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.

On Appeal from the United States District Court for the Eastern District of Washington, No. 2:17-CV-0138-WFN
Before the Honorable Judge William Fremming Nielsen

BRIEF FOR INTERVENOR-DEFENDANT-APPELLEE SPOKANE TRIBE OF INDIANS

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INTRODUCTION

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

Nearly twenty-five years ago, the Kalispel Tribe obtained such a two-part determination and opened a casino in Airway Heights, Washington, near the City of Spokane—outside Kalispel's aboriginal territory but in the heart of the Spokane Tribe's ancestral lands. Kalispel has reaped the benefits of that determination, and the Tribe has suffered its detriments: Kalispel's casino has siphoned enough business from the Tribe's two more remote casinos that the Tribe has been forced to eliminate critical support services for its members and has been unable to address its urgent financial, social, health, and environmental needs. Indeed, in

recent years, Kalispel's casino has enabled it to spend *thirty times* more per tribal member than the Spokane Tribe.

After acquiring property in Airway Heights—in the area where the Spokane Tribe lived for centuries before being forced to relocate to its current reservation—the Tribe sought a two-part determination, just as Kalispel had done many years before. Following a rigorous, decade-long administrative process that included preparation of a massive environmental impact statement and careful consideration of the views of Kalispel, Airway Heights, the County of Spokane, and many other constituencies, the Department of the Interior granted the two-part determination. Washington's Governor then concurred in that determination, permitting the Tribe to proceed with its "West Plains Development," a mixed-use development with a casino and hotel.

Unhappy at the prospect of competition in a market it has largely had to itself for nearly twenty years, Kalispel challenged the Department's two-part determination in the district court. Kalispel's primary argument was—and is—that because the Tribe's project would cause a temporary decline in Kalispel's gaming revenues, IGRA required the Department to find detriment to the surrounding community and deny the two-part determination. The district court rightly rejected that argument. Competitive injury to an existing casino, by itself, does not mean that a new casino would be detrimental to the surrounding community. The tribe

that got there first is not entitled to veto the tribe that comes later. Rather, as the courts that have addressed the issue have held, IGRA charges the Department with evaluating all the relevant evidence—including the benefits of such economic development to the surrounding community—before determining whether the new gaming facility will be detrimental to the surrounding community *as a whole*.

The Department properly applied that standard here. It commissioned experts who analyzed the project's effects. They found that the project would generate major economic benefits for the surrounding community, including thousands of jobs and hundreds of millions of dollars a year in new economic activity. And they concluded that Kalispel's claims of injury were overblown and that Kalispel would suffer only a temporary downturn in revenues that would not affect its ability to provide essential government services. Accordingly, the Department determined that Kalispel's temporary loss of revenue did not make Spokane's project "detrimental to the surrounding community." That predictive judgment is firmly rooted in an extensive record and is entitled to deference.

Kalispel argues that the Department acted arbitrarily and capriciously by disregarding or improperly discounting the harm to Kalispel. The record refutes those assertions. The Department consulted Kalispel in the same way it consulted all affected entities within the surrounding community. It acknowledged and directly addressed the projected effect of competition on Kalispel's tribal budget,

including Kalispel's per capita payments to its members. And it reasonably concluded that even if an initial decline in gaming revenue might temporarily disallow such per capita payments, Kalispel would still be able to provide essential government services and facilities to its membership. Indeed, the Department found that even with the projected reduction to Kalispel's gaming revenues, Kalispel would still have *fourteen times* more revenue per member for government programs and services than the Spokane Tribe had at the time.

Kalispel also argues, for the first time on appeal, that the Department improperly departed from its own past rule, under which it allegedly refused to issue two-part determinations if a new gaming project would cause any competitive harm to an existing casino. Not only is this argument forfeited, but the Department has never applied such a rule. The Department has always taken the view that competitive impact on a nearby tribal casino, without more, does not make a new gaming facility detrimental to the surrounding community. Kalispel benefited from that approach when it received its own two-part determination notwithstanding the competitive harm to Spokane that the Department recognized was likely to result. There is no basis for Kalispel's contention that the Department may not take the same approach now.

Kalispel's motive in seeking to block the Tribe's urgently needed economic development is plain: It wants to keep the near-monopoly on the Spokane gaming

market that it enjoyed for nearly two decades at the Tribe's expense. But nothing in IGRA's text, basic principles of reasoned agency decision-making, or the United States' trust obligation toward all Indian tribes requires that result. As the district court correctly held on its own review of the record, the Department's process was exhaustive, and its conclusions were well-founded and reasonable. The district court's judgment should be affirmed.

ISSUE ON APPEAL

Whether the Department reasonably determined that the Tribe's proposed gaming project would not be detrimental to the surrounding community.

STATEMENT

A. Statutory Framework

In 1988, Congress enacted the Indian Gaming Regulatory Act to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA recognized that gaming had become a primary means for tribes to fund governmental operations and provide services to their members. *Id.* § 2701(1). And it required that tribes use gaming revenues for those purposes; a tribe may use gaming profits to make cash distributions to its members (also known as "per capita payments") only after tribal government

operations, economic development, and members' general welfare are adequately funded. *Id.* § 2710(b)(2)-(3), (d)(1).

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

Regulations promulgated in 2008 provide that the Department will consider multiple factors in determining whether a gaming project would be detrimental to the surrounding community. *See Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354 (May 20, 2008). Those factors are

(1) "environmental impacts and plans for mitigating adverse impacts";

(2) "[a]nticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community";

(3) "[a]nticipated impacts on the economic development, income, and employment of the surrounding community"; (4) "[a]nticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them"; (5) the cost, if any, to the surrounding community of treatment for problem gambling attributable to the new facility; (6) if any other tribe has a significant historical connection to the land, the impact on that connection; and (7) "[a]ny other information that may provide a basis for" the Department's determination. 25 C.F.R. § 292.18.

The National Environmental Policy Act (NEPA) requires that the Department's consideration of environmental impacts be informed by a detailed environmental impact statement (EIS). 42 U.S.C. § 4332(C). To prepare an EIS, the Department must, among other things, solicit and respond to comments by relevant federal agencies, affected state and local entities, nearby Indian tribes, the applicant, and the general public. 40 C.F.R. §§ 1502.9, 1503.1(a), 1503.4(a). In deciding whether to grant a two-part determination, the Department considers the information in the EIS alongside all the other information obtained by the agency during the administrative process. 25 C.F.R. §§ 292.18(a), 292.21(a).

B. Historical Background

The Spokane Tribe is a federally recognized Indian tribe with approximately 2,900 enrolled members. Spokane Tribe of Indians, https://spokanetribe.com

(visited August 25, 2020); ER55 (noting 2,849 members as of January 2015). The Tribe's reservation, established by executive order in 1881, is located roughly forty miles northwest of the City of Spokane. ER55; *see* Spokane Tribe Excerpts of Record (STER) 58. Historically, the Tribe lived on millions of acres stretching from the Idaho border to the confluence of the Spokane and Columbia Rivers, sustaining itself by fishing in those rivers and holding community gatherings at Spokane Falls, located in what is now the City of Spokane's downtown commercial district. ER56.

The site of the West Plains Development "lies in the heart" of the Spokane Tribe's ancestral homeland, STER61, and the Tribe has an "extensively documented, deep historic connection to the Project Site and its immediate vicinity," STER62. "There are over sixty documented sites of historic, archaeological, cultural or spiritual significance to the Spokane Tribe within a five-mile radius of the Project Site," including former permanent villages, fishing stations, and "'historic camps.'" STER65-66; *see also* STER61 ("[T]he Spokane Tribe and its membership have maintained a continuous presence in the immediate area of the Project Site from time immemorial through the present."); ER80. The 1858 Battle of Spokane Plains, in which the Tribe fought to save its land from unlawful settlement, also occurred in the immediate neighborhood of the site. STER64. Indeed, the Tribe's connection to the West Plains area is so ingrained

and central to its identity that "many Spokane [refused] to relocate to the Reservation until well after its establishment." STER62.

Over the past century, the Tribe has struggled to support itself economically and to maintain its way of life. Construction of the Grand Coulee Dam in 1939 blocked the passage of salmon up the Columbia River, destroying not only the Tribe's commercial salmon fisheries but also its primary source of food and a critical part of its traditional culture. STER59; ER56. Timber production—one of the Tribe's alternative sources of income—has declined substantially, with revenues dropping by nearly two-thirds during the 2007-2009 housing market crash and continuing to drop even after the market rebounded. STER59, 124, 128. And uranium mines on the reservation that had been operating since the 1950s closed in 1982—taking away revenue and employment opportunities while saddling the Tribe with an acute uranium contamination problem. Uranium has polluted the streams and wetlands on the Tribe's land, endangered its wildlife, and sickened its people. The enormous and costly clean-up was delayed for decades and is not yet complete. STER59; ER57-58.

This environmental destruction and economic deprivation have left the Tribe "in crisis." STER129. At the time of the Department's decision, data regarding the Tribe's unmet needs showed that one in five homes on the reservation had unsafe drinking water; one in four members was waiting for medical treatment

from a clinic that could not adequately serve the Tribe's population; and 56% of the Tribe's adult members were unemployed. STER118, 125 n.2; ER67. Of the members who were employed, more than 45% earned so little that they fell below the federal poverty line. ER67. Nearly 25% of families on the reservation were living in poverty—a rate three times greater than the rate for Spokane County or Washington State as a whole. STER125.

The Tribe has grown increasingly dependent on gaming revenues to address these pressing needs and to provide much-needed services to its members. But the two gaming facilities the Tribe operated when the two-part determination issued—the Chewelah Casino and the Two Rivers Casino—were located in relatively remote areas distant from the population center in and around the City of Spokane. After Kalispel's Northern Quest Casino opened in 2000, Chewelah and Two Rivers had increasing difficulty attracting customers. The Tribe's gross annual gaming revenues plummeted, declining from $23.2 million in 1998 to $14.5 million in 2009. STER246. In comparison, during roughly the same time period, average gaming revenues in Washington State grew by 21% *annually*. ER64. "The declining gaming revenue for the Spokane Tribe contrast[ed] sharply with the explosive growth at other tribal casinos in Washington." STER140.

The decline in revenues wreaked havoc on the Tribe's finances and its ability to meet its members' basic needs. In 1998, the Tribe's casinos transferred

over $5.7 million to the Tribe's general fund for services to members. STER139-140. By 2009, that amount had shrunk to less than $20,000. *Id*. A revenue deficit at the Two Rivers Casino in 2009 actually required the Tribe to transfer money out of its general fund to support the casino. ER62.[1] By 2010, the Tribe faced a budget gap of $4.6 million, STER142, and its cash reserves in 2014 were barely half of what they were ten years earlier, STER252. This shortfall forced deep cuts to the Tribe's services to its members, including the elimination of disability- and energy-assistance programs, severe reductions to employee benefits, and the termination of tribal funding for certain education and business development programs. STER142-145.

In sharp contrast to the Tribe, Kalispel has flourished as a result of the Department's 1997 two-part determination authorizing Kalispel to open a casino on land in Airway Heights, in the Spokane Tribe's aboriginal territory. ER119. Because of that determination, for almost twenty years, Kalispel has enjoyed a highly lucrative near-monopoly in the Spokane-area gaming market. ER247-248. The resulting gaming revenues have permitted Kalispel to open a community center, work toward key tribal cultural preservation priorities, and make substantial

[1] The Two Rivers Casino remained open for some time on a seasonal basis to provide employment for tribal members, but closed permanently in 2018. *See* Washington State Gambling Comm'n, *Casino Locations*, https://www.wsgc.wa.gov/tribal-gaming/casino-locations (last visited Aug. 25, 2020).

yearly per capita payments to its members—something the Spokane Tribe has never been able to do. *See* ER119; *see also* ER402 ("Without the two-part determination [it] received in 1997, [Kalispel] would have been unable to begin addressing the profound socioeconomic disparities and disadvantages which undermined the strength of [its] tribal government."). Indeed, one of the studies supporting the Department's two-part determination noted that in recent years Kalispel had spent roughly thirty times more per tribal member than Spokane. *See* ER625.

C. The Administrative Review Process

In 2001, the Department took a 145-acre parcel of land in Airway Heights into trust for the Spokane Tribe. ER55, 71; STER1-3. Although the parcel was originally taken into trust for general "economic development purposes" rather than for gaming, ER55, the Tribe ultimately concluded that a mixed-use development including gaming would be the most effective way to address its budgetary shortfall and provide essential services to its members.

Accordingly, in February 2006, the Tribe formally requested a two-part determination that would authorize it to game on the trust property. STER12-15. After the Department issued its 2008 regulations governing two-part determinations, the Tribe supplemented its request with over a thousand pages "specifically describ[ing] … the benefits and impacts of the proposed gaming

establishment to the Tribe and its members; any potential detrimental impacts to the surrounding community; and proposed mitigation measures." STER53.

The Tribe proposed building out its project, the West Plains Development, in three phases. Phase 1 was to include a gaming facility with 1,500 slot machines, table games, poker, and bingo, along with a food court, bars, a cafe, and a steakhouse. STER79. Phase 2 would increase the size of the gaming facility and add more upscale restaurants and retail stores, while Phase 3 would include a full-scale hotel as well as additional gaming, restaurants, and retail stores. *Id.*

The Department spent roughly a decade exhaustively analyzing the Tribe's application, consulting relevant parties, and considering and responding to the views of opponents, including Kalispel. In accordance with IGRA and its implementing regulations, *see* 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. §§ 292.19, 292.20, the Department sent two rounds of "consultation" letters to almost eighty state and local officials and officials of nearby Indian tribes such as Kalispel, *see, e.g.*, STER37-41, 53-56; *see also* STER42-44 (list of consulted entities). The second consultation letter was sent at Spokane's request and included the extensive supplemental information on potential detrimental impacts and proposed mitigation that Spokane had provided. STER53.

The Department also prepared a thorough environmental impact statement, as required by NEPA and the IGRA regulations. The Department identified seven

cooperating agencies, including the City of Airway Heights, Spokane County, the Air Force, and the Federal Aviation Administration. After soliciting their feedback, in March 2012 the Department issued a draft EIS evaluating the Tribe's proposed West Plains Development, along with two smaller alternative projects and a "no-action" alternative. 77 Fed. Reg. 12,835, 12,873 (Mar. 2, 2012). After reviewing extensive comments on the draft EIS and obtaining further input from the cooperating agencies, the Department issued a final EIS for further public review and comment in February 2013. 78 Fed. Reg. 7427 (Feb. 1, 2013).

In light of the anticipated stimulus to the local economy, the Tribe's project garnered "substantial support from local governments in the area," including the City of Airway Heights, "which is the closest to and most affected by the Project." ER76-77. Indeed, Airway Heights "express[ed] 'unwavering support'" for the Tribe's request. ER101; *see* STER47-50, 107-114. The Board of Commissioners for nearby Lincoln County stated that "they did not foresee any adverse environmental impacts to Lincoln County," and noted their support for "economic development that creates employment and housing, which in turn increases the tax base and stimulates the economy in Lincoln County." ER100-101. The City of Spokane, which had initially opposed the project out of concerns related to potential encroachment on the nearby Fairchild Air Force Base, wrote a letter in February 2014 retracting its prior opposition and underscoring that the West Plains

Development was "extremely important to the Spokane region" and that the region would "not likely have another opportunity for private investment similar to" it. STER115. The Department and Tribe also received "many written expressions of support from local leaders, labor unions, and business interests." ER77.

The Department and the Tribe, however, also carefully considered and responded to concerns raised by other members of the community. For instance, certain local governments raised questions about the project's potential effects on Fairchild Air Force Base, which is an important employer located in Airway Heights. The Department and the Tribe worked closely with the Air Force to address those issues, ER89, developing "procedures to mitigate any potential encroachment and to ensure that the base [would] operate undisturbed," ER121. The Tribe also participated with local governments in a joint land use study funded by the Department of Defense to develop recommendations to safeguard base operations, and it incorporated those recommendations into the tribal West Plains Development Code governing the project. ER89-90.

In addition, the Tribe agreed to undertake numerous measures to assist local government agencies that might experience increased demand for services due to the Tribe's project. For example, as part of its gaming compact with the State, the Tribe agreed to establish a fund to assist non-tribal law enforcement, emergency services, and service agencies. STER18-19. The Tribe also committed to help

address problem gaming and smoking cessation. STER23, 25. And under various intergovernmental agreements, the Tribe agreed to make payments "to compensate" municipal governments "for any … impacts" from the project. STER28. The Tribe did not enter into a similar agreement with Kalispel, which does not provide municipal services to the project's site, ER375, and is part of the surrounding community only because it operates an existing casino on nearby trust land far from its own reservation, *see supra* pp. 1, 11-12.

During the agency proceedings, Kalispel claimed that competition would result in "a catastrophic reduction" in its gaming revenue and would cause it to default on loans it had recently acquired to expand its Northern Quest Casino. ER358, 373. The Department took those concerns very seriously and spent significant time and resources analyzing the potential impact of Spokane's project on Kalispel. The Department commissioned four separate reports from Analytical Environmental Services (AES), the Innovation Group, and Innovation Capital—third-party contractors with expertise in gaming markets and economic forecasting—to provide competitive effects studies and objective analysis of Kalispel's financial projections. *See, e.g.*, STER131-160, 161-214, 215-224, 225-237. Those experts' analyses were reflected in the draft EIS and final EIS.

As discussed further below, the Department's experts did not substantiate Kalispel's claims of catastrophic harm, deeming Kalispel's analysis and

projections fundamentally flawed and "wholly unreliable." ER428. They found that while Kalispel's gaming revenues would decrease in the first year after Spokane's new gaming facility opened, revenue growth would resume thereafter. STER152-155. Moreover, Kalispel would be able to transfer a "reasonable level" of revenue from its casino to its general fund while still servicing its loans, even during the projected initial decline in revenue. STER222. Accordingly, the Department's experts concluded that Kalispel had failed to demonstrate any significant adverse effect from the project on its ability to run its government and provide programs and services to its members. ER428, 624.

D. The Two-Part Determination

On June 15, 2015, the Department issued a two-part determination based on all the information gathered during the IGRA consultation and NEPA process, the nearly 500-page analysis in the final EIS, and comments received and further studies conducted after issuance of the final EIS. ER52-117. The Department determined that the Spokane Tribe's proposed gaming facility would be in the Tribe's best interest and would not be detrimental to the surrounding community, and it requested Washington Governor Jay Inslee's concurrence in that determination. ER121.

As the Department explained, the proposed West Plains Development "would provide a new economic engine to lift the Tribe's members out of

poverty." ER119. Among other things, its revenues would enable the Tribe to address uranium contamination on its reservation, provide better health care and education to its members, and pursue cultural preservation programs. *Id.* The Department concluded that the Tribe's proposed mixed-use development, including gaming, would "allow the Tribe to implement the highest and best use of the trust property" while "preserving the key natural resources" of the West Plains site. ER29-30.

The Department also concluded that the project would be beneficial to the surrounding community—generating significant economic output, jobs, and tax revenues for the Spokane region. *See, e.g.*, ER91-93. The Department projected that in the initial construction phase alone, the West Plains Development would generate over $300 million in economic output and create more than 2,200 jobs. STER81, 90. Once completed, it was projected to generate $250 million in annual economic output, supporting more than 2,800 long-term jobs. STER81, 87. That increase in economic activity, in turn, would result in over $15 million in federal, state, and local tax revenue during the construction phase, and an additional $11 million in annual tax revenue during operation. STER84-85. As the Department underscored, the prospect of "significant economic stimulus to the region" earned "substantial" backing for the project from local governments and businesses. ER76-77.

The Department addressed the anticipated effect of the Tribe's project on Kalispel's gaming revenues and governmental operations at length. It acknowledged that the Tribe's new gaming facility would compete with Kalispel's Northern Quest Casino and would temporarily reduce Kalispel's gaming revenues. It concluded, however, that the decline in revenue would be neither as steep nor as long-lasting as Kalispel contended. The Department projected that Kalispel's revenues would decline by 29.5% during the first year of operation of Phase 1 (then expected to be 2013), STER296, but that "normative revenue growth" would "resume" after that, STER155. Assuming full build-out of all three phases by 2020, the Department calculated that Kalispel's gaming revenues for that year would be 33% less than Kalispel's own projections in the absence of competition (or a 13.8% decline relative to Kalispel's most recent actual revenues), but again noted that, after that year, "[t]his impact is … anticipated to diminish." STER74-75. Indeed, the Department found that the Spokane gaming market was "sufficiently large to support three casinos of the magnitude" of Kalispel's existing facility. ER99-100, 104-109.

The Department also concluded that Kalispel would not experience a substantial adverse impact on its ability to provide government services. Based on Kalispel's own data, its total governmental budget would experience a temporary dip of 32% during the projected first full year of operation of Phase 1. ER624-625.

Nonetheless, this reduction in revenue would not prevent Kalispel from "operat[ing] its government, offer[ing] tribal programs and services …, and provid[ing] for the general welfare of its people," and would still leave Kalispel with fourteen times more funds per member than the Tribe had at the time. *Id.* By full build-out in 2020, the Department concluded, while Kalispel might have to reduce or eliminate per capita payments to its members, "the overall Kalispel tribal government budget" would be only 6.7% less than its then-current budget. STER75; *see* STER92-93.[2] And even that reduction would be temporary and would be ameliorated over time due to growth in the Spokane market. STER75.

The Department accordingly determined that the temporary reduction in Kalispel's revenues was not a detrimental impact on the surrounding community that would preclude a two-part determination. As it explained, "IGRA does not … guarantee that tribes operating existing facilities will continue to conduct gaming free from both tribal and non-tribal competition." ER105. The Department noted that it had applied that same principle when it granted Kalispel's two-part determination in 1997, *id.*, even though the Spokane "Tribe's existing casinos would experience intense competition from the new Kalispel operation," ER119. The Department also noted that, as predicted at the time, its decision to permit

[2] The Secretarial determination uses the figure 16.7%, STER297, but that is a typographical error; the final EIS makes clear that the correct figure is 6.7%, STER75, 93.

Kalispel to open a casino in Airway Heights had significantly reduced gaming revenues at Spokane's more remote casinos. ER12. Nonetheless, the Department adhered to its consistent view that competition with an existing casino does not, by itself, render a new casino detrimental to the surrounding community.

In June 2016, Governor Inslee concurred in the two-part determination. ER123. Spokane opened a gaming facility in Airway Heights in January 2018, although that facility was much smaller than the Tribe had planned even for Phase 1, containing only 450 slot machines. *See* Kramer, *Spokane Tribe Casino Honors Tribe's Past with Historic Photos, Salish Names*, Spokesman-Rev. (Jan. 7, 2018), https://www.spokesman.com/stories/2018/jan/07/spokane-tribe-casino-honors-tribes-past-with-photo. Construction of Phases 2 and 3 of the project has not yet begun.

E. The District Court's Decision

Kalispel filed this action challenging the Department's two-part determination in April 2017. ER592. In July 2017, the Tribe was granted leave to intervene to defend that two-part determination in its favor. ER593-594. In July 2019, the district court granted summary judgment to the Department and the Tribe upholding the two-part determination. ER122-131.[3]

[3] Spokane County also challenged the two-part determination in the district court, arguing that the Department had failed to consult with the County adequately and had erred in its evaluation of the impact on Fairchild Air Force

The district court rejected Kalispel's claim that competitive harm to Kalispel, by itself, required a finding of detriment under IGRA. As the court explained, "[i]n weighing detriment to the community, the Department need not find that the [proposed] casino has no unmitigated 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.'" ER125 (quoting *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1187 (D.C. Cir. 2018)). The court also noted that nothing in IGRA "suggests an affirmative right for nearby tribes to be free from economic competition." *Id*. (quoting *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000)).

The district court acknowledged that Kalispel would suffer "some detrimental impacts through loss of revenue," which the Department was "require[d] … to consider." ER125 (quotation marks omitted). But, as the court explained, the Department "squarely addressed Kalispel's concerns": It "spent ten years investigating the application, seeking expert review, and working with local officials and governments," and based on that "exhaustive review," it found that "while the Kalispel may suffer in the short term, eventually the profits would rebound and both tribes would benefit." *Id*. The court also concluded that the

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Base. The district court rejected those claims, ER125-127, and the County did not appeal the district court's ruling.

Department's reliance on its own experts' analyses and projections, rather than Kalispel's, was not arbitrary and capricious. *Id*.

The district court likewise held that the Department "did not violate the trust relationship" with Kalispel. ER130. As the court explained, "the scope of that duty must be established by statute and … necessarily equally applies to all tribes so the Government may not favor one tribe over another." *Id*. (citing *Lawrence v. U.S. Department of Interior*, 525 F.3d 916, 920 (9th Cir. 2008); *Nance v. EPA*, 645 F.2d 701, 711-712 (9th Cir. 1981)). Here, "the Department fulfilled its statutory duty to examine the benefits and harm" to both Kalispel and Spokane, thereby complying with its fiduciary obligation toward all Indian tribes. *Id*.[4]

SUMMARY OF ARGUMENT

I. Before approving gaming on newly acquired trust land pursuant to IGRA's two-part determination process, the Department must find that the proposed gaming project "would not be detrimental *to the surrounding community*." 25 U.S.C. § 2719(b)(1)(A) (emphasis added). As the courts that have addressed the question have held, IGRA's plain language directs the Department to evaluate the costs and benefits of the project and determine whether

[4] Kalispel also argued below that the Department violated NEPA by relying on independent experts and narrowing the scope of options considered in the EIS to predetermine the outcome of the administrative process. The district court rejected those arguments, ER127-129, and Kalispel has not renewed them on appeal.

it would be beneficial or detrimental to the surrounding community as a whole. Nothing in IGRA supports Kalispel's contention that *any* detriment, however small, to any part of the surrounding community necessarily trumps all benefits to the community and forecloses a two-part determination. If that were the case, no two-part determination would ever be possible; all development entails some costs, and not all costs can be completely mitigated.

Nor does IGRA grant nearby tribes the right to veto a new gaming facility that might compete with their own. IGRA is designed to facilitate economic development for all tribes, not to grant a monopoly to those who open casinos first. That is why Kalispel was granted a two-part determination permitting it to game in Spokane's aboriginal territory, notwithstanding the competitive harm to Spokane. What was true then is still true now: Kalispel's temporary loss of profits does not preclude a two-part determination for Spokane.

II. The Department's conclusion that the West Plains Development would not be detrimental to the surrounding community was supported by substantial evidence in the record and was not arbitrary or capricious. The record establishes that the Tribe's project would create a significant economic stimulus to the region, generating hundreds of millions of dollars in local economic activity, thousands of jobs, and millions of dollars in ongoing tax revenues. While Kalispel's existing casino would lose some revenue, particularly in the first year of

the new casino's operation, the Department projected based on its experts' analysis of the gaming market that revenue growth would resume after that first year. Moreover, the temporary loss of revenue would not prevent Kalispel from delivering essential government services to its members. The Department thus had substantial evidence supporting its conclusion that the project would not be detrimental to the community as a whole. That predictive judgment, based on the agency's expertise in matters of tribal gaming, merits deference.

Kalispel levels a series of attacks on the completeness and reasonableness of the Department's decision. None has merit. The Department expressly incorporated into its analysis the competitive harm to Kalispel as part of the surrounding community. And it was reasonable for the Department to take into consideration that Kalispel's loss of revenue would be short-lived and, while it might lead to the reduction or elimination of Kalispel's generous per capita payments to tribal members, would not impair Kalispel's ability to provide essential government services. The Department's consideration of Spokane's ties to the land and the disparity in the two tribes' resources was likewise reasonable and proper; indeed, the former is required by the Department's regulations. And the Department's determination was wholly consistent with its long-standing view that competitive harm to a tribe with an existing casino, without more, does not

make a new gaming project detrimental to the surrounding community as a whole. Kalispel's contrary argument is both forfeited and meritless.

III. Finally, the Department discharged its trust obligations to Kalispel by satisfying IGRA's requirements. The Department's fiduciary obligation toward all tribes does not mean that Kalispel may veto the Tribe's urgently needed economic development. Nor was the Department obligated to offer a side deal as an inducement for Kalispel to drop its opposition to the project. IGRA itself balances the relevant tribal interests by requiring the findings the Department made here, after a decade-long process and on a comprehensive record: The proposed gaming would be in the Tribe's best interest and not detrimental to the surrounding community. The Department's trust obligation requires nothing more.

STANDARD OF REVIEW

This Court reviews the district court's summary judgment ruling de novo, limiting its focus to the administrative record and "'reviewing directly the agency's action.'" *County of Amador v. U.S. Dep't of Interior*, 872 F.3d 1012, 1020 (9th Cir. 2017). Under the Administrative Procedure Act, agency action may be set aside "only if it was arbitrary, capricious, … or otherwise contrary to law." *Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584, 594 (9th Cir. 2018); 5 U.S.C. § 706. "Th[at] standard is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'"

Yazzie v. EPA, 851 F.3d 960, 968 (9th Cir. 2017). "Even when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004).

Moreover, the agency's decision need only be "supported by 'substantial evidence on the record considered as a whole.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983). "Where the agency has relied on 'relevant evidence … a reasonable mind might accept as adequate to support a conclusion,' its decision is supported by 'substantial evidence.' Even '[i]f the evidence is susceptible of more than one rational interpretation, [the court] must uphold [the agency's] findings.'" *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (citation omitted). This Court's review "'is particularly deferential in matters implicating predictive judgments'" like the one here. *Cachil Dehe*, 889 F.3d at 602.

ARGUMENT

I. IGRA REQUIRES A DETERMINATION THAT THERE WILL BE NO DETRIMENT "TO THE SURROUNDING COMMUNITY" OVERALL

Before issuing a two-part determination, the Department must find that the project "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Under IGRA's implementing regulations—which Kalispel does not challenge—the Department "evaluate[s] detriment on a case-by-

case basis based on the information developed in the application and consultation process." *Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354, 29,373 (May 20, 2008). The Department must "consider *all* the information submitted … in evaluating … detriment[]." 25 C.F.R. § 292.21(a) (emphasis added).

The Department's evaluation thus does not require "any specific finding regarding the proposed casino's 'detrimental impact' on any single entity." *Stand Up for California! v. U.S. Department of Interior*, 204 F. Supp. 3d 212, 269 (D.D.C. 2016) (*Stand Up II*); *see also Stand Up for California! v. U.S. Department of Interior*, 919 F. Supp. 2d 51, 74 (D.D.C. 2013) (*Stand Up I*). Rather, the Department's task under IGRA is "'to make only a single determination' regarding whether the proposed facility would be detrimental to the surrounding community 'as a whole.'" *Stand Up II*, 204 F. Supp. 3d at 269. In doing so, the Department has broad discretion to "consider '[*a*]*ny* … information that may provide a basis for'" its determination, including "a casino's community benefits," *Stand Up for California! v. U.S. Department of Interior*, 879 F.3d 1177, 1187 (D.C. Cir. 2018) (*Stand Up III*), and to consider both an entity's claims of particularized harm to itself and the project's benefits to "the surrounding community overall," *id*. at 1189-1190.

Kalispel's principal argument on appeal is that under IGRA, *any* unmitigated competitive harm to a nearby tribe with an existing casino—however minor—overrides *all* benefits to the larger community—however significant. Br. 24-29. According to Kalispel, the predicted temporary reduction in its gaming revenues therefore *required* a finding that Spokane's project would "be detrimental to the surrounding community," 25 U.S.C. § 2719(b)(1)(A), regardless of the project's benefits. In other words, in Kalispel's view, the Department could not actually consider "all the information" about benefits to the community, as its regulations require, 25 C.F.R. § 292.21(a), because Kalispel's projected loss of even a dollar of gaming revenue foreclosed any consideration of those benefits. That self-serving reading conflicts with IGRA's text and purpose, as well as the Department's regulations, and cannot be sustained.

To start, while Kalispel claims to be making a plain-language argument, it ignores much of IGRA's relevant language. Kalispel focuses solely on the word "detrimental," arguing (at 26) that because Congress included no "qualifying adjective," IGRA imposes "a binary test without any statutorily required threshold: either the proposed gaming would or 'would not be detrimental.'" But that disregards the plain textual limitation Congress *did* impose—that the detriment must be "*to the surrounding community*." 25 U.S.C. § 2719(b)(1)(A) (emphasis added). Kalispel is a part of the "surrounding community," but only a part. And

nothing in the statute's text suggests that any unmitigated detriment to any part of the community trumps the interests of the surrounding community as a whole.

It makes particularly little sense to read the "detrimental to the surrounding community" standard, as Kalispel does, to incorporate an unstated requirement that no nearby tribe can lose a dollar of profits to a new gaming facility. This Court has refused "to read into IGRA unnecessary requirements demanded neither by law nor logic," *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1150 (9th Cir. 2020), which is precisely what Kalispel's interpretation requires. Congress was certainly aware when it drafted IGRA that casinos compete for customers. If it had wanted to permit tribes with existing facilities to veto two-part determinations for their neighbors, it easily could have said so. It conspicuously did not. Nothing in IGRA "suggests an affirmative right for nearby tribes to be free from economic competition." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000). And that makes sense, because IGRA is not designed to grant monopolies to tribes with existing casinos, but to "'promot[e] tribal economic development'" for all tribes, including through the two-part determination mechanism. *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 468 (D.C. Cir. 2007) (quoting 25 U.S.C. § 2702(1)); *cf. FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473, 475 (1940) (under Communications Act's "public convenience, interest, or necessity" standard, "economic injury to a rival station is not in and of itself"

grounds to deny a license, since Act's "purpose" is "not … to protect a licensee against competition" but to further the public interest).

Indeed, Kalispel's reading of the statute is absurd on its face: If IGRA forbade a new gaming project from creating any unmitigated costs, however small, for any part of the surrounding community, no two-part determination could ever issue. No community is of a single mind when it comes to casinos, and every casino "entail[s] *some* costs." *Stand Up I*, 919 F. Supp. 2d at 74. To be sure, as Kalispel stresses (at 4, 7, 27, 35), a two-part determination is "an exception" to the general bar on gaming on after-acquired lands, but it "obviously was not Congress' intent" for that provision to "effectively describ[e] a null set," *DePierre v. United States*, 564 U.S. 70, 82 (2011).

For that very reason, the D.C. Circuit has squarely rejected the reading of IGRA that Kalispel advances here. In *Stand Up III*, plaintiff Stand Up for California! argued that IGRA "requires that a casino have no unmitigated negative impacts whatsoever," rather than "on balance, … a positive or at least neutral net effect on the surrounding community." 879 F.3d at 1187. As the court observed, "this cramped reading of IGRA … would result in barring any new gaming establishments, given that all new commercial developments are bound to entail *some* unmitigated costs." *Id.* (internal quotation marks and brackets omitted). Rejecting that "cramped reading," the court held instead that IGRA permits the

Department to "view[] [a new] casino's net effects holistically." *Id.* at 1188. As the court explained, the Department's regulations "expressly allow" consideration of "'[*a*]*ny*'" information that could provide a basis for determining whether a new gaming facility would be detrimental to the surrounding community. *Id.* at 1187 (citing 25 C.F.R. § 292.18(g)). And the Department's interpretation of this regulation "as authorizing it to consider a casino's community benefits—even those that do not directly remediate a specific detriment"—was "perfectly reasonable" and entitled to deference. *Id.*

Applying that reading of IGRA, the D.C. Circuit affirmed the Department's finding that the new gaming project in that case would not be detrimental to the surrounding community. *Stand Up III*, 879 F.3d at 1187-1190. Among other arguments, the court rejected a claim by the Picayune Tribe that competitive harm to its existing casino foreclosed a two-part determination. *Id.* at 1189-1190. As the court explained, the Department had reasonably concluded that "the Picayune's casino could successfully absorb the expected competitive effects" and "appropriately" determined "that the casino's potential effects on the tribe were insufficient to render the casino detrimental to the surrounding community overall," *id*. at 1190—just as the Department did here.[5]

[5] Kalispel attempts (at 20) to distinguish *Stand Up III* on the ground that it "did not involve [a] nearby tribe." The court did observe that Picayune was not within the 25-mile radius necessary to make it formally part of the surrounding

The Department's determinations both here and in *Stand Up* are consistent with its long-established interpretation of IGRA and its own regulations, under which "competition alone [i]s not sufficient" to justify a finding of detriment to the surrounding community. ER119. As discussed above, Kalispel "benefitted enormously" from that approach when, in 1997, the Department approved Kalispel's Northern Quest Casino notwithstanding the likelihood that it "would 'devastate' [Spokane's] remote gaming operations." STER70. The agency concluded in that case, as in this one, that "IGRA does not guarantee that tribes operating existing facilities will conduct gaming free from competition." ER119. Rather, the effect on nearby tribes is simply one factor in the case-specific determination whether a new gaming project would be detrimental to the surrounding community. Not only is that interpretation "perfectly reasonable,"

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community under the Department's regulations, and that the Department was therefore entitled to give its concerns less weight. 879 F.3d at 1188-1189 (citing 25 C.F.R. § 292.2). But the Department and the court nonetheless considered the harm to Picayune, and the court did not suggest that it would have found Picayune's objection meritorious if it had been part of the "surrounding community." More importantly, the court's conclusion that Picayune was outside the "surrounding community" had nothing to do with its rejection of Stand Up's threshold argument that any unmitigated harm to the community foreclosed a two-part determination under IGRA.

Stand Up III, 879 F.3d at 1187, but basic principles of fairness in agency action compel its application to Spokane and Kalispel alike.[6]

And while Kalispel repeatedly notes (*e.g.*, at 21-22, 24, 28-29, 31-33, 38-41, 43, 49) that its lost revenues—unlike, for example, potential increased costs to local utility and emergency service providers—are not being offset by mitigation payments, it does not follow that those lost revenues make Spokane's project detrimental to the surrounding community as a whole. As the final EIS explained, NEPA does not contemplate mitigation measures "[w]hen effects are solely economic and do not result in physical environmental effects," such as increased demand on local utility or emergency services. STER75; *see also Port of Astoria v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979) ("pecuniary losses and frustrated financial expectations that are not coupled with environmental considerations … are outside of NEPA's zone of interests").

Nor does IGRA require mitigation of every adverse impact on a member of the surrounding community. The Department's regulations—which, again,

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[6] Kalispel asserts in passing (at 40) that even if the Department could grant a two-part determination notwithstanding detriment to "subordinate state instrumentalities" like cities and counties, Kalispel has "a distinct, sovereign status" that precludes the Department from doing so here. Tribal sovereignty, however, does not grant Kalispel freedom from competition. Congress has "plenary authority to regulate Indian affairs," *Club One*, 959 F.3d at 1152, including by dictating the manner in which tribal interests will be considered under IGRA. The Department's compliance with that standard does not offend tribal sovereignty.

Kalispel does not challenge—direct the applicant tribe to identify sources of mitigation and invite consulted local entities to do the same only so that the information may be considered as part of the Department's determination. *See, e.g.*, 25 C.F.R. §§ 292.18(d), 292.20(b). *Stand Up III* expressly considered and rejected the same argument Kalispel makes here that every detriment must be mitigated. As the D.C. Circuit explained, "nothing in IGRA … forecloses the Department, when making a non-detriment finding, from considering a casino's community benefits, even if those benefits *do not directly mitigate a specific cost* imposed by the casino." 879 F.3d at 1187 (emphasis added).

In any event, the notion that IGRA requires a new gaming facility to reimburse an existing one for any decline in revenues is absurd. IGRA does not entitle Kalispel to undiminished profits for eternity. Rather, it entitles both Kalispel and Spokane to operate gaming facilities that benefit them and are not detrimental to the surrounding community, if the State's Governor agrees. Kalispel may have gotten there first, but that gives it no right to block Spokane's facility or demand a share of Spokane's revenues. While Kalispel now suggests (at 49) that it is not seeking mitigation payments directly from Spokane, but some equivalent concession from the Department, IGRA likewise does not require compensation from the United States for an existing casino's decline in gaming revenues due to a two-part determination. Neither Kalispel nor the United States

compensated Spokane for the revenue losses resulting from Kalispel's two-part determination. IGRA and the Department authorized Spokane's project "to lift the Tribe's members out of poverty," ER119, not to subsidize Kalispel, which would still have fourteen times as much as Spokane has had to spend on each member even *after* the projected revenue losses due to Spokane's project.

II. THE DEPARTMENT REASONABLY CONCLUDED THAT SPOKANE'S PROPOSED GAMING FACILITY WOULD NOT BE DETRIMENTAL TO THE SURROUNDING COMMUNITY

As the nearly 66,000-page administrative record shows, the Department thoroughly studied the relevant issues in this case for the better part of a decade. It engaged extensively with other federal agencies and local governments, including Kalispel, and solicited multiple rounds of public comment. It commissioned several expert analyses of the anticipated effects of the Spokane Tribe's project on the surrounding community, including extensive study of the project's impact on the local gaming market and on Kalispel specifically. And the Department took into consideration all that information about the project's anticipated effects, both positive and negative, before determining that it would not be detrimental to the surrounding community.

There is no basis to disturb that determination. To the contrary, substantial evidence supports the Department's conclusion that the Tribe's project would bring significant economic benefits to the local community—including thousands

of new jobs, hundreds of millions of dollars in new economic activity, and millions of dollars in tax revenue—and that the competitive harm to Kalispel's casino would be short-lived and would not prevent Kalispel from delivering essential government services to its members. Kalispel does not challenge any of the evidence of community benefits. And while it makes various claims that the manner in which the Department considered the harm to Kalispel was arbitrary and capricious, none of those contentions remotely undermines the reasonableness of the Department's predictive judgment here, which is "entitled to particularly deferential review." *California v. Azar*, 950 F.3d 1067, 1096 (9th Cir. 2020); *accord Cachil Dehe*, 889 F.3d at 602.

A. The Department's Determination That Spokane's Project Would Not Be Detrimental To The Surrounding Community Is Supported By Substantial Evidence In The Record

1. Undisputed record evidence establishes substantial benefits to the surrounding community.

Before issuing the two-part determination here, the Department closely studied the effects the Tribe's project would have on the surrounding community. The record contains ample evidence of the project's benefits to local residents and businesses, as well as municipal governments. In particular, the Department relied on an October 2011 study by AES, which employed a model commonly used "to determine anticipated effects of development projects on the regional economy" to forecast the project's short- and long-term effects on economic activity,

employment, and tax revenues. STER94. The Department found that the project would create substantial benefits for the surrounding community on each of those three measures. STER94-106.

First, the Department found that the Tribe's project would create a large financial stimulus for the local economy—generating "substantial direct economic output, as well as indirect and induced economic output" through increased spending on goods and services by both businesses and consumers. ER91. The Department projected that construction of the West Plains Development by itself would generate over $300 million in short-term economic activity, and that once fully built out, the development would be expected to generate approximately $250 million per year in new economic activity, "distributed among a variety of different industries and businesses throughout [Spokane] County." STER81-82, 95-97. And those "businesses would in turn increase their spending, and labor demand, thereby further stimulating the local economy." STER81.

Second, the West Plains Development would lead to significant job creation and reduce local unemployment. ER91. The construction phase would create more than 2,200 jobs and over $100 million in wages. STER85. And operation of the resort and gaming facility would support more than 2,800 long-term jobs, generating almost $70 million in wages per year. STER86-87. These opportunities, the Department predicted, would "result in employment and wages

for persons previously unemployed and would contribute to the alleviation of poverty among lower income households" in Spokane County. STER88; ER93.

Third, the anticipated fiscal impact on local governments would likewise be both "positive" and "substantial." STER84. Construction, the Department projected, would generate more than $15 million in one-time tax revenues, including $6.6 million in state and local tax revenues. *Id*. And, once the resort and gaming facility began operating, the economic activity generated by those operations would yield $11 million per year in tax revenues—$4.7 million of which would go to state and municipal government. *Id*. The "[a]ctual" tax revenues created by the Tribe's project could be even "greater," the Department noted, because the agency's estimates did not account for "direct personal income tax." *Id*. Nor did these estimates factor in millions of dollars in direct mitigation payments that, under various intergovernmental agreements, the Tribe is obligated to make to defray any costs associated with increased demand on municipal services due to its project. *E.g.*, ER89, 93.

That substantial evidence amply supports the Department's conclusion that the project would not only "provide a new economic engine to lift the Tribe's members out of poverty," ER120, but also "have a beneficial impact on the surrounding community by stimulating economic development, creating jobs, and generating income," ER91-93; STER80-87, 94-106. At the time of the

Department's decision, the project had thus garnered "substantial support from local governments in the area, as well as the business community," as well as "many written expressions of support from local leaders, labor unions, and business interests." ER76-77.

Mindful that not all entities would share in this economic growth, however, the Department carefully analyzed and accounted for potential "substitution effects"—*i.e.*, the "drop in annual revenue" at existing businesses "due to competition" with a new entrant into the market. STER92. The Department found that the project would have no "significant quantifiable … substitution effects" on non-gaming businesses such as local restaurants and bars, but that there would be a temporary loss of revenue at Kalispel's Northern Quest Casino two miles from the project (as well as at the Coeur D'Alene Casino Resort thirty-three miles away). STER83-84. While that temporary loss of gaming revenue would affect jobs and taxes, "the net impact" on regional employment and tax revenues would remain significantly "positive" even after those "substitution effects" were taken into account. *E.g.*, STER84, 88.

2. Undisputed record evidence establishes that Kalispel's temporary lost revenues would not meaningfully affect its ability to provide services to its members.

As part of its analysis of detriment, the Department also comprehensively evaluated Kalispel's contention that it would be harmed by lost gaming revenues.

As the Department explained, "[t]he critical factor in determining [the] significance" of lost gaming revenues was "whether the loss in market share will affect the ability of the Kalispel tribal government to continue to provide governmental services." STER74. To answer that question, the Department closely reviewed "detailed information" from Kalispel about "its present economic situation and tribal revenue allocation plan," *id*., and commissioned multiple expert studies of the gaming market to measure the anticipated effects of Spokane's new casino on Kalispel's existing casino, *see* ER106-113. Those studies amply support the Department's ultimate conclusion that Spokane's project would not adversely affect Kalispel's ability to provide "essential services and facilities" to tribal members. STER83.

Starting in 2011, the Innovation Group studied the Spokane-area gaming market and analyzed the likely effect of Spokane's new gaming facility on Kalispel's existing facility, using a widely accepted economic forecasting methodology known as a "gravity model." ER109. That 2011 analysis found that the Spokane gaming market could support three casinos the size of Northern Quest. STER155. Accordingly, assuming Phase 1 of the project was completed in 2013, the analysis projected that Kalispel would see a 29.5% drop in gaming revenue during that first year, STER296, but "after an approximately 12-month period of impact, normative revenue growth" at Northern Quest would resume, STER155;

see also STER146-155. Based on that analysis, the draft EIS concluded that the Tribe's project would not hinder Kalispel's provision of essential government services. STER52.

In comments on the draft EIS, Kalispel contested that conclusion and submitted reports with its own estimates of projected revenue losses. In 2012, the Department commissioned a further analysis by the Innovation Group that responded directly to Kalispel's comments, which was incorporated into the final EIS. STER161-214. As the Innovation Group found, the analysis supporting Kalispel's estimates "contain[ed] numerous flaws." STER183. Among other critical errors, for example, Kalispel's analysis was based on an inconsistent and unreliable market definition that included communities 150 miles from its casino in some directions while excluding much larger communities only 50 miles away in other directions. *See* STER165, 169, 204-205. Kalispel's estimates of revenue decline were thus "wholly unreliable." STER164, 188, 198.

In contrast to Kalispel's flawed and unreliable analysis, the Innovation Group documented multiple examples of revenue growth in other gaming markets after the introduction of a competitor. STER194-198. Based on the Innovation Group's "analysis of comparable situations," STER246, the final EIS projected that if full build-out of all three phases of the West Plains Development were complete by 2020, Kalispel's gaming revenues would be about 33% lower that

year compared to Kalispel's own projections (and 13.8% lower than Kalispel's most recent revenues in 2011), after which revenues would recover, STER92.

Kalispel's temporary loss of gaming revenue, as the Department explained, would not have a significant adverse effect on its governmental operations. STER198. Based on Kalispel's own data, the Department estimated that in the first full year of operation of Phase 1, Kalispel's total governmental budget would be reduced by 32%. ER624. That temporary reduction, however, would not prevent Kalispel from "'operat[ing] its government, offer[ing] tribal programs and services …, and provid[ing] for the general welfare of its people.'" *Id.* Indeed, Kalispel would still have fourteen times more funds per member than the Tribe had. ER625.

Moreover, the effect on Kalispel's budget would lessen over time. By completion of Phase 3, expected to occur in 2020, the Department projected that, while Kalispel might be required temporarily to reduce or eliminate per capita payments, its budget for government programs and services would be only 6.7% less than its then-current budget. STER75. And even that relatively small budgetary impact, the Department projected, would "dissipate over time due to market growth." *Id.*; STER93.

In sum, the record contains ample evidence not only that the project would deliver major benefits to the local economy, but also that Kalispel's loss of revenue

would be short-lived and would not impair Kalispel's ability to deliver essential government services. That evidence clearly supports the Department's determination that the West Plains Development "would not be detrimental to the surrounding community," 25 U.S.C. § 2719(b)(1)(A), and far exceeds the low "threshold" of "substantial evidence" required to support agency action, *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). The Department's predictive judgment, based on its review of that evidence and its expertise in matters of tribal gaming, merits deference from this Court. *Cachil Dehe*, 889 F.3d at 602.

B. Kalispel's Arguments That The Department's Decision Was Arbitrary And Capricious Are Meritless

Kalispel does not meaningfully challenge the substantial evidence set out above supporting the Department's determination. It has also abandoned the arguments it made below that the Department predetermined the outcome and that it erred by relying on its own experts' analysis rather than accepting Kalispel's self-serving assertions of harm at face value.

Instead, Kalispel offers a scattershot array of arguments that the Department's decision-making was arbitrary and capricious, falling roughly into four main categories. *First*, Kalispel contends that the Department did not actually apply the standard set out in the district court's opinion and determine whether the project would be detrimental to the surrounding community as a whole, instead simply disregarding the harm to Kalispel. The record readily disproves that

contentions. *Second*, Kalispel argues that, in making its determination, the Department failed to give sufficient weight to Kalispel's lost revenues. This argument is largely premised on the same misreading of IGRA rebutted in Part I—that any material impact on Kalispel's revenues precluded a two-part determination. It also misrepresents the record and fails to overcome the deference properly accorded the Department's predictive judgments. *Third*, Kalispel complains that its own two-part determination in 1997 and the effect that determination had on Spokane should not have been factors in the Department's analysis. But nothing in IGRA forbids the Department from considering its past precedent or basic fairness. *Finally*, Kalispel argues, for the first time on appeal, that the Department failed to adhere to a purported agency policy requiring denial of a two-part determination when there is any adverse impact on any nearby tribe. As Kalispel's own two-part determination demonstrates, however, the Department has never had any such policy.

1. The Department applied the correct legal standard

Kalispel wrongly asserts (at 32-33) that the Department did not properly take the harms to Kalispel into account and thus did not actually determine whether the project would be detrimental to the surrounding community "as a whole." In fact, the Department was explicit that its conclusion—that the project "would not be detrimental to the surrounding community, *including nearby Indian tribes*," ER113

(emphasis added)—reflected the projected competitive harm to Kalispel as part of the surrounding community. The record unequivocally refutes Kalispel's contrary claim.

As discussed above, *see supra* p. 40, the Department measured the anticipated economic growth from Spokane's project in terms of "net" impacts—*after* factoring in anticipated lost revenue to existing businesses like Kalispel's. Such "substitution effects" in the tribal gaming market were the subject of multiple expert reports, STER184, 188-189, 152-155, which were expressly incorporated into the final EIS and two-part determination, ER110-113; STER81-88.

Indeed, the section of the final EIS on the project's "Economic Effects" (§ 4.7.1) has an entire subsection summarizing these "substitution effects," including the likely loss of revenue at Kalispel's Northern Quest Casino. STER83. The Department specifically revised the EIS in response to comments from Kalispel to make clear that "while substitution effects on existing gaming facilities would temporarily affect tax revenues and employment," "the net impact" on tax revenues and employment, and thus "the net economic impact" of the project overall, "would be positive." STER77-78. That is the same standard the Department applied, and the D.C. Circuit upheld, in *Stand Up III*. 879 F.3d at 1187 (IGRA requires "on balance" that a new casino "have a positive or at least neutral net effect on the surrounding community").

At various points (*e.g.*, at 2, 15, 29, 35-36, 38-40), Kalispel also wrongly accuses the Department of failing to treat it as a full member of the "surrounding community," which the Department's regulations define to include "local governments and nearby Indian tribes located within a 25-mile radius" of the project. 25 C.F.R. § 292.2. Such governments and tribes are automatically consulted during the two-part determination process. *Id.* § 292.19(a). The regulations permit governments or tribes outside the 25-mile radius to petition for consultation if they can show that they will be "directly, immediately and significantly impacted" by the proposed gaming project. Kalispel claims (*e.g.*, at 38) that it was required to meet that "direct … impact" standard or some unspecified higher standard.

That is incorrect and reflects a basic misunderstanding of the regulation. As a nearby Indian tribe and part of the surrounding community, Kalispel was automatically included in the consultation process. STER44. It was not required to petition for consultation or to make any showing at all to be consulted. Moreover, while an entity outside the 25-mile radius that shows it will be "directly, immediately, and significantly impacted" is entitled to be consulted, it is not entitled to veto a two-part determination because of that impact. The "direct impact" standard relates only to the consultation requirement, not to the ultimate

determination whether a project will be detrimental to the surrounding community. It is entirely irrelevant to the Department's analysis of the harm to Kalispel.

Similarly, Kalispel repeatedly claims (*e.g.*, at 12, 14, 16, 31-33, 35-37) that the Department improperly ignored the harm to Kalispel or concluded that it did not constitute "cognizable detriment" under IGRA. That is false. The Department not only recognized that Kalispel's lost revenues were relevant to the analysis of detriment, but commissioned multiple expert analyses of the effect on Kalispel. The Department simply concluded, on the factual record here, that Kalispel's temporary loss of revenues—which would not prevent Kalispel from providing essential governmental services and would still allow it to spend fourteen times as much per member as Spokane—was insufficient to render Spokane's project "detrimental to the surrounding community *overall*." *Stand Up III*, 879 F.3d at 1190.

The D.C. Circuit rejected a very similar argument in *Stand Up III*, where Picayune argued that the Department improperly "discount[ed] an anticipated competitive injury merely because 'the source of the injury was competition.'" 879 F.3d at 1190. As the court there explained, the Department did not apply an incorrect legal standard, but rather "concluded" as a factual matter "that the Picayune's casino could successfully absorb the expected competitive effects." *Id*. The same is true here. Kalispel has no legitimate challenge to the legal standard

the Department applied; its quarrel is with the Department's assessment of the facts.

2. The Department reasonably considered all relevant aspects of the harm to Kalispel

Kalispel argues (at 36) that the Department acted arbitrarily and capriciously by "discount[ing]" Kalispel's lost revenues because they would be temporary and would not affect Kalispel's ability to provide essential government services. This argument is shot through with the same misapprehension of IGRA's governing standard already addressed in Part I. For example, Kalispel complains (at 39) that its lost revenues are not "immaterial" or "de minimis." But that is not the standard. Even if an existing casino's lost profits due to competition are not "immaterial" or "de minimis," they do not necessarily render a new gaming project, on balance, "detrimental to the surrounding community." *See supra* pp. 27-36. The Department's conclusion that Kalispel's lost profits did not render Spokane's project detrimental to the surrounding community, based on the evidence before it, was entirely reasonable. And Kalispel's specific complaints about various aspects of the Department's decision, to the extent they are distinct from its statutory interpretation argument, fall flat.

To start, contrary to Kalispel's contention (at 36), the Department did not treat per capita payments to tribal members as a mere "gratuity, which could be wholly eliminated without cognizable harm." It treated all of Kalispel's

anticipated loss of gaming revenue—including any cuts to per capita payments—as a cognizable harm, which it accordingly studied at length. STER74. The "critical factor" in assessing the "significance" of that harm, however, was whether the loss of revenue would impede Kalispel's ability to provide essential government services. *Id*. As explained, the record amply supports the Department's conclusion that it would not. *Supra* pp. 40-44.

At bottom, Kalispel's objection is that by identifying the budgetary impact on Kalispel after removing per capita payments—which accounted for 7.1% of Kalispel's expenditures—the Department was distinguishing per capita payments from other "form[s] of providing for the welfare of tribal members" that IGRA allows. Br. 36. But IGRA itself requires that distinction: It allows gaming revenues to "be used to make per capita payments to members," but "*only* if" the tribe has first adequately funded its government and services. 25 U.S.C. § 2710(b)(3) (emphasis added); *see* 25 C.F.R. § 290.12(b). Thus, in reviewing Kalispel's "revenue allocation plan" and determining that any loss of gaming revenue would "reduce the direct payments to tribal members *before* affecting the funding of the tribal government and its services," the Department was simply applying IGRA regulations to isolate the specific impact (if any) that the project would have on Kalispel's ability to "provid[e] essential services." STER74-75 (emphasis added). It was entirely reasonable for the Department to do so.

According to Kalispel (at 37), the Department unreasonably ignored that Kalispel "would be prohibited from providing all the programs and services" currently funded. But that is pure tautology: A budget cut will, of course, reduce some programs funded by the budget. The notion that *any* budget cut is enough to dictate the agency's decision is just a repackaged version of Kalispel's meritless statutory argument that even a dollar in lost revenue to a nearby tribe is dispositive under IGRA. *Supra* pp. 29-36. Nor does every budget cut necessarily impact essential government services. At the time of the Department's decision, a substantial portion of Kalispel's budget was allocated to per capita payments that can be made only *after* government operations are funded, and additional funds were allocated to charitable giving that—while commendable—is likewise not an essential government service and is made at Kalispel's "sole discretion." STER76; *see* ER367.

Kalispel claims that eliminating per capita payments would "make a significant number of [its] members need to seek federal or state welfare assistance to meet their basic needs." Br. 38 (citing ER617-618). But Kalispel's sole basis for that claim is the flawed analysis it submitted, which the Department's experts deemed "wholly unreliable." STER164. The Department was "'entitled to rely upon the reasonable views of [its] experts,'" *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1254 (9th Cir. 2017)—as the district

court correctly held in a part of its decision that Kalispel has not challenged on appeal, *see* ER125, 129; *supra* p. 23 n.4.

The main threat to its government that Kalispel presented to the Department was not a temporary cut to per capita payments but the prospect of defaulting on loans it had recently acquired to expand its Northern Quest Casino. Kalispel cites the same self-serving analysis in passing here, *see* Br. 38 (citing ER407, 605, 616-618)—without mentioning that the Department expressly rejected it. As noted, however, an independent financial analysis by the Department's experts did not bear out Kalispel's doomsday predictions and instead found that Kalispel could service its loans while adequately funding its government. *Supra* p. 17.[7]

Analogizing its temporary loss of revenue to a broken leg, Kalispel contends (at 39) that the Department dismissed that loss as "too short" to be cognizable. The Department did no such thing. As discussed, it extensively studied Kalispel's projected loss of revenue to determine its effect on Kalispel's ability to continue

[7] Kalispel relies (at 34, 38) on *Redding Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015), to argue that the Department arbitrarily ignored the likely impact on Kalispel's government. But *Redding* only corroborates the propriety of the Department's analysis in this case. There, the Department wholly "failed to consider" an important aspect of the issue before the agency, denying a tribe's gaming application "without any mention of the [t]ribe's offer" not to "operate multiple gaming facilities." 776 F.3d at 714. Here, the Department rejected Kalispel's arguments after conducting several independent analyses of all the harms asserted by Kalispel—it did not "fail[] to consider" anything of significance.

providing essential government services to its members. *Supra* pp. 40-44. Whether a given loss is temporary or permanent is clearly relevant to that inquiry.

Having taken into account all the evidence relevant to its analysis, the Department was required only to consider short-term and long-term costs and benefits in a reasonable manner. *Cf. Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1180 (9th Cir. 2011) (agency "may conclude that long-term benefits outweigh short-term costs"). Kalispel offers no sound reason for "'second-guessing'" the agency's consideration of risks and benefits here. *Azar*, 950 F.3d at 1096.

3. The Department's consideration of basic fairness and Spokane's ties to the land was proper

Kalispel attacks the Department (at 36-37) for considering factors Congress purportedly precluded the agency from considering—specifically, "the proposed casino site being in Spokane's aboriginal territory" and the vast disparity in the two tribes' funding, which is itself a product of the previous two-part determination in Kalispel's favor. But to issue any two-part determination, the Department must find that the proposed gaming project "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The Department's own regulations—which, again, Kalispel nowhere challenges—require it to consider "*all* … information" relating to those two factors that was submitted during the

administrative process. 25 C.F.R. § 292.21 (emphasis added); *see id.* §§ 292.16-20. Consideration of the Tribe's connection to the land and the prior two-part determination for Kalispel falls well within that broad mandate.

"Evidence of [a tribe's] significant historical connections, if any, to the land" is, in fact, a required element of a tribe's application for a two-part determination. 25 C.F.R. § 292.17(i). That the site here lies "within the Spokane Tribe's aboriginal territory" and is of "historical significance" to the Tribe was clearly relevant to the Department's determination that the proposed project would be in the Tribe's best interest. ER119. Kalispel seemingly complains (at 25-26) that the Department improperly discounted the competitive harm to Kalispel because of the site's significance to Spokane, but the Department did no such thing. It simply concluded that the competitive harm to Kalispel was not enough to make the project detrimental to the surrounding community. *See supra* pp. 18-21.

Nor does IGRA require the Department to turn a blind eye to basic fairness. Kalispel contends (at 36) that IGRA requires two "independent" determinations—one as to the applicant tribe's best interest, the other as to the impact on the surrounding community. Assuming that is correct for the sake of argument, it does not follow that the Department must ignore its 1997 two-part determination authorizing Kalispel to game on Spokane's ancestral lands—which has contributed to both Kalispel's good fortune and Spokane's poverty. The Department not only

can, but must, look to its past decisions to inform current decisions. *See Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 690 (9th Cir. 2007) (vacating agency decision that "departed from its two-decade-old precedent without supplying a reasoned analysis for its change of course"). Here, as in 1997, the Department recognized that there would be competitive harm to existing casinos, but that did not preclude the agency from finding either then or now that the proposed new gaming facility would be in the applicant tribe's "best interest" and "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A).

4. The Department's two-part determination is consistent with the Department's prior treatment of competitive harm

Despite the prior two-part determination in its favor, Kalispel now argues that the Department in this case departed from a purported policy of not approving a new casino "'where a nearby Indian tribe demonstrates that it is likely to suffer a detrimental impact as a result.'" Br. 42 (quoting ER407, 521). As an initial matter, because Kalispel never made that argument to the district court, this Court should "'not consider [it] for the first time on appeal.'" *Club One*, 959 F.3d at 1153. This Court's discretion to consider new arguments is limited to "exceptional circumstances." *Id*. Below, Kalispel quoted the same language from prior two-part determinations that it highlights here, without once claiming—as it now does (at 41-43)—that the Department's decision was an unexplained "change from

existing policy." The district court therefore had no opportunity to address that claim in the first instance. "A party's unexplained failure to raise an argument that was indisputably available below" is hardly an "'exceptional' circumstance warranting" discretionary relief from the ordinary rule of forfeiture. *G & G Prods. LLC v. Rusic*, 902 F.3d 940, 950 (9th Cir. 2018).

In any event, there is no inconsistency between the Department's determination here and its prior decisions. In the decisions Kalispel cites concerning the North Fork and Enterprise Rancherias, the Department likewise granted a two-part determination over the objection of a competing tribe. Both of those decisions said the same thing the Department said here: "IGRA does not guarantee that tribes operating existing facilities will conduct gaming free from competition," ER119, and "[m]ere competition … in an overlapping gaming market is not sufficient, in and of itself, to conclude that [a new casino] would result in a detrimental impact," ER106 (citing North Fork and Enterprise Rancheria determinations). That is why the Department relied on them, along with its prior decision in Kalispel's favor, in the two-part determination in this case. *See* ER106 n.296; ER119. In context, the language on which Kalispel relies simply means that the Department will take a new gaming facility's effect on existing tribal casinos into account in assessing detriment and that sufficient harm to a tribe with a competing casino could justify the denial of a two-part determination. It clearly

did not mean that *any* loss of revenue requires denial, or the Department would not have issued two-part determinations for North Fork or Enterprise.

Kalispel also claims (at 42) that the Department changed course by requiring a showing of "complete closure or failure to generate any revenue" to prove detriment. But the Department required no such showing—either in the part of the record Kalispel cites, ER641-643, or elsewhere. To be sure, based on its own analysis of the regional gaming market, the Department rejected Kalispel's predictions of catastrophic harm, and instead found that "existing regional casinos would continue to generate significantly positive cash flows," and that Kalispel would therefore continue to be able "to provide essential services" to its members. STER83. But that does not suggest a rigid closure standard for detriment. It simply represents adherence to the Department's longstanding policy that competition by itself does not make a new casino detrimental to the surrounding community. The record amply supports the Department's determination that the temporary loss of gaming profits due to competition would not have any significant adverse effect on Kalispel's government functions and services.

III. THE DEPARTMENT COMPLIED WITH ITS TRUST OBLIGATIONS

Finally, Kalispel contends (at 43-49) that the Department breached its trust obligation to Kalispel. But the Department "discharged its fiduciary obligations by complying with" IGRA's requirements. *Lawrence v. U.S. Department of Interior*,

525 F.3d 916, 920 (9th Cir. 2008); *see supra* Part I. Under Supreme Court and Ninth Circuit precedent, the general "trust relationship … between the United States and Indian Nations" is "actionable" only where "'a further source of law'"—such as a statutory provision designed to confer a specific benefit on the tribe—"'provide[s] focus for the trust relationship.'" *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921-924 (9th Cir. 2008) (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003)). In *White Mountain*, for example, the Supreme Court recognized a damages action brought by a tribe for breach of a fiduciary trust obligation with respect to property held in trust for *that* tribe. *See* 537 U.S. at 473-476. But, here, Kalispel is not seeking damages for any breach with respect to its own property; it is seeking to block a casino on Spokane's property.

Kalispel relies (at 44-47) on IGRA's requirement that the Department "consult[] with … appropriate State and local officials, including officials of other nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A). But the Department consulted with Kalispel multiple times during the administrative process, commissioning no fewer than four studies responding to Kalispel's claims of competitive harm. *Supra* pp. 16-17. Kalispel's argument is not that the Department failed to undertake IGRA's required consultation, but that the Department did not heed Kalispel's objection. IGRA, however, does not grant nearby tribes like Kalispel a

veto over a proposed casino. Rather, it protects those tribes in two ways—by mandating that the Department, before granting a two-part determination, (1) consult with nearby tribes and (2) determine that the proposed casino "would not be detrimental to the surrounding community," of which they are part. 25 U.S.C. § 2719(b)(1)(A). The Department did both: It solicited Kalispel's concerns, and it reasonably found that Spokane's project would bring significant net benefits to the region—despite the temporary competitive harm to Kalispel. *Supra* pp. 36-44. As this Court has long held, "[p]rotections required by law are coterminous with those required by the trust relationship." *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371, 1385 (9th Cir. 1997). The Department's compliance with IGRA is thus dispositive of Kalispel's trust claim.

Kalispel invokes the Department's fiduciary duty not to "favor one tribe over another." Br. 46 (quoting *Redding*, 776 F.3d at 713). What Kalispel is seeking, however, is not even-handed but *special* treatment. Indeed, what Kalispel ultimately objects to (at 49) is that the Department did not offer some sort of side agreement or inducement—such as promising to work with Kalispel on separate land deals under a separate statutory scheme—as a condition for granting Spokane's two-part determination. Kalispel never made that argument to the Department or in the district court and has thus forfeited it here. *Club One*, 959 F.3d at 1153. But, in any event, it is not a valid objection under IGRA, which does

not allow nearby tribes to hold up a two-part determination in exchange for a payoff by the Department. Spokane did not receive side deals or special favors from the Department after Kalispel's own two-part determination took needed gaming revenue away from Spokane. To the contrary, the Department has long rejected any construction of IGRA that would allow tribes with existing casinos to block badly needed economic development for other tribes based solely on claims of competitive harm. That does not violate the Department's trust obligations—which run to all tribes—but fulfills them.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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