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 KALISPEL TRIBE OF INDIANS' REPLY BRIEF

Daniel I.S.J. Rey-Bear
Rey-Bear McLaughlin, LLP
421 W Riverside Ave, Suite 1004
Spokane, WA 99201-0410
telephone: 509-747-2502
email: dan@rbmindianlaw.com

Attorney for Kalispel Tribe of Indians

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INTRODUCTION

The record establishes that the newest casino for the Spokane Tribe of Indians ("Spokane") will impose on the Kalispel Tribe of Indians ("Kalispel") significant, extended impacts on governmental services and member welfare that are not offset or mitigated by benefits or payments to other parts of the surrounding community. This violates the strict bar against detriment in the two-part exception for new off-reservation gaming in Section 20 of the Indian Gaming Regulatory Act ("IGRA"). It also violates the established policy and trust duties of the U.S. Department of the Interior ("DOI") to protect nearby Indian tribes from such harm. The Answer Briefs do not explain how IGRA's plain meaning and DOI's regulations, policy, and trust duties allow a different determination. Rather, they assert irrelevant facts, red herring arguments, straw-man defenses, and post-hoc rationalizations that do not cure DOI's unlawful determination or the District Court's erroneous decision. Therefore, DOI's determination must be vacated and the District Court's decision must be reversed.

FACTS

Neither Appellee disputes that DOI's expert calculated that the first year of Spokane's casino operation will reduce Kalispel's governmental budget by almost $29 million or 32%. Kalispel Excerpts of Record ("KER") 624; *see* Spokane Br. at 19. This reduction includes a 45% cut to Kalispel's program and services budget, which would impact 14 distinct types of essential services. *See* KER 298-99, 624. It

also would wholly eliminate Kalispel's federally approved per-capita and elder payments ("PCEPs"), which replace housing assistance to Kalispel members and help them meet basic needs given low income and limited housing. *Compare id. with* KER 329-30, 358, 396, 609, 617. All these impacts are conservative, as they are from just the first phase of Spokane's casino development. *See* KER 261, 418, 624.

DOI and Spokane also do not refute that Kalispel's losses will continue for up to six years and will harm Kalispel's governmental services and members. KER 417, 420, 642; *see* KER 621-23; Fed. Appellees' Ans. Br. ("DOI Br.") at 42. The full extent of Kalispel's first-phase losses over time is unknown because DOI never quantified them; instead, DOI dismissed them by noting that they would decline after the first year. KER 642. Also, DOI quantified and neither Appellee disputes that there will be 5% more impacts from additional phases of Spokane's casino development. *See* KER 206, 621, 642; DOI Br. at 41-42. Appellees also do not dispute that benefits to and mitigation for other parts of the surrounding community will not inure to Kalispel and that DOI did not offset or mitigate any impacts to Kalispel with benefits or payments to others. *See* KER 418, 634-38; DOI Br. at 53.

Consistent with all the above facts, Appellees do not dispute either DOI's finding that "the Kalispel tribal government's budget would be impacted by the Project," KER 642, or the District Court's acknowledgement that Kalispel "will likely suffer some detrimental impacts[,]" KER 125. Appellees also do not refute

that Kalispel's established impacts here differ from Spokane's objections to Kalispel's prior two-part determination, where DOI rejected allegations for which Spokane "did not submit any evidence" of detriment. KER 139-40.

Instead of challenging the above material facts, DOI and Spokane try to draw attention away from relevant facts and issues with irrelevant comparisons between the neighboring tribes. They highlight Spokane's needs and benefits for this determination, that Kalispel has a larger budget per capita than Spokane, that Kalispel's casino is located within Spokane's aboriginal territory, and that DOI's expert rejected Kalispel's gaming revenue projections. DOI Br. at 5-12; Spokane Br. at 2, 8-11, 16-17, 20, 25. But Kalispel did not dispute Spokane's needs and benefits. KER 402; Kalispel Br. at 24. Also, the two parts of the determination are legally separate under IGRA. *See* 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.13(c). Finally, the gaming revenue projection critique is a red herring because this appeal relies on findings by DOI and its expert. The relevant facts above are undisputed.

At most, DOI and Spokane assert that Kalispel's governmental programs and services budget will be reduced by only 6.7% in the first year after completely eliminating Kalispel's PCEPs. DOI Br. at 43, 48; Spokane Br. at 20 & n.2, 43. *Compare* KER 609, 617. But neither DOI in its determination nor either Appellee justifies that percentage rather than the 45% from DOI's own expert. *See* KER 624. Neither refutes that their discounted figure improperly compares future impacted

revenue with unimpacted revenue nine years earlier without significant intervening market growth, contrary to DOI's analysis. *See* Kalispel Br. at 18-19. Appellees' assertion also overlooks that Spokane concedes the total 32% first-year governmental impact on Kalispel, Spokane Br. at 19, and that Kalispel's PCEPs comprise only 7% of its governmental budget, Kalispel Br. at 14; KER 608. This confirms that the impact on the rest of Kalispel's budget is far larger than 6.7%.

Finally, Appellees try to justify DOI's determination based on the duration that Spokane's application was pending and DOI's consideration under the National Environmental Policy Act ("NEPA"). *See* DOI Br. at 1; Spokane Br. at 7, 13-14, 36. The former assertion is misleading because Spokane's application was not complete for most of the time it was pending. *See* KER 51, 207. In turn, the NEPA compliance is irrelevant because Kalispel does not challenge that here and that did not address if Spokane's casino "will be detrimental to the surrounding community" since IGRA's determination is "independent from" NEPA. KER 414-15.

ARGUMENT

The Answer Briefs misstate most and do not undermine any arguments in Kalispel's appeal. First, neither DOI nor Spokane refutes that IGRA's plain meaning precludes this two-part determination that will impose significant, extended harms on Kalispel that are not offset or mitigated. Second, neither Answer Brief salvages DOI's arbitrary and capricious determination that wrongly relied on implausible,

extra-statutory considerations, ignored important information, and cannot be saved by belated, unfounded balancing. Third, neither refutes that DOI violated both its trust duties to Kalispel under IGRA and its duty to explain a policy change when it approved Spokane's new off-reservation casino despite the unmitigated detriment to Kalispel. For all these reasons, the District Court decision must be reversed and this matter must be remanded to DOI to comply with its duties under IGRA.

I. IGRA's Plain Meaning Precludes DOI's No-Detriment Determination Because Spokane's Casino Will Impose Significant, Extended Harms On Kalispel that Are Not Mitigated or Offset.

A. *The undisputed, unmitigated, and significant governmental harm to Kalispel precludes a favorable two-part determination under IGRA.*

Because DOI and Spokane expend much effort attacking straw men, it is helpful to reiterate the relevant issue. Section 20 of IGRA precludes Spokane's new off-reservation casino if it would be "detrimental to the surrounding community," "including . . . nearby Indian tribes[.]" 25 U.S.C. § 2719(b)(1)(A). To identify and apply the plain meaning of that standard, this Court should use "the ordinary public meaning of the statute's language at the time of the law's adoption[.]" *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020). For that, the term "detriment" means "[a]ny loss or harm suffered in person or property[.]" Black's Law Dictionary 406 (5th ed. 1979). Congress did not set a higher threshold for this exception to Section 20's general prohibition on new off-reservation Indian gaming by using a qualifier, such as in referencing "substantial" violations elsewhere in IGRA. *Compare* 25

U.S.C. §§ 2719(a), 2719(b)(1)(A) *with id.* § 2713(b)(1). This matters because the "limited exception[]" in Section 20 for gaming on after-acquired lands must be "narrowly appl[ied.]" DOI Supp. Excerpts of Record ("DER") 86, 88, 90-91; *see* KER 369, 407; *cf. United States v. Washington*, 157 F.3d 630, 643 (9th Cir. 1998).

Under that plain meaning, DOI violated IGRA by concluding that Spokane's casino would not be detrimental to the surrounding community, including Kalispel as a nearby Indian tribe, 25 C.F.R. § 292.2. The undisputed record establishes a $29 million or 32% loss in Kalispel's governmental budget in the first year of Spokane's casino operation, with continuing and additional impacts thereafter. *See supra* pages 1-2. Those impacts are considerable and will harm essential services and member's welfare. *Id.* Even though DOI found that "the Kalispel tribal government's budget would be impacted by" Spokane's casino, KER 642, DOI concedes that it did not find any offsets for those impacts elsewhere within the surrounding community, DOI Br. at 53. Nor was there any mitigation for Kalispel, unlike for other local governments. *See* KER 636-38. Altogether, this establishes preclusive harm or detriment under IGRA. This straightforward statutory interpretation and application alone require reversal. There is no merit in Appellees' defenses about forfeiture, mere competition, de minimus losses, or extratextual considerations.

B. *Kalispel did not forfeit its claim regarding IGRA's plain meaning.*

DOI asserts that Kalispel forfeited its *ultra vires* challenge to DOI's

determination because Kalispel did not cite 5 U.S.C. § 706(2)(C) in its Complaint. DOI Br. at 54-56. DOI overlooks that the Complaint generally sought relief under the Administrative Procedure Act ("APA") in part because DOI had failed to comply with IGRA. DER 5. Kalispel also asserted an APA claim that DOI's determination was not in accordance with law because DOI had "failed to comply with text of IGRA" regarding whether Spokane's casino "would not be detrimental to the surrounding community" separate from arbitrary reliance on factors not supported by IGRA. DER 72-75. Later, in briefing on IGRA's plain meaning, Kalispel argued that DOI had applied an "*ultra vires* heightened standard[.]" KER 546-47.

DOI also overlooks that a claim that agency action is "not in accordance with law" under subsection 706(2)(A) because it conflicts with the language of the governing statute is subject to the same analysis as a claim that action is "in excess of statutory . . . authority" under subsection 706(2)(C). *Nw. Envtl. Advocates v. E.P.A.*, 537 F.3d 1006, 1014, 1019 (9th Cir. 2008). Moreover, once a claim is properly presented, a party can make any argument in support of it and is "'not limited to the precise argument they made below.'" *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (9th Cir. 2004) (citation omitted). Thus, where a plaintiff presents a consistent claim throughout litigation on a legal issue, this Court considers it "in light of 'all relevant authority,'" regardless of whether the authority was cited in the district court. *Id.* (citation omitted). The lack of an APA subsection cite in the

Complaint therefore does not preclude the plain meaning argument in this appeal.

C. *Kalispel's large governmental harms constitute preclusive detriment under IGRA and cannot be dismissed as competitive or de minimis.*

Relying on *Sokaogan Chippewa Community v. Babbitt*, 214 F.3d 941 (7th Cir. 2000) and disregarding undisputed record evidence, DOI and Spokane repeatedly micharacterize Kalispel's harms and arguments as concerning competition. *See* DOI Br. at 1, 16-17, 21, 23, 32-33, 51-52; Spokane Br. at 22, 25-26, 30, 33, 48, 54, 57. That overlooks the undisputed material harms to Kalispel's governmental services and welfare, unlike bare competitive complaints by the objecting tribe in *Sokaogan* and Spokane's unsupported opposition to Kalispel's prior two-part determination. *Compare Sokaogan*, 214 F.3d at 947; KER 139-40 *with* KER 624, 642; *supra* page 2. Also, Kalispel only used the terms "competitive" and "competition" to make clear that DOI and the District Court misidentified Kalispel's objections because that is not what Kalispel has argued. Kalispel Br. at 6-7, 17, 18, 19, 20, 30, 32, 48.

Likewise, Spokane complains repeatedly that Kalispel seeks a "veto" and a monopoly. Spokane Br. at 3, 24, 26, 30, 47, 59. That complaint is unfounded because Kalispel does not seek those. *E.g.,* Kalispel Br. at 7. IGRA Section 20 allows new off-reservation casinos if the resulting harms within the surrounding community are mitigated or offset to avoid detriment. That allowance is irrelevant here because Kalispel's challenge concerns undisputed, material harms to its members' welfare and essential governmental services that were not mitigated or offset in any way.

Relying on *Stand Up for California! v. U.S. Dep't of the Interior* ("*Stand Up*"), 879 F.3d 1177, 1187 (D.C. Cir. 2018), DOI and Spokane also repeatedly mischaracterize Kalispel's argument and minimize its losses as asserting that "any" harm outweighs all greater benefits to the "whole" surrounding community. DOI Br. at 16, 21, 27-28, 50; Spokane Br. at 24, 28, 29, 30-31, 34 n.6, 49, 51, 57, 60. As explained above, the "any" harm standard comes directly from the plain meaning of "detriment" in Section 20's two-part exception. Because Kalispel's undisputed detriment far exceeds a de minimis impact, *e.g.*, KER 624, this Court can safely set aside the defenses based on *Stand Up* against "even a dollar" in impacts. *E.g.*, DOI Br. at 27-28; Spokane Br. at 29, 30, 51. Also, Kalispel is indisputably part of the surrounding community under 25 C.F.R. § 292.2, not a distant tribe whose concerns are "permissibly assigned" "reduced weight[.]" *Stand Up*, 879 F.3d at 1190.

Moreover, unlike in DOI's analysis in *Stand Up*, 879 F.3d at 1188, DOI never analyzed Kalispel's detriment within or against "holistic" benefits to the rest of the surrounding community. Instead, DOI used extra-statutory bases to improperly discount and disregard almost $29 million in impacts to Kalispel's governmental services and welfare in just the first year, with additional impacts in subsequent years. *See infra* § I.D. DOI concedes that it did not determine that Kalispel's significant, extended detriments will be offset or mitigated by benefits or payments to other parts of the surrounding community. *See* DOI Br. at 53; KER 636-38. Thus,

DOI impermissibly disregarded IGRA's plain meaning by applying a separate, heightened standard to Kalispel's detriments to exclude those from consideration of detriment to the whole surrounding community, including Kalispel. *See* KER 642.

Because DOI did not offset Kalispel's impacts, that belated defense fails. "It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Security v. Regents of Univ. of Cal.* ("*DHS*"), 140 S. Ct. 1891, 1907 (2020) (citation omitted). Thus, this Court "can only uphold agency action on grounds articulated by the agency in its orders" and "'may not accept appellate counsel's *post hoc* rationalizations for agency action.'" *Cal. Public Utility Comm'n v. F.E.R.C.* ("*CPUC*"), 879 F.3d 966, 978 n.5 (9th Cir. 2018) (citation omitted).

DOI now also asserts that Kalispel's impacts are not "material" because they are "[]tethered to projected revenue losses from competition[.]" DOI Br. at 32. Aside from being barred, *see DHS*, 140 S. Ct. at 1907, this tardy defense contravenes the plain meaning of IGRA's two-part deterimation exception. Section 20 only specifies a causal connection between the proposed gaming and the prohibited detriment to the surrounding community. *See* 25 U.S.C. § 2719(b)(1)(A); *supra* § I.A. Congress did not leave discretion to exclude or require a high threshold for certain types of harm. *See infra* § I.D. Section 20 certainly does not authorize disregarding or setting a high threshold for nearby Indian tribes' governmental impacts from lost gaming

revenue since IGRA expressly promotes and protects the generation of tribal government revenue through Indian gaming. *See* 25 U.S.C. §§ 2701(1), 2702(1), 2710(b)(2)(B)(i). Kalispel, which lacks a tax base and relies on gaming revenue to fund its government, *e.g.,* KER 607, suffered cognizable harm under IGRA.

D. *DOI's and Spokane's additional asserted extratextual thresholds for detriment contravene IGRA's plain meaning.*

This Court will not "read words into statutory provisions" and will presume that Congress "'says . . . what it means and means . . . what it says'" in a statute. *Pit River Tribe v. B.L.M.*, 939 F.3d 962, 970 (2019) (citation omitted). Nor will this Court "read into IGRA unnecessary requirements demanded neither by law not logic." *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1150 (9th Cir. 2020). Therefore, extratextual sources may not overcome clear statutory terms, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020), and "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest." *Bostock*, 140 S. Ct. at 1737. Because of this, nothing outside IGRA avoids Kalispel's undisputed, unoffset, and unmitigated—and therefore preclusive—detriment.

DOI's determination rejected Kalispel's significant, extended governmental budget impacts because they allegedly would not be "considerabl[e]" or "prohibit the Kalispel tribal government from providing essential services and facilities to its membership." KER 642-43. DOI did not explain there the bases for or meaning of those novel, vague, and malleable thresholds. DOI and Spokane do not justify those

in court either. That is not surprising, since IGRA's plain meaning precludes those *ultra vires* higher, subjective, and undefined standards. Those might have been imported from NEPA even though DOI's NEPA analysis did not address IGRA's two-part determination. *See* KER 414-15, 417-18. Regardless, Congress could not "have intended to create such a large and obvious loophole" in one of IGRA's "key" provisions. *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1473 (2020).

DOI's and Spokane's additional excuses for avoiding detriment fare no better. They assert that the costs of impacts to Kalispel are not "detrimental" because they will be "relatively small" and "temporary" and will "dissipate" or "ameliorate" over time. *See, e.g.*, KER 642-43; DOI Br. at 11, 13, 38, 43, 47; Spokane Br. at 19-20, 24-25, 40, 43 (among 22 references to "temporary"). But IGRA's plain meaning does not require that detriments have certain magnitude or duration. If IGRA allows such thresholds, Kalispel's harms are sufficiently large and long.

Even more detached from IGRA's plain meaning, DOI now asserts that the standard for detriment to the surrounding community is *higher* than "'directly, immediately, and significantly[,]'" as required for impacts outside the surrounding community to be considered. DOI Br. at 30 (quoting 25 C.F.R. § 292.2). That post-hoc defense is absurd since IGRA does not require that detriment be instant or even significant to be preclusive. In sum, no defense avoids that the plain meaning of Section 2719(b)(1)(A) requires reversing the District Court decision.

II. DOI's Determination of No Detriment Is Arbitrary and Capricious Because It Relied on Extra-Statutory Considerations and Implausible Explanations, It Ignored Important Information, and It Cannot Be Saved By Belated, Unfounded Balancing.

DOI's two-part determination is arbitrary and capricious because it impermissibly relied on Spokane's aboriginal territory, dismissing Kalispel's PCEPs, and different harm thresholds than the one Congress specified in that narrow IGRA exception. *See* Kalispel Br. at 35-37. DOI's determination also improperly ignored DOI's own expert calculation of Kalispel's costs, which need not have been greater than the threshold DOI's regulations impose for considering impacts to distant tribes outside of the surrounding community. *Id.* at 37-39. Finally, DOI's explanations for avoiding detriment are implausible and cannot be ascribed to agency expertise or saved by the District Court's belated, unfounded balancing. *Id.* at 39-41. None of Appellees' defenses for these deficiencies have any merit.

A. *DOI's reliance on "fairness" is unfounded and irrelevant for this two-part determination.*

DOI and Spokane argue that the prior two-part determination for Kalispel makes this one fair. DOI Br. at 34; Spokane Br. at 24, 34, 45, 53-55. That contention ignores the material difference between the two determinations, Kalispel Br. at 4-5, 48, which DOI and Spokane do not refute. Namely, Spokane "did not submit any evidence" of harm from Kalispel's gaming, KER 139-40, whereas here "the Kalispel tribal government's budget would be impacted[.]" KER 642. This distinction matters

because DOI "will consider detrimental impacts on a case-by-case basis[.]" Gaming on Trust Lands Acquired After Oct. 17, 1988, 73 Fed. Reg. 29,354, 29,356 (May 20, 2008); DOI Br. at 4, 20. There is thus no evidentiary basis for "fairness."

Even if the comparison were "fair" regardless of that evidentiary difference, that consideration relates to Spokane's undisputed benefits under the first part of this IGRA exception, not Kalispel's undisputed detriments under the second part. *See* 73 Fed. Reg. at 29,356. Section 20 does not authorize offsetting others' detriments with Spokane's benefits. *See* 25 U.S.C. § 2719(b)(1)(A). That restriction is reinforced by DOI's regulations codified at 25 C.F.R. Part 292 ("Part 292"), which underscore that the two parts of this exception must be evaluated and satisfied independently. 25 C.F.R. §§ 292.13(c), 292.21(a). The asserted fairness is thus also legally irrelevant.

Undeterred, DOI and Spokane argue that this determination is fair because DOI previously approved Kalispel's casino within Spokane's aboriginal territory and can consider any information here. *See* DOI Br. at 6-7, 15, 18, 59; Spokane Br. at 53-55. Yet under Part 292, Spokane's "historical connections" are relevant only to the land for Spokane's casino and whether gaming will be in Spokane's best interest. 25 C.F.R. §§ 292.16(e), 292.17(i). Those historical connections are irrelevant to whether Spokane's casino "would or would not be detrimental to the surrounding community." *Id.* § 292.21(a); *see id.* §§ 292.16(f), 292.18(f).

The only historical connection relevant to the second part of the determination

is that of a "nearby Indian tribe . . . to the land" to be acquired for Spokane. 25 C.F.R. § 292.18(f). But Kalispel's connection to Spokane's casino land is not at issue. Part 292 therefore does not allow the asserted consideration. The authorization for considering any relevant information, 25 C.F.R. §§ 292.19(g), 292.20(b)(6), does not provide a loophole concerning Part 292's specific provisions.

The asserted "fairness" only would have supported Spokane's objection to Kalispel's gaming acquisition 23 years ago. *Compare* KER 133, 139 *with* 25 C.F.R. § 292.18(f). It is now far too late for that challenge. *See* 28 U.S.C. § 2401(a); *Big Lagoon Rancheria v. California*, 789 F.3d 947, 954 (9th Cir. 2015) (en banc). The belated complaint about that prior determination cannot justify this determination.

B. *Detrimental impacts caused by competition must be considered and are preclusive here.*

DOI asserts that Kalispel's impacts are not "material" because they are "[]tethered to projected revenue losses from competition[.]" DOI Br. at 32. Even if that excuse were not already barred and meritless under IGRA itself, *see supra* § I.C, Part 292 and logic preclude it. Part 292 requires that DOI consider "[a]nticipated costs of impacts" "on the economic development, income, and employment of the surrounding community[.]" 25 C.F.R. §§ 292.20(b)(3), 292.20(b)(4), 292.21(a). All that may be tethered to revenue losses from competition. Therefore, in Part 292, for a nearby Indian tribe, "the detrimental effects to the tribe's on-reservation economic interests will be considered." 73 Fed. Reg. at 29,356. That rule governs here.

In addition, under DOI's position, lost taxes for any local governments or reduced employment at local business caused by competition also would be excluded. But DOI could not disregard those detriments under IGRA or Part 292 and recognized that Spokane's casino would cause "loss of customers at existing commercial businesses[.]" KER 19. The same causes of impacts to Kalispel cannot be dismissed. Kalispel's impacts are material, unoffset, and preclusive.

C. *DOI failed to consider that payments for Kalispel's members' general welfare cannot be eliminated without cognizable detriment.*

DOI and Spokane complain that elimination of Kalispel's per-capita and elder payments ("PCEPs") to its members is not detrimental and was properly considered by DOI. This is assertedly because those payments are discretionary and not necessary for providing for the general welfare of members and are made only after adequately funding government operations, economic development, and general welfare. DOI Br. at 25-26, 43, 48, 50; Spokane Br. at 5-6, 25, 50-51. Appellees misread IGRA and relevant regulations.

IGRA allows only five uses of tribal gaming net revenues: (i) government operations and programs, (ii) tribal and member general welfare; (iii) tribal economic development; (iv) charitable donations; and (v) funding local governments. 25 U.S.C. § 2710(b)(2)(B)(i)-(v). That matters because "Congress is presumed to act with deliberation when drafting statutes[.]" *E.E.O.C. v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001). Also, when a statute designates

certain things, omissions should be understood to have been intentional. *Castillo v. Met. Life Ins. Co.*, 970 F.3d 1224, 1232 (9th Cir. 2020). IGRA's per-capita prerequisites, 25 U.S.C. § 2710(b)(3), accordingly do not create a sixth revenue use category. For that reason, Kalispel's PCEPs must fall in one of IGRA's allowable revenue uses. Among those, "provid[ing] for the general welfare of the Indian tribe and its members" readily applies. *See id.* § 2710(b)(2)(B)(ii).

Any doubt about this is resolved by IGRA's implementing regulations. Those recognize that PCEPs constitute a form of "provid[ing] . . . for the general welfare of the tribe and its members[.]" 25 C.F.R. § 522.4(b)(2)(ii). Thus, elimination of PCEPs is detrimental to tribal members' general welfare. This applies for Kalispel, for which PCEPs replace housing assistance and cover basic needs. KER 609, 617.

In turn, the uses for which a tribe "must reserve an adequate portion" of gaming revenue before PCEPs can be approved includes *any* "one or more" of the five allowable uses. 25 C.F.R. § 290.12(b)(1)(i)-(v); *see* 25 U.S.C. § 2710(b)(3)(A). That includes charitable donations and funding local governments, which ought not rank above members' welfare. While governmental operations and economic development remain a priority, 25 C.F.R. § 290.12(b)(2), that does not refute that PCEPs "provide . . . for the general welfare[.]" *Id.* § 522.4(b)(2)(ii). Elimination of PCEPs for Kalispel members directly harms their welfare, unlike stopping any charitable donations or gaming impact mitigation payments to local governments.

D. *Kalispel's detriments are not nullified by Appellees' remaining capricious defenses or the District Court's late, unfounded rationale.*

DOI and Spokane reassert that Kalispel's governmental services budget will not be "considerably reduced" after wholly eliminating PCEPs and that DOI and its expert found that Kalispel still could provide "essential" services. DOI Br. at 11, 26; Spokane Br. at 17, 51. They also rely on deference for expert gaming revenue projections and an asserted holistic analysis of net economic effects. DOI Br. at 21-23, 37-41, 47; Spokane Br. at 25, 44, 45-46. The former defenses are extra-statutory and counter-factual and the latter overlook DOI's expert quantifications of harm and DOI's admitted failure to evaluate the costs of detriment to the entire surrounding community, including Kalispel's unmitigated and unoffset harm. Also, all these defenses overlook that Part 292 and unrefuted facts and law all support Kalispel.

First, there is no expert dispute here that warrants deference. Kalispel's appeal relies on DOI's own expert's projections; it does not challenge them. Moreover, the projected impacts are "considerable" and will harm Kalispel's "essential" services and its members' general welfare. *See supra* pages 1-2. Spokane concedes that its casino will impose 32%, or almost $29 million, in impacts on Kalispel in just the first year. Spokane Br. at 19, 43; KER 624. According to DOI's expert, that includes completely eliminating PCEPs and reducing the rest of Kalispel's program and services budget by 45% or over $22 million that year. KER 624. Although DOI projected that those impacts will diminish after the first year, the additional

governmental harms to Kalispel during the recovery period constitute additional undisputed impact, not mitigation or offset. *See id.* Impacts from subsequent phases of the Spokane casino development are also quantified and undisputed. *See id.* Regardless of expertise, DOI rejected Kalispel's detriments without offsets or mitigation, or even considering the total "anticipated costs of impacts" to Kalispel, as required under Part 292. *See* 25 C.F.R. §§ 292.18(d), 292.20(b)(4), 292.21(a).

Second, DOI and Spokane provide no basis under Section 20, Part 292, or expertise why Kalispel's extended budget impacts will not be detrimental to its members' welfare or why DOI need not consider the actual harms of those budget cuts. There is no legal or plausible basis to assert that all Kalispel's defunded services will be only for "[non]essential" matters, whatever that means. *Compare* KER 642-43 *with* KER 298-99. That matters because DOI failed to perform a holistic analysis of detriment by evaluating, offsetting, or mitigating Kalispel's considerable, essential harms via benefits or payments to other local governments, as DOI concedes, DOI Br. at 53. Indeed, the annual and total costs of Kalispel's impacts far exceed mitigation payments to other local governments that will not benefit Kalispel in any way. Kalispel Br. at 6, 14. Baldly concluding that Spokane's casino would not be detrimental to the surrounding community, including nearby Indian tribes, KER 113, lacks support not refuted previously and here. The District Court's brief, belated boilerplate fares no better, both under the APA and since more jobs or taxes

for or payments to other local governments will not inure to Kalispel as a separate sovereign. *Compare DHS*, 140 S. Ct. at 1907; Kalispel Br. at 39-41 *with* KER 125.

Third, DOI and Spokane assert that Kalispel does not challenge DOI's regulations. DOI Br. at 16, 20, 21, 33; Spokane Br. at 27, 35, 53. That provides no talismanic defense because those support Kalispel. Critically, Part 292 specifies high standards for considering harm to distant tribes, 25 C.F.R. § 292.2, but not the "considerabl[e,]" "essential," and permanent thresholds applied to Kalispel's services and welfare. Also, DOI merely disregarded rather than considered the "[a]nticipated impacts on . . . services" and the "[a]nticipated costs of impacts" on Kalispel as required. *Id.* § 292.20(b)(2), (4); *see id.* §§ 292.19(a), 292.21(a).

Fourth, DOI and Spokane state that 25 C.F.R. § 292.18(g) allows DOI to consider *any* information. *E.g.*, Spokane Br. at 32. But that provision does not allow Spokane's benefits to offset Kalispel's detriment since it does not provide a loophole through or around Section 20 or Part 292's specific provisions. That provision also confirms that DOI should have but failed to properly consider the substantial, extended, unmitigated "costs of impacts" to Kalispel, as required by Part 292.

Fifth, DOI and Spokane emphasize benefits to others and that DOI can rely on community benefits that do not mitigate Kalispel's impacts. *E.g., id.* at 35, 37-40, 46. But DOI rejected Kalispel's detriment as nonessential, inconsiderable, and temporary and did not offset that based on others' benefits. *See* DOI Br. at 53. Thus,

this post-hoc rationalization is barred by *CPUC*. Moreover, nothing in IGRA authorizes disregarding a separate sovereign's discrete detriments that are significant and extended and not offset or mitigated at all. Appellees identify no legal thresholds greater than Kalispel's impacts to support their implausible, extra-statutory standard.

Sixth, DOI and Spokane assert that this case is like *Stand Up*, despite acknowledging that *Stand Up* concerned a tribe outside the surrounding community. *E.g.*, DOI Br. at 27-28; Spokane Br. at 32 n.5, 47. In addition to *Stand Up* involving a distant tribe whose concerns merited less weight under Part 292, 879 F.3d at 1188, Kalispel has not argued that "any" de minimis harm trumps all surrounding benefits. Also, DOI concluded that Kalispel's government will be harmed, KER 642, and concedes that it did not offset that harm in its analysis, DOI Br. at 53.

Seventh, Spokane alone now asserts that long-term benefits can outweigh short-term costs, unlike DOI's failure to consider an important issue in *Redding Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015). Spokane Br. at 52-53 & n.7. That post-hoc defense is barred and unfounded, and this case remains like *Redding Rancheria*. DOI here failed to consider the lack of offsets within the surrounding community to Kalispel's 32% or almost $29 million sovereign, governmental budget impact in the first year of the Spokane casino operation plus further losses over six years or more and additional impacts from subsequent phases of development.

Finally, Spokane responds to Kalispel's argument about mitigation by

proclaiming that "the notion that IGRA requires a new gaming facility to reimburse an existing one for any decline in revenues is absurd." Spokane Br. at 35. Indeed it is, which is why Kalispel does not make that argument. Instead, DOI has trust duties to both Spokane and Kalispel, so DOI should address this situation that it created.

III. DOI Violated the APA by Failing to Explain a Policy Change and Breaching Its Trust Duties to Kalispel By Approving "Off-Reservation Gaming Where a Nearby Indian Tribe Demonstrates That It is Likely to Suffer a Detrimental Impact as a Result."

A. *DOI violated the APA by ignoring its prior policy to protect nearby tribes from detrimental impacts due to off-reservation gaming.*

Spokane contends that Kalispel waived its challenge to DOI's unexplained policy change by not specifically asserting that claim below. Spokane Br. at 55. That is baseless because Kalispel before the District Court specifically noted that DOI's determination here omitted without explanation the following statement from two prior determinations: "'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.'" KER 521-22 (quoting prior decisions) (emphasis added). This unexplained policy departure makes DOI's determination arbitrary under the APA, *Org. Village of Kake v. U.S. Dep't of Agric.* ("*Kake*"), 795 F.3d 956, 966 (9th Cir. 2015) (en banc), and Kalispel has consistently challenged DOI's determination as arbitrary under the APA, *e.g.*, KER 517, 541; DER 75, 76. Moreover, Kalispel had relied on DOI's prior policy in objections leading up to

DOI's determination. *See* KER 366-70, 407, 479-81. Therefore, Kalispel sufficiently stated its position and provided DOI an adequate opportunity to consider the issue. *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 710 (9th Cir. 2009). Moreover, once a claim is properly presented, a party can make any argument in support of it and is "'not limited to the precise argument they made below.'" *Ballaris*, 370 F.3d at 908. Consequently, there is no basis to avoid this challenge.

On the merits, Spokane concedes that DOI's prior determinations establish that "sufficient" harm to a tribe with an existing casino can justify the denial of a two-part determination, Spokane Br. at 56, though the prior policy did not specify that threshold. Still, DOI here found that there would be detriment to Kalispel, KER 624, 642, and Spokane has conceded significant impacts to Kalispel, Spokane Br. at 19. Despite that, DOI impermissibly departed from its prior policy "'*sub silentio*.'" *CPUC*, 879 F.3d at 977 (citation omitted). That alone requires vacating under the APA regardless of Spokane's belated, unfounded effort to distinguish this case from the prior policy on the grounds that Kalispel's harms were not "sufficient."

To avoid this, DOI asserts that the prior policy was not really a policy because it was just a sentence taken out of context and misapprehended. DOI Br. at 34-37. DOI cites no authority that a prior policy must be elaborate to qualify as such. There is none, as this APA violation entails only an "'[u]nexplained inconsistency' between agency actions[.]" *Kake*, 795 F.3d at 966 (citation omitted). Nonetheless,

Kalispel agrees that the key sentence is "informed by the sentences that immediately surround it." DOI Br. at 36. The key sentence underlined above immediately follows and explains DOI's statement that "'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.'" *Id.* at 35 (quoting DER 88, 91). The two sentences together state a policy, which "was part of Interior's reasoning in those [prior] two determinations[.]" *Id.* at 36; *see* DER 88, 91-92.

Notwithstanding DOI's policy to not approve new off-reservation Indian gaming where a nearby Indian tribe will likely suffer detrimental impacts as a result, DER 88, DOI approved Spokane's casino even though DOI itself concluded that "the Kalispel tribal government's budget would be impacted by the Project[.]" KER 642. DOI's failure to distinguish this from the prior policy in this determination violates the APA. In this situation, "[t]he appropriate recourse is . . to remand to D[OI] so that it may consider the problem anew." *DHS*, 140 S. Ct. at 1916.

B. *DOI violated the APA by breaching its trust duties under IGRA to not favor one tribe over another and to protect Kalispel from unmitigated detriment from Spokane's new, nearby off-reservation casino.*

DOI contends that Kalispel has forfeited arguments that DOI's prior policy reflects trust duties under IGRA to not favor one tribe over another and to protect nearby tribes from unmitigated detriment from new off-reservation casinos. According to DOI, Kalispel did not present these arguments to the District Court and

provides no argument for them here. DOI Br. at 60. The no-argument defense is nonsensical because DOI cites several pages of Kalispel's brief that make those arguments. Kalispel also has not forfeited arguments here because Kalispel asserted them before DOI and the District Court. KER 160-62, 366-71, 407, 408, 479-81, 521-22, 530-32. Also, a party is not limited to the precise arguments made below. *Ballaris*, 370 F.3d at 908.

On the merits, no one disputes that DOI "'cannot favor one tribe over another'" under Section 20 and *Redding Rancheria*, 776 F.3d at 713 (citations omitted). *See* KER 119 (DOI), 130 (District Court); Spokane Br. at 59. Nor is there a dispute that an APA claim can be stated for breach of actionable trust duties. *See* Kalispel Br. at 43-45 (citing cases). Also, DOI concedes that its trust duty to not favor one tribe over another must inform how it carries out its IGRA duties. DOI Br. at 61. Especially with these undisputed and conceded baselines, no trust breach defenses here have merit.

First, DOI and Spokane object that IGRA does not impose "special rights" or a duty to "tip the scale" in Kalispel's favor and that conflicting duties to two tribes precludes a trust breach. DOI Br. at 57-59 (citing *Nance v. EPA*, 645 F.2d 701, 711-12 (9th Cir. 1981)); Spokane Br. at 59. Kalispel argues only that scales cannot favor Spokane since Section 20 and Part 292 require DOI to consult with Kalispel and to protect its interests and trust assets. *See* 25 U.S.C. § 2719(b)(1)(A); 73 Fed. Reg. at

29,356. Also, there is no real trust duty conflict in this case because no tribe has a right to acquire land in trust under IGRA's two-part exception and Section 20 separately addresses the interests of applicant and objecting tribes. *See id.* Even if there were conflicting trust duties here, *Nance* does not preclude an actionable trust breach in this situation. In *Nance*, there was "the strong possibility that the [complaining] tribe would not be prejudiced at all[,]" *Nance*, 645 F.2d at 711, whereas here DOI found that "Kalispel . . . would be impacted[,]" KER 642.

Second, DOI asserts that its consultation duty sets no standard to approve gaming and IGRA has no "priority system favoring the first tribal casino[.]" DOI Br. at 58-60. Kalispel does not assert a priority or that consultation alone imposes a substantive standard. Instead, DOI has a fiduciary duty to use consultation information under Section 20 to act in Kalispel's "'best interest,'" Kalispel Br. at 45 (citation omitted), and the second part of the two-part exception expressly imposes the no-detriment standard. IGRA's statutory mandates impose an actionable trust duty to protect nearby tribes' existing trust assets, supported by case law and DOI's existing policies. *See* Kalispel Br. at 45-47. After all, "'[o]ne of the fundamental common-law duties of a trustee is to preserve and maintain trust assets[.]'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (citation omitted).

Third, Spokane complains that DOI did not breach trust duties here because Kalispel is not seeking money damages and merely objects to Spokane's casino on

Spokane's property and DOI's failure to heed Kalispel's concerns. Spokane Br. at 58. The absence of damage claims is irrelevant for APA claims. *See* 5 U.S.C. § 706(2). In turn, this claim concerns protecting Kalispel's own existing trust assets and interests, for which Section 20 and Part 292 provide specific focus and a basic standard for agency action. *See* 25 U.S.C. § 2719(b)(1)(A); 73 Fed. Reg. at 29,356.

Fourth, Spokane asserts that DOI sufficiently complied with IGRA, and DOI asserts that it violated no specific statute or regulation. DOI Br. at 58; Spokane Br. at 59. Those assertions overlook that DOI violated IGRA both by failing to avoid detriment to the surrounding community and by balancing Kalispel's detriment with Spokane's benefits. Furthermore, 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). Thus, under *White Mountain*, "[o]nce a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation." *Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004). After all, if the government's fiduciary duties were limited to the plain dictates of statutes, the duties are not really "fiduciary" at all. *See Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996).

Fifth, DOI does not dispute its authority under other statutes to help Kalispel offset harm from approving Spokane's casino, but objects that nothing in or under IGRA authorized DOI to so act, so no such action is required. DOI Br. at 60-61. The

defense is absurd especially given DOI's concession that trust duties inform IGRA implementation. DOI's trust duties under IGRA support and nothing in IGRA prohibits using other statutory authority to avoid or mitigate Kalispel's harm.

Finally, Spokane objects to Kalispel's assertion that DOI could mitigate Kalispel's impacts without harming Spokane. Spokane argues that this is a new, forfeited argument and IGRA does not allow holding up a two-part determination for a "payoff." Spokane Br. at 59-60. Kalispel has not forfeited its claims regarding trust duties, as explained above. On the merits, Kalispel has cited statutory authorities, which DOI does not deny, which illustrate that DOI can honor its trust duties to Kalispel rather than throwing its hands in the air as DOI did here, KER 120. Nor is mitigation *ultra vires*, since Part 292 recognizes that DOI may consider mitigation of impacts and other information that may assist it in determining whether there would be detriment. 25 C.F.R. § 292.20(b)(4), (b)(6). Indeed, this Court previously has noted that DOI has "alternatives" under IGRA "to patch up a situation" about Spokane's gaming and not mechanically enforce it against tribes. *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1302 (9th Cir. 1998).

CONCLUSION

For all these reasons, DOI's determination must be vacated and remanded.

CERTIFICATE OF COMPLIANCE

I am an attorney for Plaintiff-Appellant Kalispel Tribe of Indians. This brief

contains 6998 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.

s/Daniel I.S.J. Rey-Bear

Daniel I.S.J. Rey-Bear, WSBA# 46068
Rey-Bear McLaughlin, LLP
421 W Riverside Ave, Suite 1004
Spokane, WA 99201-0410
telephone: 509-747-2502
email: dan@rbmindianlaw.com

Attorney for Kalispel Tribe of Indians

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