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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KALISPEL TRIBE OF INDIANS and SPOKANE COUNTY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

SPOKANE TRIBE OF INDIANS,

Intervenor-Defendant.

No. 2:17-cv-00138-WFN

FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Hearing Date: June 17, 2019

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I. INTRODUCTION

Federal Defendants, the United States Department of the Interior, Acting Secretary of the Interior David Bernhardt, Assistant Secretary of the Interior–Indian Affairs Tara Sweeney, Bureau of Indian Affairs, and Bryan K. Mercier (collectively, the "Department") approved the application of Spokane Tribe of Indians (the "Tribe") for a Secretarial Determination under the Indian Gaming Regulatory Act ("IGRA") that gaming should be allowed on the Tribe's trust land in Airway Heights, Washington. The Department found that gaming on the parcel would be in the Tribe's best interest and would not be detrimental to the surrounding community.

Plaintiff Kalispel Tribe of Indians ("Kalispel") and Plaintiff Spokane County (the "County") argue that the Department failed to comply with IGRA, the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA") in approving the Tribe's request. These claims lack merit. The Department's nearly ten-year decision process thoroughly examined the project's impacts and concluded that any impacts would be minimal, particularly with mitigation. Kalispel alleges adverse impacts due to new competition from the Tribe and that the Department failed to properly consider these economic impacts. But the Department considered all of Kalispel's submissions and conducted its own economic analysis of potential impacts before concluding Kalispel's

assertions of economic disaster were overstated and unfounded. As for the County, it engaged in consultation with the Department only late in the process and raised concerns about impacts to the Fairchild Air Force Base ("FAFB") that the Department had already addressed by working with both the Air Force and other local governments. Because mitigation ensures no impacts on FAFB and the project will benefit the County, the County will suffer no detriment.

As explained further below, the Department requests that this Court grant its motion for summary judgment and deny Plaintiffs'.

II. BACKGROUND

A. The Spokane Tribe

The Tribe is a federally recognized Indian tribe with a reservation located approximately forty miles northwest of the city of Spokane. AR65429. The Tribe's ancestral lands included much of eastern Washington. AR65430. On August 16, 2001, the United States acquired an approximately 145-acre parcel of land located in the City of Airway Heights, Spokane County, Washington, in trust for the Tribe for development purposes. AR65429. The trust land is within the Tribe's aboriginal territory and is in an area with historical significance to the Tribe. AR65423.

The Tribe has significant economic challenges. It has an unemployment rate nearly double that of the surrounding communities, and a quarter of the families on

its reservation live in poverty. AR65422; AR63826. The Tribe's traditional economic activities are no longer viable as sources of sustainable income. AR65422. The Tribe has looked to timber and uranium mining, but those industries have not proven to be a reliable source of revenue for the Tribe and have led to other problems, such as contamination from uranium mining. *Id.* Due to declining revenues from its two existing gaming facilities, AR63821, and other industry, the Tribe cannot currently provide sufficient services to meet its needs for tribal housing, health care, education, and other assistance programs. AR65422; AR63826. The Tribe is also trying to address groundwater contamination that contains hazardous levels of uranium decay products from former mining operations, as well as extensive environmental remediation resulting from the Midnite Mine Superfund site on the Tribe's property. AR65422–23; AR63828.

B. The Proposed Project

In 2006, the Tribe requested that the Department approve gaming on the Airway Heights parcel. AR65422. IGRA prohibits gaming on land acquired in trust by the Secretary after October 17, 1988, with some exceptions. As a result, gaming is permissible on the parcel only if the Department makes a "two-part" or "Secretarial Determination" that gaming on the trust land would (1) be in the Tribe's best interest, and (2) not be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A). Such a Secretarial Determination requires consultation

with the Tribe and appropriate state and local officials, including officials of other nearby tribes, and requires the Governor's concurrence. *Id.*

The Tribe's proposed project is a mixed-use development with a casino for Class II and Class III[1] gaming on the Site. AR65429. The Project will include approximately 2,500 electronic gaming devices, fifty table games, and ten poker room tables within a 98,442-square-foot gaming floor area. *Id.* The facility will also include a three hundred-room hotel, and several restaurants and retail stores. *Id.* The Tribe will also construct a tribal cultural center, a tribal police and fire station, and a two-story commercial building. *Id.* The preferred project also includes a 13.25-acre area set aside as open space to protect a wetland and vernal pool in that area, and provides both surface parking and a parking structure. *Id.*

At full build-out, the casino portion of the Project will create 1,027 full-time jobs, with an additional 1,060 jobs projected from the retail development

[1] Under IGRA, Class II gaming includes bingo and certain "non-banking" card games. 25 U.S.C. §§ 2703(7)(A)(i), 2704, 2710(b). Class III gaming includes traditional "casino" games and can occur lawfully only pursuant to a tribal-state "compact." *Id.* § 2710(d). The Tribe has had a tribal-state compact with Washington since 2007. AR65446.

component of the Project. AR65449. In addition, more than 1,200 construction jobs will be created during the projected seven years of construction. *Id.*

C. The Department's NEPA Process

Because a two-part determination is a major federal action, the Department prepared an Environmental Impact Statement ("EIS") to analyze the environmental effects of the proposed project. During the scoping process, the Department identified seven cooperating agencies, including the Tribe, the City of Airway Heights, the County, the Federal Aviation Administration ("FAA"), and the Air Force. AR65457; AR65498. As explained in the March 2011 scoping report, the Department received numerous comments in writing and at the public meeting, including from the Kalispel tribe. The County did not comment. The scoping report defined the purpose and need for the project as "to improve the Tribe's short-term and long-term economic condition and promote its self-sufficiency, both with respect to its government operations and its members," and summarized the major issues and concerns raised in comments during the scoping process. AR21409; AR65498.

The Department developed several alternatives in addition to the Tribe's proposed project for study in the EIS. An administrative version of the Draft EIS was circulated to the cooperating agencies, including the County, in May 2011 for review and comment. AR65498. The County did not comment. The Department

considered the cooperating agencies' comments and then distributed a Draft EIS for public review on March 2, 2012. 77 Fed. Reg. 12,873 (Mar. 2, 2012).

The EIS studied in detail four alternatives: (1) the preferred alternative, a mixed-use development involving casino, hotel, retail spaces, restaurants, tribal cultural center, and a parking structure; (2) a smaller mixed-use alternative not including a hotel or parking structure; (3) an alternative with mixed-use development including a hotel and retail space, but without a casino; and (4) the no action alternative required by NEPA. AR21410; AR49417–18; AR65500–06. Several alternatives were rejected without detailed analysis because they were infeasible or would not fulfill the stated purpose and need of the proposed action. AR65499. Expansion of the Tribe's two existing casinos was rejected because it would not result in sufficient income to address the Tribe's unmet needs. *Id*. Similarly, the Department rejected other potential locations, determining that the Tribe's reservation was not a viable site because it was too far from potential gaming markets, and two off-site locations owned by the Tribe were not viable options because they had limited area for development and were not held in trust for the Tribe. AR65499–500.

The EIS thoroughly analyzed the potential impacts of the four alternatives, and specifically addressed the potential economic impact of the project on Kalispel, noting that the critical question was whether projected loss of market share would affect Kalispel's ability to provide governmental services. AR48712–

13. The Draft EIS included appendices with an Economic Impact Study, and a "Background Study and Competitive Effects Analysis" conducted by the Innovation Group. AR48713, AR4694–97; AR33440–59; AR34637–AR34668; AR34918–56. The Department also considered detailed information Kalispel provided regarding its present economic situation and tribal revenue allocation. AR48713. The Department concluded, based on all the information, that there could be economic impacts to Kalispel, but that any effect would likely be temporary due to market growth from a second casino introduced in the area. AR48713; AR63851; AR65511. Any reduction in gaming revenue as a result of competition would not prohibit the Kalispel tribe from providing essential services and facilities to its membership. AR48714; AR65511.

The Department also consulted about and thoroughly studied the potential impact of the Project on FAFB. Although the County did not provide comments on the Draft EIS, the City of Spokane and the Air Force did and the Tribe took steps to address the concerns. AR65477–78. The Final EIS includes detailed mitigation measures to ensure no encroachment on FAFB to the satisfaction of the Air Force and the City of Spokane. AR65514–15.

The Draft EIS was made available for public comment for an extended period of seventy-five days, during which time a public hearing was held.

AR48701. The Department received approximately 277 comment letters, which it responded to in the Final EIS. *Id.*

In February 2013, the Department published the Final EIS for public comment and review. AR48695–52082. The Final EIS consists of the Department's responses to comments received and a revised EIS and appendices. The Final EIS retained the same alternatives for analysis, and found that the proposed action would not significantly affect the quality of the human environment as defined by NEPA. AR49417–18. The Department extended the thirty day public comment period on the Final EIS an additional fifty-eight days until May 1, 2013. 78 Fed. Reg. 7448 (Feb. 1, 2013); 78 Fed. Reg. 15,040 (Mar. 8, 2013). The County submitted comments for the first time in April 2013, and submitted additional comments in 2014, arguing that the Air Force needed to modify Accident Potential Zones ("APZ"s) around FAFB and that a supplemental EIS was needed to address these newly raised concerns. AR65464. The Department referred the County's concerns to the Air Force, which disagreed about the need for new APZs. AR3433.

D. The Department's Decision

On June 15, 2015, the Assistant Secretary – Indian Affairs ("ASIA") issued a Secretarial Determination finding that the proposed casino project would be in the best interest of the Tribe and its members, and would not be detrimental to the

surrounding community. AR65542. On that same date, the Department sent a letter to Governor Jay Inslee requesting his concurrence in the decision. AR65422. Governor Inslee concurred by letter dated June 8, 2016. The casino began operating in January 2018.

III. STATUTORY BACKGROUND

A. The Indian Gaming Regulatory Act

In 1988, Congress enacted IGRA 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). IGRA provides that gaming shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless the land satisfies one of three exceptions listed at 25 U.S.C. § 2719(a)-(b). The relevant exception for purposes of this case is the exception commonly known as the "Two-Part Determination," 25 U.S.C. § 2719(b)(1)(A), which states:

> Subsection (a) of this section will not apply when—
>
> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

Id. The Department's IGRA regulations define "nearby Indian tribe" as "an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the

proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters," and "surrounding community" as "local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment." 25 C.F.R. § 292.2.

B. The National Environmental Policy Act

NEPA serves the dual purposes of informing agency decision-makers of the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public so that they "may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To meet these dual purposes, NEPA requires that an agency prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.3. In reviewing the sufficiency of an EIS, the courts evaluate whether the agency has presented a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citation omitted). "The reviewing court may not 'fly speck' an [EIS] and hold it insufficient on the basis of inconsequential, technical deficiencies." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997) (citations omitted).

IV. SCOPE OF REVIEW

A. The Administrative Procedure Act

Agency compliance with NEPA and IGRA is reviewed under the judicial review provisions of the APA, 5 U.S.C. §§ 701-06. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990); *ONRC Action v. BLM*, 150 F.3d 1132, 1135 (9th Cir. 1998) (NEPA); *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000) (IGRA). Under the APA, agency decisions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In accordance with that standard, an agency's decision will be overturned

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

McFarland v. Kempthorne, 545 F.3d 1106, 1110 (9th Cir. 2008) (citations and quotation marks omitted). The standard of review is "'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Nw. Ecosys. All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted). "The APA does not allow the court to overturn an agency decision because it disagrees with the

decision or with the agency's conclusions . . . ." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (citation omitted).

B. Summary Judgment Standard

A party is entitled to summary judgment as a matter of law if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Here, the facts are contained in the administrative record and the Court may not "find" underlying facts. There are, therefore, no material facts in dispute and the only issues presented are issues of law. *See Lujan*, 497 U.S. at 883–84; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). Accordingly, the Court's task is to determine as a matter of law whether the agency's decision, based on the record, was within its authority, considered the relevant factors, and involved no clear error in judgment. *See, e.g., Fla. Power*, 470 U.S. at 743–44.

V. ARGUMENT

A. The Department properly found that Kalispel overstated impacts from new competition and that any impacts to Kalispel do not constitute a detriment to the surrounding community.

Kalispel argues that the Department violated IGRA by disregarding detriment to the surrounding community and prejudging the Tribe's application. Kalispel MSJ at 18–27. Kalispel also argues that the Department violated IGRA by considering factors it was not intended to consider. *Id.* at 27–30. These arguments are without merit. The Department properly considered detriment to the

surrounding community, and reasonably concluded that with regard to Kalispel, any impacts will not prevent it from providing tribal services and programs. The Department also properly considered that the casino is within the Tribe's aboriginal lands, as IGRA requires that the Department consider such evidence.

1. The Department considered financial impacts on the "surrounding community."

IGRA requires the Department to consider whether a new gaming facility would "be detrimental to the surrounding community." 25 U.S.C. § 2719(a). The Department must consider impacts upon Kalispel, but at the end of the day, those impacts must be set within the context of the broader surrounding community. The D.C. Circuit has noted that "nothing in IGRA . . . forecloses the Department, when making a non-detriment finding, from considering a casino's community benefits, even if those benefits do not directly mitigate a specific cost imposed by the casino." *Stand Up for Cal.! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1187 (D.C. Cir. 2018). The Department's regulations require a wide-ranging evaluation of impacts on the surrounding community, including, among others, environmental impacts, 25 C.F.R. § 292.18(a), social and economic impacts, *id.* §§ 292.18(b-c), and "[a]ny other information" that would be relevant to the determination, *id*. § 292.18(g). Moreover, the existence of an unmitigated adverse impact in itself does not preclude a finding of no detriment because, as the D.C. Circuit recognized, "all new commercial developments are bound to entail *some*

unmitigated costs." *Stand Up*, 879 F.3d at 1187 (internal quotation marks and brackets omitted).

Kalispel argues that it will suffer detriment in the form of the decreased profitability of its Northern Quest gaming facility due to competition resulting from the Department's favorable two part determination. But IGRA is designed to promote tribal gaming as a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments" for all tribes, 25 U.S.C. § 2702(1), and therefore, as the Department noted, IGRA does not "guarantee that tribes operating existing facilities will continue to conduct gaming free from both tribal and non-tribal competition." AR63864.

Courts agree. For example, the Seventh Circuit noted that "it is hard to find anything in [IGRA's Section 2719] that suggests an affirmative right for nearby tribes to be free from economic competition." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000). The D.C. district court agreed with the "Secretary's conclusion that competition from the North Fork Tribe's proposed gaming facility in an overlapping gaming market is not sufficient, in and of itself" to find detriment. *See Stand Up for California! v. U.S. Dep't of Interior (Stand Up I)*, 204 F. Supp. 3d 212, 271 (D.D.C. 2016) (citation, internal quotations and brackets omitted). Another district court noted "that competition alone from the proposed gaming facility in an overlapping gaming market is not sufficient to

conclude that it would result in a detrimental impact on [a tribe with a competing facility]." *Citizens for a Better Way v. U.S. Dep't of Interior* ("*Enterprise*"), No. 2:12-cv-3021-TLN-AC, 2015 WL 5648925, at *15 (E.D. Cal. Sept. 24, 2015).

Even though new competition and potentially decreased profitability that may result from a favorable two-part determination are not considered a detrimental impact, the Department "does examine detrimental effect on the surrounding community and nearby tribes, including detrimental financial effects." Department of the Interior, *Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29354, 29371 (May 20, 2008). For example, in *Stand Up*, the Department considered evidence that competition would adversely affect a neighboring tribe's revenues, resulting in job losses and reduced public services. 879 F.3d at 1189–90. The D.C. Circuit affirmed the Department's conclusion that the neighboring tribe's "casino could successfully absorb the expected competitive effects" and "that the casino's potential effects on the tribe were insufficient to render the casino detrimental to the surrounding community overall." *Id.*

2. APA principles are directly relevant to the Department's analysis of competitive impacts.

Kalispel submitted technical reports predicting dire impacts on its casino and itself from new competition. The Department's experts reviewed those reports and assessed their predictions, determining that Kalispel's submissions were unreliable.

Kalispel asks this Court to second-guess the Department. In such circumstances, a number of settled APA principles govern.

First, if an agency's findings are supported by substantial evidence, a reviewing court is not free to upset them in favor of other findings, even if those also could be supported by substantial evidence. *Stand Up I*, 204 F. Supp. 3d at 272; *see also Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992); *Alaska Eskimo Whaling Comm'n v. EPA*, 791 F.3d 1088, 1095 (9th Cir. 2015); *Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 215 (9th Cir. 1995).

Second, assessing the effects of future competition involves predictive judgments. Deference to an agency's findings is greatest where an agency must make predictive judgments within its area of expertise. *Stand Up I*, 204 F. Supp.3d at 272. "As a reviewing court, we are most deferential when the agency is making predictions within its area of special expertise." *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1073 (9th Cir. 2012) (citation, internal quotation marks and brackets omitted); *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs.*, 887 F.3d 906, 921 (same); *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 711 (9th Cir. 2009) ("In so concluding, the Service made scientific predictions within the scope of its expertise, the circumstance in which we exercise our greatest deference."); *St. John's United Church of Christ v. FAA*, 550 F.3d 1168, 1172 (D.C. Cir. 2008)

(court "highly deferential" to agency forecast of airport capacity/demand). Here, the Department is the agency tasked with implementing IGRA in the context of the two-part determination, and therefore assessing the impacts of competition in a detriment analysis falls within its special area of expertise.[2]

Third, when confronted by a battle of the experts, the agency has discretion to determine which experts it will rely upon, and a reviewing court is not free to second guess that judgment. *Stand Up I*, 204 F. Supp. 3d at 272; *see also N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (noting that "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." (internal

[2] The fact that the Department relies on the technical expertise of consulting experts, like the Innovation Group, in arriving at its decision does not undermine the fact that the Department is acting within its expertise. The Ninth Circuit has recognized the necessary reliance of agencies upon technical experts even as it also affords those same agencies the deference due where technical or scientific matters are at issue. *See Trout Unlimited v. Lohn*, 559 F.3d 946, 958–59 (9th Cir. 2009) (affording deference due where "scientific and technical expertise is necessarily involved" when the agency relied upon the work of various experts).

brackets and quotation marks omitted)); *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012) ("We may not impose ourselves as a panel of scientists that instructs the agency, chooses among scientific studies, and orders the agency to explain every possible scientific uncertainty.") (internal brackets, quotation marks and ellipses omitted); *Trout Unlimited*, 559 F.3d at 958.[3] That rule applies here where Kalispel submitted expert reports predicting how new competition would impact its gaming facility and revenues and the Department in turn relied on the Innovation Group to respond to those technical reports.

3. The Department's analysis of the financial effects of competition on Kalispel was not arbitrary and capricious.

The Department fully considered Kalispel's numerous submissions, solicited the assistance of the Innovation Group and Innovation Capital to evaluate and respond to Kalispel's submissions, and in the end concluded: "While the Kalispel tribal government's budget would be impacted by the Project, these effects are expected to dissipate over time due to market growth and would not prohibit the Kalispel tribal government from providing essential services and facilities to its membership." AR63870. Kalispel challenges this finding but, as discussed above,

[3] Corollary to this rule, the Department "has substantial discretion to choose between available scientific models, provided that it explains its choice." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 997 (9th Cir. 2014).

in the APA context this Court is not free to choose among competing experts and must afford the agency's predictive judgment the highest deference. Substantial evidence supports the Department's findings.

At the outset, the Department found that construction and operation of the proposed facility "will have a beneficial impact on the surrounding community by stimulating economic development, creating jobs, and generating income." AR63850. Construction and operation of the facility are expected to provide a significant boost to the local economy. AR63851. Indirect and induced outputs from the project "would be dispersed and distributed among a variety of different industries and businesses throughout [Spokane] County." *Id.* Employment in the surrounding community will also benefit with workers needed to build and operate the facility. AR63851–52 (concluding that "nearly 5000 jobs" will result from construction and operation). Based on the Tribe's gaming compact with Washington, the Department expects the Tribe to pay a significant amount to address community impacts of the new gaming operation within its first year. AR63855. Given all this, including a lengthy analysis of Kalispel's submissions, AR63863–72, the Department concluded there would be no detrimental impact to the surrounding community. AR63858.

Kalispel claims that the Department was "going through the motions" in the ten pages of the decision devoted to impacts on Kalispel, ECF No. 79 ("Kalispel

MSJ") at 22, but in fact that detailed analysis summarized Kalispel's submissions, discussed their methodological flaws and showed that when properly analyzed, the financial impacts on Kalispel are much less severe than Kalispel claimed. Moreover any detrimental financial impacts will dissipate over time and leave Kalispel's tribal government able to "provid[e] essential services and facilities to its membership." AR63870. By requiring the Innovation Group to address each of Kalispel's technical submissions and by reviewing all the reports in the decision, the Department showed it took Kalispel's concerns seriously, and accorded them their proper weight. In the end, the Department found that Kalispel had overinflated the likely financial impacts of new competition.

As explained in the Two-Part Determination, Kalispel submitted a report by PKF Consulting USA ("PKF") that projected significant revenue declines when the Tribe's facility became operational, which losses would be compounded by full build-out of the facility. AR65481.[4] Kalispel also retained Tribal Financial Advisors ("TFA") to analyze how PKF's projected revenue losses would affect

[4] Citations are to the unredacted Two Part Determination and Record of Decision filed under seal at ECF No. 81. AR63807–927. This version of the decision contains the specific figures arrived at by the various consulting experts which are otherwise confidential business information.

Kalispel. *Id.* TFA projected that Kalispel's decreased revenues could cause it to default on debt obligations, requiring it to secure new credit on worse terms with the result that debt repayment could consume the majority of its future gaming revenues. *Id.* Kalispel also retained Nathan Associates to prepare a report addressing how Kalispel's government spending on tribal programs and services would be constricted. AR63866. The Nathan Associates report's projections depended on the accuracy of projections of the TFA and PKF reports. *See* AR5320–46.[5]

By contrast, the Final EIS relied upon a 2011 report produced by the Innovation Group, as well as a 2012 Innovation Group report responding to the Kalispel submissions. *See* AR4671–702 (2011 report); AR7474–527 (2012 report).[6] The Department noted that the 2011 Report showed that "the Spokane area is sufficiently large to support three casinos of the magnitude of Northern Quest." AR63868. The Innovation Group's work relied upon a "gravity model," AR4688, which, the Department noted, "is an accepted and widely used form of market analysis for casino operators, public entities, and the financial sector."

[5] Citations are to the unredacted version, filed under seal at ECF 81.

[6] Citations are to the unredacted version, filed under seal at ECF 81.

AR63868. The Department concluded that it "is sufficient for the analysis of potential impacts on existing casinos and local tribal governments in the EIS." *Id.* The Department's decision to rely on the Innovation Group's application of the gravity model is entitled to deference from this Court, as explained above. *See San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 997.

The Innovation Group also found new competition would impact Northern Quest's revenues, although it did not agree with the extent of the impact projected by PKF. AR63869. The Department noted that PKF was projecting "very aggressive impacts, with insufficient supporting analysis or evidence from other markets." AR63870. Moreover, "based on an analysis of comparable situations," Innovation Group expected the drop in revenue from competition "to diminish after the first year . . . once local residents experience the casino and return to more typical spending patterns." AR63869–70. After that, Northern Quest's revenues are expected to resume growth. AR63870.

As explained in the FEIS, by 2020 impacts on Kalispel should diminish such that Northern Quest would suffer only a 13.8 percent reduction in its 2011 revenue. AR49634. Moreover, the Department noted that even accepting PKF's estimated revenue reductions to Northern Quest from competition, Kalispel would still have significantly more revenue available to provide government services per tribal member than the Tribe. AR63871 n.335.

In fact, Kalispel currently allocates a portion of revenues from Northern Quest to its membership in per capita payments. AR63865. This means that such money, instead of being reserved for government services, is distributed to individuals for private use. IGRA only permits per capita payments from Class II and III gaming revenues once the Secretary has approved a tribal revenue allocation plan that adequately funds tribal government operations and programs and promotes tribal economic development. 25 U.S.C. § 2710(b)(3)(B); 25 C.F.R. § 290.12. As the Department noted, "[t]his ensures that any reductions in gaming revenues would reduce the direct payments to tribal members before affecting the funding of tribal government and its services." AR63865. The FEIS noted that after the elimination of per capita pay outs, the projected impact on the 2020 Kalispel government budget would be only a 6.7 percent reduction in revenues. AR49635. The Department appropriately considered that fact, AR63871,[7] and concluded effects on Kalispel "will be ameliorated by market growth over time and

[7] The Department reiterates the FEIS, but through an apparent typo, adds a digit to the 6.7 percent number.

would not prohibit the Kalispel tribal government from providing essential services and facilities to its membership."[8]

Given this, Kalispel's assertion that the Department found no detriment only because its gaming facility would not close (Kalispel MSJ at 27) is simply wrong. The Department considered whether Kalispel could continue to provide "essential services and facilities to its membership," not whether it would have to shutter Northern Quest. Kalispel's expert submissions projected aggressive and overstated impacts from new competition and the Department was entitled to rely instead on the Innovation Group's studies and responses to Kalispel's submissions. Because Northern Quest is a very successful facility, enabling per capita payments above and beyond supporting tribal government operations and services, and based on the Innovation Group's projections, the Department appropriately concluded that Kalispel could absorb the impacts of new competition and continue to support its members with tribal government programs and services. Moreover, the

[8] Kalispel also submitted another report in 2015 suggesting that Northern Quest's gaming market was saturated. Both BIA and the Innovation Group considered the report and found it methodologically flawed. The Department's conclusion that it was unsound is entitled to this Court's deference. AR63871–72.

Department found those impacts would diminish over time. Those conclusions should be affirmed by this Court.

Lastly, Kalispel challenges the Department's reliance on the Innovation Group based on a two-page memo authored by Thomas Hartman, a Senior Financial Analyst with the BIA. Kalispel MSJ at 13–16. Kalispel argues Hartman found the Innovation Group's analysis unreliable. *Id.* at 16. In fact, Hartman was skeptical of the effort to make "[f]inancial projections based upon distance and demographic data" with great precision because it involves too many assumptions and "spreadsheet analysis can change greatly as the assumptions are changed." AR3574. This critique applies to PKF as much as to the Innovation Group. That is why courts are at their most deferential when an agency is engaged in making predictions, *League of Wilderness Defs.*, 689 F.3d at 1073, and also why the Department's judgments about future impacts on Kalispel are entitled to deference.

In any event, Kalispel mischaracterizes the thrust of Hartman's memo which supports the Innovation Group's own conclusion that the impacts of new competition will diminish over time as the market grows. Hartman explained that "[i]n most cases the reality was that new entrants improved business for everyone." AR3574. He predicted that the two casinos at Airway Heights "will create marketing plans and casino features that attract customers and grow the market." AR3575. Given that, as Hartman explained, typically new competition grows the

market, the "likelihood that the Kalispel Tribe would see the huge impact that it has predicted is very small." *Id.* In short, Hartman found, based on his knowledge of other gaming markets, that Kalispel's concerns were overblown and that new competition would lead to benefits for both the Kalispel and Spokane Tribes.[9]

4. The Department properly considered the Tribe's historical connection to the site and did not prejudge the application.

Kalispel argues that the Department decided to grant the application because Kalispel had a casino within Spokane's historical territory, and in so doing, relied upon a factor it should not have considered. Kalispel MSJ at 28.[10] IGRA regulations, however, specifically require an application for a two-part determination to contain "evidence of historical connections, if any, to the land."

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[9] Kalispel argues without basis that a memo by Steve Payson disagreed with the Innovation Group. Kalispel MSJ at 16. As Kalispel elsewhere complains, the memo is privileged as deliberative and that privilege was sustained by this Court. *Id.* at 13. Thus, there is no evidence before the Court about the memo's contents.

[10] Kalispel submitted a declaration from Chairman Nenema with its motion for summary judgment. Federal Defendants have moved to strike this declaration as extra-record evidence that post-dates the decision, ECF No. 97, but the declaration shows only that the Department considered the Tribe's historical ties to the area, as required by IGRA. Kalispel reads too much into the ASIA's alleged statements.

25 C.F.R. § 292.17(i). The regulations also require the Department to "consider all information submitted" in making the Secretarial Determination. 25 C.F.R. § 292.21(a); *Stand Up I*, 204 F. Supp. 3d at 258. The Department thus complied with IGRA's regulations by considering the Tribe's historical connection to the area.

Further, the record shows that the Department's decision was not based solely on the fact that Kalispel has a casino in the Tribe's historical area. The record shows a lengthy and thorough review process, with literally thousands of pages of analysis. The Department found that the casino would both benefit the Tribe, which sorely needs a reliable source of income, and the surrounding community through, *inter alia*, jobs, increased tourism, and direct payments. Nothing in IGRA or the APA requires the Department to disregard the Department's decision to allow Kalispel to open a casino in the Tribe's territory.

Kalispel argues repeatedly throughout its brief that the Department prejudged the application and rushed through the NEPA process in order to get the decision on Governor Gregoire's desk before she left office. *See, e.g.*, Kalispel MSJ at 33. But the Department did not issue its Final EIS or decision until after Governor Gregoire left office in 2013, and Governor Inslee signed the concurrence letter. Further, Kalispel does not demonstrate that the Department impermissibly prejudged the issue. "[G]enerally, courts have not found predetermination except

in cases where an agency has *committed* itself — for example, by contract — to an outcome." *Stand Up I*, 204 F. Supp. 3d at 303–04 (citing *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 713 (10th Cir. 2010). Plaintiffs have made no such showing. Draft documents written by agency personnel do not suffice to show a commitment to an outcome. *See* Kalispel MSJ at 10. In addition, Kalispel misrepresents the evidence. For example, Kalispel portrays a Department employee's email as requesting to transmit her two-part determination recommendation before "the EIS was complete," *id.*, but the email itself notes that the Final EIS had in fact been completed and sent to D.C. for "review/approval," AR65818. Further the email simply requested information on when a recommendation could be sent. *Id.* It in no way implies that a decision was made by anyone, much less the actual decision-maker, before the EIS was completed. Kalispel's assertions of a rush to judgment simply are not supported by the facts or the record.

B. The Department met its requirements to consult with the County.

IGRA requires that the Department's two part determination be made "after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A). The Department, pursuant to its responsibility to implement this part of IGRA, has promulgated notice and comment regulations concerning how consultation will be

conducted. 25 C.F.R. §§ 292.19–20. They provide that the Department shall send letters to State and local officials, along with nearby Indian tribes soliciting comments within a sixty-day period. *Id.* § 292.19(a). The consultation letters must solicit comments on six topics as they relate to the surrounding community: (1) environmental impacts of the proposal and potential mitigation; (2) impacts on "social structure, infrastructure, services, housing, community character, and land use patterns"; (3) economic impacts; (4) "anticipated costs" and potential revenue sources to mitigate them; (5) costs of treatment programs for compulsive gambling problems derived from the proposed facility; (6) and any other relevant information. *Id.* § 292.20(b). The comments of the state and local officials, along with those of any nearby Indian tribes are provided to the applicant tribe which is given 60 days to respond as well as an opportunity to "address or resolve any issues raised in the comments". *Id.* § 292.19(c–d).

The Department began consultation on April 8, 2011, asking for comments within sixty days. AR10534–38 (local agency consultation letter). The County did not respond. AR65473. Although not required by Department regulations, on March 14, 2012, the Department reinitiated consultation, again soliciting comments from local governments and nearby tribes and attaching supplemental

materials provided by the Tribe concerning its application.[11] AR36531–7607. On May 16, 2012, the County responded that it was unclear whether it would participate in the consultation. AR9727.

The City of Spokane, however, did substantively engage with the Department's consultation outreach and raised issues regarding the impact on FAFB. It indicated that FAFB is the largest employer in the community and expressed concern that the proposed facility "will limit the base's current flight operations due to height, lighting and noise compliance and safety." AR9673. The Tribe "listened, conducted studies, and/or altered its plans to address" the concerns. AR65424. For example, the Tribe participated in a Joint Land Use Study ("JLUS") to provide recommendations "designed to protect the integrity of operations at [FAFB]," and requested an FAA study to determine whether a 140-foot structure could be erected safely at the site. Even after FAA approval, the Tribe nevertheless agreed to limit the facility to a sixty-foot height. *Id*. As a result of the consultation, the Spokane City Council rescinded a resolution opposing the project and on February 25, 2014, stated that the "Spokane City Council now recognizes [that the project] will not impede upon existing or future operations at

[11] The Tribe requested that the Department distribute the Tribe's recently submitted supplement to its application and reinitiate consultation. AR36529.

Fairchild Air Force Base and that the project is not detrimental to the surrounding community." AR 57822.

Meanwhile, on April 30, 2013, the County submitted comments on the FEIS and in those comments belatedly began providing its views on whether the project would detrimentally impact the surrounding community. AR52715–3696. The Department addressed these comments in the Secretarial Determination.

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

The County argues that the Department failed to consult with it. The Department, however, clearly followed the relevant regulation governing consultation for Secretarial Determinations, 25 C.F.R. § 292.19. The County argues that IGRA requires more than is contemplated by the regulation. The Court should defer to the Department's implementing regulation.

"Consult" has a plain meaning, as the County argues: "asking the advice or opinion of someone." *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 117 (1st Cir. 2002) (quoting Black's Law Dictionary 311 (7th ed. 1999)). But that does not provide guidance on how advice is to be sought. In *Companale*, upon which the County relies, the First Circuit concluded that soliciting comments is acceptable so long as the consulted entity knows what information is sought. *Id.* at 118–19. 25 C.F.R. § 292.20 does just that by specifying six topics on which a consultation letter must solicit comments.

The County argues that where public comments are also required by a statute, consultation must mean something more than soliciting comments. But the case the County cites concerns a very different statute where one provision required a study to be done "in consultation with affected States" and the next provision required a report, based on the study, with "an opportunity for comment from affected States." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1080 (9th Cir. 2011) (emphasis omitted). Given the close proximity of the statutory requirements to both consult with states and to allow them to comment, the Ninth Circuit reasoned that consultation *in that context* had to mean more than just soliciting comments. *Id.* at 1085; *see also Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 988 (9th Cir. 2015) (distinguishing *Cal. Wilderness Coal.* based on the peculiarity of the statute at issue in the case). Not so with IGRA. 25 U.S.C. § 2719 contains no provision for comment, let alone a provision requiring first consultation with and second an opportunity for comment by local governments. The County scoured IGRA and found a public comment requirement in 25 U.S.C. § 2704(b)(2)(B), a provision entirely unrelated to Secretarial Determinations, that requires a period of public comment on nominees to the National Indian Gaming Commission. *Id.* That "context" sheds no light on what Congress contemplated by requiring consultation in Section 2719.

Neither does IGRA's legislative history. The County notes that an earlier version of IGRA that did not become law required the concurrence of local governments and nearby tribes. County MSJ at 23–24. All that shows is that Congress, in enacting IGRA, did not provide that local governments and nearby tribes with the ability to veto the Determination — that Congress gave to States alone. The legislative history says nothing about how the Department is to carry out consultation.

Where, as here, Congress tasks an agency with carrying out a statutory provision, and the agency specifies procedures through notice and comment rulemaking, that rulemaking is entitled to *Chevron* deference from this Court. The consultation regulations have "controlling weight," *United States v. Haggar Apparel Co.*, 526 U.S. 380, 390, 392 (1999), and are "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute," *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Because nothing in 25 C.F.R. §§ 292.19–20 is contrary to IGRA, this Court should reject the County's attempt to rewrite IGRA's consultation requirement. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 598–99 (9th Cir. 2018) (affirming Department's compliance with its IGRA consultation regulations).

2. The Department is not required to defer to the County's views.

The County argues that the Department is required to defer to the views of local governments. County MSJ at 27–28. IGRA requires consultation with appropriate state and local officials but does not require that the Department defer to their views or even give them substantial weight, as the County asserts. As the County notes, earlier versions of what became IGRA required local government concurrence, but in the end Congress required only the concurrence of the State's governor. 25 U.S.C. § 2719(b)(1)(A).

The Department also did not act arbitrarily or capriciously in addressing the County's concerns with FAFB. As discussed above, the Final EIS discusses the Project's compatibility with FAFB operations. *See* AR48718–23 The FEIS also discusses how the project is consistent with local zoning codes. AR48724–25. The Department consulted with the Air Force before concluding that the Project would be compatible with FAFB operations, the JLUS, and Air Installations Compatibility Use Zone ("AICUZ"), and its conclusions were well-supported and reasonable. AR49663–71. The Department considered criteria historically used by previous base realignment and closure committees and found that the Proposed Project would have no impact on the FAFB's military value. AR48722–23. The Tribe further agreed to changes to the Project and mitigation to ameliorate any concerns regarding FAFB.

In addition, the Department's decision to issue the two-part determination over the County's objections was sound and well-supported. The Principal Deputy Assistant Secretary of the USAF in a February 3, 2015, letter "reiterated that the Proposed Project is outside the Fairchild AFB noise zones and accident potential zones and that the mitigation measures identified and agreed to by the Spokane Tribe in the Final EIS would protect the mission success of USAF operations at Fairchild AFB." AR65536. The record shows that the Air Force did not oppose the project because it was satisfied with mitigation that was itself the result of the Air Force's participation and comments.

According to the County, the Department had to specifically state why it was not deferring to the County's views. County MSJ at 31. But neither NEPA nor the APA requires such a response, and the County does not show otherwise. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978) (holding that a rulemaking "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man" (internal quotation marks omitted)); *Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1139–40 (10th Cir. 1991) (holding that agency is not required to "review every document arguably related to" the dispute when plaintiff "had numerous opportunities to present its views"); *NLRB v.*

Beverly Enterprises–Mass., Inc., 174 F.3d 13, 26 (1st Cir. 1999) (noting that agency decision maker "can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a party"). Given that IGRA clearly does not require the Department to defer to the County's views, the Department's failure to explain this legal fact does not amount to a failure "to consider an important aspect of the problem" or "evidence bearing on the issue." *See* County MSJ at 32. The County's comments regarding deference were not reasonable and did not require a specific response.

The County also argues that the Department acted arbitrarily by understating the opposition of the County and the surrounding community. This argument is without merit. Under IGRA and its regulations, the Department does not need to determine that the local community supports the project. *See* 25 C.F.R. § 292.18. The Department needed only consider whether the Project would be detrimental to the surrounding community, and the record amply explains why the Department found the Project would not cause detriment. While the Department has on occasion considered community opposition — where it was expressed in the form of a public referendum — such opposition is not "dispositive" and is appropriately addressed where "the Secretary took into account the opposition and addressed the opposition in the ROD." *Enterprise*, 2015 WL 5648925,at *17. The Department

did so here by considering all relevant comments, and the County's arguments otherwise should be rejected.

The County takes issue with the Department's statement that "[t]here is local support for the Project." AR65451. But both Airway Heights and, after their comments were addressed, the City of Spokane support the project. In any event, the record also indicates that various other local entities and individuals wrote letters supporting the Project. *See, e.g.*, AR48790 (City of Chewelah); AR49024 (Spokane City Council President); AR49401 (Stevens County Commissioners); AR65451. Further, contrary to Plaintiffs' assertion, the Department did not conceal the County's termination of the Interlocal Agreement, as the ROD notes that fact. AR 65467, n.230. The County's claims, therefore, are meritless.

C. Federal Defendants are entitled to summary judgment on Plaintiffs' NEPA claims.

1. Plaintiffs' NEPA claims must fail because economic interests are not within NEPA's zone-of-interests.

As an initial matter, Plaintiffs' NEPA claims assert purely economic interests that are not cognizable under NEPA. A plaintiff must demonstrate that its interest comes within the "zone of interests" Congress intended to protect in the statute in question. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). "NEPA is concerned with harm to the physical environment." *Ranchers Cattlemen Action Legal Fund v. USDA*, 415 F.3d 1078,

1103–04 (9th Cir. 2005) (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983)). NEPA is directed at environmental concerns and does not protect purely economic interests. *Cachil Dehe*, 889 F.3d at 606; *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005).

In *Cachil Dehe*, the Ninth Circuit dismissed a plaintiff tribe's claims that the Department's economic data and conclusions were flawed because these economic claims were not within NEPA's zone of interests. 889 F.3d at 606 (citing *Ashley Creek*, 420 F.3d at 940). Similarly, here, Plaintiffs' alleged harms are purely economic, stemming either from economic impacts on Kalispel's casino or potential economic harms to FAFB. Neither plaintiff alleges that the Project will have impacts on the environment that the Department failed to consider. Because NEPA does not protect purely economic interests, Plaintiffs' NEPA claims fail.

2. The statement of purpose and need was sufficiently broad and the range of alternatives was reasonable.

The Department properly defined the purpose and need for the Project based on the Department's policy, IGRA's statutory purpose, and the Tribe's goals. The Project's purpose and need statement was sufficiently broad as to allow meaningful consideration of several alternatives, including a non-gaming alternative.

NEPA requires analysis of the proposed action and reasonable alternatives. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1500.2(e), 1502.1, 1502.14. Agencies identify reasonable alternatives based on the purpose and need for the proposed

action. 40 C.F.R. § 1502.13. The purpose and need statement must be shaped by "the statutory context of the federal action at issue," and must be broad enough to allow for consideration of more than one alternative. *HonoluluTraffic.com v. FTA*, 742 F.3d 1222, 1230 (9th Cir. 2014). "Courts review purpose and need statements for reasonableness giving the agency considerable discretion to define a project's purpose and need." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013).

Alternatives should be chosen to illuminate whether an alternative to the proposed action "would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. The Ninth Circuit has interpreted the Council on Environmental Quality's instruction to "evaluate all reasonable alternatives," 40 C.F.R. § 1502.14, to mean enough alternatives "to permit a reasoned choice." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1100 (9th Cir. 2012). "An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives.' *HonoluluTraffic.com*, 742 F.3d at 1231 (quoting *Seattle Audubon Soc'y v. Mosely*, 80 F.3d 1401, 1404 (9th Cir. 1996)).

Contrary to Kalispel's argument, the Department defined the proposed action's purpose and need broadly enough to allow serious consideration of several

alternatives, including a non-gaming alternative. The EIS properly identified broad objectives, including advancing "the BIA's 'Self Determination' policy of promoting the Tribe's self-governance capability, and to promote opportunities for economic development and self-sufficiency of the Tribe and its members." AR49416–17. The EIS also broadly describes the Tribe's need for a reliable income source, to be self-sufficient, develop the Airway Heights property, potential profitability of Class III gaming in Airway Heights, and re-establish cash reserves to ensure stability during economic downturns. *Id*. All of these objectives are consistent with IGRA's statutory purposes. 25 U.S.C. § 2702(1), (3); *HonoluluTraffic.com*, 742 F.3d at 1230 (noting that courts must consider statutory context in assessing reasonableness of statement of purpose).

More importantly, the EIS's purpose and need statement was not so narrow that only one alternative could achieve the objectives. All the objectives could also be met by a number of different alternatives, including gaming and non-gaming projects. Although one objective included purposes specific to gaming — "potential profitability of Class III gaming in Airway Heights" — it did not preclude a non-gaming option. *See* AR48711 ("While the potential income from the non-gaming development, Alternative 3, would be inherently less likely to fully meet the purpose and need, the BIA determined that a non-gaming alternative would be a reasonable alternative . . . and that presentation of that alternative

significantly expanded the range of alternatives considered."). The EIS analyzed three development alternatives that were selected based on "their ability to meet the purpose and need" and the EIS in fact concluded that Alternatives 2 and 3 would be reasonable alternatives but would not provide as much economic benefit as the proposed project. AR65505. Thus, the four alternatives studied in detail satisfied the "rule of reason." *See Block*, 690 F.2d at 767.

The Ninth Circuit's recent decision in *Cachil Dehe Band* is instructive here. The court found that the purpose and need statement, which focused on improving the tribe's socioeconomic position and economic self-sufficiency, as well as effectuating "the Congressional purposes set out in [IGRA]," was sufficiently broad. 889 F.3d at 603–04. The Department there analyzed five alternatives, four of which were the same as the alternatives analyzed here — the proposed project, a smaller casino on the same site, a water park on the same site, and the no action alternative — as well as a casino on an alternate site. The Court upheld the analysis, finding that "[t]he range of alternatives was not 'illusory.'" *Cachil Dehe*, 889 F.3d at 604. This Court should draw the same conclusion.

Further, none of Kalispel's specific attacks on the purpose and need statement or range of alternatives has merit. First, the Department properly considered the Tribe's goals in defining the Project's purpose and need. "In determining its purpose and need statement, the agency *must* consider the statutory

context of the proposed action and the applicant's private objectives." *Protect our Cmtys. Found. v. Salazar*, No. 12CV2211-GPC PCL, 2013 WL 5947137, at *3 (S.D. Cal. Nov. 6, 2013) (emphasis added) (citing *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013), *aff'd sub nom. Backcountry Against Dumps v. Jewell*, 674 F. App'x 657 (9th Cir. 2017). This is particularly important when the applicant is a federally-recognized Indian tribe. As the Department explained in its responses to comment, "[i]t would not be consistent with the government-to-government relationship, or the basic fiduciary responsibilities of the federal government, for the BIA to ignore the purposes of the tribal government and substitute purposes that it feels are more appropriate." AR48710.

Kalispel's argument that the Department narrowed the purpose and need statement between the scoping notice and report and the Draft EIS is similarly baseless. Kalispel MSJ at 36–37. It is reasonable that the purpose and need statement would change from the scoping notice and report, which are intended to provide an opportunity for the public and other federal and state agencies to help determine the scope of the EIS and alternatives. AR21404. The original scoping notice was issued in 2009, and the Draft EIS was not issued until 2012, during which time the Tribe submitted a supplemental application and the purpose and need statement was refined. In addition, while the EIS's purpose and need

statement is more specific than the Scoping Notice's, it encompasses the same ideas of promoting the Tribe's economic development in order to achieve self-sufficiency and self-determination. And, as shown, the purpose and need statement was sufficiently broad to allow a robust alternatives analysis.

Kalispel waived any arguments about the EIS's failure to analyze alternatives involving the Tribe purchasing land elsewhere or having a third-party casino developer/manager acquire land for gaming because it did not raise issues in its comments to the Department in the Draft EIS in 2012. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) ("Persons challenging an agency's compliance with NEPA must structure their participation so that it alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration."). In *Cachil Dehe*, the Court rejected similar allegations by the plaintiff that the Department should have analyzed two additional sites when the plaintiff failed to raise them before the Department during the administrative process. 889 F.3d at 604.

In addition, the Department explained that examination of an off-site alternative would not add in expanding the range of reasonable alternatives or "further the objectives and goals of the Tribe, to which BIA gives substantial weight and deference in light of the Tribe's role as applicant." AR48712. The Tribe expressed the need to further develop the proposed project site, which was

already held in trust and over which it exercises jurisdiction. *Id.* "Consideration of off-site alternatives would require the BIA to defer meeting the Tribe's urgent needs, while speculating that the Tribe could successfully purchase, acquire into federal trust, and develop these parcels." *Id.* The Department concluded that off-site alternatives were not reasonable and the EIS therefore did not err in not discussing such alternatives.

3. The Department fulfilled its obligations to supervise its contractor.

Kalispel's argument that the Department relied upon inaccurate and incomplete data to determine the socioeconomic impact to Kalispel is not cognizable under NEPA because it goes to Kalispel's economic injuries. The *Cachil Dehe* court expressly rejected an identical argument, explaining that the "alleged experience of a purely economic harm is not cognizable under NEPA, so it is unclear how, under NEPA, a failure properly to analyze that harm is evidence of improper supervision of the NEPA process." 889 F.3d at 606

In any event, the Department relied upon appropriate economic data and properly supervised the contractor in accord with NEPA. *See* 40 C.F.R. § 1506.5(c) (if a contractor prepares an EIS, "the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents."); *see also Enterprise*, 2015 WL 5648925, at *8. Here, the Department

used Analytical Environmental Services ("AES") to prepare documents, in accordance with 40 C.F.R. § 1506.5(c), and entered into a Memorandum of Agreement with AES and the Tribe. AR65793. The agreement provided that AES would work under the Department's direction and the Department would direct and control all work on the scoping report, EIS, technical studies, and other NEPA-related documents. *Id.* The Department also independently evaluated the EIS before it was approved, and took responsibility for its scope and contents. *See, e.g.*, AR11178 (email indicating Solicitor's Office review of Draft EIS); AR11328 (email regarding call between AES and Solicitor's Office to discuss Draft EIS); AR8418 (edits from Maria Wiseman at the Office of Indian Gaming on EIS, transmitted to AES); AR8419–41 (Wiseman edits); AR8496–518 (same); AR 8519–75 (same); AR31455 (memo indicating that Office of Indian Gaming reviewed and commented on Draft EIS); AR31461 (AES submitted Draft EIS for final review and approval). The record also clearly shows that the Department reviewed the contractor's economic conclusions, as well as Kalispel's comments on the project. AR3574–75; AR 3714–15; AR4833–34.

Kalispel's "evidence" that the Department failed to supervise the contractor or did not review Kalispel's submissions is simply statements cherry-picked from emails. That the BIA does not have a financial analyst on staff in Washington, D.C., or that the contractor sent its response to Department personnel in D.C.

before receiving comment from B.J. Howerton is not evidence that the Department failed to supervise the contractor. *See* Kalispel MSJ at 43. Nor does the Hartman memorandum indicate that the Department had not reviewed or considered the economic data before that time, as Kalispel asserts. *Id.* at 42. Kalispel has not overcome the "presumption of regularity [that] attaches to the actions of Government agencies." *See USPS v. Gregory*, 534 U.S. 1, 11 (2001); *Enterprise*, 2015 WL 5648925, at *8 ("While the Court does note the minimal nature of BIA's participation, the Court does not consider this to be sufficient to conclude Defendants acted arbitrarily and capriciously.").

Further, NEPA does not require that an agency have its own experts on staff for all areas. *See EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) (holding that agency met NEPA responsibilities despite relying on experts outside the agency). And "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if . . . a court might find contrary views more persuasive." *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (internal quotations and citations omitted). Here, the Department reviewed Kalispel's submissions and is entitled to rely on its own experts.

D. The Department did not violate its trust responsibility.

Kalispel is correct that the Department owes it, like all federally recognized tribes, a fiduciary duty but the United States' trust responsibility "does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006); *see also Hopi Tribe v. EPA*, 851 F.3d 957, 960 (9th Cir. 2017); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175–78 (2011) (characterizing United States' trust relations with tribes).

That is especially the case where, as here, providing special solicitude for one tribe's concerns under a statute would come at the expense of another tribe whose interests are also meant to be protected and promoted by the statute at issue. *See Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) (United States "cannot favor one tribe over another"); *Nance v. EPA.*, 645 F.2d 701, 711–12 (9th Cir. 1981) (no breach of trust where there are "conflicting fiduciary responsibilities" to two tribes and applicable federal statutes provide "adequa[te] procedural protections" for the tribe's concerns). Here Congress intended to IGRA to promote "tribal economic development, self-sufficiency, and strong tribal governments" through gaming for *all* tribes and that means implementing the statute even-handedly for all tribes.

E. The County's remaining objections are without merit.

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

On March 31, 2014, the County submitted a comment letter arguing that the Air Force should modify Accident Potential Zones ("APZ") that it had designated for FAFB in 2007 to include the project site. AR3668–69. Because the FEIS had relied on the Air Force's current designation of APZs, modification of the APZs to include the site would likely require new NEPA work, which the County requested, along with a reassessment of the Secretarial Determination. AR3669-70. The County's request was based on information "the Air Force provided to BIA," which it obtained through Freedom of Information Act ("FOIA") requests. AR3669. The Department forwarded the County's request to the Air Force which responded on July 29, 2014. AR3433. The Air Force noted that the FOIA-released material the County relied upon "does not contain any new information" and concluded: "It was the consensus of all the organizations that the Fairchild APZs are appropriately aligned in accord[ance] to the Air Force AICUZ policy and the AICUZ DODI." *Id.*[12]

[12]The City of Airway Heights opposed the County's request given that "the expansion of APZ's to cover the area suggested by the County would result in the

The County argues the Department erred by relying on the Air Force's response to its concerns about the current APZs. At the outset, the County is not arguing that the Department "failed to consider an important aspect of the problem," *Motor Vehicle Mfrs.*, 463 U.S. at 43, because the Department did consider the Air Force's APZs in its decision. Instead, the County seeks to create a new "aspect of the problem" by urging the Air Force to designate new APZs and *then* to require supplementation of the Department's NEPA work to consider those new APZs. The entire argument is meritless.

The County first contends that the Air Force's response falls short of the "reasoned explanation" required by the APA. Kalispel MSJ at 37. But the Air Force explained that the County's arguments were based on information the Air Force had already considered (because it was the Air Force's information) and thus provided no basis for reconsideration of anything. AR3433. But more to the point, the County's "argument misses the mark, however, because the [Air Force] is not a party to this action." *Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

APZs covering most of the City of Airway Heights, effectively halting growth of the City." AR65465; *see* AR3578–82.

The County next challenges the Department's reliance on the Air Force's response. ECF No. 82 ("County MSJ") at 37–38. It cites cases for the proposition that agencies cannot "blindly" rely on Biological Opinions provided to them in the context of complying with the Endangered Species Act ("ESA"). In that context, however, the Ninth Circuit is clear that an agency *can* rely on such opinions: "even when the . . . opinion is based on 'admittedly weak' information, another agency's reliance on that opinion will satisfy it obligations under the Act if a challenging party can point to no 'new' information – *i.e.*, information the [consulting agency] did not take into account – which challenges the opinion's conclusions." *Pyramid Lake*, 898 F.2d at 1415; *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010) (same). As noted, the Air Force explained "[t]he briefing does not contain any new information." AR3433. But even if it did, the Department had done all that was needed by passing such information to the Air Force to see if there was any basis to revisit the Department's reliance on the current APZs.

Finally, even if there were merit to the County's argument on this score, there could be no relief because any error here would be harmless. Error is harmless where it "*clearly* had no *bearing* on the procedure used or the substance of the decision reached." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (citation and internal quotation marks

omitted). A remand to the Department would be futile because, in the end, only the Air Force can determine whether it is appropriate to designate new APZs.

2. The Court should apply settled principles of APA law in reviewing the Department's finding of no detriment and conclude that the finding was reasonable.

The County's final argument begins as a challenge to whether the Tribe's project complies with the JLUS but devolves into a bid for the Court to depart from settled APA law and defer to the County's views, rather than the agency Congress tasked with making Secretarial Determinations. County MSJ at 38–44. First the County argues that the project does not comply with JLUS strategy 50 which provides that "[n]on-residential uses in MIA 4[13] can have a maximum occupancy of 150 persons per gross acre. Gross acreage is measured based on the site for a given use." AR49668. Gross acreage is further defined to include "the building or structure and land area associated with that development (parking, storage, etc)." *Id.* The FEIS explains that assessing the project area against projected employees and average daily patronage, the anticipated population density per gross acre satisfies Strategy 50's 150-person ceiling. *Id.*

[13] MIA 4 means Military Influence Area 4. For a discussion of this terminology within the JLUS, *see* AR49562-63. The western half of the project area falls within MIA 4. AR49563.

The County attacks this result by attempting to rewrite Strategy 50 to exclude parking, County MSJ at 40–41, and then suggesting that instead of applying Strategy 50, the Department should apply a different standard proposed "[a]fter the JLUS was finalized." AR52738 n.15. Like the County's request for new APZs, this is not so much an attack on the decision as an attempt to change the goal posts by inserting new standards.

Next, the County argues that it, not the Department, is the expert when it comes to safety issues. County MSJ at 42. However, the relevant expertise here involves determining whether the Tribe's proposed gaming facility will be detrimental to the surrounding community and Congress tasked the Department, not the County, with that responsibility under IGRA. It is blackletter law that this Court may not substitute its or the County's judgment for the Department's. *Haw. Helicopter*, 51 F.3d at 215.

In any event, the Air Force, not the County, is the expert when it comes to airport safety — as the County presumably recognizes by next arguing that the Air Force's neutrality was merely a façade. County MSJ at 42–43. As discussed above in Section V.B., the County's argument is meritless because the Air Force agreed that mitigation measures would address its concerns. AR63755–56. There is no basis to look behind the Air Force's statements or its conclusion that the mitigation will avoid detrimental impacts on FAFB or the surrounding community.

3. The Department properly determined that the Project's impacts would be mitigated.

IGRA requires that applications for two-part determinations include information about "anticipated costs of impacts to surrounding community and identification of sources of revenue to mitigate them," 25 C.F.R. § 292.18(d), but does not require all negative impacts be mitigated. *Stand Up*, 879 F.3d at 1187 (approving district court's findings that "[a]ll new commercial developments are bound to entail some [unmitigated] costs").

The Department determined that Project impacts would be mitigated. In part, this decision was based on payments that the Tribe agreed to make to cover the costs of public services for the Project. The County, the Tribe, and the City are all parties to the Intergovernmental Agreement that ensures adequate public services for the Project, including sewer and water service and street improvements to offset project-related traffic impacts. *See* AR65468. The Tribe and the City also entered into a Memorandum of Agreement ("MOA"), which requires the Tribe to pay the City to compensate for services such as fire protection, emergency medical services, and road maintenance. AR20480. The MOA also states that "the City shall be responsible for payments to the County pursuant to an agreement between the City and the County." AR20483.

The County argues that because it made a political decision to terminate the Interlocal Agreement, which outlined the terms and conditions by which the City

would share the Tribe's payments with the County, shortly before the Final EIS was issued, it will not be compensated by Airway Heights pursuant to that agreement and the Department thus erred in determining that the Project's impacts would be mitigated. In other words, the County seeks to use its self-inflicted wound as a basis to overturn the Department's decision on the ground of unmitigated impacts. The Tribe is still obligated to make payments to the City pursuant to the MOA and Intergovernmental Agreement ("IGA"). The County's decision to forfeit its share of the payments or not to negotiate a new agreement with the City does not create an APA violation.

In any event, even if the County will not receive mitigation payments pursuant to the Interlocal Agreement, the Department's statements were not unreasonable. The Tribe worked closely with the City (the primary provider of services, such as sewer and water to the casino) to determine the casino's impacts and to mitigate them through payments under the MOA and IGA. And contrary to the County's argument, the Department is required to consider Intergovernmental Agreements. *See Stand Up*, 879 F.3d at 1187–88; 25 C.F.R. § 292.18(g).

The Department also reasonably found that the County will benefit from the casino. The Department relied on a number of factors, not just revenues from the MOA and IGA, as the County implies. The project is expected to generate substantial revenue for the County due to construction costs, and to create

construction and other jobs. In addition, the project will result in substantial tax revenues. The County is also entitled to recurring revenues through the Tribal-State Gaming Compact, AR65470, and will receive payment through the Intergovernmental Agreement, to which it is still a party. In short, the project is reasonably expected to benefit the County.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court grant its motion for summary judgment and deny Plaintiffs'.

Respectfully submitted on this 6th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing ("NEF") to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identities recipients of electronic notice.

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

DATED this 6th day of March, 2019.

/s/ Devon Lehman McCune
DEVON LEHMAN McCUNE
Senior Attorney