No. 19-35808

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KALISPEL TRIBE OF INDIANS,
Plaintiff-Appellant,

and

SPOKANE COUNTY,
Plaintiff,

v.

U.S. 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-0138-WFN

# APPELLANT'S OPENING BRIEF

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page(s)

**Cases**

**Statutes**

**Rules**

**Regulations**

**Other Authorities**

## JURISDICTIONAL STATEMENT

Plaintiff Kalispel Tribe of Indians ("Kalispel") is a federally recognized Indian tribe, 85 Fed. Reg. 5462, 5463 (Jan. 30, 2020), and filed this action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, to challenge decisions by the U.S. Department of the Interior ("DOI") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-47, and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-19. These decisions allowed the Spokane Tribe of Indians ("Spokane") to open and operate the Spokane Tribe Casino on newly acquired off-reservation land in Airway Heights, Washington ("Airway Heights"), ECF No. 1 at 1-5. The District Court therefore had subject-matter jurisdiction because this action involves federal questions and Acts of Congress regulating commerce and was brought by a federally recognized Indian tribe. *See* 28 U.S.C. §§ 1331, 1337, 1362.

This Court has jurisdiction over this appeal because it concerns a final district court decision that disposed of all claims. *See* 28 U.S.C. § 1291; Excerpts of Record ("ER") 132. The District Court entered final judgment for DOI, the U.S. Bureau of Indian Affairs ("BIA"), and their officials on July 25, 2019. ER 132. This appeal is timely because Kalispel filed its Notice of Appeal 60 days later, on September 23, 2019, and the parties include federal agencies and their officials sued in their official capacities. *See* Fed. R. App. P. ("FRAP") 4(a)(1)(B)(ii)-(iii); ER 564-67.

## STATEMENT OF ISSUES

Should the Court vacate DOI's determination under IGRA that the Spokane Tribe Casino would not be "detrimental to the surrounding community[,]" 25 U.S.C. § 2719(b)(1)(A), including to Kalispel as a "nearby Indian tribe[,]" *id.*; 25 C.F.R. § 292.2, where—

(1) DOI unlawfully disregarded the plain meaning of "detrimental" under IGRA by applying a new, *ultra vires*, and higher threshold for harm to Kalispel;

(2) DOI arbitrarily and capriciously dismissed the substantial, extended, and unmitigated detriment to Kalispel's government, programs, services, and members by applying unauthorized thresholds and discounts, ignoring important considerations and relevant evidence, and relying on implausible reasoning;

(3) DOI failed to provide a reasoned explanation for departing from its established policy that it "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"; and

(4) DOI violated its duty as trustee to not favor one tribe over another where their interests are not aligned, including its duty under IGRA to protect nearby Indian tribes from unmitigated detriment from new off-reservation casinos?

## PERTINENT STATUTES AND REGULATIONS

For pertinent statutes and regulations, please see the addendum to this brief.

## STATEMENT OF THE CASE

### I. Kalispel's Reservation, IGRA Section 20, and Northern Quest

Kalispel's original Reservation is located near the town of Usk, in far northeast Washington. ER 134, 413 (map). It was established in 1914 and consists of about 4,600 acres of land that have been partly flooded for decades by a downstream hydropower project. *See United States as Trustee for Kalispel Indian Tribe v. Pend Oreille P.U.D.*, 926 F.2d 1502, 1504, 1509 (9th Cir. 1991); ER 387-89. The Reservation is nearly undevelopable because it is located almost entirely within a floodplain between a mountainside and a river. ER 105, 329, 358, 360, 390-93. It also was allotted into small parcels in 1924 because the Reservation is so small, but those allotments and flooding made farming difficult. ER 360. Given all this, Kalispel historically has had great poverty and unemployment; limited housing, education, and governmental resources; inadequate health care and water and sewer systems; and no real economic development opportunity. ER 147, 160, 329-30, 360. To help address these issues, in 1996, DOI proclaimed an addition to the Reservation consisting of 40 acres of land in Airway Heights, in Spokane County near the City of Spokane, about 67 miles from the original Reservation but within commuting distance for 25% to 45% of Kalispel members. ER 134, 138, 364; *see* 61 Fed. Reg. 55,992 (Oct. 30, 1996).

In 1997, DOI approved proposed gaming on Kalispel's reservation land in Airway Heights via a "two-part determination" under Section 20 of IGRA ("Section 20"). 25 U.S.C. § 2719; ER 133-34. Section 20 generally prohibits tribes from gaming on lands taken into trust after IGRA's 1988 enactment date but includes certain exemptions and exceptions. 25 U.S.C. §§ 2719(a)-(b); *Redding Rancheria v. Jewell*, 776 F.3d 706, 710 (9th Cir. 2015). In the exception relevant here, gaming on such after-acquired land is allowed when

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

25 U.S.C. § 2719(b)(1)(A) (emphasis added); *see* 25 C.F.R. § 292.13. The underlined text makes clear why this DOI action is called a two-part determination.

For the second part of the determination for Kalispel, DOI rejected Spokane's objection that Kalispel's proposed gaming would negatively affect Spokane's three existing casinos. ER 139-40. Those included an off-reservation casino in Chewelah, Washington, outside Spokane's aboriginal territory and near Kalispel's aboriginal territory. ER 363-64, 413. DOI found no detriment under Section 20 in part because Spokane's casinos all were over 45 miles away from Kalispel's proposed site and

Spokane "did not submit any evidence" of alleged detriment even though it could have submitted a report or study to support its claim. ER 139-40.

Based on that DOI two-part determination and state concurrence as required under Section 20, 25 U.S.C. § 2719(b)(1)(A), Kalispel in late 2000 opened the Northern Quest Resort and Casino ("Northern Quest") on its Airway Heights reservation land. *See* ER 247. That could not come soon enough, as Kalispel then was among the poorest and most unemployed Indian tribes in Washington, with a 30% poverty rate, almost 29% unemployment, and a per-capita income of only $8,888 in 2000. ER 395-97. Since that time, Northern Quest has become the single business that drives Kalispel's economy and is the primary source of income by far for Kalispel's government. ER 105, 358, 364. Per IGRA, all net revenue from Northern Quest is used only to fund Kalispel's government operations and programs, to provide for the general welfare of Kalispel's members, to promote tribal economic development, to donate to charitable organizations, and to help fund operations of local government agencies. *See* 25 U.S.C. § 2710(b)(2)(B)(i)-(v); ER 408.

## II. Spokane's Two-Part Determination Application

In 2012, Spokane finished submitting information required under IGRA to apply for a two-part determination for its second off-reservation casino. ER 207, 211, 217-21; *see* 25 C.F.R. § 292.17-18 (specifying required information); *cf.* ER 145-46 (noting incomplete application). This off-reservation casino would be

located on newly acquired land in Airway Heights, only about two miles from Northern Quest. ER 119. It also is roughly 40 miles away from each of Spokane's two other still-existing casinos and about 30 driving miles away from Spokane's 157,376-acre Reservation, ER 55, 81, which has long been used for substantial timber production and mining, ER 56, 118-19.

In support of its application, Spokane committed to mitigate impacts from its proposed gaming and documented that it would mitigate impacts on Airway Heights and Spokane County by paying those local governments over $1 million in annual average mitigation payments over 15 years, starting out at $14,500 in the first year of city annexation and then $600,000 in the first full year of gaming. *See* ER 168-73, 178, 182-92, 198-99, 222-23, 229. In turn, Spokane did not dispute that its proposed gaming would have a detrimental impact on Kalispel's gaming revenue and Kalispel's tribal programs. ER 230. However, Spokane flatly rejected Kalispel's opposition to Spokane's proposed gaming as "rooted in preserving its gaming monopoly within the . . . area[,]" because IGRA does not prohibit competition for tribes' existing gaming facilities and competition alone does not establish a detrimental impact to a nearby tribe. ER 230-32.

## III. Kalispel's Comments on Spokane's Application

In fact, Kalispel submitted multiple, extensive, and multifaceted objections to Spokane's application for a two-part determination. *E.g.*, ER 147-57, 322-31, 356-

75, 399-413, 479-504. Kalispel was fundamentally sympathetic to Spokane's desire to address the socioeconomic needs of its people and did not dispute that the Spokane Tribe Casino would be in the best interest of Spokane. *See* ER 402. Also, contrary to Spokane's contention, Kalispel agreed that IGRA does not "protect unbridled monopolies for tribes with existing gaming operations" and "'does not guarantee that tribes operating existing facilities will continue to conduct gaming free from . . . competition.'" ER 369, 406 (quoting prior DOI two-part determinations). Therefore, Kalispel acknowledged that "the mere introduction of new competition" in a market does not constitute "detriment" under IGRA Section 20. *Id.*

Kalispel further emphasized that DOI's existing policy for two-part determinations explicitly recognized the following:

> "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 [i.e., IGRA's enactment date]. 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."

ER 369, 407 (quoting 2011 DOI Enterprise and North Fork two-part determinations) (emphasis added). Kalispel also distinguished its very different situation from those of tribal objectors for prior two-part determinations. *See* ER 366-67, 404-05 (listing and summarizing prior decisions). Namely, prior objecting tribes either were not within the geographical limits of the "surrounding community" as defined under

IGRA, *see* 25 C.F.R. § 292.2, so their comments were properly accorded less weight, and/or they failed to provide any documented evidence of detriment. ER 366-67, 369-370, 407, 479-481.

In contrast to prior objecting tribes, including Spokane with respect to Kalispel's two-part determination, Kalispel explained and documented via expert reports that the proposed Spokane Tribe Casino would significantly reduce Kalispel's revenue from Northern Quest, which is the only significant funding source for the Kalispel government. ER 104-06, 108, 333, 342, 344-45, 349, 371-75, 399-402, 408, 603-07. And because all net revenue from Northern Quest is restricted under IGRA, *see* 25 U.S.C. § 2710(b)(2)(B); ER 408, any lost revenue from Northern Quest directly translates into lost governmental revenue for Kalispel, ER 605. Therefore, DOI approval of the Spokane Tribe Casino would substantially impact Kalispel's government and its provision of services, including health care, child care, elder care, education assistance, public safety, housing, social services, and public transport. ER 298-99, 315, 375, 411.

Kalispel submitted several reports to document these detrimental impacts that approving the Spokane Tribe Casino would have on Kalispel's government. *See* ER 106-08 (summarizing same). Kalispel also disputed relevant findings and conclusions in the Draft Environmental Impact Statement ("EIS") and the Final EIS that DOI had prepared under NEPA for this two-part determination under IGRA,

though the EIS did not address whether the Spokane Tribe Casino would be detrimental to the surrounding community. ER 331-55, 375-86; *cf.* ER 108-09, 414-15 (noting same). Overall, Kalispel documented that DOI's own analysis had determined that just Phase I of the Spokane Tribe Casino would cause an impact of almost $43 million or 30% on Kalispel's gaming revenue, while the additional phases of the project would impact Kalispel by at least an additional 5% over and above Phase I. ER 204-06, 333-40. As DOI and its expert recognized, this "market cannibalization"—also euphemistically called a "substitution effect"—from the Spokane Tribe Casino would be expected but would diminish after the first year of operation. ER 164-65. These impacts would force Kalispel to reduce its work force, including many tribal-member employees. ER 336.

Kalispel explained in detail how its casino revenue losses translated to governmental losses. Almost 85% of funding for Kalispel's governmental budget comes from Northern Quest, while only about 15% comes from federal, state, and other grant funding, which are restricted in use and mostly concern hydropower mitigation. *See* ER 607. Within that total budget, about 55% of expenditures are for tribal programs and services, 35% are for debt repayment, and 7.1% are for per-capita and elder payments ("PCEPs"). ER 608. Those PCEPs replace housing assistance to members and cover basic needs not covered by other programs, services, or members' income. ER 609, 617. Those PCEPs are particularly critical

to the well-being of tribal members given Kalispel's very low per-capita tribal income and the severe housing limitations on the original Kalispel Reservation. ER 160, 329-30, 358, 396. Those PCEPs also are expressly provided for and approved by DOI under IGRA, implicitly as a form of providing for the welfare of tribal members. *See* 25 U.S.C. § 2710(b)(2)(B)(ii), (3).

As Kalispel explained, and the data it provided documented, if the Spokane Tribe Casino became operational, Kalispel would lose between about $31 million to $65 million or 32% to 57% in total governmental revenue annually, and 37% to 64% of its non-grant budget, depending on the reduced, preferred, and maximum buildout alternatives. ER 604-05, 615-16. Those huge impacts to the Kalispel government budget would prevent Kalispel from funding a large portion of its governmental operations and programs and providing some essential government services to its members. ER 407, 605, 616, 618. As a result, the socioeconomic progress of Kalispel would be harmed and many of its members would likely be forced to seek federal or state welfare assistance to meet their basic needs. ER 617-18.

Kalispel also noted that it has a distinct political and jurisdictional status from and does not function within the same political structure as the state subdivisions that also lie within the 25-mile radius of the "surrounding community" under IGRA. ER 159 (quoting 25 C.F.R. § 292.2). Therefore, the detrimental impacts from the Spokane Tribe Casino on Kalispel may be totally different from and should not be

balanced with stated benefits for the non-Indian portions of the surrounding community. ER 159-60. For example, none of Spokane's over $1 million in average annual mitigation payments to Airway Heights and Spokane County over 15 years would flow to or benefit Kalispel. *See* ER 168-73, 178, 182-92, 198-99. Also, DOI owes a fiduciary duty to Kalispel concerning its Airway Heights Reservation, which DOI does not owe to the rest of the surrounding community, and DOI must deal fairly with both Kalispel and Spokane without harming the existing economic development on Kalispel trust land. ER 160-62, 370-71, 408. In sum, the evidence of substantial unmitigated harm to Kalispel as a nearby tribe, IGRA's plain language, DOI's established policy, and DOI's trust responsibility all required a negative two-part determination based on detriment. ER 369-71.

## IV. DOI's Two-Part Determination

In 2015, DOI issued a two-part determination approving the Spokane Tribe Casino. ER 52-121. DOI acknowledged the cannibalistic effect of "some market decline" for Northern Quest, ER 92, and found that the buildout and operation of the Spokane Tribe Casino would result in a "combined reduction in future gaming revenues of approximately 33 percent at the Northern Quest casino[,]" ER 642. This was based on findings by DOI's expert that the Spokane Tribe Casino would impose a $42.8 million or 29.5% impact on Kalispel's revenue in the year when Phase I was completed, plus an additional $23.0 million or 20.9% impact on Kalispel's projected

revenue in the year that Phase III was projected to be completed, for a total revenue impact of at least $65.8 million over several years. ER 203-04, 621, 641-42. However, DOI and its expert later discounted the additional Phase III impact to 5.1% based on a projected 15.8% growth over the intervening five years before full buildout. ER 621, 642.

DOI discounted the combined impact on Kalispel's revenue at Northern Quest in numerous ways. First, DOI stated that this impact was "approximately" 33% even though the numbers above add up to 34.6%. *See* ER 641-42. Second, DOI further downplayed the combined impact on Northern Quest's revenue by stating that it would be only 13.8% compared to Kalispel's revenue from nine years previously. ER 642. But that ignored the substantial market growth over the intervening nine years, including 15.8% growth over five years noted by DOI's expert. *Compare id. with* ER 621, 42263, 42298. That discount also disregarded that DOI and its expert both repeatedly and logically evaluated these impacts based on comparing projected affected and unaffected revenue only for the year when impacts would occur. *See* ER 203-04, 621, 641-42. Third, DOI stated that Northern Quest's expected "market decline . . . will be mitigated by the length of time it takes to construct and develop the Spokane Tribe's Project," ER 635, without explaining how construction lag constitutes mitigation.

Fourth, DOI stated that "[t]his impact is also anticipated to diminish after the first year of . . . operation at full build out[,]" ER 642, and that Northern Quest's revenue "will likely recover over time as the market grows[,]" ER 92. This focus on attenuation over time overlooked Kalispel's extended, cumulative harm, especially with Spokane's casino expansion buildout. *See* ER 621, 642. Also, this overlooked that DOI's expert documented that it took four to six years or more for revenue to recover to pre-impact levels, even with much smaller initial impacts than the almost 30% initial impact here and the additional 5% impact three to five years later with full buildout. *See* ER 206, 621-23.

Fifth, DOI stated that "[p]otential adverse impacts to the Kalispel Tribe's casino will be mitigated as described in the Final EIS." ER 92. However, the Final EIS did not identify any mitigation of the impacts to Northern Quest or Kalispel or its members. Instead, the Final EIS disclaimed that "[w]hen effects are solely economic and do not result physical environmental effects, as they are in this case, NEPA does not require mitigation." ER 418; *see* ER 416-19. Also, the only socio-economic mitigation required in the Final EIS Record of Decision concerned payments to Airway Heights and Spokane County and policies and payments concerning gambling addiction. ER 35-37.

DOI did not dispute that the $66 million or more impact on Northern Quest's revenue over six years or more would impose corresponding multi-year impacts on

Kalispel's governmental budget, programs, and services. *Compare* ER 203-04, 641-42 *with, e.g.,* ER 604-07. DOI also did not dispute that those budgetary impacts would harm the socioeconomic progress of Kalispel and the well-being of its members and make a significant number of members need to seek federal or state welfare assistance to meet their basic needs. ER 315-17, 407. Rather, DOI acknowledged that "the Kalispel tribal government's budget would be impacted by the Project[.]" ER 642 (emphasis added). That finding was consistent with the standard in the Final EIS that "[a]n adverse economic, fiscal, or social impact would occur if the effect of the project were to negatively alter the ability of governments to perform at existing levels, or alter the ability of people to obtain public health and safety services." ER 420. That finding also was supported by DOI's expert, who found that the Spokane Tribe Casino will reduce Kalispel's governmental budget by $28.53 million or 32% in the first year. ER 624. That could cause Kalispel to completely eliminate its PCEPs, which constituted 7.1% of its budget, ER 608, and to reduce its remaining programs and services budget by over $22 million or over 45% in the first year, ER 624.

However, just as DOI discounted and explained away the huge revenue losses at Northern Quest that the Spokane Tribe Casino would impose, DOI did the same for the resulting impacts on Kalispel's governmental budget, programs, services, and members. First, while DOI acknowledged that Kalispel's PCEPs "might be reduced

or eliminated" as a consequence of the Spokane Tribe Casino, DOI implicitly dismissed that detrimental impact as not cognizable. ER 642. This was despite DOI's prior approval of the PCEPs under IGRA to provide for the welfare of tribal members and Kalispel's documented need for them. *Compare id. with* ER 316, 358, 396, 609; *see* 25 U.S.C. § 2710(b)(3).

Second, DOI asserted that the overall Kalispel governmental budget (including continuing restricted grants) was "not expected to be considerably reduced when compared to existing conditions (approximately 16.7 percent after elimination of direct payments to tribal members)." ER 642 (emphasis added). But DOI did not explain how or why it set a higher threshold for cognizable impacts or how the additional programmatic impact would be only 16.7% when DOI's expert calculated that to be 45% in just the first year. *See* ER 624.

Third, DOI stated that these impacts on Kalispel's governmental budget "are expected to dissipate" and "be ameliorated" over time by market growth. ER 642-43. But DOI did not explain how additional budgetary impacts over successive years did not constitute additional impacts, especially since DOI's expert found that effects that could last six or more years. *See* ER 621-23.

Fourth, DOI stated that the impacts on Kalispel's budget "would not prohibit the Kalispel tribal government from providing essential services and facilities to its membership." ER 642-43. But DOI did not explain how that was consistent with the

45% impact on Kalispel's program and services budget in just the first year, with continuing effects for perhaps half a dozen years or more. *See* ER 621-24. DOI also did not explain how that standard of harm was consistent with either the meaning of "detriment" under IGRA or DOI's policy that it "'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.'" ER 369, 407.

Finally, DOI asserted that Kalispel would still have more revenue per member than was currently available for Spokane. ER 643 n.335; *see also* ER 625. But DOI did not identify any legal authority for that consideration. *See id.*

Because DOI thus discounted and disregarded the $28.53 million or 32% impact on Kalispel's governmental budget in the first year that would only fade away over perhaps six years or more, DOI did not consider how those impacts to Kalispel's government, budget, programs, services, and members balanced with, were offset by, or otherwise were considered in "detriment to the surrounding community" under IGRA. *See generally* ER 629-39. Instead, DOI stated that "[n]o potentially significant impacts were identified" regarding public services, the Spokane Tribe Casino "would not result in detrimental impacts on housing[,]" and the impacts to Northern Quest (but not its employment) would be "mitigated" as explained above. ER 630-31, 635-36. DOI also noted that Spokane had entered into intergovernmental agreements with Airway Heights and Spokane County to address impacts to them,

but did not explain how that would help Kalispel. ER 636-38. Without irony, DOI also noted that a portion of Spokane's gaming revenue would be applied to its own governmental programs that have an impact on the community by assisting Spokane and its members regarding education, housing, health, and elder care, among other things. ER 638. DOI thus ultimately concluded that the Spokane Tribe Casino would not be detrimental to the surrounding community. ER 640.

DOI then requested concurrence from the Washington State Governor as required by IGRA. ER 118-21. There, DOI acknowledged the two-mile separation between the existing and proposed casinos and that it is "a Federal trustee with the responsibility to support all tribes." ER 119. However, DOI stated that competition alone was insufficient to deny either Kalispel's prior two-part determination or Spokane's current one, without explaining the legal and factual differences between the respective tribal objections to each application. ER 119-20. DOI also stated that, "[a]s trustee, we can merely ask tribal nations to try to work together for the good of both" without explaining how that was consistent with its "responsibility to support all tribes." ER 120. Additionally, DOI rejected Kalispel's concerns about harm to its revenues because the proposed casino site was in Spokane's aboriginal territory but not Kalispel's, and it would be "deeply ironic" to allow Kalispel to game there but not Spokane. *Id.* But DOI did not explain the bases for these considerations. The Governor concurred in DOI's approval and then the Spokane Tribe Casino opened.

## V. District Court Proceedings

In 2017, Kalispel challenged DOI's two-part determination in the U.S. District Court for the Eastern District of Washington. ECF No. 1. Subsequently, Spokane intervened, and that litigation was consolidated with another challenge to the two-part determination by Spokane County. ECF Nos. 20, 30. In 2018, the District Court granted motions to complete production of the administrative record. ECF No. 51. After DOI filed additional documents, plaintiffs objected, and the District Court ordered DOI to complete the record and to augment the privilege log. ECF No. 68.

Thereafter, the parties filed cross-motions for summary judgment. ECF Nos. 79, 82, 96, 98. Kalispel repeated its arguments from before DOI that Kalispel's harm was not merely competitive and the undisputed evidence established substantial, unmitigated detriment to Kalispel's government and members. ER 516-29, 541-53. Kalispel also argued that DOI had unlawfully discounted Kalispel's detriment, applied a high standard of detriment contrary to IGRA and DOI's existing policy, relied on arbitrary reasons not authorized by Congress, and breached DOI's trust duties to Kalispel. ER 516-532, 541-63.

For its part, DOI argued among other things that the discounted, additional first-year 16.7% impact to Kalispel's government budget for programs and services was a scrivener's error and should be 6.7%. ECF No. 98 at 32 & n.7. But that asserted reduced impact was based on comparing future impacted revenue with unimpacted

revenue from nine years previously, ER 418, 421-22, without significant intervening market growth and unlike DOI's expert analysis, ER 204-05, 620, 643. Also, the expert analysis found that the Spokane Tribe Casino will reduce Kalispel's entire governmental budget by almost $29 million or 32% in the first year, with recovery taking up to six years. ER 623-24. DOI's expert had calculated that this would cause Kalispel in the first year to completely eliminate its PCEPs plus reduce its tribal programs and services budget by over $22 million, or over 45%. ER 624.

In June 2019, the District Court held oral argument on the summary judgment motions. ECF 117. Kalispel reiterated its arguments and made clear that DOI could use its existing authority to provide mitigation for Kalispel so that mitigation need not fall on Spokane. ER 568-75, 581-87. In turn, DOI acknowledged that, per IGRA, DOI's analysis in the two-part determination looked at whether a new casino would impact a nearby Indian tribe's ability to provide government services to its members. ER 576. But DOI and the District Court stated that about the only thing Kalispel alleged was economic and competitive harms. *Id.* And DOI further asserted that the impact on Kalispel will be acute but will not be chronic because it will self-mitigate via market and population growth. ER 577-78. For its part, Spokane acknowledged that "we all agree that detriment means harm," but asserted that there are virtually always going to be some unmitigated harms, and DOI here properly looked at the net benefit to the entire surrounding community. ER 579-80.

In July 2019, the District Court granted Defendants summary judgment. ER 122-31. The District Court devoted just two paragraphs of analysis to detrimental impacts. ER 125. The District Court did not perform a statutory analysis of IGRA and did not address Kalispel's arguments regarding the undisputed evidence or DOI's change in policy. The District Court at least acknowledged that Kalispel "likely will suffer some detrimental impacts through loss of revenue[.]" *Id.* However, the District Court concluded that DOI's two-part determination was not arbitrary and capricious because "while the Kalispel may suffer in the short term, eventually the profits would rebound and both tribes would benefit." *Id.*

As support, the District Court stated only the following based on two cases that did not involve nearby tribes with undisputed evidence of detriment:

> In weighing detriment to the community, the Department need not find that the casino has no unmitigated negative impacts whatsoever, but instead . . . 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." *Stand Up for California! v. United States Dep't of Interior* [("*Stand Up*")], 879 F.3d 1177, 1187 (D.C. Cir. 2018), *cert. denied sub nom. Stand Up for California! v. Dep't of the Interior*, 139 S. Ct. 786, 202 L. Ed. 2d 629 (2019). "Although the IGRA requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities, it is hard to find anything in that provision that suggests an affirmative right for nearby tribes to be free from economic competition." *Sokaogon Chippewa Cmty. v. Babbitt* [("*Sokaogon*")], 214 F.3d 941, 947 (7th Cir. 2000).

ER 125.

Finally, for Kalispel's breach of trust claim, the District Court acknowledged that the "the trust duty necessarily equally applies to all tribes so the Government may not favor one tribe over another." ER 130. The District Court also noted that the scope of that duty must be established by statute, *id.*, but did not note that IGRA requires DOI to consult with "nearby Indian tribes" regarding whether proposed gaming would be detrimental to the surrounding community, 25 U.S.C. § 2719(b(1)(A). Instead, the District Court noted that the Spokane and Kalispel interests are not aligned, so since DOI "fulfilled its statutory duty to examine the benefits and harm to all [a]ffected parties, the Department did not violate the trust relationship." ER 130. The District Court then entered judgment for Defendants, and this appeal followed in September 2019. ER 132, 564-67.

## ARGUMENT SUMMARY

There are four fundamental failings in DOI's deficient determination of detriment to the surrounding community from the Spokane Tribe Casino, and each independently requires vacating that agency action as unlawful. First, under IGRA's plain meaning, the unmitigated material detriment in DOI's finding that "the Kalispel tribal government's budget would be impacted" precludes a conclusion that the Spokane Tribe Casino "would not be detrimental to the surrounding community," including Kalispel as a nearby Indian tribe. Second, DOI's determination was arbitrary and capricious because DOI disregarded important

considerations and relevant evidence concerning the extended, substantial, and unmitigated detriments to Kalispel's governmental budget, programs, services, and members. Also, DOI relied on thresholds and discounts for detriment that are implausible and inconsistent with IGRA and frustrate Congress's intent. None of that can be avoided by the District Court's belated, unfounded suggestion that Kalispel's detriment will be offset by benefits to others. Third, DOI's determination improperly failed to provide a reasoned explanation for departing from DOI's existing policy that it "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." Finally, DOI's determination unlawfully violated DOI's duties as trustee to not favor one tribe over another where their interests are not aligned and to protect nearby Indian tribes under IGRA from unmitigated detriment from new off-reservation tribal casinos. Accordingly, the DOI two-part determination must be vacated and remanded for proper analysis under IGRA.

## ARGUMENT

### I. Under The Governing Standard of Review, This Court Reviews De Novo Based On The Administrative Record Whether DOI's Two-Part Determination Under IGRA Must Be Set Aside Under The APA Because It Is Either Not In Accordance With Law Or In Excess Of Statutory Authority Or Limitations.

This Court reviews de novo a district court's grant of summary judgment, including its interpretation and application of federal statutes. *San Luis & Delta-*

*Mendota Water Auth. v. Haugrud* ("*San Luis*"), 848 F.3d 1216, 1227 (9th Cir. 2017) (APA); *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 555 (9th Cir. 2016) (IGRA). And in administrative appeals, district court factfinding is typically unnecessary and the appellate court must review the administrative record to decide whether the agency action satisfies the governing standard of review. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Ag.* ("*R-CALF*"), 499 F.3d 1108, 1114-15 (2007). Thus, even on appeal, this Court reviews agency action "'directly[.]'" *Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610, 614 (9th Cir. 2019) (citation omitted).

Here, the APA governs judicial review of DOI's two-part determination under Section 20 because IGRA does not specify a different standard of judicial review. *See San Luis*, 848 F.3d at 1227; *cf.* 25 U.S.C. § 2714 (specifying APA review for other IGRA sections). Under the APA, this Court must "hold unlawful and set aside" DOI's action if it is either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations . . . ." 5 U.S.C. §§ 706(2)(A), (C). Finally, regardless of which APA standard is applied, the analysis starts with the text of the statute from which the agency purports to derive authority to act. *San Luis*, 848 F.3d at 1227. These standards all govern this Court's review of the District Court's affirmance of DOI's two-part determination for the Spokane Tribe Casino.

## II. DOI's Two-Part Determination Violates The Plain Meaning Of IGRA's Prohibition On New Off-Reservation Casinos That Would Be "Detrimental To The Surrounding Community[.]"

### A. *IGRA's plain meaning requires that a proposed off-reservation tribal casino not cause unmitigated harm to the surrounding community, including nearby Indian tribes.*

In this case, the dispute concerns the second part of DOI's two-part determination under IGRA's Section 20: that Spokane's proposed gaming "would not be detrimental to the surrounding community[.]" 25 U.S.C. § 2719(b)(1)(A). There is no dispute here about the definition of "surrounding community," which is ambiguous in scope but has been defined by DOI to mean "local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment." 25 C.F.R. § 292.2. There also is no dispute here that Kalispel constitutes a "nearby Indian tribe" that is part of the surrounding community because Kalispel is "an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment[.]" *Id.; cf. Cachil Dehe Band of Wintun Indians v. Zinke* ("*Cachil*"), 889 F.3d 584, 598-99 (9th Cir. 2018) (addressing challenges by a tribe outside the 25-mile radius); *Stand Up*, 879 F.3d at 1188 (same). Instead, Kalispel's challenge here focuses on the proper meaning and DOI's unlawful misinterpretation or misapplication of the term "detrimental."

For this, both the "not in accordance with law" and the "in excess of statutory . . . authority" APA standards present questions of law, under which agency action

is *ultra vires* if it is invalid under the plain, unambiguous meaning of the authorizing statute. *See Northwest Envtl. Advocates v. E.P.A.*, 537 F.3d 1006, 1019, 1020, 1022 (9th Cir. 2008), *partly superseded by statute on other grounds as stated in Lake Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 4 n.1 (D.C. Cir. 2011); *Clouser v. Espy*, 42 F.3d 1522, 1527-28 & n.5 (9th Cir. 1994). In applying that standard, if "Congress has directly spoken to the precise question at issue" as determined by traditional rules of statutory construction, and "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837, 842-43 & n.9 (1984); *Wilderness Society v. U.S. Fish & Wildlife Serv.* 353 F.3d 1051, 1059, 1060 (9th Cir. 2003) (en banc), *amended*, 360 F.3d 1374 (9th Cir. 2004); *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1151 (9th Cir. 2019) (IGRA).

Here, a number of canons of statutory construction apply. Foremost, when a statute does not define words, a fundamental canon provides that they will be interpreted as taking their ordinary, contemporary, common meaning. *Wilderness Society*, 353 F.3d at 1060. This plain meaning may be derived from the dictionary. *United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017). Likewise, words in a statute must be read in the context of the overall statutory scheme and purpose. *Wilderness Society*, 353 F.3d at 1060. Also, under another canon of construction, a word is not ambiguous just because it has a broad general meaning. *Arizona*, 818

F.3d at 557. This is because courts presume that Congress acts deliberately when using broad terms, *San Luis*, 848 F.3d at 1230, and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Finally, a "familiar principle . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006).

Applying the first canon of construction, IGRA does not define "detrimental" but that word has a clear and settled meaning dating to the 17th Century of "[c]ausing harm, damage, or loss; injurious or hurtful[.]" Black's Law Dictionary 565 (11th ed. 2019). That corresponds to the meaning of "detriment" since the 15th Century as being "[a]ny loss or harm suffered in person or property; harm or damage." *Id*. That unambiguous, broad meaning should apply under IGRA. *See San Luis*, 848 F.3d at 1230; *Arizona*, 818 F.3d at 557; *Wilderness Society*, 353 F.3d at 1060.

In addition, Congress did not provide any limiting, modifying, or qualifying adjective for "detrimental" in Section 20, so it must be understood as a binary test without any statutorily required threshold: either the proposed gaming would or "would not be detrimental[.]" 25 U.S.C. § 2719(b)(1)(A). Per *Hamdan*, this unqualified standard contrasts with the first part of the two-part determination, under which the proposed gaming separately must be in the "best" interest of the proposing

Indian tribe and its members. *See id*. This lack of a threshold for detriment also contrasts with the congressional finding in IGRA that prior law did not provide "clear" standards for the conduct of Indian gaming and with the provision that a "substantial" violation of IGRA warrants a temporary closure of Indian gaming, while "any violation" warrants a civil fine. *Id.* §§ 2701(3), 2713(a)(1), (b)(1).

The logical and legal role of a categorical meaning for "detrimental" also makes sense in the context for the two-part determination, since it is an exception to Section 20's general rule that otherwise prohibits Indian gaming on land acquired in trust after IGRA's enactment. *See Cachil*, 889 F.3d at 598; *Redding Rancheria*, 776 F.3d at 710. Indeed, per IGRA, DOI's "policy is to narrowly apply the off-reservation exception to the general prohibition on the conduct of tribal gaming on trust lands acquired after . . . 1988[.]" ER 407. If "detrimental" were construed to require a high showing of harm, the exception could impermissibly swallow the rule. *Cf. Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985). And it is difficult to see "how Congress could have intended to create such a large and obvious loophole" in one of IGRA's "key" provisions. *See County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1473 (2020).

In sum, Congress knows how to qualify or quantify terms, and it did not do that in crafting the categorical "detrimental" standard in the two-part determination exception in IGRA Section 20. As the meaning of "detrimental" in IGRA is plain,

the intent of Congress is clear and "'that is the end of the matter.'" *United States v. Turner*, 689 F.3d 1117, 1119 (9th Cir. 2012) (citation omitted). And because IGRA is neither silent nor ambiguous, this Court "must give effect to the plain language that Congress chose." *United States v. Geyler*, 949 F.2d 280, 283 (9th Cir. 1991). Thus, IGRA requires that a proposed off-reservation tribal casino would not cause any harm, damage, or loss to the surrounding community.

DOI's Section 20 implementing regulations confirm and implement this plain meaning. They do not attempt to re-define "detrimental" and acknowledge the clear, binary nature of the governing standard by repeatedly recognizing that it simply concerns whether the proposed gaming "would or would not be detrimental to the surrounding community." 25 C.F.R. §§ 292.19(g), 292.20(b)(6), 292.21(a). In addition, DOI's regulations implement that clear standard in four ways. First, they recognize that numerous types of "impacts" and "costs" can be detrimental. *See id.* §§ 292.18(a)-(g), 292.20(b)(1)-(5). Second, they recognize that mitigation, including via intergovernmental agreements, is the antidote to identified detrimental impacts and costs. *See id.* §§ 292.18(a), (d), (g); 292.20(b)(1), (b)(4); *cf. Cachil*, 889 F.3d at 601 (recognizing that mitigation measures prevent, avoid, or minimize detriment to the surrounding community). Third, DOI's regulations provide that mitigation is only required for the surrounding community, 25 C.F.R. § 292.18(a), (d), (g); *id.* § 292.20(b)(1), (b)(4), which is defined to mean "local governments

and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment." *Id.* § 292.2; *cf. Stand Up*, 879 F.3d at 1188-90 (affirming "reduced weight" for concerns of tribe located outside the surrounding community).

Finally, DOI's Section 20 regulations confirm that IGRA's unqualified use of the term "detrimental" sets a low standard for harm to the surrounded community by setting an elevated standard for detriment to governments located outside the circumscribed surrounding community. "A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation [regarding a two-part determination] 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). All this confirms that IGRA Section 20 prohibits a proposed off-reservation tribal casino that would cause unmitigated harm to the surrounding community, including nearby Indian tribes, and that such detriment need not be significant.

### B. *DOI unlawfully determined that the Spokane Tribe Casino would not be detrimental to the surrounding community because the record establishes that it will cause substantial, unmitigated harm to Kalispel.*

Under IGRA's categorical governing standard, DOI found that "the Kalispel tribal government's budget would be impacted by the Project[.]" ER 642. DOI's own expert quantified that as $28.53 million in just the first year, ER 624. Also, both DOI and its expert acknowledged that the impacts would continue over a number of years,

with the expert estimating up to six years for recovery. ER 203-04, 621-23, 641-42. Therefore, given the expected duration of attenuation, the total cost of the impact would certainly far exceed $30 million. *See id.*

DOI suggested that this impact could lead Kalispel to reduce or eliminate its PCEPs, ER 641-42, which constituted 7.1% of Kalispel's budget, ER 608. That was despite DOI's own prior approval of those under IGRA to provide for the needs and welfare of Kalispel's members. *See* 25 U.S.C. § 2710(b)(3); ER 308, 316, 358, 396. And after wholly eliminating those, Kalispel's tribal programs and services budget would have to be materially further reduced by an additional $22.16 million or 45% in just the first year. ER 624. Thus, the overall governmental impact in just one year would be 32% as stated in DOI's expert's supporting analysis. *See id.*

Regardless of how DOI downplayed these impacts on Kalispel's government, budget, services, and members, these impacts exist and exceed the preclusive detriment threshold established by Congress under IGRA. *See* 25 C.F.R. §§ 292.18(b)-(c); ER 407, 605, 616-18. These impacts also are not merely about economic competition. *Compare* ER 119, 230-32, 576 *with* ER 405-06. Instead, they concern a core purpose of IGRA to support tribal self-sufficiency and governments as well as IGRA's mandate to fund tribal government operations and programs and provide for the general welfare of tribal members. *See* 25 U.S.C. §§ 2702(1), 2710(b)(2)(B)(i)-(ii). Also, payments to members that replace housing assistance

and cover basic needs not covered by other programs or services or members' income, ER 308, 316, are not a gratuity but are expressly provided for under IGRA and approved by DOI to provide for the welfare of tribal members. *See* 25 U.S.C. §§ 2710(b)(2)(B)(ii), (3).

Instead of ensuring that Kalispel's undisputed harm was mitigated as DOI's regulations require, DOI sought to discount its finding of harm. First, DOI completely dismissed Kalispel's material, quantified, extended impacts on the grounds that they were insufficiently "considerabl[e,]" that they would "likely recover over time[,]" be "expected to dissipate[,]" and "be ameliorated" over time by market growth, and that they "would not prohibit the Kalispel tribal government from providing essential services and facilities to its membership." ER 635, 642-43. But IGRA's plain meaning does not require that minimum threshold, permanent duration, or catastrophic impact for a harm to constitute preclusive detriment to the surrounding community. There is thus no textual hook in IGRA for DOI's primary reasons for disqualifying Kalispel's substantial, undisputed harms.

Next, DOI asserted that Kalispel would still have more revenue per member than was currently available for Spokane. ER 643 n.335; *see also* ER 625]. And DOI asserted that it would be improper to allow Kalispel but not Spokane to conduct gaming in Spokane's aboriginal territory. ER 120. But IGRA imposes two separate parts in the required determination, 25 U.S.C. § 2719(b)(1)(A), as DOI's regulations

confirm, 25 C.F.R. § 292.21(a). IGRA thus does not allow balancing the best interests of Spokane with the detriment to Kalispel.

In addition, DOI asserted that impacts to Kalispel would be "mitigated by the length of time it takes to construct and develop" the Spokane Tribe Casino and that "[p]otential adverse impacts" to Kalispel "will be mitigated as described in the Final EIS. ER 635. However, development lag is not mitigation, as it just means that a harm will occur later. In turn, the Final EIS did not describe or require any mitigation of the impacts to Kalispel or its members and disclaimed "solely economic" mitigation. ER 418. That was apt since under NEPA "economic or social effects are not intended by themselves to require preparation of an environmental impact statement." 40 C.F.R. § 1508.14. Finally, the Final EIS Record of Decision only required socio-economic mitigation via payments to Airway Heights and Spokane County plus policies and payments to address gambling addiction. ER 35-37. None of that will provide essential government services and housing for Kalispel members that the Spokane Tribe Casino will impact. ER 298, 308, 315-317, 407. Thus, no asserted mitigation measures would prevent, avoid, or minimize detrimental harm to Kalispel, and hence the surrounding community. *See Cachil*, 889 F.3d at 601.

The belated explanations offered in and by the District Court also cannot save DOI's deficient detriment determination. Contrary to assertions there, Kalispel did not only really complain about economic and competitive harms. *See* ER 576.

Rather, Kalispel pointed to undisputed evidence of substantial, unmitigated harms to its government, programs, services, and members. *See supra* Statement of Case § III. And contrary to Spokane's litigation assertion and the District Court's conclusion, DOI did not actually consider the net benefit to the entire surrounding community. *See* ER 125, 579-80. Instead, DOI's determination just discounted, disregarded, and dismissed the quantified, significant, extended, and multifarious detriments to Kalispel and its members. *See supra* Statement of Case § IV. Because of that, DOI never actually evaluated all those cognizable harms under IGRA within the entire surrounding community. DOI did not determine whether the harms to Kalispel would be offset by some other, greater benefits to surrounding community. Nor did DOI identify any sources of revenue or propose an intergovernmental agreement that would prevent, avoid, or minimize the calculated costs of the material, multi-year governmental impacts to Kalispel. *See Cachil*, 889 F.3d at 601.

In sum, neither DOI nor the District Court identified and applied the proper legal standard for detriment under Section 20 or evaluated the evidence in the record against that standard. Under Section 20's plain meaning, the substantial, extended, unmitigated harm to Kalispel's government, services, and members established that the Spokane Tribe Casino would be detrimental to the surrounding community. Therefore, DOI's two-part determination must be vacated as *ultra vires* and the District Court decision must be reversed.

## III. DOI's Determination Of No Detriment To The Surrounding Community, Including Kalispel, Was Also Arbitrary And Capricious.

In addition to being unlawfully *ultra vires* under the plain meaning of IGRA Section 20, DOI's two-part determination fails the APA's "arbitrary and capricious" standard. Under this standard, the scope of review is narrow, and a court may not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* ("*State Farm*"), 463 U.S. 29, 43 (1983). This standard of review is highly deferential and presumes that agency action is valid, so that it should be affirmed if a reasonable basis exists for it. *R-CALF*, 499 F.3d at 1115.

Nevertheless, in so reviewing an agency decision, the court must consider whether the decision was based on consideration of relevant factors and articulated a rational connection between facts and conclusions. *See State Farm*, 463 U.S. at 43; *San Luis*, 848 F.3d at 1227 (citing *State Farm*). Thus, agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43; *Org. Village of Kake v. U.S. Dep't of Agric.* ("*Kake*"), 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (quoting *State Farm*). An agency decision therefore is arbitrary and capricious "if it ignores important considerations or relevant evidence on the record." *Redding Rancheria*, 776 F.3d at 714 (citing *State Farm*, 463 U.S. at 43). Finally, agency

decisions are unlawful if they are inconsistent with a statutory mandate or frustrate the congressional policy underlying a statute, and if an agency decision does not provide reasons that satisfy the above standards, this Court will not use its own reasoning to bolster the decision on grounds that were not in the decision. *N.R.D.C., Inc. v. Pritzker* ("*NRDC*"), 828 F.3d 1125, 1132-33, 1139 (9th Cir. 2016). DOI failed these standards here in three ways, and those failures cannot be saved by the courts.

### A. *DOI impermissibly relied on thresholds, discounts, and excuses that Congress did not intend it to consider, which were inconsistent with IGRA and frustrated IGRA's relevant policies and mandates.*

There are three ways in which DOI's detriment determination was arbitrarily inconsistent with IGRA. First, Section 20 does not require high minimum durations or levels of impacts for consideration as detriment, even though Congress "knows how to impose such a requirement when it wishes to do so." *Whitfield v. United States*, 543 U.S. 209, 216 (2005). Therefore, by imposing and applying such heightened requirements here, DOI frustrated Congress's command that an off-reservation gaming acquisition categorically "would not be detrimental[.]" 25 U.S.C. § 2719(b)(1)(A). Moreover, because "'IGRA favors on-reservation gaming over off-reservation gaming,'" ER 369, 407, Congress could not have intended such large loopholes or exceptions that could impermissibly swallow its basic, relevant rule, *see County of Maui*, 140 S. Ct. at 1473; *Wei*, 763 F.2d at 372. The high harm threshold applied by DOI here renders Section's 20's careful, categorical scheme

meaningless. Accordingly, IGRA precludes DOI's determination that disregarded the substantial, unmitigated, multi-year detriments to Kalispel's government budget, programs, services, and members because they were not sufficiently considerable and they would diminish, dissipate, and ameliorate over time. ER 642-43.

Second, DOI dismissal of Kalispel's PCEPs to discount detriment was also inconsistent with IGRA. Those payments were not a gratuity, which could be wholly eliminated without cognizable harm, as DOI implied. *See* ER 642. Rather, IGRA expressly authorizes those payments and even requires their approved by DOI. 25 U.S.C. § 2710(b)(3). Those payments are necessarily a form of providing for the welfare of tribal members as one of IGRA's allowable uses for gaming revenue. *Compare id. with id.* § 2710(b)(2)(B)(ii). Therefore, their complete cancellation certainly constitutes detriment. That especially applies here given Kalispel's documented, acute need for them. ER 316, 358, 396, 609.

Finally, IGRA Section 20 precludes DOI from rejecting or discounting Kalispel's detrimental impacts based on the proposed casino site being in Spokane's aboriginal territory, ER 120, by highlighting benefits to Spokane, ER 119-21, or by comparing Kalispel's detriment to Spokane's revenue and government spending, ER 619, 625. The two parts of the two-part determination are discrete and independent and cannot be balanced against other. *See* 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.21(a). IGRA thus does not allow detrimental impacts to a nearby tribe to be

either discounted or offset by matters relating to an applicant tribe. Indeed, under DOI's regulation, only the historical connections of "a nearby Indian tribe" are relevant for the second part of the determination, whereas an applicant tribe's historical connections are only relevant for the separate, first part of the determination. *Compare* 25 C.F.R. §§ 292.16(e), 292.17(i) *with id.* § 292.18(h).

### B. *DOI's determination was also arbitrary and capricious because it improperly ignored important considerations and relevant evidence.*

DOI's own expert quantified Kalispel's governmental budget impacts as $28.53 million or 32% in just the first year. ER 624. And both DOI and its expert acknowledged that the impacts would continue over a number of years, with the latter explaining that it could take up to half a dozen years to recover to pre-impact levels. ER 203-04, 621-23, 641-42. Nonetheless, DOI asserted that these impacts "would not prohibit the Kalispel tribal government from providing essential services and facilities to its membership." ER 642-43. But Kalispel would be prohibited from providing all the programs and services for its members that the identified impacts to its governmental budget would preclude.

According to DOI's calculations, Kalispel would have to wholly eliminate 7.1% of its budget that supplements tribal members' and elders' income as needed and approved by DOI. *See, e.g.,* ER 608-09, 617, 642. Kalispel also would have to reduce its remaining governmental programs and services budget by over $22 million or 45% in just the first year, with continuing effects in successive years. *See*

ER 621-24. All that would prevent Kalispel from funding a large portion of its governmental operations and programs and providing some essential government services to its members. ER 407, 605, 616, 618. That also likely would harm the socioeconomic progress of Kalispel and the well-being of its members and make a significant number of members need to seek federal or state welfare assistance to meet their basic needs. ER 617-18. IGRA and the APA preclude DOI from ignoring these real impacts by imposing higher thresholds for cognizable detriment so that a nearby Indian tribe's entire government must be practically forced to completely close. This case therefore is like *Redding Rancheria*, where this Court vacated and remanded because DOI similarly did not consider a tribe's relevant submission. *See Redding Rancheria*, 776 F.3d at 714-15.

DOI's determination further ignored important considerations by defying the logic of DOI's own Section 20 regulations. Those regulations employ a no-detriment standard of harm to the surrounding community, 25 C.F.R. § 292.21(a), and an elevated standard of direct, immediate, and significant impact only for governments that are located further away, *id.* § 292.2. Yet in dismissing the record evidence of the $28.53 million, 32% first-year governmental impact to Kalispel, ER 624, DOI imposed a higher standard of harm for a "nearby Indian tribe" located just two miles away than DOI would require for a government more than 25 miles away. Also, DOI should have considered mitigation for that almost $30 million impact since that

plainly entailed "[a]nticipated costs" that could be mitigated. *Id.* § 292.20(b)(4). Likewise, there was no legal basis to dismiss Kalispel's multi-year impacts as insufficiently long-term, since DOI's regulations do not require that for detriment to be cognizable. For comparison, "[b]oth short- and long-term effects are relevant" under NEPA even though NEPA sets a higher threshold of "significant[]" for environmental impacts. *See* 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.27(a).

### C. *DOI's determination was also arbitrary and capricious because it relied on implausible, counter-evidentiary explanations that could not be ascribed to agency expertise.*

DOI's imposition of high thresholds for detriment and its dismissal of Kalispel's immediate, significant, and extended governmental losses are simply implausible. That almost $29 million, 32% impact in just the first year, which will be exacerbated by later buildout and take perhaps half a decade or more to dissipate, is certainly not immaterial or de minimis. And as explained above, neither IGRA nor DOI's regulations impose higher thresholds for that. Indeed, the qualifiers that DOI used to negate Kalispel's harm would also negate the indisputable detriment from a broken leg or the current coronavirus pandemic. After all, a broken leg should heal over time and one would still have use of the other leg and both arms. Likewise, this pandemic is not expected to eliminate more than 32% of lives or jobs this year and is expected to ameliorate over time. Kalispel's direct, immediate, and multi-year

losses here are thus sufficiently "considerable" and are not too small or too short to constitute cognizable detriment under Section 20.

### D. *DOI's arbitrary analysis cannot be saved by the District Court's belated, unfounded balancing.*

The District Court did not address any of the above numerous, dispositive deficiencies in DOI's determination. Instead, it affirmed because DOI must just weigh the benefits and impacts on the whole even if the benefits do not directly mitigate specific impacts. ECF No. 118 at 4. But DOI did not balance or offset Kalispel's detriment, and neither the District Court nor this Court may bolster DOI's determination with that belated reasoning. *See NRDC*, 828 F.3d at 1132-33. In particular, DOI did not analyze whether benefits to other parts of the surrounding community offset Kalispel's detriment because DOI misinterpreted the law and mischaracterized the facts to conclude that Kalispel would not suffer any cognizable detriment under IGRA. *E.g.,* ER 19, 642. Moreover, any such asserted "wholistic" analysis would improperly ignore that Kalispel's distinct political and jurisdictional status precludes balancing or offsetting its impacts with benefits or mitigation to other parts of the surrounding community. *See* ER 159-60. Kalispel has a distinct, sovereign status separate from subordinate state instrumentalities that would preclude such offsetting or balancing. *See United States v. Wheeler*, 435 U.S. 313, 320, 322-23 (1978).

Finally, even if DOI could and did analyze and balance overall detrimental impacts to the surrounding community including instead of disregarding Kalispel's documented, cognizable impacts, those impacts would not be mitigated or otherwise offset. *See* ER 159-60, 416-19, 626-28. Local construction, Spokane Tribe Casino jobs, and payments to Airway Heights or Spokane County would not remedy Kalispel's budget or help Kalispel children or elders who will lose benefits and services. *See, e.g.*, ER 308. Also, the calculated $28.53 million impact to Kalispel's governmental budget in just the first year, ER 624, far exceeds and is unaffected by the roughly $15 million in mitigation payments over 15 years to Airway Heights and Spokane County. *See* ER 626-28. Kalispel's greater detriment would be even more pronounced if DOI had considered rather than disregarded the $42.8 million impact on Kalispel's gaming revenue in the year when the Spokane Tribe Casino opened and the additional $23 million impact from full buildout. ER 203-04. For all these reasons, DOI's two-part determination must be vacated as arbitrary and capricious.

## IV. DOI's Determination Is Unlawful Because It Provided No Reason For Departing From DOI's Existing Policy That It "Will Not Approve . . . Off-Reservation Gaming Where A Nearby Indian Tribe Demonstrates That It Is Likely To Suffer A Detrimental Impact As A Result."

An "'[u]nexplained inconsistency' between agency actions" is arbitrary and capricious under the APA. *Kake*, 795 F.3d at 966 (citation omitted). Thus, "'[a]n agency may not depart from a prior policy . . . *sub silentio*[.]'" *Cal. Public. Utilities Comm'n v. F.E.R.C.* ("*CPUC*"), 879 F.3d 966, 977 (9th Cir. 2018) (quoting *FCC v.*

*Fox Television Stations, Inc.* ("*Fox*"), 556 U.S. 502, 515 (2009)). Instead, an agency must provide "some minimal explanation for the change." *Redding Rancheria*, 776 F.3d at 714 (concerning Section 20 two-part determinations). For this, "a policy change complies with the APA if the agency (1) displays 'awareness that it is changing position,' (2) shows that 'the new policy is permissible under the statute,' (3) 'believes the new policy is better, and (4) provides 'good reasons' for the new policy . . . ." *Kake*, 795 F.3d at 966 (quoting *Fox*, 556 U.S. at 515-16). Finally, an agency action can be upheld only on grounds articulated by the agency in its decision, so a court "'may not accept appellate counsel's *post hoc* rationalizations for agency action.'" *CPUC*, 879 F.3d at 978 n.5 (quoting *State Farm*, 463 U.S. at 50) (additional citation omitted).

Before DOI and the District Court, Kalispel documented that DOI in two of the most-recent prior two-part determinations had explicitly recognized that DOI "'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.'" ER 407, 521 (citations omitted). But that is not what DOI did here. Instead, DOI asserted that only complete closure or failure to generate any revenue or "prohibit[ing] the Kalispel tribal government from providing essential services and facilities to its membership" would constitute detriment. *See* ER 521-22 (concerning ER 644), 642-43.

Even if Kalispel had not specifically, repeatedly noted the preexisting DOI policy directly governing this situation, DOI under *Fox* and *Kake* had an obligation under the APA to (1) display awareness that it was changing position, (2) show that the new policy is permissible under IGRA, (3) state that it believed the new policy was better, and (4) provide good reasons for the new policy. But DOI did not do any of that. And under *State Farm* and *CPUC*, it is now too late for DOI's appellate counsel to advance excuses for why DOI failed to do that or why DOI's alternative explanations should suffice. Nor may this Court supply the required explanations. *See NRDC*, 828 F.3d at 1132-33. Consequently, apart from all other failings, DOI's two-part determination here must be vacated and remanded for DOI to justify its change from existing policy that protects nearby Indian tribes from detrimental impacts from new off-reservation Indian gaming.

## V. DOI Unlawfully Breached Its Duties As Trustee To Not Favor One Tribe Over Another And Under IGRA To Protect Nearby Indian Tribes From Unmitigated Detriment From New Off-Reservation Casinos.

Even if this Court were to remand for DOI to justify a change in policy, DOI likely could not, since that existing DOI policy is required by DOI's duty as trustee under IGRA Section 20. While this Court has not previously addressed this issue, the *utra vires* APA standard logically also requires compliance with applicable fiduciary duties to Indian tribes. *Cf. Gros Ventre Tribe v. United States*, 469 F.3d 801, 808 n.8, 809, 810 n.10 (9th Cir. 2006) (respectively citing the *ultra vires*

doctrine, concluding that tribes must state breach of trust claims "within the confines of the APA" and "leaving open the question of whether the United States is required to take special consideration of tribal interests when complying with applicable statutes and regulations"). This standard should apply here because "[i]t is fairly clear that *any* Federal government action is subject to the United States' fiduciary duty responsibilities toward the Indian tribes." *Nance v. E.P.A.*, 645 F.2d 701, 711 (9th Cir. 1981). Also, courts look "to common-law principles to inform . . . interpretation of statutes and to determine the scope of liability that Congress has imposed." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011).

In particular here, Section 20 requires that DOI "consult[] with . . . officials of other nearby Indian tribes" regarding whether "a gaming establishment on newly acquired lands . . . would not be detrimental to the surrounding community[.]" 25 U.S.C. § 2719(b)(1)(A). This requirement is expanded and elaborated upon in DOI's implementing regulations, which give nearby Indian tribes a suite of rights as a distinct part of the surrounding community. 25 C.F.R. §§ 292.2; 292.18(a), (d), (g); 292.19(a)(2), (b)(1)-(6); 292.20(b)(1), (b)(4). Naturally, "the purpose of consulting with nearby Indian tribes is to determine whether a proposed gaming establishment will have detrimental impacts on a nearby Indian tribe that is part of the surrounding community under section 20(b)(1)(A) of IGRA." Gaming on Trust Lands Acquired After October 17, 1988; Final Rule, 73 Fed. Reg. 29,354, 29,356 (May 20, 2008).

This consultation mandate is not an empty, purely procedural, box-checking exercise because it substantively serves to enable DOI to determine whether there would be "detrimental impacts on a nearby Indian tribe[.]" *Id.* Namely, Indian tribes' communications to DOI about federal actions that may affect their trust property are important for proper discharge of DOI's trust obligations, but DOI "in its fiduciary capacity would be obliged to adopt the stance it believed to be in the beneficiary's best interest, not necessarily the position espoused by the beneficiary itself." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12, 14 (2001). This "specific duty that has been placed on the government" contrasts with "compliance with general regulations and statutes not specifically aimed at protecting Indian tribes[,]" which are not enforceable beyond their terms. *Gros Ventre Tribe*, 469 F.3d at 810; *see also Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) for same point). Accordingly, IGRA itself and DOI's implementing regulations create an "actionable fiduciary obligation" by conferring a special tribal benefit on Kalispel as a nearby Indian tribe. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 924 (9th Cir. 2008); *see United States v. Mitchell*, 463 U.S. 206, 216-19 (1983) (regulations can create enforceable trust duties).

Section 20's express consultation duty imposes and implements the policy that DOI "'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.'" ER 369, 407 (citations omitted). That policy and that duty also reflect DOI's recognized duties of loyalty and to support Indian beneficial owners' use of trust assets when taking actions "potentially affecting assets held in trust . . . for Indian tribes[,]" DOI, Departmental Manual, Part 303, §§ 2.6(C)(3), 2.7, 2.7(B)—duties with which all DOI employees must comply or be subject to discipline or removal, 43 C.F.R. § 20.502(a). Application of those duties makes sense in considering potential detriment to Kalispel since DOI previously acquired Kalispel's nearby lands in trust, ER 134, and that necessarily included finding that the DOI "is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." 25 C.F.R. § 151.10(g).

More fundamentally, the Section 20 consultation mandate and corresponding DOI policy reflect that, "because 'the government owes same trust duty to all tribes[,]' . . . . [i]t cannot favor one tribe over another" where "tribal interests are not aligned." *Redding Rancheria*, 776 F.3d at 713 (quoting *Confed. Tribes of Chehalis Indian Res. v. Washington*, 96 F.3d 334, 340 (9th Cir.1996) (citing additional cases)). The District Court at least acknowledged this. ER 130. And, as DOI acknowledged in seeking state concurrence for this two-part determination, DOI is "a Federal trustee with the responsibility to support all tribes." ER 119. All that comports with DOI's general fiduciary duty "'to act impartially as between or

among'" beneficiaries, "'with due regard' to the interests of the Tribe in trust property." *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1379-80 (Fed. Cir. 2001), *aff'd sub nom. United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (quoting Restatement (Second) of Trusts § 232 (1959)); Restatement (Third) of Trusts § 79(1) (2007). Thus, there may be a claim for breach of fiduciary duties for federal interference with beneficial use of existing trust lands in two-part determinations. *See Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 83 n.28 (D.D.C. 2013).

All this is critical, because where DOI "is obligated to act as a fiduciary . . . [its] actions must not merely meet the minimal requirements of administrative law but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001). Accordingly, where "the government's liability is predicated on trust obligations, it need take those protective measures that a reasonable or prudent trustee would take." *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371, 1385 (9th Cir.1997). In this, DOI "is required to exercise the greatest care in administering its trust obligations" and is bound by "the same trust principles that govern the conduct of private fiduciaries." *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont.*, 792 F.2d 782, 794 (9th Cir. 1986). Thus,

DOI's standard of behavior is the "punctilio of an honor the most sensitive." *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1942).

But here, DOI did not comply with either its own specifically stated existing policy or its acknowledged trust duties under Section 20. As noted above, DOI found that the Spokane Tribe Casino will impose extended, substantial detrimental impacts on Kalispel's governmental budget and services to its members. ER 642. But rather than follow its policy or its duty to deny the second part of the two-part determination, DOI asserted various impermissible and unfounded—and ultimately unlawful—excuses for avoiding the actual consideration that IGRA required. *See supra* Argument § III.

DOI's additional specific evasive-trustee excuses fare no better. Dismissing Kalispel's detriment as merely a competitive harm and "fair" given the prior two-part determination for Kalispel would make sense only if Kalispel here like Spokane there "did not submit any evidence documenting its allegation of severe detriment." ER 140. But that comparison is not apt or fair since Kalispel demonstrated and DOI found that there would be governmental impacts here. ER 642.

Finally, DOI wrongly asserted here that, "[a]s trustee, we can merely ask tribal nations to try to work together for the good of both." ER 120. DOI plainly can do much more under relevant authorizing statutes, as the above governing case law and its own policy and Departmental Manual require. For example, pursuant to being

"charged with the supervision of public business relating to . . . Indians[,]" 43 U.S.C. § 1457(10) and the "management of all Indian affairs[,]" 25 U.S.C. § 2, DOI could enter into an intergovernmental agreement with Kalispel to help mitigate the impacts to Kalispel without harming Spokane. *See* 25 C.F.R. §§ 292.18(g), 292.20(b)(6). DOI also could work with Kalispel under the Federal Land Policy and Management Act on a disposal or exchange of federal lands to consolidate their respective land holdings for more efficient and effective management and to secure important objectives including expansion of communities, economic development, and fulfillment of public interests and needs. *See* 43 U.S.C. §§ 1713(a)(3), 1716(a); 43 C.F.R. §§ 2200.0-6(b), 2201.1(c). DOI thus could and should have done far more than it did to offset or mitigate the material, extended detriment to Kalispel's government, programs, services, and members. Accordingly, DOI's two-part determination also must be vacated for violation of DOI's trust duties to Kalispel.

## CONCLUSION

For any and all of the above reasons, the District Court's decision granting summary judgment to Defendants must be reversed and DOI's determination under Section 20 of IGRA that the Spokane Tribe Casino "would not be detrimental to the surrounding community" must be vacated as unlawful and remanded for further consideration.

## CERTIFICATE OF COMPLIANCE

I am an attorney for Plaintiff-Appellant Kalispel Tribe of Indians. This brief contains 11,970 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Ninth Circuit Rule 32-1.

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Dated: May 13, 2020

# ADDENDUM OF

# PERTINANT STATUTES

# AND REGULATIONS

# TABLE OF CONTENTS

# STATUTES

## 5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

## 25 U.S.C. § 2. Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

## 25 U.S.C. § 2702. Declaration of Policy

The purpose of this chapter is—

(1) 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. § 2710. Tribal gaming ordinances**

* * * *

**(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts**

* * * *

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

* * * *

(B) 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;
(iii) to promote tribal economic development;
(iv) to donate to charitable organizations; or
(v) to help fund operations of local government agencies;

* * * *

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

* * * *

**25 U.S.C. § 2713. Civil penalties**

**(a) Authority; amount; appeal; written complaint**

(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, . . . .

* * * *

**(b) Temporary closure; hearing**

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, . . . .

*  *  *  *

**25 U.S.C. § 2714. Judicial review**

Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

**25 U.S.C. § 2719. Gaming on lands acquired after October 17, 1988**

**(a) Prohibition on lands acquired in trust by Secretary**

Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 . . . .

*  *  *  *

**(b) Exceptions**

**(1)** Subsection (a) will not apply when--

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

*  *  *  *

**43 U.S.C. § 1457. Duties of Secretary**

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

*  *  *  *

10. Indians.

*  *  *  *

**43 U.S.C. § 1713. Sales of public lands**

**(a) Criteria for disposal; excepted lands**

A tract of the public lands (except land in units of the National Wilderness Preservation System, National Wild and Scenic Rivers Systems, and National System of Trails) may be sold under this Act where, as a result of land use planning required under section 1712 of this title, the Secretary determines that the sale of such tract meets the following disposal criteria:

*  *  *  *

(3) disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be

achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership.
*  *  *  *

**43 U.S.C. § 1716. Exchanges of public lands or interests therein within the National Forest System**

**(a) Authorization and limitations on authority of Secretary of the Interior and Secretary of Agriculture**

A tract of public land or interests therein may be disposed of by exchange by the Secretary under this Act and a tract of land or interests therein within the National Forest System may be disposed of by exchange by the Secretary of Agriculture under applicable law where the Secretary concerned determines that the public interest will be well served by making that exchange: *Provided*, That when considering public interest the Secretary concerned shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.
*  *  *  *

**REGULATIONS**

**25 C.F.R. Part 151—Land Acquisitions**
*  *  *  *

**§ 151.10 On-reservation acquisitions.**

. . . . The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:
*  *  *  *

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

**§ 151.11 Off-reservation acquisitions.**

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10 (a) through (c) and (e) through (h);

* * * *

**25 C.F.R. Part 292—Gaming on Trust Lands Acquired After October 17, 1988**

**§ 292.2 How are key terms defined in this part?**

* * * *

*Nearby Indian tribe* means an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters.

* * * *

*Secretarial Determination* means a two-part determination that a gaming establishment on newly acquired lands:

(1) Would be in the best interest of the Indian tribe and its members; and

(2) Would not be detrimental to the surrounding community.

* * * *

*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.

**§ 292.13 When can a tribe conduct gaming activities on newly acquired lands that do not qualify under one of the exceptions in subpart B of this part?**

A tribe may conduct gaming on newly acquired lands that do not meet the criteria in subpart B of this part only after all of the following occur:

(a) The tribe asks the Secretary in writing to make a Secretarial Determination that a gaming establishment on land subject to this part is in the best interest of the tribe and its members and not detrimental to the surrounding community;

(b) The Secretary consults with the tribe and appropriate State and local officials, including officials of other nearby Indian tribes;

(c) The Secretary makes a determination that a gaming establishment on newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and

(d) The Governor of the State in which the gaming establishment is located concurs in the Secretary's Determination (25 U.S.C. 2719(b)(1)(A)).

**§ 292.16 What must an application for a Secretarial Determination contain?**

A tribe's application requesting a Secretarial Determination under § 292.13 must include the following information:

(a) The full name, address, and telephone number of the tribe submitting the application;

(b) A description of the location of the land, including a legal description supported by a survey or other document;

(c) Proof of identity of present ownership and title status of the land;

(d) Distance of the land from the tribe's reservation or trust lands, if any, and tribal government headquarters;

(e) Information required by § 292.17 to assist the Secretary in determining whether the proposed gaming establishment will be in the best interest of the tribe and its members;

(f) Information required by § 292.18 to assist the Secretary in determining whether the proposed gaming establishment will not be detrimental to the surrounding community;

(g) The authorizing resolution from the tribe submitting the application;

(h) The tribe's gaming ordinance or resolution approved by the National Indian Gaming Commission in accordance with 25 U.S.C. 2710, if any;

(i) The tribe's organic documents, if any;

(j) The tribe's class III gaming compact with the State where the gaming establishment is to be located, if one has been negotiated;

(k) If the tribe has not negotiated a class III gaming compact with the State where the gaming establishment is to be located, the tribe's proposed scope of gaming, including the size of the proposed gaming establishment; and

(l) A copy of the existing or proposed management contract required to be approved by the National Indian Gaming Commission under 25 U.S.C. 2711 and part 533 of this title, if any.

**§ 292.17 How must an application describe the benefits and impacts of the proposed gaming establishment to the tribe and its members?**

To satisfy the requirements of § 292.16(e), an application must contain:

(a) Projections of class II and class III gaming income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe;

(b) Projected tribal employment, job training, and career development;

(c) Projected benefits to the tribe and its members from tourism;

(d) Projected benefits to the tribe and its members from the proposed uses of the increased tribal income;

(e) Projected benefits to the relationship between the tribe and non–Indian communities;

(f) Possible adverse impacts on the tribe and its members and plans for addressing those impacts;

(g) Distance of the land from the location where the tribe maintains core governmental functions;

(h) Evidence that the tribe owns the land in fee or holds an option to acquire the land at the sole discretion of the tribe, or holds other contractual rights to cause the lands to be transferred from a third party to the tribe or directly to the United States;

(i) Evidence of significant historical connections, if any, to the land; and

(j) Any other information that may provide a basis for a Secretarial Determination that the gaming establishment would be in the best interest of the tribe and its members, including copies of any:

(1) Consulting agreements relating to the proposed gaming establishment;

(2) Financial and loan agreements relating to the proposed gaming establishment; and

(3) Other agreements relative to the purchase, acquisition, construction, or financing of the proposed gaming establishment, or the acquisition of the land where the gaming establishment will be located.

**§ 292.18. What information must an application contain on detrimental impacts to the surrounding community?**

To satisfy the requirements of § 292.16(f), an application must contain the following information on detrimental impacts of the proposed gaming establishment:

(a) Information regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA);

(b) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(c) Anticipated impacts on the economic development, income, and employment of the surrounding community;

(d) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(e) Anticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment;

(f) If a nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land; and

(g) Any other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments.

**§ 292.19 How will the Regional Director conduct the consultation process?**

(a) The Regional Director will send a letter that meets the requirements in § 292.20 and that solicits comments within a 60–day period from:

(1) Appropriate State and local officials; and

(2) Officials of nearby Indian tribes.

(b) Upon written request, the Regional Director may extend the 60–day comment period for an additional 30 days.

(c) After the close of the consultation period, the Regional Director must:

(1) Provide a copy of all comments received during the consultation process to the applicant tribe; and

(2) Allow the tribe to address or resolve any issues raised in the comments.

(d) The applicant tribe must submit written responses, if any, to the Regional Director within 60 days of receipt of the consultation comments.

(e) On written request from the applicant tribe, the Regional Director may extend the 60–day comment period in paragraph (d) of this section for an additional 30 days.

**§ 292.20 What information must the consultation letter include?**

(a) The consultation letter required by § 292.19(a) must:

(1) Describe or show the location of the proposed gaming establishment;

(2) Provide information on the proposed scope of gaming; and

(3) Include other information that may be relevant to a specific proposal, such as the size of the proposed gaming establishment, if known.

(b) The consultation letter must include a request to the recipients to submit comments, if any, on the following areas within 60 days of receiving the letter:

(1) Information regarding environmental impacts on the surrounding community and plans for mitigating adverse impacts;

(2) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(3) Anticipated impact on the economic development, income, and employment of the surrounding community;

(4) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(5) Anticipated costs, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment; and

(6) Any other information that may assist the Secretary in determining whether the proposed gaming establishment would or would not be detrimental to the surrounding community.

**§ 292.21 How will the Secretary evaluate a proposed gaming establishment?**

(a) The Secretary will consider all the information submitted under §§ 292.16–292.19 in evaluating whether the proposed gaming establishment is in the best interest of the tribe and its members and whether it would or would not be detrimental to the surrounding community.

(b) If the Secretary makes an unfavorable Secretarial Determination, the Secretary will inform the tribe that its application has been disapproved, and set forth the reasons for the disapproval.

(c) If the Secretary makes a favorable Secretarial Determination, the Secretary will proceed under § 292.22.

**40 C.F.R. Part 1508—Terminology and Index**

* * * *

**§ 1508.14. Human environment.**

*Human environment* shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

* * * *

**§ 1508.27 Significantly.**

*Significantly* as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
* * * *

**43 C.F.R. Part 2200—Exchanges: General Procedures**
* * * *

**§ 2200.0–6 Policy.**
* * * *

(b) *Determination of public interest.* The authorized officer may complete an exchange only after a determination is made that the public interest will be well served. When considering the public interest, the authorized officer shall give full consideration to the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs.
* * * *

**§ 2201.1(c) Agreement to initiate an exchange.**

(a) Exchanges may be proposed by the Bureau of Land Management or by any person, State, or local government. . . .
* * * *

(c) If the authorized officer agrees to proceed with an exchange proposal, a nonbinding agreement to initiate an exchange shall be executed by all prospective parties.

**OTHER AUTHORITY**

**Dep't of the Interior, Departmental Manual, Part 303, Ch. 2 (eff. 10/31/00) Principles for Managing Indian Trust Assets**

* * * *

2.6 **Responsibilities.**
* * * *

C. **Heads of bureaus and offices** are responsible for ensuring that the principles in Paragraph 2.7 of this Chapter are carried out by their organizations as they:

*  *  *  *

(3) Manage, administer, or take other actions directly relating to or potentially affecting assets held in trust by the United States for Indian tribes and individual Indians.

**2.7 Trust Principles.** It is the policy of the Department of the Interior to discharge, without limitation, the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty. The proper discharge of the Secretary's trust responsibilities requires that persons who manage Indian trust assets:

*  *  *  *

B. Assure that any management of Indian trust assets that the Secretary has an obligation to undertake promotes the interest of the beneficial owner and supports, to the extent it is consistent with the Secretary's trust responsibility, the beneficial owner's intended use of the assets;

*  *  *  *

D. Promote tribal control and self-determination over tribal trust lands and resources;

*  *  *  *