No. 19-35808

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KALISPEL TRIBE OF INDIANS,
Plaintiff/Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants/Appellees,

and

SPOKANE TRIBE OF INDIANS,
Intervenor-Defendant/Appellee.

Appeal from the United States District Court
for the Eastern District of Washington
No. 2:17-cv-00138 (Hon. Wm. Fremming Nielsen)

FEDERAL APPELLEES' ANSWERING BRIEF

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INTRODUCTION

Under the framework of the Indian Gaming Regulatory Act (IGRA), the Department of the Interior (Interior) found that a casino proposed by the Spokane Tribe of Indians (Spokane) "would not be detrimental to the surrounding community." The Kalispel Tribe of Indians (Kalispel) challenges that decision, which was rendered after almost a decade of consultation, public comment, analyses, and studies, including consideration of reports and submissions provided by Kalispel itself. Kalispel's asserted injury is the anticipated reduction in revenue from its own casino resulting from competition from Spokane's new establishment.

The district court granted summary judgment dismissing all of Kalispel's claims on the merits. As elaborated herein, that judgment should be affirmed.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Kalispel's claims arose under federal law, namely IGRA and the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. (APA).

(b) The district court's judgment was final because it disposed of all claims against all defendants. 1 Excerpts of Record (E.R.) 122-31. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The judgment was entered on July 25, 2019. 1 E.R. 132. Kalispel filed its notice of appeal on September 23, 2019, or 53 days later. 3 E.R. 564-67. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether Interior reasonably determined that Spokane's proposed gaming would not be "detrimental to the surrounding community" for purposes of IGRA Section 2719(b)(1)(A), notwithstanding acknowledged impacts to Kalispel's casino revenue.

2. Whether Interior's determination was consistent with Interior's trust obligation to both tribes.

STATEMENT OF THE CASE

A. Statutory and regulatory background

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). Under IGRA, gaming is generally permitted on any lands that the United States holds in trust for the benefit of an Indian tribe. *Id.* § 2703(4)(b). But IGRA also generally prohibits gaming on lands that Interior took into trust after October 17, 1988. *Id.* § 2719(a). The Act, however, provides exceptions under which gaming may be conducted on lands taken into trust after that date

where the land is not contiguous to the tribe's reservation. *See id.* § 2719(a), (b)(1). The exception relevant here provides that gaming may be permitted if

> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines [1] that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and [2] 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. § 2719(b)(1)(A).[1] Interior refers to this as a "two-part determination," and we refer to it herein as the "Determination."

Interior published a final rule implementing the two-part determination in 2008. *See Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354, 29,371 (May 20, 2008). The rule "establishes a process for submitting and considering applications from Indian tribes seeking to conduct class II or class III gaming activities on lands acquired in trust after October 17, 1988." *Id.*[2] The rule's preamble explains that, as a component of Interior's two-part determination, it "examine[s] detrimental effect on the surrounding community and nearby tribes, including detrimental financial effects." *Id.* at 29,371. Two-part determinations

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[1] Kalispel does not challenge either Interior's determination that a casino would be "in the best interest of" the Spokane Tribe or the Governor's concurrence.

[2] "Class II" gaming means bingo and card games, not including banking card games. 25 U.S.C. § 2703(7). "Class III" gaming includes slot machines and house banking games, including card and casino games. *Id.* § 2703(8).

"present a fact-based inquiry," *id.* at 29,361, and Interior will "evaluate detriment" and "consider detrimental impacts" of proposed gaming on a "case-by-case basis based on the information developed in the application and consultation process," *id.* at 29,373, 29,356. Interior will also conduct an evaluation under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., to address the potential impacts of proposed gaming as required under that statute. 73 Fed. Reg. at 29,369, 29,374.

Interior's final 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." 25 C.F.R. § 292.2. "Surrounding community" is defined as "local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment." *Id.* The regulations identify information that Interior considers in determining whether the proposed gaming establishment will not be detrimental to the surrounding community. *Id.* §§ 292.16, 292.18, 292.21. Such information includes the "[a]nticipated impacts on the economic development, income, and employment of the surrounding community," along with "[a]ny other information that may provide a basis" for Interior's "[d]etermination whether the proposed gaming establishment would or would not be detrimental to the surrounding community." *Id.* §§ 292.18(c), (g).

The regulations also provide for the consultation process that must be conducted for two-part determinations. *Id.* § 292.19; *see also* 25 U.S.C. § 2719(b)(1)(A).

B. Factual background

1. The Spokane Tribe

The Spokane Tribe is a federally recognized Indian tribe. 1 E.R. 55. The Tribe's ancestral lands included more than 3 million acres of land in what is now eastern Washington State. 1 E.R. 56. The Tribe now has a reservation located approximately 40 miles northwest of the City of Spokane in Steven and Lincoln Counties, Washington. 1 E.R. 55.

The Spokane Tribe faces significant economic challenges. 1 E.R. 55-69; 1 S.E.R. 121-24, 142, 169, 172, 173. It has an unemployment rate nearly double that of the surrounding communities. 1 E.R. 67, 118. Twenty-five percent of the families on its reservation live in poverty. The Spokane Tribe cannot currently provide sufficient services to meet its needs for tribal housing, health care, education, and other assistance programs due to declining revenues from its traditional economic activities, which are no longer viable as sources of sustainable income. 1 E.R. 67-69, 118. Spokane's fishing industry, which provided a source of food and income from its early history until the late 1930s, ended in 1939. 1 E.R. 56-57, 118. Thereafter, Spokane undertook uranium mining and timber harvesting on its reservation as sources of employment and revenue. *Id.* The

mining operations terminated due to a decline in the uranium industry. *Id.* The mining activities also led to problems, such as contamination of groundwater and soils on the reservation. 1 E.R. 56-59, 118-19. An extensive environmental remediation process is ongoing at the Midnite Mine Superfund site located on Spokane's reservation lands. 1 E.R. 9, 57-58, 118-19, 142. Spokane continues to engage in timber production, but its timber revenue fell 65 percent from 2007 to 2009 and remains an unstable source of revenue. 1 E.R. 118.

Before the events at issue in this case, Spokane operated two small and remotely located gaming facilities: the Chewelah Casino, approximately 42 miles north of the City of Spokane, and the Two Rivers Resort Casino, a seasonal facility located approximately 45 miles northwest of the City. 1 E.R. 60; 1 S.E.R. 143. Due to the economic downturn of 2008 and increasing competition from other gaming venues, including Kalispel's casino, Spokane's two facilities experienced an average annual decline of five percent from 1998 to 2009. 1 E.R. 60; 1 S.E.R. 172a-172b. Spokane closed the Two Rivers Resort Casino in 2018. 1 S.E.R. 175.

2. Kalispel gaming on Spokane's aboriginal land

In 1994, the United States acquired in trust approximately 40 acres of land in the City of Airway Heights, Spokane County, Washington, for the benefit of the Kalispel Tribe. 1 E.R. 7; *see also* 1 S.E.R. 161 (map showing Airway Heights approximately 19 miles west of Spokane). Airway Heights is located within

Spokane's aboriginal territory. 1 E.R. 119. Kalispel sought Interior's approval to develop a casino on that trust land. *Id.* Spokane expressed concerns that Kalispel's casino would negatively impact Spokane's existing casinos, which were located approximately 42 miles (Chelewah) and 45 miles (Two Rivers) from Airway Heights. 1 E.R. 60, 119. In 1997, Interior issued a two-part determination, concluding that the Kalispel casino would be in the best interest of Kalispel and would not be detrimental to the surrounding community. 1 E.R. 119. In that two-part determination, Interior "recognized that the Spokane Tribe's existing casinos would experience intense competition from the new Kalispel operation, but decided that competition alone was not sufficient to conclude that the project would be detrimental to the surrounding community." *Id.* The Governor of Washington concurred. *Id.*

Kalispel developed its Northern Quest Casino and Resort on the acquired trust lands, and the casino is a "successful Class III gaming facility" that has "for several years brought increased economic opportunity to the Kalispel Tribe through its gaming revenues." *Id.*; 1 E.R. 106, 247-248. For almost two decades, Kalispel has experienced "little or no direct competition" to its casino in the Spokane Tribe's aboriginal territory. 1 E.R. 119.

3. Spokane proposes a casino on its trust lands

In 2001, the United States acquired approximately 145 acres of land in Airway Heights in trust for the Spokane Tribe for economic development purposes. 1 E.R. 55. The trust land is within Spokane's aboriginal territory and is in an area of historical significance to Spokane. 1 E.R. 119. In 2006, Spokane asked Interior to make a two-part determination that the land was eligible for gaming under IGRA Section 2719(b)(1)(A). Spokane envisioned a casino as part of a mixed-use development project that would include Class II and Class III gaming. 1 E.R. 55. Spokane's proposed casino (the first phase of which is now complete) is located within five miles of several of Spokane's permanent villages along the Spokane River, within five miles of several of Spokane's key fishing locations, and inside a critical fishing harvest area for Spokane. 1 E.R. 80. Within a five-mile radius of the casino are more than 60 documented sites of historic, archaeological, cultural, or spiritual significance to Spokane. *Id.* Spokane's casino is approximately two miles from Kalispel's existing Northern Quest Casino. 1 E.R. 20.

4. Interior's two-part determination for the Spokane Tribe's gaming establishment

Interior conducted a two-part determination for the Spokane's proposed gaming establishment over nearly a decade. 1 E.R. 125. In accordance with IGRA Section 2719, that process included consulting and deliberating with the

appropriate state and local officials as well as with Kalispel and its experts to assess the potential impacts of the establishment on the surrounding community.

a. Interior's NEPA analysis examining potential economic impacts of the Spokane Tribe's proposed gaming on Kalispel's casino

As part of its two-part determination, Interior prepared an Environmental Impact Statement (EIS) pursuant to NEPA to analyze the potential environmental effects of Spokane's proposed project. *See Protect Our Communities Foundation v. LaCounte*, 939 F.3d 1029, 1034-35 (9th Cir. 2019) ("NEPA requires agencies to prepare an EIS for 'major Federal actions significantly affecting the quality of the human environment.' " (quoting 42 U.S.C. § 4332(2)(C)); 2 S.E.R. 274 (concluding that the issuance of the two-part determination was a "major federal action" for purposes of NEPA). The EIS considered several alternatives to the Spokane's project. The selected alternative is "Alternative 1," or the "preferred" project. 1 E.R. 8-9; 1 S.E.R. 95-107; 40 C.F.R. § 1502.14. The preferred project is to be constructed in three phases. 1 S.E.R. 95. Under the initial plan, 2015 was the expected date of final build out for the project. An updated plan established that construction of the first phase would begin in 2012, the second in 2015, and the third in 2019. *Id.* Phase I was to begin operation in 2013, and the second and third phases were to begin operation in 2016 and 2020, respectively. *Id.*

As required under NEPA's implementing regulations, Interior evaluated the potential environmental impacts and socioeconomic impacts of the casino. 40 C.F.R. § 1508.14. Interior commissioned multiple contractors with expertise in gaming markets and economic forecasting to provide expert analyses of the potential impacts of the proposal. *See, e.g.*, 1 S.E.R. 94-107-39. These analyses included extensive study of competitive impacts to casinos within the regional area of Spokane's proposed gaming, including Kalispel's casino in particular. 1 S.E.R. 108-134; 3 E.R. 423-78. Interior included these expert reports with the draft EIS and incorporated information, data, analyses into the NEPA document as relevant.[3]

At Interior's express request, one of its experts prepared a document that was devoted solely to evaluating and responding to the comments, information, and technical reports that Kalispel submitted to Interior during the NEPA process predicting impacts to Kalispel and its casino revenues. 3 E.R. 423-78. The document concluded that the expert reports provided by Kalispel were deficient in various respects, including an incorrect definition of the residential market area, a deficient and contradictory application of gaming participation rates, and a failure to account for total gaming market revenues. 3 E.R. 423-46. Interior included the

[3] Although NEPA does not require Interior to address the specific issues that must be addressed under IGRA, Interior conducted certain IGRA-based analyses within the NEPA framework and "expanded" the scope of the final EIS to explain potential impacts to Kalispel.

response document as an appendix to the final EIS and incorporated relevant information, data, and analyses into the NEPA document.

Interior concluded that, based on all of the information before it, the project could have economic impacts on Kalispel, but any impact would likely be temporary due to gaming market growth in the area that would result from a second casino being introduced into the location of the two casinos. *See, e.g.*, 1 S.E.R. 149-51, 257-58; 2 S.E.R. 302-304. Interior further concluded that any reduction in gaming revenue as a result of competition would not impair Kalispel's ability to provide essential government services to its membership. *See, e.g.*, 1 E.R. 111-12; 2 S.E.R. 302-304.

b. Interior's two-part determination, the Governor concurrence, and Spokane's West Plains casino opening

In June 2015, Interior issued a two-part determination concluding that the proposed casino project would be in the best interest of the Spokane Tribe and its members and would not be detrimental to the surrounding community. 2 S.E.R. 240-360.

Interior's Determination explained the information and analyses that were used to evaluate the potential impacts of Spokane's gaming establishment on the surrounding community. Interior found that, based on its analysis of the submitted information and financial projections, the Spokane's gaming will (1) provide much

needed revenue for the Tribe; (2) provide a significant economic stimulus to the region, creating employment and contracting opportunities; and (3) stimulate the existing local tourist industry and benefit the local businesses and economy by creating an influx of non-resident consumers. 2 S.E.R 267-69, 273-74.

Interior's Determination also addressed the potential effects of Spokane's gaming on Kalispel. 2 S.E.R. 296-305; *see also* 2 S.E.R. 176-229; 1 S.E.R. 149-52, 159b, 159c. As it had explained in the draft and final EIS analyses, Interior observed that its experts had studied those potential impacts and responded directly to Kalispel's concerns. 2 S.E.R. 296-305. Based on their study, those experts concluded that new competition would impact the Kalispel's casino revenues; at the same time, however, Kalispel's projection of the extent of that impact was unsupported, and the market saturation analysis on which Kalispel relied "over-inflates market saturation and fails to account for expected market growth." 2 S.E.R. 305; *see also* 2 S.E.R. 296-305.

Based on the data and the analyses, Interior concluded that (1) "the Spokane area is sufficiently large to support three casinos of the magnitude of Northern Quest [Kalispel's casino]," 2 S.E.R. 302; (2) Kalispel was projecting very aggressive impacts" to its casino revenue but had provided "insufficient supporting analysis or evidence from other markets," 2 S.E.R. 302-03; and (3) "based on an analysis of comparable situations," the drop in revenue from competition is

expected to "diminish after the first year . . . once local residents experience the casino and return to more typical spending patterns," *id.*. After the period, "normative revenue growth for [the Kalipel's casino] is expected to resume." 2 S.E.R. 303. Interior concluded that effects on the Kalispel "will be ameliorated by market growth over time and would not prohibit the Kalispel tribal government from providing essential services and facilities to its membership." *Id.*

Interior sent its two-part determination to then-Governor Jay Inslee requesting his concurrence therein. 2 S.E.R. 240-43. In the forwarding letter, Interior referred to its "commitment to implementing the intent of IGRA" and explained that "economic development for Indian tribes is a top priority." 2 S.E.R. 243. Interior further explained that "[a]s federal resources shrink, tribes must necessarily become more self-sufficient to sustain their communities." *Id.* Interior also addressed Kalispel and its concern that the proposed establishment would harm the Kalispel's casino revenues. 2 S.E.R. 241-42. Interior stated its position that "IGRA does not guarantee that tribes operating existing facilities will conduct gaming free from competition." *Id.*

The Governor concurred in Interior's Determination in 2016. Phase I of Spokane's West Plains Casino Resort commenced operations in 2018, twelve years after the Spokane sought approval for a gaming establishment. 1 E.R. 123.

C. Proceedings below

Kalispel filed its complaint in April 2017. 1 S.E.R. 1-84. In its cross-motion for summary judgment, Kalispel challenged Interior's two-part determination, arguing among other things that (1) Interior's conclusions about the potential effects of gaming competition on Kalispel were arbitrary and capricious; and (2) under IGRA, Interior has a trust responsibility to Kalispel that requires Interior to give special weight to the harm that Kalispel might experience due to the Spokane casino. Interior filed a cross-motion for summary judgment. The Spokane Tribe successfully moved to intervene and likewise cross-moved for summary judgment.

The district court denied Kalispel's motion and granted summary judgment in favor of Interior and Spokane. 1 E.R. 122-31. Regarding the potential impact on Kalispel, the court found that (1) Interior spent almost ten years investigating Spokane's application, and Interior's process included "seeking expert review, and working with local officials and governments prior to issuing a decision"; (2) Interior "squarely addressed Kalispel's concerns regarding lost profits at the Northern Quest Casino"; and (3) Interior's expert concluded that "while the Kalispel may suffer in the short term, eventually the profits would rebound and both tribes would benefit." 1 E.R. 125.

The district court also rejected Kalispel's argument that Interior violated its trust relationship with Kalispel. 1 E.R. 130. The court held that the federal government "owes a duty of trust to all tribes; however, the scope of that duty must be established by statute and that trust duty necessarily equally applies to all tribes so the Government may not favor one tribe over another." *Id.* The court concluded that, here, the interests of the Spokane Tribe and Kalispel Tribe "are not aligned," and so Interior fulfilled its statutory duty under IGRA by "examin[ing] the benefits and harm to all effected parties." *Id.*

SUMMARY OF ARGUMENT

IGRA Section 2719(b)(1)(A) authorizes tribal gaming on trust lands acquired after 1988, provided that Interior determines that the proposed gaming establishment "would not be detrimental to the *surrounding community*." In the late 1990s, Kalispel applied to Interior, asking it to make a determination under Section 2719(b)(1)(A) that certain of Kalispel's trust lands—located on Spokane's aboriginal land in Airway Heights, Washington—were eligible for gaming. Interior approved Kalispel's application. Approximately ten years later, Spokane applied to Interior under the very same statutory provision, asking it to make a determination for a gaming establishment on Spokane's trust and aboriginal lands in Airway Heights. Interior's determination approving Spokane's application is the subject of this appeal.

In this Court, Kalispel's central concern is that Spokane's new casino will draw patrons from Kalispel's own casino, thereby reducing its casino revenue. The district court correctly concluded that Interior squarely addressed Kalispel's concern regarding lost revenue and that Interior was not arbitrary or capricious in determining that Spokane's new casino "would not be detrimental to the surrounding community," which includes Kalispel.

1. Interior's determination under IGRA Section 2719(b)(1)(A) that Spokane's casino would not be "detrimental to the surrounding community" was rational and supported by substantial evidence. IGRA is silent regarding how Interior should evaluate a "detrimental" impact to the "surrounding community." Interior's interpretation, which is embodied in unchallenged regulations, is wholly consistent with the Act in that it fulfills IGRA's purposes of promoting tribal economic development and self-sufficiency. In particular, Interior's scope of analysis for determining whether a proposed casino will be "detrimental to the surrounding community" is designed (a) to determine the potential impacts to the "surrounding community" as a whole, not to any single entity within the "surrounding community"; (b) to determine whether "nearby Indian tribes," which are included in the regulatory definition of "surrounding community," will continue to be able to provide essential government services and programs for their members; and (c) to seek to ensure that IGRA does not function as a mechanism

for barring tribal-gaming competition or preserving the monopoly status for any first-in-time tribal gaming facility. Interior's considerations were entirely reasonable.

Likewise reasonable were Interior's analysis and conclusion that, even with approval of the Spokane casino, Kalispel would be able to provide essential services and programs for its members; and that Kalispel's casino would still be able to operate in the long-term. Interior based this determination on substantial evidence, including its own analyses, the gaming market studies and analyses conducted by its experts (which included specific evaluations of financial impacts to Kalispel), and the reports and information submitted to Interior by Kalispel. The fact that Kalispel disagrees with Interior's conclusions does not invalidate those conclusions or render them unreasonable.

2. Interior's consultation process for its Section 2719(b)(1)(A) determination was consistent with Interior's general trust obligations to both the Spokane and Kalispel tribes. Kalispel is wrong to presume that Interior has a trust duty that is specific to Kalispel alone. Thus, the specific trust-related concepts on which Kalispel relies cannot control under Section 2719(b)(1)(A). Rather, Interior has a general trust obligation *both* to the tribe seeking to commence a gaming establishment (here, Spokane) *and* to any "nearby Indian tribe" (here, Kalispel). Interior fulfilled that general trust obligation to these two tribes by balancing the

tribal interests and considering more than merely that Kalispel will experience some casino revenue reductions from Spokane's casino. In addition, Interior reasonably considered that (a) the arguments advanced by Kalispel derive from the happenstance that Kalispel happened to be the first-in-time to seek approval under Section 2719(b)(1)(A) to game on Spokane's aboriginal lands; (b) nothing in IGRA mandates a priority system favoring the first tribal casino in time; and (c) Kalispel's argument for special "rights" and "benefits" as a "nearby Indian tribe" is contrary to both the Act's overall purposes and Interior's obligation to treat all Section 2719(b)(1)(A) applicants equitably.

The district court judgment should be affirmed.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo to determine whether Interior's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1146 (9th Cir. 2020) (citing 5 U.S.C. § 706(2)(A)). The scope of review under the arbitrary and capricious standard is "narrow," *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1096 (9th Cir. 2020), and "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision," *Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Service*, 475 F.3d 1136, 1140 (9th Cir. 2007). If an

agency's findings are supported by substantial evidence on the record as a whole, a reviewing court is not free to upset them in favor of other findings, even if those also could be supported by substantial evidence. *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992); *Alaska Eskimo Whaling Commission v. EPA*, 791 F.3d 1088, 1095 (9th Cir. 2015).

ARGUMENT

I. Interior reasonably determined that gaming on Spokane's Airway Heights land would not be "detrimental to the surrounding community."

The gravamen of Kalispel's position on appeal is that it will experience economic impacts from gaming competition and reduced casino revenue and, for that reason, Interior violated IGRA Section 2719(b)(1)(A) by concluding that Spokane's casino would not be "detrimental to the surrounding community." That argument is founded on three flawed premises: (1) Interior may not render a two-part determination in favor of a proposed casino if any *individual entity* within the defined "surrounding community" will experience adverse impacts; (2) the criterion for determining whether a proposed casino would be "detrimental to the surrounding community" is whether there will be "*any* harm" to any entity within the "surrounding community"; and (3) Interior may not render a favorable two-part determination if competition from the proposed casino will cause "any harm" to a

"nearby Indian tribe's" casino from gaming revenue losses. None of Kalispel's foundational premises is borne out by IGRA or its implementing regulations.

A. Interior's framework for determining whether Spokane's casino would be "detrimental to the surrounding community" was consistent with IGRA and its implementing regulations.

Throughout its opening brief, Kalispel makes general and conclusory assertions challenging Interior's analysis of whether Spokane's casino will be detrimental to the surrounding community." Kalispel's criticisms indicate a misapprehension of the fundamental elements of Interior's analysis.

The preamble to the unchallenged IGRA regulations explains that, as a component of Interior's two-part determinations, Interior examines detrimental effects on the surrounding community, including "detrimental financial effects." 73 Fed. Reg. at 29,371. The determinations "present a fact-based inquiry," *id.* at 29,361, in which Interior "evaluate[s] detriment" and "consider[s] detrimental impacts" of proposed gaming on a "case-by-case basis based on the information developed in the application and consultation process," *id*. at 29,373, 29,356. More fundamentally, however, Interior conducts its determinations in a manner that fulfills IGRA's express purposes, which include "promoting tribal *economic development* and *self-sufficiency*." 25 U.S.C. § 2702 (emphasis added).

Thus, as the Determination in this case reveals, Interior's framework for determining whether a proposed casino will be "detrimental to the surrounding

community" requires it (1) to determine the potential impacts to the "surrounding community" *as a whole*, not any individual entity; (2) to determine whether the "nearby Indian tribes," are, and will continue to be, able to provide essential government services and programs for their members; and (3) to seek to ensure that IGRA does not function as a tool for preventing tribal-gaming competition or preserving monopoly status for first-in-time tribal gaming facilities. Interior's considerations are wholly consistent with IGRA.

1. IGRA and IGRA regulations focus on the "surrounding community" as a whole.

IGRA authorizes gaming on lands taken into trust after 1988 if Interior determines (among other requisites) that the proposed gaming establishment "would not be detrimental to the *surrounding community*." 25 U.S.C. § 2719(b)(1)(A) (emphasis added). Interior's regulations—which Kalispel does not challenge—define "surrounding community" as "local governments and nearby Indian tribes" located within a 25-mile radius of the proposed gaming facility. 25 C.F.R. § 292.2. Kalispel seeks to set aside the Determination in this case based solely on allegations of competition-based harm to the Kalispel Tribe alone. Neither IGRA nor the regulations impose such a myopic focus on Interior's two-part determinations.

IGRA and its regulations require Interior to take a holistic approach to the determinations. *Stand Up for California v. U.S. Dep't of Interior*, 204 F. Supp. 3d

212, 269 (D.D.C. 2016) (IGRA requires Interior to determine whether the proposed facility "would be detrimental to the surrounding community *as a whole*" (internal quotation marks omitted and emphasis added)). The plain language of the Act and the regulations bears that out. IGRA uses the comprehensive, unmodified term "surrounding community" to identify the subject of the two-part determinations. Thus, Congress has made clear that its concerns about impacts from proposed gaming establishments are directed to the collective "surrounding community" in the aggregate, not to any single unit within the community. The regulations provide some specificity, but the definition there consists of two components—i.e., "local governments and nearby Indian tribes"—that operate conjunctively to define "surrounding community," thus confirming that the definition encompasses more than just an individual entity. Therefore, Interior must render its determinations with respect to both components, and all entities contained therein, which together constitute the complete "surrounding community."

When Interior conducts a two-part determination, it might conclude (for example) that there will be potential adverse impacts to a particular "nearby Indian tribe" within the surrounding community. But a conclusion about one entity alone cannot constitute Interior's *determination* whether the gaming will be "detrimental to the surrounding community." Such a standard would require Interior to reject proposed gaming based solely on a potential adverse effect to a particular member

of the community even if the proposal would be beneficial to the community as a whole. Thus, Interior may not properly base its two-part determination regarding Spokane's gaming on the potential impacts to the Kalispel alone. Instead, Interior was obligated to (1) consider the particular impacts to Kalispel, but do so within the broader context of the surrounding community as a whole; and (2) base its determination on the assessment of potential impacts to the collective "surrounding community." Interior fulfilled that obligation here.

Kalispel does not grapple with IGRA's broad language or the regulations' dual-pronged definition. Instead, Kalispel requests that the Spokane Determination be set aside based solely on allegations of competition-based harms to Kalispel alone, simply *assuming* that those Tribe-specific harms required Interior to conclude that Spokane's casino would be "detrimental to the surrounding community." *See e.g.*, Opening Brief 29-33 36, 37-41, 42. As we have shown, nothing in IGRA or its implementing regulations supports such a myopic interpretation.

2. Interior's framework for potential financial impacts to Kalispel is consonant with IGRA's purposes.

In keeping with IGRA's objective of promoting tribal economic development and self-sufficiency, Congress limited the ways in which tribes may use gaming revenues, requiring generally that they support tribal government functions. IGRA provides that

> net revenues from any tribal gaming are not to be used for purposes other than—(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; [or] (iii) to promote tribal economic development.

25 U.S.C. § 2710(b)(2)(B).

Against that statutory backdrop, Interior's main objective in determining the impacts of proposed gaming on a "nearby Indian tribe" is to assess whether that tribe is able—and will continue to be able—to provide essential government services and programs for its members in a manner consistent with IGRA. Interior accomplishes this principally by assessing the impacts to the tribe's operating governmental budget and revenue allocation plans. *See, e.g.*, 2 S.E.R. 298 & n.299; 2 S.E.R. 214, 303, 328-29; 1 S.E.R. 149-51, 160, 166-67. This approach ensures that, consistent with IGRA's objectives, all tribes are able to engage in gaming for the fundamental purposes of promoting self-sufficiency and economic development, which are achieved, principally, by providing necessary services to their members. 25 U.S.C. § 2702. Accordingly, Interior does not use the determination process to discern whether a first-comer tribal casino will be able to maintain the *profit* levels or particular revenue streams that it achieved in the absence of any competitive gaming. Such considerations lie beyond the parameters of the explicit, fundamental objectives of IGRA.

The record in this case reveals Interior's adherence to this statutorily based framework. In its final EIS, for example, Interior stated that the "critical factor" in

the analysis was whether the projected loss of the gaming market share would "affect Kalispel's ability to continue to provide governmental services." 1 S.E.R. 149-50. Interior explained that Kalispel had provided detailed information "regarding its present economic situation and tribal revenue allocation plan to aid Interior's assessment of potential impacts on the Kalispel tribal government's ability to provide essential services and facilities to its membership." 1 S.E.R. 150. Interior considered that information and found that, because of its financial capability, Kalispel had been able to allocate a portion of its gaming revenue to its membership in the form of per capita payments. 2 S.E.R. 298 & n.299.[4]

Indeed, as with Kalispel, tribes can sometimes generate gaming revenue in amounts exceeding that which is needed to provide essential governmental services and programs. Provided that the requirements of IGRA are satisfied, such tribes are authorized to make discretionary per capita payments, in any amount, directly to their individual members to use as they wish. 25 C.F.R. § 290.8. IGRA permits such payments only after Interior has approved a tribal revenue allocation plan that ensures that the tribe has **"**adequate" finances to "fund government operations or programs" and to "promote tribal economic development." 25 U.S.C.

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[4] "Per capita payment" means the distribution of money or other thing of value to tribal members that is paid directly from the net revenues of any tribal gaming activity. 25 C.F.R. § 290.2. Per capita payments do not include payments "which have been set aside by the tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, [or] housing." *Id.*

§ 2710(b)(3)(B); *id.* § 2710(b)(2)(B)(i), (iii); 25 C.F.R. § 290.12. Thus, per capita payments, by definition, are *surplus* to meeting essential tribal governmental services and needs. *See* 2 S.E.R. 298 n.299 (explaining that IGRA's requirement of adequate funding before per capita payments may be made "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"). Therefore, Interior does not consider per capita payments to be funds that are necessary to "fund government operations or programs" and "promote tribal economic development." Accordingly, if a tribe experiences a reduction in gaming revenue, the per capita payments represent a category of surplus funds that can be reduced without affecting the essential funding of the tribal government. *Id.*

Here, as we explain in detail below (p. 43), Interior concluded that Kalispel could address potential losses resulting from the Spokane casino by reducing or foregoing their per capita payments. *See e.g.*, 2 S.E.R. 151; 1 S.E.R. 166-67. And Interior determined that if those payments were eliminated, Kalispel's government budget was still not likely to be considerably reduced compared to existing conditions, and Kalispel would be able to continue to provide essential services and programs, consistent with IGRA's objectives. 2 S.E.R. 303-04; 1 S.E.R. 167.

Kalispel takes issue with Interior's framework for determining whether proposed gaming will be "detrimental to the surrounding community." Instead of

adhering to IGRA's principles, Kalispel interprets the phrase "detrimental to the surrounding community" by (1) construing the word "detrimental" in isolation; (2) assigning it "categorical meaning" equal to "any harm"; and (3) not limiting the harm to that which "significant." Opening Brief 24-29. Kalispel's interpretation is untenable.

First, when construing a statute, the Court does "not read a single word in isolation, but instead [the Court] look[s] to the statutory scheme for clarification and contextual reference." *Lopez v. Sessions*, 901 F.3d 1071, 1077 (9th Cir. 2018) (internal quotation marks and ellipses omitted).

Second, Kalispel's introduction of the expansive modifier "any" in front of word "detrimental" effectively defeats the particularized purposes and scheme of IGRA. *See supra* pp. 22-25. Kalispel's interpretation establishes a boundless standard under which Interior must render a "detrimental" determination even if there is only a single harm to a single entity—*regardless* of the actual nature of the impact to the "local governments and nearby Indian tribes" that constitute the "surrounding community." 25 C.F.R. § 292.2. In contrast, Interior reasonably interprets IGRA as requiring the agency to conduct both a qualitative and quantitative assessment of factors that fulfill the Act's purposes.

Third, the D.C. Circuit's rejection of an argument similar to that made by Kalispel is instructive. The plaintiffs in *Stand Up for California! v. U.S. Dep't of*

Interior, 879 F.3d 1177, 1187 (D.C. Cir. 2018) argued that IGRA's requirement that a casino "not be detrimental to the surrounding community," requires that the proposed casino have "no unmitigated negative impacts whatsoever." That argument is the natural corollary of Kalispel's position that, if *any* harm exists to any single entity, then the requirement that proposed gaming "not be detrimental to the surrounding community" is *not* satisfied. *Stand Up* rejected this "cramped reading" of the Act, concluding that it "would result in barring any new gaming establishments, given that all new commercial developments are bound to entail some unmitigated [impacts]." *Id.* (internal quotation marks and brackets omitted). The same reasoning applies here.

Fourth, Kalispel wrongly asserts that Interior's regulations support a "categorical" interpretation of the word "detrimental" because certain provisions are strictly "binary" in nature, using the phrase "*would or would not* be detrimental to the surrounding community." Opening Brief 28 (emphasis added) (citing 25 C.F.R. §§ 292.18(g), 292.20(b)(6), 292.21(a)); *id.* at 25-27. But that formulation does not and was not intended to convey the meaning that Kalispel ascribes to it. When the regulations were originally proposed and published for public comment, the language in each of the provisions cited by Kalispel referred to Interior's inquiry as determining whether the proposed gaming establishment "would *not* be detrimental to the surrounding community" and was "*not* detrimental to the

surrounding community." *Gaming on Trust Lands Acquired After October 17, 1988*, 71 Fed. Reg. 58,769, 58,775 (Oct. 5, 2006) (emphasis added). Interior received a public comment recommending that Interior change the language so it would refer to "whether gaming *is or is not* detrimental to the surrounding community" and thus "avoid sounding conclusory." 73 Fed. Reg. at 29,370. Interior adopted the recommendation and made the change (adjusting for tense) in the subsections to which Kalispel refers. *See* 25 C.F.R. §§ 292.20(b)(6), 292.21; *see also id.* § 292.18. Thus, the regulatory phrase "*would or would not* be detrimental to the surrounding community" does not, and is not intended to, denote a binary standard that requires the word "detrimental" to be construed as meaning "any harm."

Kalispel also argues for a "categorical" meaning of the word "detrimental," contending that the regulations establish an "elevated standard" for finding harm to local governments and nearby tribes that are located "outside" the defined "surrounding community;" therefore, the unqualified use of the word "detrimental" must set a "low standard" for finding harm to local governments and nearby tribes *within* the "surrounded community." Opening Brief 29, 35-36, 38. This argument is premised on the following regulatory definition and appears to rely in particular on the emphasized portions:

> Surrounding community means local governments and nearby Indian tribes located *within* a 25-mile radius of the site of the proposed

> gaming establishment. A local government or nearby Indian tribe located *beyond* the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be *directly, immediately and significantly* impacted by the proposed gaming establishment.

25 C.F.R. § 292.2 (emphasis added).

Contrary to Kalispel's assertion, this provision does not create a *comparative* relationship between (1) the local governments and nearby tribes within the 25-mile radius and (2) those outside of that radius. Rather, the provision identifies the criteria that local governments and nearby Indians tribes located beyond that radius must satisfy in order to *petition* to participate in the consultation process under Section 2719(b)(1)(A). Accordingly, the provision does not serve the purpose that Kalispel suggests. In any event, the modifying words associated with entities outside of the radius—"directly," "immediately," and "significantly"—constitute a *lower* burden than the "detrimental" requirement for entities within the radius, thus belying Kalispel's theory.

Kalispel next speculates that if the word "detrimental" is not given "categorical meaning," then the "exception" embodied in Section 2719(b)(1)(A) "could impermissibly swallow" Interior's policy of narrowly applying the post-1988 land-into-trust exception. Opening Brief 27, 29, 35-36. This contention is based on two flawed and unsubstantiated assumptions. First, it assumes that Interior's interpretation of the detriment provision is *at odds* with a narrow

application of the Section 2719(b)(1)(A) exception. That is incorrect: Interior's interpretation is true to the plain language of the phrase "detrimental to the surrounding community," and it is consistent with IGRA's purposes. Therefore, Interior is implementing the exception appropriately. In any event, Interior's reasonable interest in a narrow application of the *exception* provision does not require Interior to construe the exception as Kalispel suggests, because that would render the exception almost void of meaning.

Kalispel's second flawed assumption is that Interior's interpretation of Section 2719(b)(1)(A) requires an impermissibly "heightened" or "high" showing of harm. Opening Brief 2, 29, 35-36, 38, 39. This argument logically requires a showing of some undisputed standard of harm that Interior has purportedly exceeded. But Kalispel has made no such showing. To the extent that Kalispel is relying on the standard for a petition to participate in consultation, we have shown that that standard does not govern the "detrimental to the surrounding community" determinations.

Kalispel's sweeping and unbounded interpretation of Section 2719 (b)(1)(A) should be rejected.

3. IGRA Section 2719(b)(1)(A) cannot function as a mechanism for barring tribal-gaming competition or preserving monopoly status for first-in-time tribal gaming facilities.

Kalispel maintains that the impacts about which it complains "are not merely about economic competition." Opening Brief 30. But Kalispel has demonstrated no material impacts to its tribal budget or essential programs that are untethered to projected revenue losses from competition with Spokane's casino. Thus, the essence of Kalispel's lawsuit is that, if it loses its status as a gaming monopoly in Airway Heights, its casino operations will become less profitable, and its members will be harmed. Interior correctly concluded that, as a threshold matter, IGRA does not "guarantee that tribes operating existing facilities will continue to conduct gaming free from both tribal and non-tribal competition." 2 S.E.R. 297. Indeed, the profits-based, no-competition interests on which Kalispel's arguments are ultimately founded are not interests that IGRA protects.

Under Kalispel's interpretation of Section 2719(b)(1)(A), the Spokane casino would have to be considered "detrimental to the surrounding community" solely because Kalispel will experience a period of budget reductions stemming from a revenue stream that is less than it earned as the operator of the sole tribal gaming facility in Airway Heights. Construed in that way, Section 2719(b)(1)(A) effectively becomes an affirmative tool that bars tribal-gaming competition and preserves first-in-time tribal gaming establishments. This result has no basis in

IGRA, for "it is hard to find anything in [Section 2719(b)(1)(A)] that suggests an affirmative right for nearby tribes to be free from economic competition." *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000); *see also Stand Up*, 879 F.3d at 1189-90 (upholding two-part determination that a neighboring tribe's casino "could successfully absorb the expected competitive effects" of a proposed tribal casino and that "the casino's potential effects on the tribe were insufficient to render the casino detrimental to the surrounding community overall").

When Section 2719(b)(1)(A) is properly construed through the lens of IGRA's objectives, it is plain that the Act is designed to promote tribal gaming as a mechanism that provides an opportunity for all tribes to pursue economic "self-*sufficiency*", as opposed to a tool for generating economic surpluses for one tribe at the expense of other tribes. 25 U.S.C. § 2702(1) (emphasis added). Thus, the mere potential for reduced revenues at an existing tribal casino as a result of competition from proposed tribal casino cannot be determinative in Interior's decisionmaking. IGRA's implementing regulations—which, again, are not challenged here—bear this out. The regulations do not identify gaming competition impacts to a "nearby Indian tribe" as a determinative consideration in assessing whether a proposed gaming facility will be "detrimental to the surrounding community." *See* 25 C.F.R. Part 292.

Finally, and tellingly, Kalispel's interpretation of Section 2719(b)(1)(A) does not comport with how Interior applied the two-part determination when Kalispel sought to have land taken into trust for *its* casino in Airway Heights. Interior's determination approving Kalispel's casino stated expressly that Spokane's then-existing casinos would experience "intense competition" from the new Kalispel operation. 2 S.E.R. 241, 298. Nevertheless, Interior reasoned that competition alone was not sufficient to conclude that the introduction of Kalispel's casino in Airway Heights would be "detrimental to the surrounding community." *Id.* Based on Kalispel's own experience, therefore, it is reasonable to assume that Kalispel is well aware that, even if an existing tribal casino may experience "*intense* competition" from gaming that is proposed under Section 2719(b)(1)(A), Interior is not *required* to conclude that the proposed facility will be "detrimental to the surrounding community."

4. The single sentence that Kalispel identifies in two of Interior's prior two-part determinations does not constitute an Interior "policy" for determinations.

Kalispel accuses Interior of failing to apply a purported agency "policy" in rendering the two-part determination in this case. Citing only a solitary sentence from two of Interior's past determinations issued in 2011 (four years before the Determination here), Kalispel argues that, if Interior had applied that "policy" here, it would not have approved the Spokane casino. Opening Brief 2, 7, 16, 20, 22,

41-43. Kalispel has taken the sentence out of context and misapprehended its function.

In September 2011, Interior issued two separate two-part determinations under Section 2719(b)(1)(A). *See* 1 S.E.R. 85, 88, 89, 91-92. As part of its background discussion of the exception afforded by that provision, Interior pointed out that two-part determinations were intended to "provide tribes with a limited opportunity to conduct gaming outside of their existing or former reservations where circumstances warrant" and that "[c]onsistent with the scheme established by IGRA, Interior will apply heavy scrutiny to tribal applications for off-reservation gaming" under the exception. 1 S.E.R. 86, 90. Interior clarified, however, that "IGRA does not guarantee existing tribal gaming operations protection from tribal competition." 1 S.E.R. 86-87, 90. Then, in discussing a "nearby Indian tribe" involved in that case, Interior reiterated its commitment to a careful application of the Section 2719(b)(1)(A) exception. Kalispel focuses exclusively on the emphasized sentence:

> IGRA favors on-reservation gaming over off-reservation gaming, and the Department's policy is to narrowly apply the off-reservation exception to the general prohibition against the conduct of tribal gaming on trust lands acquired after October 17, 1988. *The Department will not approve a tribal application for off-reservation gaming where a nearby Indian tribe demonstrates that it is likely to suffer a detrimental impact as a result.* Nevertheless, IGRA does not guarantee that tribes operating existing facilities will continue to conduct gaming free from both tribal and non-tribal competition.

1 S.E.R. 88 (emphasis added); *see also* 1 S.E.R. 91-92.

Reading the emphasized sentence in isolation, Kalispel argues that (1) the sentence declares an Interior policy as to what it "will not approve"; and (2) if Interior had applied that alleged policy here, it would have concluded that the Spokane casino would be detrimental to surrounding community because Kalispel alleged detrimental harm. That single sentence on which Kalispel relies cannot bear the weight that Kalispel places on it.

The emphasized sentence is informed by the sentences that immediately surround it. It responds to the first sentence by highlighting the careful scrutiny that Interior employs when considering applications for off-reservation gaming. The emphasized sentence responds to the third sentence by clarifying that Interior's approval of off-reservation gaming nevertheless imposes a burden on "nearby Indian tribes" to show that they are "likely to suffer a detrimental impact as a result" of the proposed gaming. 1 S.E.R. 88, 91.

Thus, when fairly and contextually construed, the sentence was not intended to declare an Interior "policy" that is determinative in deciding whether a proposed gaming facility will be detrimental to the surrounding community. It was part of Interior's reasoning in those two determinations, explaining that Interior adheres to IGRA's intention that Section 2719(b)(1)(A) functions as an exception.

In any event, Interior's two-part determination here is consistent with the overarching principles stated in those prior determinations. Interior stated therein that it would not approve off-reservation gaming if a "nearby Indian tribe," such as Kalispel, demonstrated that it was "*likely to suffer* a detrimental impact" due to the proposed tribal gaming. 1 S.E.R. 88 (emphasis added); *see also* 1 S.E.R. 91-92. Here, as Interior correctly found, and as we show in Section I.B. below, Kalispel did *not* meet its burden. Thus, Interior's determination here was not inconsistent with the prior determinations.

B. Interior's analysis was neither arbitrary nor capricious nor otherwise not in accordance with law.

Section 2719(b)(1)(A) tasks Interior with utilizing its expertise to determine whether proposed tribal gaming will be detrimental to the surrounding community. "[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, so long as they are reasonable." *Becerra*, 950 F.3d at 1096.

During the two-part determination process for the Spokane casino, Kalispel expressed its concerns about potentially dire economic consequences stemming from gaming competition with the Spokane casino. Kalispel provided Interior with comments and expert reports, to which Interior considered and responded, culminating in almost a decade of analysis. *See id.* at 1100 ("future-looking pessimistic predictions and assumptions" offered in response to the agency "are

simply evidence for the [agency] to consider," and they "are not entitled to controlling weight.' " (internal quotation marks omitted)). In the end, as the district court correctly found, Interior "squarely addressed Kalispel's concerns regarding lost profits at [its] Northern Quest Casino." 1 E.R. 125. Interior based its determination on substantial evidence derived from its own analyses and those of its expert, together with the expert reports submitted by Kalispel. Firmly grounded in an extensive record, Interior reasonably concluded that any reduction in gaming revenue that Kalispel was likely to experience as a result of competition with Spokane would dissipate due to such factors as the ability of the Spokane area to support the Kalispel and Spokane casinos, a reduced competitive effect within the first year of each phase of Spokane's casino, and growth in the gaming market. Thus, Kalispel would not be impacted in its ability to provide essential services and facilities to its membership.

1. Interior's analyses and conclusions of potential impacts to Kalispel were supported by substantial evidence.

Kalispel asserts that Interior "disregarded," "ignored," and "dismissed" the impacts of the gaming revenue losses at Kalispel's casino. Opening Brief 21-22, 31, 33, 35-36, 37-39, 41, 48. The administrative record belies that contention.

Interior's two-part determination concisely summarizes the considerations of which the Determination is comprised. 2 S.E.R. 244-360. The Record of Decision

for the Determination provides additional detail, *see* 2 S.E.R. 310-60, as do the various other studies, reports, documents, and information on which the Determination relies, *see* 2 S.E.R. 240-309. The Determination addressed the specific, potential effects of Spokane's casino on Kalispel. Referring first to the information submitted on Kalispel's behalf, Interior explained that a report by PKF Financial Analysis (PKF) considered how Kalispel's casino would likely perform with and without the introduction of the Spokane casino. Kalispel's report concluded that its casino profits (i.e., earnings before interest, taxes, depreciation, and amortization) would be reduced, and once that loss was incurred, Kalispel would never recover it in the future. 2 S.E.R. 299.

A letter submitted by the Tribal Financial Advisors (TFA) was similarly dire, projecting that Kalispel's decreased revenue could cause it to default on debt obligations shortly after the Spokane Tribe completed the first phase of its gaming. *Id.* The TFA letter projected that Kalispel would be required to secure new credit on worse terms and the resulting debt repayment would consume the majority of Kalispel's future gaming revenues and affect government services. *Id.* Nathan Associates submitted a report for Kalispel that expressly relied on the projections offered in the TFA and PKF reports. 2 E.R. 295-321. The Nathan Associates report concluded that based on those projections, Spokane's casino would have a

significant negative economic impact on the Kalispel Tribe. 2 S.E.R. 300; 2 E.R. 317.

Interior responded by relying on the information contained in the draft and final EISs and the appendices to those documents, which included the studies, data, conclusions and responses provided by one of Interior's experts, the Innovation Group. *See, e.g.*, 2 S.E.R. 296-305; 2 S.E.R. 176-229; 1 S.E.R. 125-34, 149-52, 155-56, 160, 166-67. Interior pointed out that the draft EIS addressed the ability of the affected Spokane regional gaming market to support the Spokane casino as a new entrant. 2 S.E.R. 301. The draft analyzed the anticipated competitive effect of the Spokane casino on the projected gaming revenue for the Spokane regional market, which included Kalispel's casino. *Id.* The analysis determined that the Spokane regional area is sufficiently large to support three casinos of the magnitude of the Kalispel casino. *Id.*

Interior noted that the final EIS had been "expanded to specifically describe the analysis of reduced revenues at [the Kalispel's casino] resulting from [the Spokane Tribe casino]." *Id.* The methodology underlying that analysis included collecting background information and developing a gaming market "gravity model." *Id.* "Gravity models are commonly used in location studies," 1 S.E.R. 125; and Interior explained that the methodology is "an accepted and widely used form of market analysis for casino operators, public entities, and the financial

sector," 1 S.E.R. 151; 2 S.E.R. 301; *see also* 2 S.E.R. 189 (Innovation Group's statement that "in numerous studies throughout North America over nearly 20 years, we have found the gravity model to be highly reliable in its distribution of gaming visits in competitive markets"). The gravity model functions as an "analytical tool" that defines (1) "the behavior of consumers based on travel distance" and (2) the availability of services at various locations. *Id.* The model "assesses gaming revenue by objectively distributing where casinos gamers will visit based on proximity, size, and quality of a casino facility." 2 S.E.R. 189, 220. It provides this assessment using data of population, incomes, typical wins per visit, and casino gaming participation both nationally and in the Pacific Northwest. 2 S.E.R. 301. Kalispel's submitted materials do not utilize the widely-employed gravity model and are not based on any recognized methodology.

Based on the findings of its expert, Interior concluded that once Phase I of the Spokane casino was operational, a reduction in gaming revenues at Kalispel's casino was anticipated due to the "gaming substitution effect," which is the decline in annual revenue at one gaming facility due to competition from another gaming facility. 2 S.E.R. 302-03. Interior concluded, however, that "based on analysis of comparable situations," that anticipated reduction in Kalispel's revenue was likely to "diminish after the first year of the Phase I operation." 2 S.E.R. 303. After that first year, the local residents will have already experienced the Spokane casino and

thus return to more typical spending patterns. *Id.* (after the first year of operation, "normative revenue growth for [the Kalispel casino] is expected to resume"); *see also* 1 S.E.R. 159a ("revenue growth typically resumes after approximately 12 months of impact"); 2 S.E.R. 209-13 (analytical explanation for growth resumption after 12 months).

As indicated by its expert, Interior noted that a revenue decline was also anticipated once the second phase of development became operational. 2 S.E.R. 303. The combined effect of the project, including the time frame for all three phases of development, was anticipated to reduce Kalispel's gaming revenues over a five-year period (2015-2020). *Id.*; 1 S.E.R. 166-67. Interior pointed out, however, that the declines projected by Kalispel's expert for that same time frame were "very aggressive impacts, with insufficient supporting analysis or evidence from other markets." 2 S.E.R. 303; *see also* 2 S.E.R. 193-94 (providing data contrary to PKF's impact projections). Interior also pointed out that because the build-out date for the Spokane casino was extended from 2015 to 2020, the original estimate of reduced gaming revenues resulting from the operation of Phases II and III of the Spokane casino would need to be reduced. 2 S.E.R. 303. In response to comments on the final EIS, Interior explained that the "delay in operation gives [Kalispel] the competitive advantage for an additional five years of having a hotel, larger casino, and more amenities than the proposed Spokane

facility." 1 S.E.R. 156a. And, it provides an additional five years of growth in the area population and income which increase demand for gaming in the area. *Id.*

Interior used the population and income growth that Kalispel estimated for that period, which was a 15.8 percent growth in the gaming market for the period between 2015 and 2020. *Id.*; 1 S.E.R. 158. That would eliminate all but 5.1 percent of the 20.9 percent impact projected for the Phase II and III operations. 1 S.E.R. 150, 156a, 158; 2 S.E.R. 303. Interior concluded that the final combined reduction in future gaming revenues as of the 2020 build out was approximately 33 percent (when compared to future revenue projections that were based on the 3 percent growth rate that Kalispel predicted in the absence of competition from Spokane's casino). 1 S.E.R. 156a; 2 S.E.R. 303. As with the first-year impacts for Phase I, the impacts of operation at full build out are also anticipated to diminish after the first year. 1 S.E.R. 150.

In light of these projections, Interior found that while Kalispel's per capita payments to its members might have to be reduced or eliminated, the overall Kalispel tribal government budget for 2020 was not expected to be significantly reduced (approximately 6.7 percent). 1 S.E.R. 151, 166-67. Interior further found that although Kalispel's government budget would be impacted, the effects are expected to dissipate over time due to market growth and market strategy adjustments, and they would not prevent the Kalispel tribal government from

providing essential services and facilities to its membership. 2 S.E.R. 303; 2 S.E.R. 329; 1 S.E.R. 151, 157; *see also* 2 S.E.R. 185 (concluding that "contrary to PKF's assertion of *no market growth*, frequency—along with participation—does typically increase with a greater selection of gaming choices," and providing a list of factors supporting that conclusion, including that different facility choices draw different and more demographic segments); 2 S.E.R. 200 ("There is no supporting analysis to the claim that the proposed Spokane casino would not grow the existing gaming market."); 1 S.E.R. 155 ("As explained in [the NEPA analyses], the Spokane area market shows a strong potential for growth in future gaming revenues."); 2 S.E.R. 192-93 (providing examples of market growth from addition of a new casino); 1 S.E.R. 134 (same); 2 S.E.R. 189-94 (discussing elasticity of Spokane region's gaming market).

As to Kalispel's position that the gaming market in the Spokane area was too saturated to support another tribal casino, Interior found that Kalispel's view was based on an approach that "over-inflates market saturation" and "fails to account for expected market growth." 2 S.E.R. 305. As the Innovation Group explained in its response to Kalispel's comments, the data revealed (1) that the figures presented by PKF were "by no means indicative of a saturated market," 2 S.E.R. 190; and (2) data shows that "[e]ven in markets much more saturated than Spokane, the opening

of a new casino has led to significant market growth," 2 S.E.R. 192-93; 1 S.E.R. 159.

In particular, the Market Saturation Analysis submitted by PKF relied on "unjustified market comparables and market definitions." 2 S.E.R. 304. For example, three of the gaming markets used in that analysis were not analogous to the Spokane market. *Id.* The PKF analysis also defined the Spokane market in terms of a 120-minute travel distance, versus a 60-minute distance; in so doing, it added gaming facilities in outlying areas. 2 S.E.R. 304-05. That added approximately 1,000 machines to the analyzed market but excluded the commensurate population increases associated with those facilities. *Id.* Thus, when those outlying facilities were viewed with respect to the Spokane market's smaller population, the Spokane market appeared to be a saturated gaming market. *Id.* The Innovation Group noted that the role of travel distance was also a factor in rendering PKF's analyses unreliable. Specifically, the gaming market defined by PKF for its analyses was based on the projection that, in the absence of the Spokane casino, *100 percent* of gamers would go to Kalispel's casino, even from areas as far as 150 miles away. 2 S.E.R. 180, 219. But there are much closer casino options for those distant gamers. *Id.*

The record includes other flaws associated with Kalispel's projected impacts, including the way in which its experts framed the tourism market. 2

S.E.R. 186. For example, PKF assumed that *all* gaming visits that did not originate from the defined residential market area were overnight guests in Spokane-area hotels. *Id.* In other words, for purposes of projecting impacts to Kalispel, a resident from a location only one hour away from Kalispel's casino would *not* be counted as a visitor to Kalispel's casino unless that visitor stayed overnight at a hotel in the Spokane area, even though that visitor's residence was only one hour away. PKF also identified the "total" gaming market within its defined residential market area as consisting of only *Kalispel's* casino. 2 S.E.R. 187. Limiting the total gaming market in that way results in "material consequences to the impact analysis" because it implies that Kalispel captures the *entire* market share and thereby "artificially inflates the impact" of the Spokane casino on Kalispel. *Id.* The Innovation Group, by contrast, used a gravity model, based on specific area data, that estimated the true total residential market revenues for all facilities within the defined market area. *Id.*; 1 S.E.R. 95-139. Finally, PKF concludes that the gaming market will not grow *at all*. 2 S.E.R. 189-90. But data from Kalispel's gaming revenue trends shows a highly elastic market and strong growth in gaming revenue. *Id.*

The Innovation Group also provided analyses indicating that "favorable circumstances and options are available to [Kalispel]" that will "enable maintenance of a strong credit profile" while also "improving its ability to provide

a reasonable level of distribution" to its tribal members. 2 S.E.R. 236-37; *see also* 2 S.E.R. 230-39. For example, by "implementing a prudent fiscal policy" Kalispel "can realistically . . . maintain more tribal distributions to fund tribal programs when compared to the results included in the TFA Assessment." 2 S.E.R. 231. Additionally, "[p]roactively delevering [i.e., reducing leverage] will help reduce cash interest expense and debt balances, freeing up cash flow for tribal distributions and/or additional voluntary debt repayments." *Id.*

Interior rendered its findings based on all of the data and analyses that it received and reviewed, including that provided by Kalispel. Those findings are entitled to deference. *See Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) ("[W]e generally must be at [our] most deferential when reviewing scientific judgments and technical analyses within the agency's expertise."). Interior found in particular that

- the Spokane gaming market can support another entrant, 2 S.E.R. 301;
- there will be competitive impacts on Kalispel, but those impacts will be temporary, 1 S.E.R. 165; 2 S.E.R. 209-13;
- the impacts are likely to have the greatest impact within the limited time of the first year of competition when Spokane's facility is novel and attractive to the local market, but that will dissipate as the gaming market grows, 2 S.E.R. 302-03;

- although Kalispel might suffer some reduction of the per capita payments that it makes to its members, the overall tribal government budget, as of the 2020 full build-out time frame for the Spokane casino "is not expected to be considerably reduced [i.e., 6.7 percent] when compared to existing conditions," 1 S.E.R. 151; and

- Kalispel's casino is a very successful facility, enabling per capita payments above and beyond supporting tribal government operations and services, 1 S.E.R. 241, 298; 2 S.E.R. 214, thus allowing Kalispel to absorb the impacts of new competition and continue to support its members with tribal government programs and services, 1 S.E.R. 149-51, 166-67.

It was on the basis of these findings that Interior issued its two-part determination, concluding that the Spokane casino would not be detrimental to the surrounding community. 2 S.E.R. 305. Interior's Determination was reasonable and based on substantial evidence.

2. The harms alleged by Kalispel do not make the Spokane casino "detrimental to the surrounding community."

Kalispel contends that the Tribe will be harmed due to revenue losses from gaming competition. These harms do not render the Spokane casino "detrimental to the surrounding community."

As a threshold matter, Kalispel's allegations of harm focus largely on the high revenue losses that are projected for the *first year* that the Spokane casino operates. Opening Brief 14-16, 29, 30, 37, 38, 39, 41. But Kalispel overlooks that when a new entrant to the gaming market first commences its operations, it represents a novel, compelling enticement and draw; thus, its competitive impacts

are the most significant during that early time frame. *See, e.g.*, 1 S.E.R. 168 ("Whenever a new casino opens in a market area, a certain amount of market cannibalization is to be expected."). That initial effect, however, generally subsides after the first year when residents have already experienced the new entrant and return to more typical spending patterns, as is projected here for the Spokane casino. *See, e.g., id.* ("Anticipated gaming revenue substitution effects [i.e., competitive impacts] are likely to diminish after the first year of the project's operation once local residents experience the casino and return to more typical spending patterns."); *id*. Thereafter, resumed normative growth and recovery are usually expected. Indeed, Interior determined that here, it "is anticipated that all competing casinos would continue to generate significantly positive cash flows" after the first year. 1 S.E.R. 165; *see also* 2 S.E.R. 209-13 (data showing diminished competitive impacts after approximately one year); 1 S.E.R. 150 (after the first year of each phase operation, "normative revenue growth for [Kalispel's casino] is expected to resume"). Moreover, "the addition of a casino in Spokane County would be likely to expand the gaming market f*or the region as a whole*." 1 S.E.R. 165 (emphasis added). Thus, contrary to Kalispel's focus, the projected impacts for the first year of the Spokane casino operation cannot rationally govern Interior's determination of whether that casino will be detrimental to the surrounding community.

Kalispel contends that it will be harmed by the potential loss of per capita payments to its members and that Interior violated IGRA by declining to view that potential loss as a "detriment" that per se required Interior to conclude that Spokane's casino would be detrimental to the surrounding community. Opening Brief 36. Kalispel argues that the per capita payments "necessarily" are a form of providing for the welfare of tribal members as one of IGRA's allowable uses for gaming revenue." *Id.* (citing 25 U.S.C. § 2710(b)(2)(B)(ii), (b)(3)). Kalispel is mistaken. Under IGRA, "net revenues" from tribal gaming may be used to "provide for the general welfare of the Indian tribe and its members." But the Act does not identify *per capita payments* as a necessary form of providing for the "general welfare" of a tribe and its members, as Kalispel contends. Consequently, because per capita payments do not represent an essential government service or program under the Act, Interior reasonably did not consider the Kalispel's potential loss of per capita payments as a detriment requiring Interior to determine that the Spokane casino would be "detrimental to the surrounding community."

3. IGRA does not require mitigation of a "nearby Indian tribe's" revenue losses from competition between gaming establishments.

Kalispel makes several veiled references to "unmitigated" impacts that it will potentially experience from the operation of the Spokane casino, Opening Brief 2, 11, 29, 31-34, 36, 38, 41, 49, and it contends that Section 2719 "prohibits"

a proposed tribal casino that would "cause unmitigated harm" to nearby Indian tribes, *id.* at 29. The *harm* about which Kalispel complains is the economic impact of revenue losses that stem from gaming competition with Spokane's casino. The *mitigation* that Kalispel seeks is direct, economic mitigation that represents dollar-for-dollar compensation for Kalispel's gaming losses that is to be provided by Spokane or Interior. Nothing in IGRA or its implementing regulations require mitigation for "losses" from gaming competition.

The essence of Kalispel's view is that it must receive direct mitigation to ensure that, once Spokane's casino is operating, Kalispel will still maintain its pre-competition revenues and pre-competition share of the gaming market. That view is based on two flawed premises: (1) that IGRA grants "nearby Indian tribes" the right to be free of tribal gaming competition and attendant economic consequences; and (2) that the Act requires mitigation for gaming competition impacts to "nearby Indian tribes" to guarantee that they are directly compensated to match the revenue stream they achieved in the absence of the competition.

As to the first premise, Interior correctly concluded that IGRA does not guarantee that tribes operating existing facilities will continue to conduct gaming free from tribal competition. 2 S.E.R. 297; *supra* pp. 32-34. Indeed, the Seventh Circuit pointed out that "it is hard to find anything in [IGRA] that suggests an affirmative right for nearby tribes to be free from economic competition."

Sokaogon Chippewa, 214 F.3d at 947. As to the second premise, IGRA simply does not require the kind of gaming revenue assurance that Kalispel seeks to achieve by way of "mitigation." Indeed, the Act does not guarantee a gaming revenue stream for a "nearby Indian tribe" at all, let alone the particular revenue stream that the tribe achieved in the absence of the proposed competition. Thus, there is no statutory basis for the mitigation of a "nearby Indian tribe's" losses from gaming competition.

Moreover, the kind of financial protection that Kalispel suggests—whereby one tribe is assured a particular revenue stream at the expense of another tribe—does not comport with IGRA's purposes. The Act is designed to establish gaming as an opportunity for and means of promoting tribal economic development and self-sufficiency for *all* tribes. 25 U.S.C. § 2702(1). But if the Act is construed as Kalispel suggests, requiring each new tribal gaming entrant to mitigate the gaming competition effects on "nearby Indian tribes" to pre-competition levels, the Act would in effect (1) impose a financial burden on gaming entrants that would hinder the achievement of economic development and self-sufficiency; and (2) guarantee a pre-competition level of revenue for "nearby Indian tribes" that would facilitate enhanced economic achievements. Both results run counter to IGRA's purposes.

As to IGRA's regulations, they likewise lack any mitigation requirement for "nearby Indian tribes" that experience economic impacts from gaming

competition. The regulations require only that an applicant provide, and the consulting participants comment on, information regarding "environmental impacts and plans for mitigating adverse impacts pursuant to NEPA," as well as "[a]nticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them." 25 C.F.R. §§ 292.18(a), (d); *id.* § 292.20(b)(1), (4). The regulations say nothing about mitigation for "nearby Indian tribes" that experience gaming competition impacts. This silence is not surprising "given that all new commercial developments are bound to entail some unmitigated [impacts]." *Stand Up*, 879 F.3d at 1187 (internal quotation marks and brackets omitted).

Finally, in an effort to craft the type of mitigation that it deems appropriate, Kalispel asserts that IGRA does not allow Interior to "balance" or "offset" the detriments to a "nearby Indian tribe" with the benefits to the community or the applicant tribe. Opening Brief 36, 40. But as Kalispel correctly points out, Interior did no such offsetting here. *Id.* at 40. Kalispel follows up asserting that the district court sustained the agency action in this case because Interior "must just weigh the benefits and impacts on the whole even if the benefits do not directly mitigate specific impacts." *Id.* (citing 1 E.R. 125). First, that is not the district court's stated reason for its ruling. Second, the sentence to which Kalispel refers is not a comprehensive legal conclusion of Interior's obligations in determining detriment,

as Kalispel suggests. Rather, it is a response to (1) Kalispel's requests for complete and direct mitigation of the gaming revenue losses that it projects; and (2) Interior's argument that it must consider impacts to Kalispel, but that the inquiry must be set within the context of the broader "surrounding community." The court correctly concluded that Interior "need not find that the [Spokane] casino has no unmitigated negative impacts whatsoever, but instead [Interior] must weigh the benefits and possible detrimental impacts as a whole, even if those benefits do not directly mitigate a specific cost imposed by the casino." 1 E.R. 125.

In short, nothing in IGRA or its regulations guarantee Kalispel or any other "nearby Indian Tribe" a certain gaming revenue stream by way of mitigation. And Kalispel cites no Interior determination requiring that direct economic mitigation be provided to compensate a "nearby Indian tribe" for economic impacts stemming from competition-based losses.

C. Kalispel has forfeited its ultra vires challenges to Interior's two-part determination and, in any event, those challenges are properly reviewed under the APA arbitrary and capricious standard.

Kalispel sought judicial review of Interior's two-part determination under the arbitrary and capricious standard of the APA, embodied in subparagraph (A) of 5 U.S.C. § 706(2). *See, e.g.*, 1 S.E.R. 5, ¶ 5; 1 S.E.R. 76, ¶219; 1 S.E.R. 83. Kalispel's Complaint does not seek relief under any other provision of the APA. On appeal, however, Kalispel argues for the first time that Interior's Determination

was also "ultra vires" and should be set aside under subparagraph (C) of 5 U.S.C. § 706(2), which refers to agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." Opening Brief 24-33. Because this claim was not asserted below, it is forfeited. *See Sandoval v. County of Sonoma*, 912 F.3d 509, 518 (9th Cir. 2018). In any event, the claim lacks merit.

In support of its ultra vires claim, Kalispel reiterates the same arguments, and alleges the same errors, that it advanced in support of its arbitrary and capricious claims. *Compare* Opening Brief 26-29 *with id.* at 36-37 (both arguing meaning of detriment); *compare id.* at 31-33 *with id.* at 35-36 (both alleging that Interior "disregarded" and "dismissed" impacts to Kalispel); *compare id.* at 27, 29 *with id.* at 35-36 (both alleging Interior used a "heightened" standard for the two-part determination); *compare id.* at 29-31 *with id.* at 36-38 (both alleging harms to Kalispel). Properly understood, these are not claims under Section 706(2)(C).

The criteria for arbitrary and capricious claims and ultra vires claims are not the same. In determining whether an agency action is ultra vires, the question is whether the agency acted beyond the scope of its statutory or regulatory authority. *See Suever v. Connell*, 439 F.3d 1142, 1147 (9th Cir. 2006). An official's action is "not ultra vires just because he erroneously applies his delegated duty but only when he acts outside the scope of his duty." *Id.* A "simple mistake of fact or law does not necessarily mean that an officer of the government has exceeded the

scope of his authority." *United States v. Yakima Tribal Court*, 806 F.2d 853, 860 (9th Cir. 1986). "Scope of authority turns on whether the government official was empowered to do what he did; i.e., whether, even if he acted erroneously, it was within the scope of his delegated power." *Id.* (citations omitted).

Kalispel does not argue that Interior had *no authority* to issue the two-part determination, to consider the factors that it examined as part of that Determination, or to reach the conclusions that it did. Indeed, Congress afforded Interior substantial discretion in conducting determinations. And while Kalispel alleges that Interior erred in various ways, nothing with which Kalispel takes issue reveals that Interior *exceeded* the authority granted to it by IGRA. Thus, all of Kalispel's claims are properly reviewed under the arbitrary or capricious standard on which Kalispel originally relied.

In sum, Interior reasonably determined that gaming on Spokane's aboriginal land in Airway Heights would not be "detrimental to the surrounding community."

II. Interior's consultation process for the two-part determination was consistent with its general trust obligations to both the Spokane and Kalispel tribes.

IGRA requires that, as part of a two-part determination, Interior must consult both with the Indian tribe applying for the determination and with the "appropriate State and local officials, including officials of other nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A). Kalispel does not argue that the Department failed to

undertake IGRA's required consultation properly. Rather, Kalispel contends that this provision and the implementing regulations impose a "trust duty" and "actionable fiduciary obligation" on Interior that "contrasts with" the obligation to comply with "general regulations and statutes not specifically aimed at protecting Indian tribes [and] not enforceable beyond their terms." Opening Brief 45-48. Kalispel further contends that for purposes of the consultation process, all "nearby Indian tribes," such as Kalispel in this case, possess a "suite of rights" and a "special tribal benefit" that arises because the "nearby Indian tribes" are a "distinct part of the surrounding community." *Id.* at 44-45. The particular benefit that Kalispel seeks is compensation to "help Kalispel mitigate the impacts" to the Kalispel Tribe. *Id.* at 48-49. Kalispel is wrong.

Interior does not dispute that it owes Kalispel (like *all* federally recognized tribes) a fiduciary duty, but a fiduciary relationship alone is not sufficient to support a cause of action; a further source of law is needed to provide a basis for the alleged trust responsibility. *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 921 (9th Cir. 2008). IGRA's two-part determination process, however, does not impose a trust duty on Interior with respect to Kalispel as a "nearby Indian tribe." That is because, in the context of determinations, Kalispel is not the *only* tribe that Interior must consider.

IGRA imposes duties on Interior that require it to consider not only multiple tribes but tribes with *conflicting* interests—namely, the interests of the applicant tribe (here, Spokane) juxtaposed against those of any "nearby Indian tribes" that already operate a casino (here, Kalispel). Because the tribal interests conflict, there can be no trust duty that would require Interior to tip the scale to the benefit of Kalispel. The "government owes the same trust duty to all tribes," and it "cannot favor one tribe over another." *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) (citation and internal quotation marks omitted). A breach of trust cannot lie where the government is faced with conflicting responsibilities to two tribes. *See Nance v. EPA*, 645 F.2d 701, 711-12 (9th Cir. 1981). Thus, the law rejects Kalispel's mechanistic view, which defines Interior's purported trust duty as if Kalispel were Interior's *sole* tribal consideration under IGRA. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (when a tribe "cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . common-law trust principles [do not] matter").

For purposes of determining whether impacts to a "nearby Indian tribe" preclude an applicant tribe's gaming proposal, Interior's general trust duty allows it to consider, for example, the benefits to the "nearby Indian tribe," the overall statutory purpose of IGRA, and Interior's duty (trust or otherwise) to treat all tribes fairly and equitably. *See id.* at 182 (noting that the "Government may be obliged

to balance competing interests when it administers a tribal trust," including "other statutory duties" and "conflicting obligations to different tribes or individual Indians"). Accordingly, in considering the potential economic impacts to Kalispel from gaming competition with Spokane, Interior could take into account the fact that all of the arguments that Kalispel advances in this case arise only because Kalispel happened to be the first-in-time to seek approval to game on Spokane's aboriginal lands in Airway Heights under the IGRA Section 2719(b)(1)(A) exception. Interior could consider that nothing in IGRA mandates a priority system favoring the first tribal casino in time. Interior could also consider that (1) Kalispel already received benefits under IGRA as a tribal gaming applicant; and (2) Kalispel's argument now for special "rights" and "benefits" as a "nearby Indian tribe" is contrary to both the Act's overall purposes and Interior's obligation to treat all Section 2719(b)(1)(A) applicants evenhandedly.

In short, neither IGRA in general, nor its consultation provision in particular, creates a trust relationship with Kalispel for purposes of Interior's two-part determination. Thus, there can be no breach of trust in making that determination in a manner that considers the interests of both tribes.

Kalispel gains no ground on the trust issue by invoking the purported "policy" that Interior "will not approve a tribal application for off-reservation gaming where a nearby Indian tribe demonstrates that it is likely to suffer a

detrimental impact as a result." Opening Brief 43, 45-46. Kalispel contends that (1) IGRA's consultation requirement "imposes and implements that "policy," *id.* at 45-46; (2) the "policy" "protects nearby Indian tribes from detrimental impacts from new off-reservation Indian gaming," *id.* at 43; and (3) the "policy is required by [Interior's] duty as trustee under IGRA Section 20," *id.* Kalispel did not present these assertions in the district court and provides no argument for them here. Thus, they are forfeited. *Sandoval*, 912 F.3d at 518.

In any event, IGRA's consultation requirement establishes no *standard* by which Interior is to approve a proposed gaming facility. Thus, the requirement does not implement any "policy" that governs approval. The consultation requirement instead is a requisite information-gathering process for Interior's two-part determinations. In addition, IGRA does not identify the consultation process as a method of "protecting" "nearby Indian tribes" from detrimental impacts that are the subject of a two-part determination, particularly when those impacts stem from tribal gaming competition. And Interior has no specific "trustee duty" to "nearby Indian tribes" under IGRA's consultation requirement.

Kalispel suggests that under the rubric of Interior's "trust duties," it may go beyond the bounds of IGRA and take action under other statutes, such as the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 et seq., to "help mitigate the impacts to Kalispel without harming [the] Spokane [Tribe]." Opening

Brief 48-49. Kalispel suggests, for example, that Interior could agree to dispose of federal lands or exchange federal lands for some of Kalispel's other lands so Kalispel could "consolidate their respective land holdings." *Id.* at 49. As an initial matter, there is nothing in the consultation provisions of IGRA or its implementing regulations that authorizes Interior to provide such a remedy or compensation. Thus, no such action is required. *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C.Cir.1995) ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."). But equally important, the general trust principle, and Interior's trustee obligation not to favor one tribe over another, must inform how Interior carries out its IGRA duties, including in determining whether there are detrimental effects to the surrounding community. Here, Kalispel's allegations of harm are linked solely to interests that Kalispel acquired under IGRA and under the exact same provision that Spokane is attempting to now use to its own benefit. Thus, from the general trust perspective, Kalispel's gaming competition losses are not patently unfair.

In sum, Interior's consultation process for the two-part determination was consistent with its general trust obligations to both tribes.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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