed longstanding agency policy that "competition alone [i]s not sufficient" to
20 justify a finding of detriment under IGRA. AR63808. Kalispel fails to mention
21 that it "enormously benefited" from that same policy when, in 1997, the
22 Department approved Kalispel's Northern Quest Casino notwithstanding the
23 Tribe's concern that a casino in Airway Heights "would 'devastate' [the] Tribe's

1 remote gaming operations." AR48356. The agency concluded then, as now, that
2 "IGRA does not guarantee that tribes operating existing facilities will conduct
3 gaming free from competition." AR63808.

4 Courts have consistently upheld the Department's view that competing
5 casinos' potential loss of revenue is not "sufficient, in and of itself," "to render [a
6 proposed] casino detrimental to the surrounding community overall." *Stand Up III*,
7 879 F.3d at 1189-1190; *accord Stand Up II*, 204 F. Supp. 3d at 269; *Sokaogon*
8 *Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) ("Although the
9 IGRA requires the Secretary to consider the economic impact of proposed gaming
10 facilities on the surrounding communities, it is hard to find anything in that
11 provision that suggests an affirmative right for nearby tribes to be free from
12 economic competition."). The Court should do likewise here.

13 Kalispel attempts (at 23-25) to distinguish the D.C. Circuit's decision in
14 *Stand Up III* on the ground that the competing tribe in that case (the Picayune
15 Rancheria) fell "outside the 25-mile range to be considered a 'nearby Indian tribe'"
16 and thus part of the "surrounding community" under the Department's regulations.
17 That is irrelevant, as the Department (and the courts) considered Picayune's
18 arguments even though it was not a "nearby Indian tribe." *Stand Up III*, 879 F.3d at
19 1188-1190. Picayune's distance from the proposed project in *Stand Up* simply
20 meant that the Department was entitled to give its concerns less weight than it
21 would those of a closer tribe. *Id.* at 1189. But the basic principles governing the
22 Department's analysis are the same regardless of distance: IGRA does not
23 guarantee either "nearby tribes" or slightly more distant tribes "free[dom] from

1 economic competition." *Sokaogon*, 214 F.3d at 947. The correct inquiry is whether
2 the proposed casino will be "detrimental to the surrounding community overall,"
3 *Stand Up III*, 879 F.3d at 1190—precisely the inquiry that the Department
4 undertook and reasonably resolved in this case.

5 *Second*, the Department made a reasonable factual finding, supported by
6 substantial evidence, that the competitive harm to Kalispel would not be acute and
7 would not prevent Kalispel "from providing essential services" to its members.
8 AR63870. Kalispel asserted that the proposed casino would cause it to "default on
9 its current debts and … no longer be able to provide essential government services
10 to its members." AR5234. Those "catastrophic impacts," it argued, "compel a
11 finding of detriment." *Id*. After undertaking a full analysis and making its own
12 projections, however, the Department concluded that no such "catastrophic
13 impacts" were expected to occur. To the contrary, the Department found that
14 although Kalispel's gaming revenues would decline to some extent at first, that
15 initial drop in revenue would be substantially ameliorated within a short time due to
16 market growth. AR63869-63870; *see* AR4697 ("[A]fter an approximately 12-
17 month period of impact, normative revenue growth for Northern Quest … is
18 expected to resume."). Moreover, the initial reduction in revenue would primarily
19 affect Kalispel's large per capita payments to its members and would not
20 significantly affect funding for government services. AR63870 ("While
21 [Kalispel's] direct payments [to members] might be reduced or eliminated, the
22 overall Kalispel tribal government budget in 2020 is not expected to be
23 considerably reduced when compared to existing conditions[.]").

Kalispel argues (at 27) that "no Tribe will ever be able to demonstrate detriment" under the Department's reasoning. Even a cursory reading of the Department's decision shows that is not so. The Department did not apply a standard that is impossible to meet; it simply concluded, based on the factual record, that the expected temporary monetary loss *to Kalispel*—which would not even require significant reductions in governmental services—was insufficient to render the Tribe's project "detrimental to the surrounding community *overall*." *Stand Up III*, 879 F.3d at 1190. The D.C. Circuit rejected a very similar argument in *Stand Up III*, where Picayune argued that the Department improperly "discount[ed] an anticipated competitive injury merely because 'the source of the injury was competition.'" 879 F.3d at 1190. As the court there explained, the Department did not apply an incorrect legal standard, but rather "concluded" as a factual matter "that the Picayune's casino could successfully absorb the expected competitive effects." *Id*.

The same is true here: Kalispel has no legitimate challenge to the legal standard the Department applied; its quarrel is with the Department's assessment of the facts. But while Kalispel may disagree with the Department's predictive judgments, those judgments are subject to "'particularly deferential review,'" *Cachil Dehe*, 889 F.3d at 602, and substantial evidence supports the Department's conclusion that even with an initial decline in revenue due to competition, Kalispel will be able to "'operate its government, offer tribal programs and services, … and provide for the general welfare of its people.'" AR7506; *see also* AR63870-63871.

1
2
B. The Department Reasonably Relied On Its Own Economic Forecasts Rather Than Kalispel's Deeply Flawed Analysis

3 Kalispel faults the Department (at 27-28) for "reject[ing] Kalispel's detailed
4 economic analysis." But, as the record here shows, Kalispel's methodology was
5 "unreliable and unsupported by available evidence." AR63870-63871. Among
6 other critical errors in its analysis, Kalispel used an inconsistent and unreliable
7 definition of the relevant market that included communities 150 miles from its
8 casino in some directions while excluding much larger communities only 50 miles
9 away in other directions. *See* AR7478, 7482, 7517-7518. And Kalispel's
10 projections of the revenue it would lose within that market were further skewed
11 because Kalispel based its calculations on an unrealistic all-or-nothing capture rate.
12 For example, Kalispel assigned "100% of gaming visits within its defined market"
13 to its own casino, even though some of the residents within that market were closer
14 to other casinos. AR7517. That had the effect of artificially *inflating* Kalispel's
15 capture rate, which, in turn, made it appear that the Tribe's proposed casino would
16 siphon away more business than it actually would. On the other hand, Kalispel
17 assumed—without evidence—that none of the residents in the Coeur d'Alene area
18 would choose its casino over the closer local casino, which had the effect of
19 artificially *deflating* Kalispel's capture rate and thereby hiding an existing stream of
20 revenue. AR7478.

21 In addition, while Kalispel acknowledged that the rate of participation in
22 gaming "increas[es] the closer the population is to [a] gaming venue" and the more
23 "familiar[]" residents are with new gaming options, it assumed that participation in

the Spokane market would remain frozen at 30% even after the Tribe's casino opened. AR5291. But the Tribe's casino would be closer to a large part of the area's population and would double the number of nearby casinos. *See* AR7482. Kalispel's assumption that participation would remain static at 30% thus "direct[ly] contradict[ed]" its "own stated understanding" that the participation rate could rise to 50% once there were multiple nearby gaming options. *Id.*

Kalispel does not challenge these conclusions. Nor does it identify any flaws in the Department's own methodology. Rather, Kalispel relies (at 13-15, 42-43) on mischaracterization of a memorandum by Tom Hartman, one of the Department's financial analysts—as well as conclusory assertions that the Department failed to supervise its contractors—to imply some lack of due diligence in the Department's hundreds of pages of substantive analysis of the competitive injury to Kalispel. The record does not bear out that implication.[2]

Indeed, rather than undermining the Department's conclusions, the Hartman memo strongly supports them. It points out that "[i]n most cases" "new entrants" to a gaming market "improve[] business for everyone." AR3574. In California, for example, "the exponential growth in the number and revenues of Indian gaming" has made "every tribe … a winner," and "in almost no places has new competition

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[2] While Kalispel frames these objections (at 42-43) as violations of NEPA, they overlap with its claim under IGRA that the Department did not adequately respond to evidence of competitive injury. Whether analyzed under IGRA or NEPA, the objections fail for the reasons stated in this section.

1 impacted existing establishments in a significant way." AR3575. Finding "almost
2 no examples of casinos failing because of new competition, and very few examples
3 of casinos experiencing large reductions of revenues due to new competition," the
4 memo concludes that "[t]he likelihood that the Kalispel Tribe would see the huge
5 impact that it has predicted is very small." *Id.* Kalispel's attempt to rely on this
6 document to suggest that the Department *erred* in its assessment of the competitive
7 harm to Kalispel merely demonstrates how weak that argument is.

8 Kalispel tries (at 14-15, 42) to make hay of the memo's references to
9 "assumptions" and "guessing" in describing the projections. But the Department
10 never suggested that its forecast was meant to be anything other than a prediction,
11 which is necessarily based on "assumptions [for] factors like distance, population
12 age, and capture rates." AR3574. Some uncertainty is inherent in any prediction.
13 *Id*. That is precisely why review of an agency's predictive judgment in matters
14 entrusted to its expertise is "'particularly deferential.'" *Cachil Dehe*, 889 F.3d at
15 602; *accord Friends of Santa Clara River v. Army Corps of Eng'rs*, 887 F.3d 906,
16 921 (9th Cir. 2018).

17 Kalispel's assertion (at 42-43) that the Department "adopted [its contractor's]
18 analysis by whole cloth" rather than performing an "independent evaluation" is
19 even more insubstantial. Per its usual practice, the Department delegated initial
20 preparation of the EIS to contractors experienced in gaming-market analysis. *See,*
21 *e.g.*, 40 C.F.R. § 1506.5(c) (an EIS "prepared pursuant to the requirements of
22 NEPA shall be prepared directly by or by *a contractor* selected by the lead agency"
23 (emphasis added)); *Cachil Dehe*, 889 F.3d at 591 (describing process of hiring

1 contractors to prepare EIS); *Stand Up I*, 919 F. Supp. 2d at 80 (same). That does
2 not remotely suggest that the Department failed to bring its own assessment to bear
3 before incorporating the contractors' findings into its EIS statements.

4 The Department's regulatory responsibility was to "furnish guidance" during
5 the EIS process, "participate in the preparation" of the EIS statement, and
6 "independently evaluate the statement prior to its approval." 40 C.F.R. § 1506.5(c).
7 The Department did all of that, independently reviewing its contractors'
8 conclusions throughout the process. *See, e.g.*, AR63871 ("The Market Saturation
9 Analysis was reviewed by BIA[.]"); AR48368 (noting "BIA's independent review
10 and analysis conducted in support of the Final EIS"); AR48312 ("The Final EIS has
11 been reviewed by both the NWRO and the BIA Central Office."); AR29437 (noting
12 that "BIA … will direct and control all of the work of" its contractor). Kalispel's
13 contrary suggestions are wholly unsubstantiated. In *Cachil Dehe*, the Ninth Circuit
14 rejected a similar claim by a competing tribe, explaining that the tribe had "not
15 presented any evidence that the BIA failed to engage in adequate independent
16 oversight over the preparation of" the EIS. 889 F.3d at 608. The same is true here.

17
18 **C. The Department's Consideration Of The Tribe's Connection To The Land And Agency Precedent Was Consistent With IGRA**

19 Kalispel also claims (at 27-30) that the Department considered factors
20 Congress did not intend it to consider—specifically, the Tribe's aboriginal
21 connection to the land and the Department's prior two-part determination in favor
22 of Kalispel. That claim is baseless. As discussed, to issue a two-part
23 determination, the Department must find that the proposed gaming project "would

1 be in the best interest of the Indian tribe and its members, and would not be
2 detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The
3 Department is thus required by its own regulations—which Kalispel nowhere
4 challenges—to consider "all … information" relating to those two factors that was
5 submitted during the administrative process. 25 C.F.R. § 292.21; *see id.* §§ 292.16-
6 20. Consideration of the Tribe's connection to the land and the prior authorization
7 of Kalispel's Northern Quest Casino within the Tribe's aboriginal territory falls
8 well within that broad mandate.

9 Indeed, "[e]vidence of [a tribe's] significant historical connections, if any, to
10 the land" is a required element of a tribe's application for a two-part determination.
11 25 C.F.R. § 292.17(i). That the site here lies "within the Spokane Tribe's
12 aboriginal territory" and is of "historical significance" to the Tribe was clearly
13 relevant to the Department's determination that the proposed project would be in
14 the Tribe's best interest. AR63808. A tribe may successfully petition for a two-
15 part determination without such a connection, as Kalispel's own two-part
16 determination demonstrates. But it hardly follows that the Department is barred
17 from considering a factor expressly set out in the governing regulations.

18 Nor does IGRA prohibit the Department from examining its own precedent.
19 Kalispel's interpretation of the statute as requiring the Department to ignore its two-
20 part determination authorizing the Northern Quest Casino "would produce absurd
21 results." *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1184 (9th Cir.
22 2010). Under bedrock principles of reasoned agency decisionmaking, "[a]n agency
23 may not … depart from [its] prior policy *sub silentio* or simply disregard rules that

1 are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515
2 (2009). Had the Department ignored its own precedent—as Kalispel apparently
3 believes it was required to do—its decision would be vulnerable to attack under the
4 APA on the basis of the "'[u]nexplained inconsistency.'" *Organized Vill. of Kake*
5 *v. USDA*, 795 F.3d 956, 966 (9th Cir. 2015).
6 Moreover, contrary to Kalispel's unsubstantiated assertion (at 28) that "the
7 fix was in," consideration of these factors did not negate the thousands of pages of
8 substantive analysis the Department undertook before granting the Tribe's
9 application. At bottom, Kalispel contends that the Department should have ignored
10 the inequity in Kalispel's attempt to block the Tribe from gaming on the Tribe's
11 own aboriginal lands two decades after Kalispel was granted the right to game on
12 those lands over the Tribe's objection. But IGRA does not require the Department
13 to turn a blind eye to basic fairness. IGRA's intent is to "promot[e] tribal economic
14 development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1),
15 and the Department's two-part determination "implement[ed] that intent,"
16 AR63810.
17
18
19

II. THE DEPARTMENT ADEQUATELY ADDRESSED THE ISSUES RAISED BY THE COUNTY AND REASONABLY DETERMINED THAT THE PROPOSED CASINO WOULD NOT ENCROACH ON FAIRCHILD AIR FORCE BASE

20

A. The Department Satisfied IGRA's "Consultation" Requirement

21 The County claims (at 22-28) that the Department "violated IGRA by failing
22 to consult with the County." That claim fails on both the law and the facts. While
23 IGRA requires the Department to "consult[] with … appropriate … local officials"

1 before making a two-part determination, 25 U.S.C. § 2719(b)(1)(A), it does not
2 define "consultation"—as the County concedes (at 22-23). In the absence of a
3 statutory definition, IGRA's governing regulations define "the consultation
4 process" to require essentially two actions by the agency. First, the Regional
5 Director of the Bureau of Indian Affairs "will send a letter" to "[a]ppropriate State
6 and local officials" and "[o]fficials of nearby Indian tribes" describing the proposed
7 gaming establishment and requesting comments within a 60-day period on any
8 anticipated impacts on the surrounding community. 25 C.F.R. § 292.19(a); *see id.*
9 § 292.20 (specifying required contents of consultation letter). Second, "after the
10 close of the consultation period, the Regional Director must … [p]rovide a copy of
11 all comments received during the consultation process to the applicant tribe" and
12 "[a]llow the tribe to address or resolve any issues raised." *Id.* § 292.19(c).
13 The Department took those steps here. On two separate occasions—in April
14 2011 and again in March 2012 when it reinitiated the consultation process—the
15 Department sent letters to local officials, including the County. AR10534-10538;
16 AR37608-37695. Those letters included all required elements. AR17804. The
17 Department furnished the comments it received to the Tribe, AR17782; AR17786-
18 17787, which submitted written responses addressing the issues raised. AR12710-
19 12714; AR16206-16216; AR16244-16245. The Department, in turn, addressed
20 those submissions at length. AR63858-63872. That should end the matter.
21 Without mentioning the governing regulations, the County contends (at 22)
22 that IGRA's consultation process requires some unspecified "engagement," beyond
23 "[s]oliciting comments," that the Department allegedly failed to undertake. But the

1 Department's interpretation of IGRA in its regulations is consistent with the plain
2 text of the statute. The regulations establish a process for contacting local officials
3 to describe the proposed project and to request comments on how the project might
4 affect their jurisdictions. *See* 25 C.F.R. §§ 292.19-20. That process tracks "[t]he
5 plain meaning of the term 'consult,'" which is "to seek advice or information,"
6 *Masseth v. Hartford Life & Accident Ins. Co.*, 60 F. App'x 51, 52 (9th Cir. 2003);
7 *accord* Black's Law Dictionary (10th ed. 2014) (defining "consultation" as "[t]he
8 act of asking the advice or opinion of someone"). Even if the term "consultation"
9 were ambiguous, the Department's commonsense interpretation of IGRA—a statute
10 it "'is charged with administering,'" *Arizona v. Tohono O'odham Nation*, 818 F.3d
11 549, 556 (9th Cir. 2016)—is eminently reasonable. In that situation, "*Chevron*
12 requires a federal court to accept the agency's construction of the statute, even if the
13 agency's reading differs from what the court believes is the best statutory
14 interpretation." *Id.*; *see Chevron U.S.A., Inc. v. Natural Resources Defense*
15 *Council, Inc.*, 467 U.S. 837 (1984). The Department's compliance with its own
16 regulations reasonably defining the "consultation" required by IGRA is therefore
17 dispositive of the County's claim.

18 The County asserts (at 24)—based on one Department official's statement a
19 decade after IGRA was enacted—that "[b]y requiring consultation, Congress
20 sought to ensure that the Secretary authorized gaming on newly-acquired land only
21 when the affected governmental entities all agreed to the proposal." That argument
22 contravenes IGRA's clear text, which requires the Department to "consult[]" with
23 local officials, 25 U.S.C. § 2719(b)(1)(A), not to obtain their "consent." IGRA

1 requires the "concur[rence]" of only one state official: "the Governor of the State."
2 *Id*. The County's interpretation would give a veto to anyone consulted—contrary to
3 "the plain meaning of 'consult,'" *United States v. Board of Cty. Comm'rs*, 184 F.
4 Supp. 3d 1097, 1129 n.16 (D.N.M. 2015), *aff'd*, 843 F.3d 1208 (10th Cir. 2016),
5 and the concurrence requirement that Congress expressly imposed.

6 Relying on cases in other statutory contexts, the County argues (at 25) that
7 "consultation" implies "'an affirmative duty'" distinct from the opportunity for
8 public comment. Even assuming the same is true under IGRA, it is undisputed that
9 the Department undertook the affirmative steps its consultation regulations require
10 by identifying the relevant officials and sending letters asking for their views.[3]

11 Nor do the facts support the County's claim that it was ignored. The
12 Department sent the County two consultation letters. The County did not respond
13 at all to the first letter, *see* AR63858, and despite being granted a 30-day extension,
14 it provided no substantive response to the second, *see* AR63862; AR15805-15806.
15 The County did not submit substantive comments until April 2013—almost a year
16 after the close of the second (extended) consultation period. AR63862. The
17

18 [3] The County cites (at 23) a provision of IGRA requiring notice and comment
19 when the Secretary nominates someone to the National Indian Gaming
20 Commission. *See* 25 U.S.C. § 2704(b)(2)(B). That provision is irrelevant here.
21 The Department did provide an opportunity for public comment on the draft and
22 final EIS, but that was required by NEPA, not IGRA, and the Department
23 responded separately to those comments. *See* AR48707-48787.

County's failure to participate in the IGRA consultation process is the County's responsibility; it does not indicate any deficiency in the process itself.

And the County ultimately raised its substantive objections in comments on the final EIS—a separate process under NEPA in which the County was designated as a consulting agency. AR1802. The Department engaged closely with those concerns, *see* AR63848-63850; AR49663-49671, and held multiple meetings with County officials to address them, *see* AR3445. Courts have found IGRA's "consultation" requirement satisfied by far less. In *Citizens for a Better Way v. Department of Interior*, for example, the district court found that the plaintiff was "given proper consultation" where the Department "granted a 60 day period to submit comments required by the regulations." 2015 WL 5648925, at *13-14 (E.D. Cal. Sept. 24, 2015). In *Stand Up II*, the district court rejected the claim of a party that had received "a courtesy copy of the consultation letter" and whose views were therefore "solicited and considered," explaining that the Department "essentially, informally" "includ[ed] the [party] in the consultation process." 204 F. Supp. 3d at 268 & n.30. There is no precedent for setting aside a two-part determination for failure to consult a party—much less in the circumstances here, where the agency sent the party multiple letters, met with it multiple times, and responded at length to its substantive concerns.

The County's real complaint is that its views did not dictate the Department's "substantive course." *Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 865 (9th Cir. 2003). But, as the Ninth Circuit has explained, "[t]he fact that [the agency's

decision] did not conform to [the plaintiff's] hopes and expectations does not bear on whether [the agency] adequately consulted state and local officials." *Id.*

B. The County's Remaining Objections Are Meritless

The County's other objections to the no-detriment finding are also meritless.

1. The Department reasonably determined, after consulting with the Air Force, that the project would not have a material detrimental impact on Fairchild Air Force Base

During the EIS process, the Department repeatedly consulted with the Air Force regarding potential impacts on Fairchild Air Force Base, and the Tribe took significant steps to ensure that the West Plains Development would not have any adverse effects on the base. The Air Force itself never opposed the West Plains Development or suggested that the project would impede operation of the base.

The County nonetheless insists that it knows better, that the project will have a detrimental impact on Fairchild, and that the Department's no-detriment finding is thus arbitrary and capricious. To the contrary, the Department's finding is eminently reasonable in light of its consultation with the Air Force and the evidence in the record on this point.

The County claims (at 27-32) that the Department "dismiss[ed]" its concerns about Fairchild, giving them "little weight." The record shows the opposite: The Department was mindful of "the importance of Fairchild to the regional economy" and of the strong "desire" by "[v]irtually all … members of the community … to ensure that Fairchild … continues to operate uninhibited," AR63809, and it thus gave "significant consideration to comments raised by the local community

concerning potential encroachment on Fairchild," AR48719. The Department carefully engaged with and thoroughly addressed any threat to the continued viability of base operations, as well as the safety of casino patrons. AR63848-63850 (secretarial determination); AR63920-63922 (record of decision); AR49663-49673 (final EIS); AR33477-33485 (draft EIS). The APA does not entitle the County "to substitute its judgment for" the Department's. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Nor did the Department, as the County suggests (at 29-32), simply cancel out the County's opposition by pointing to the Air Force's lack of opposition or Airway Heights' support. The Department considered all information, negative and positive, bearing on whether the proposed casino "'would or would not be detrimental to the surrounding community.'" *Stand Up III*, 879 F.3d at 1187 (quoting 25 C.F.R. § 292.18(g)). The Department can hardly be faulted for considering the views of Airway Heights, "which is the closest to and most affected by the Project." AR63836. And although the County claims (at 29) to know "far better than [the Department] about safety issues related to" Fairchild, the Air Force surely "knows far better" than the County about "safety issues related to" its own base—and it never once suggested that any such safety issues existed.

Similarly, the County contends (at 36-38) that the Department did not "independently consider" its argument that the Accident Potential Zones surrounding Fairchild should be redrawn to include the West Plains Development. But the Air Force—the entity charged with drawing and maintaining the APZs—considered and rejected the County's argument that the APZs were improperly

1 drawn. As the Air Force noted, the "consensus" of its relevant divisions was that
2 the APZs surrounding Fairchild were "appropriately aligned," and the County's
3 request that the APZs be redrawn did "not contain any new information." AR3433.
4 The County argues (at 37) that the Department should not have "blindly adopt[ed]"
5 the Air Force's response and should have asked for a more "reasoned explanation,"
6 but offers no reason why the Department should have doubted the expert opinion of
7 the agency tasked with assessing the risk of flight accidents. In fact, NEPA
8 regulations required the Department to "[u]se the environmental analysis … of
9 cooperating agencies" like the Air Force "with jurisdiction by law or special
10 expertise, to the maximum extent possible consistent with its responsibility as lead
11 agency." 40 C.F.R. § 1501.6(a)(2). The Department did exactly that here.
12 The Department also reasonably concluded that the Tribe's proposed casino
13 complied with the recommendations in the joint land use study that the County
14 itself helped to draft. As described above, the JLUS was the product of
15 collaboration by the Department of Defense, the County, the Tribe, Airway
16 Heights, and other entities to "develop recommendations for land use restrictions
17 designed to protect the integrity of Base Operations at Fairchild." AR63848; *see*
18 *supra* pp. 13, 20-21. The group generated nearly sixty non-binding land use
19 recommendations, and the Tribe enacted a zoning code for the proposed casino that
20 adopted the relevant JLUS recommendations. *See* AR63849; AR63920.
21 Tellingly, the County does not dispute that the West Plains Development
22 complies with the terms of the JLUS's recommendations as written. Nor could it.
23 To take the example highlighted in the County's brief (at 38-42), the JLUS

established a maximum occupancy of 150 people per gross acre in areas like the project site that are designated as MIA 4. AR49667-49668 (Strategy 50). Because the full buildout of the West Plains Development is expected to occupy 121 gross acres, and no more than 9,821 people are expected to occupy the site at a time under even the most optimistic projections, the Department calculated that the average density would be 80 people per gross acre—well below the recommended limit. *Id.*

The County does not dispute the Department's math but implies (at 40) that the Department ran the wrong equation. According to the County, the portion of the project's 121 acres devoted to parking should not be counted as "gross acreage" in the density calculation, and with that acreage removed, the occupancy rate would exceed the recommended limit. But the JLUS expressly defines "gross acreage" in this recommendation as the "building or structure *and land area associated with that development (parking, storage, etc.)*." AR49668 (emphasis added); *see* Final Fairchild JLUS 5-59 (Sept. 2009). The County's post-hoc interpretation is contrary to that plain text.

Finally, the County asserts (at 42-43) that the Air Force, in fact, opposed the proposed casino even while publicly declaring itself neutral. The County's sole evidence for this startling claim, however, is the Air Force's comments on the draft EIS, which do not signal opposition to the project or even the type of "serious safety and conflict concerns" that the County insinuates (at 43) the Air Force was secretly trying to convey. Those comments requested that the Department consider the "JLUS recommendations as part of its decision-making" and that the Tribe implement certain noise and lighting mitigation measures. AR10445-10446. The

Department and the Tribe fully complied with those requests. *E.g.*, AR63848-63849. The Tribe also agreed never to request that the Air Force "alter its flight activities" or "change [its] current or future flight operations." AR63920-63922. And the Air Force confirmed the Tribe's multiple commitments to mitigate any potential impact on base operations. *See* AR2824-2825. The Air Force was fully capable of speaking for itself if it opposed the project. It did not. That forecloses the County's attempt to step into its shoes here.

2. The Department reasonably determined that detrimental impacts on the County would be adequately mitigated

Nor was it arbitrary and capricious for the Department to conclude that negative impacts on the County from the West Plains Development would be mitigated. To start with, the Tribe remains obligated under its gaming compact with the State to make significant contributions toward mitigation, including through contributions to a fund that is to be apportioned among various locally impacted service providers, including the County. *Supra* p. 18. The Department's finding that the project's impacts would be mitigated was based in part on these payments. AR63887-63888.

Moreover, as described above, the Tribe entered into agreements with the County and the City of Airway Heights requiring the Tribe to make mitigation payments "intended to compensate the City and County for any direct or indirect impacts caused to the City and County" by the West Plains Development. AR20466; *see supra* pp. 18-20. The Intergovernmental Agreement—to which the County is a party—obligates "[t]he City and County [to] meet and confer in order

1 to determine a fair and equitable portion of the Annual Payment that should be
2 received by each party." AR20467. And the City remains obligated, under its
3 Memorandum of Agreement with the Tribe, to "be responsible" for sharing the
4 Tribe's mitigation payments with the County "pursuant to an agreement between
5 the City and the County." AR20483.

6 As also discussed above, the City and County in fact executed an Interlocal
7 Agreement entitling the County to receive 20% of the total mitigation payments.
8 AR20500; *see supra* p. 20. When the County's political leadership changed three
9 years later, the County repudiated the ILA so that it could oppose the Tribe's
10 project. But that tactical decision by the County does not change the City's
11 obligation to share the Tribe's mitigation payments with the County, or the
12 County's right and obligation to negotiate with the City to obtain its share of those
13 payments. Given that the County can exercise that right and obtain mitigation
14 payments whenever it chooses, it was entirely reasonable for the Department to
15 conclude that the EIS's mitigation measures were sufficient.

16 At bottom, the County is arguing that, because it made a strategic choice to
17 opt out of an agreement entitling it to specific mitigation payments, it should now
18 be permitted to derail the project on the ground that it is not receiving those
19 payments. That argument recalls the proverbial man who killed his parents and
20 then pleaded for mercy because he was an orphan. The County's choice not to
21 accept mitigation payments is a self-inflicted (and readily self-healed) wound, and
22 not a ground for setting aside the Department's considered judgment that the
23 framework set out in the IGA adequately mitigated impacts on the County.

1 **III. THE DEPARTMENT COMPLIED WITH ITS OBLIGATIONS UNDER NEPA**

2 Kalispel separately claims (at 30-41) that the Department violated NEPA by
3 engineering the process to reach a predetermined result. "The standard for proving
4 predetermination is high," and requires that the agency "made an irreversible and
5 irretrievable commitment of resources … before [it] considered [the project's]
6 environmental consequences." *Stand Up II*, 204 F. Supp. 3d at 303 (internal
7 quotation marks omitted). Kalispel has not come close to meeting that standard.

8 As the Supreme Court has made clear, NEPA "imposes only procedural
9 requirements on federal agencies … to undertake analyses of the environmental
10 impact of their proposals and actions." *Department of Transp. v. Public Citizen,*
11 541 U.S. 752, 756-757 (2004). It "does not mandate particular results." *Robertson*
12 *v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Because "agencies
13 enjoy 'considerable discretion'" in "defin[ing] the purpose and need" of their
14 actions, Kalispel's challenge to the EIS is subject to review only "'under a
15 reasonableness standard.'" *Cachil Dehe*, 889 F.3d at 603.

16 Kalispel concedes (at 34) that the Department's purpose and need statement
17 was "relatively broad," but it nevertheless claims that "[t]he entire NEPA process
18 was used 'as a subterfuge designed to rationalize a decision already made.'" As the
19 record readily confirms, the Department fully satisfied NEPA's requirements: It
20 engaged in a detailed evaluation—spanning hundreds of pages—of four different
21 alternatives and concluded, based on its analysis, that the proposed casino and
22 mixed-use development "would best meet [the Department's] purpose … of
23 promoting the Tribe's self-governance capability" and thereby "effectuat[ing] the

1 purpose of IGRA to promote 'tribal economic development, self-sufficiency, and
2 strong tribal governments.'" AR49483 (quoting 25 U.S.C. § 2702(1)). The
3 Department also provided clear "reasons for [the] eliminat[ion]" of "alternatives …
4 eliminated from detailed study." 40 C.F.R. § 1502.14; *see* AR49479-49481. None
5 of that is consistent with a perfunctory exercise to reach a foreordained result.

6 In *Cachil Dehe*, the Ninth Circuit rejected a virtually identical claim that the
7 Department had "'artificially limited'" a statement of purpose in order to create an
8 "'illusory'" range of alternatives. 889 F.3d at 603-604. Like the final EIS here, the
9 EIS there "considered in detail the environmental and economic consequences of
10 each" of the handful of reasonable alternatives the Department identified and found
11 that "the best alternative" was "the casino/hotel project." *Id*. at 604. Kalispel tries
12 (at 39) to distinguish *Cachil Dehe* on the ground that the purpose and need
13 statement there "considered a wide range of goals," including "effectuating the
14 purposes of IGRA." But the same is true here: The final EIS set forth a wide range
15 of goals. AR49416-49417. And the purpose the Department identified was "to
16 advance [the Department's] 'Self Determination' policy of promoting the Tribe's
17 self-governance capability," AR49416, and thus "to effectuate the purpose of
18 IGRA," AR49483. The statement of purpose and need here cannot be distinguished
19 in any meaningful way from the statement upheld in *Cachil Dehe*.

20 Kalispel faults the Department (at 35) for not spending more time exploring
21 the possibility of locating the Tribe's casino somewhere else. But the Department
22 did consider that possibility. As it explained, "several off-site locations for the
23 proposed casino were considered and determined to be unreasonable alternatives"

because they were too far from a profitable gaming market, too small to support a casino, or not yet held in trust for the Tribe and therefore "not practical or feasible" for a casino. AR48712. Ultimately, the Department concluded that "detailed evaluation of … off-site gaming alternative[s]" would be unhelpful because it "would require the [agency] to defer meeting the Tribe's urgent needs, while speculating that the Tribe could successfully purchase, acquire into federal trust, and develop these parcels." AR48712. Kalispel never explains why that conclusion was unreasonable.

Kalispel further alleges (at 36-39) that the Department improperly "rewrote" the statement of purpose to predetermine the selection of the Airway Heights site by including, as bases for the Tribe's need, "[d]esire to further develop [its trust] property" and the "[p]otential profitability of Class III gaming in Airway Heights." But it was entirely proper for the Department to take the Tribe's goals into account when setting out the purpose and need for the Tribe's proposed project. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). The premise of the Tribe's application was that developing a casino on its trust land in Airway Heights, in a profitable gaming market, would help meet the Tribe's urgent need for revenue to provide basic governmental services. The Department's recognition of those facts—which were only two of eight different grounds for the Tribe's need listed in the final EIS, AR49416-49417—in no way suggests that the Department unreasonably excluded off-site options out of hand or gave short shrift in the final EIS to non-casino alternatives. In *Stand Up II*, the final EIS stated that the tribe's purpose included "team[ing] with" a particular casino developer who had

1 purchased the site at issue. 204 F. Supp. 3d at 307. Yet the court easily dispatched
2 the plaintiff's predetermination claim there. As the court noted, the Department
3 was not "obligated, contractually or otherwise, to approve" a casino on that site
4 simply because the tribe had entered into an arrangement with the developer who
5 owned it. *Id*. at 305. Here, too, Kalispel identifies no commitment by the
6 Department to approve the Tribe's request before engaging in a full analysis of the
7 reasonable alternatives identified in the EIS.

8 Finally, Kalispel claims (at 36) that the EIS was rushed so that the two-part
9 determination could be submitted to then-Governor Gregoire for her concurrence
10 before she left office. The record refutes that allegation. The review process here
11 lasted the better part of a decade. The record is nearly 66,000 pages long. And the
12 two-part determination never made it to Governor Gregoire's desk—Governor
13 *Inslee* provided the concurrence. But even if the process had been expedited as
14 Kalispel alleges, there is no evidence that the agency "'*irretrievably* committed
15 itself to a plan of action'" before undertaking the required analysis under NEPA.
16 *Stand Up II*, 204 F. Supp. 3d at 304.

17 **IV. THE DEPARTMENT DID NOT BREACH ITS TRUST OBLIGATION TO KALISPEL**

18 Finally, Kalispel contends (at 43-45) that the Department breached a trust
19 obligation by violating IGRA and NEPA and not giving "special weight" to the
20 impact on Kalispel. That argument fails for the reasons above. *Supra* pp. 27-37,
21 48-51; *see Lawrence v. Department of Interior*, 525 F.3d 916, 920 (9th Cir. 2008)
22 (agency "discharged its fiduciary obligations by complying with" statute). It also
23 fails for three additional reasons.

1 *First*, Kalispel has not identified any statutory basis for a separate cause of
2 action to vacate the Department's two-part determination based on breach of a
3 fiduciary responsibility *toward a third-party tribe*. Under Supreme Court and
4 Ninth Circuit precedent, the general "trust relationship between the United States
5 and Indian Nations" is "actionable" only where "'a further source of law'"—such as
6 a statutory provision designed to confer a specific benefit on the tribe—"provide[s]
7 focus for the trust relationship.'" *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916,
8 921-924 (9th Cir. 2008) (quoting *United States v. White Mountain Apache Tribe*,
9 537 U.S. 465, 477 (2003)). In *White Mountain*, for example, the Supreme Court
10 recognized a damages action brought by a tribe for breach of a fiduciary trust
11 obligation with respect to property held in trust for *that* tribe. *See* 537 U.S. at 473-
12 476. But, here, Kalispel is not seeking damages for any breach with respect to its
13 own property; it is seeking to block a casino on the Tribe's property.

14 *Second*, the Department's general trust obligation flows not only to Kalispel
15 but also to the Tribe. *See Nance v. EPA*, 645 F.2d 701, 711-712 (9th Cir. 1981)
16 (denying tribe's breach-of-trust claim "[i]n light of … conflicting fiduciary
17 responsibilities" owed to another tribe). As the record makes clear, the Department
18 recognized that, as "a Federal trustee," it has "the responsibility to support *all*
19 tribes." AR63808-63809 (emphasis added).

20 *Finally*, IGRA already requires the Department to consult with "nearby
21 Indian tribes" in determining that the proposed casino "would not be detrimental to
22 the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Having failed to show
23 actual detriment, Kalispel again demands a veto. But that is not the scheme

Congress created. Nor can the federal government's general trust obligation toward all tribes be used to impose that interpretation, which courts have rightly rejected. *See, e.g.*, *Sokaogon*, 214 F.3d at 947; *Stand Up I*, 919 F. Supp. 2d at 74. "[S]uch a cramped reading would have the phrase 'detrimental to the surrounding community' nullify the 'overarching intent' of the IGRA, which was 'in large part to … promot[e] tribal economic development, self-sufficiency, and strong tribal governments.'" *Stand Up I*, 919 F. Supp. 2d at 74. The Department's two-part determination furthers that purpose. Kalispel's attempt to rewrite IGRA to preserve monopoly rights for tribes with existing casinos should be rejected.

CONCLUSION

The district court should grant summary judgment to the Department and the Tribe and deny Kalispel's and the County's motions for summary judgment.

1 March 6, 2019

Respectfully submitted,

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ADDENDUM:
LIST OF KEY DOCUMENTS IN THE ADMINISTRATIVE RECORD

Document	AR Citation
TWO-PART DETERMINATION DOCUMENTS	
Tribe's Two-Part Determination Request	12459-12463
Tribe's Supplemental Two-Part Determination Request	36531-37606
Tribe's Unmet Needs Update	63264-63731
June 15, 2015 Department Decision Letter	63807-63810
Secretarial Determination	63811-63876
Record of Decision	63877-63927
NEPA DOCUMENTS	
Scoping Report	21399-21734
Draft Environmental Impact Statement	33231-35158
Final Environmental Impact Statement – Vol. I	48695-49404
Final Environmental Impact Statement – Vol. II	49405-50107
EXPERT STUDIES AND REPORTS	
AES/Innovation Group – Background Study and Competitive Effects Analysis (Nov. 2011)	4671-4702
PKF – Financial Performance Analysis (Mar. 2012)	5263-5319
Nathan Associates – Potential Economic Impact of the Proposed Spokane Tribe Casino (May 2012)	5320-5346
Tribal Financial Advisors – Assessment of Financial Impact of the Proposed Spokane Tribe Casino (May 2012)	5347-5364
AES/Innovation Group – Response to Kalispel DEIS Comments (June 2012)	7474-7527
Innovation Capital – Response to Tribal Financial Advisors Assessment (July 2013)	54721-54730
Nathan Associates – Saturation Analysis (Jan. 2015)	2832-2853
AES – Response to Nathan Associates Saturation Analysis (Mar. 2015)	2237-2249

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Document	AR Citation
INTERGOVERNMENTAL AGREEMENTS	
Tribal-State Compact for Class III Gaming: Tribe, State of Washington	20506-20635
Intergovernmental Agreement: Tribe, City of Airway Heights, County of Spokane	20464-20476
Interlocal Agreement: City of Airway Heights, County of Spokane	20498-20504
Memorandum of Agreement: Tribe, City of Airway Heights	20478-20496

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 6th day of March, 2019, I electronically

3 transmitted the foregoing document to the Clerk's Office using the CM/ECF

4 System, which will send a notice of filing to all counsel of record.

5

/s/ Scott Wheat
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