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20  
 21 **UNITED STATES DISTRICT COURT**  
 22 **EASTERN DISTRICT OF WASHINGTON**  
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24 KALISPEL TRIBE OF INDIANS, a federally	)	
25 recognized Indian tribe,	)	
26	)	Court File
27 Plaintiff,	)	No. 2:17-cv-138
28	)	
29 v.	)	<b>Complaint for</b>
30	)	<b>Declaratory and</b>
31 UNITED STATES DEPARTMENT OF THE	)	<b>and</b>
32 INTERIOR; RYAN ZINKE, Secretary of the	)	<b>Injunctive Relief</b>
33		

1 Interior; MICHAEL BLACK, Acting )  
2 Assistant Secretary of the Interior for )  
3 Indian Affairs; BUREAU OF INDIAN AFFAIRS; )  
4 and STANLEY M. SPEAKS, Northwest Regional )  
5 Office, Bureau of Indian Affairs, )  
6 )  
7 Defendants. )

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9  
10 Plaintiff Kalispel Tribe of Indians, by and through its counsel, alleges:

11 **INTRODUCTION**

12 1. Plaintiff Kalispel Tribe of Indians (the “Kalispel Tribe”)  
13 brings this civil action against above-named Defendants seeking review  
14 of and relief from a June 15, 2015 decision (“the Decision”) issued by the  
15 prior administration that will jeopardize the continued operation of the  
16 Kalispel Tribe’s government. The Decision will allow the Spokane Tribe  
17 of Indians (“the Spokane Tribe”) to construct a gaming facility on newly  
18 acquired lands in the City of Airway Heights, Washington (“Airway  
19 Heights”). The Spokane Tribe’s proposal is known as the West Plains  
20 Casino and Mixed-Use Development Project (“West Plains”). West Plains  
21 would be approximately two miles from the Kalispel Tribe’s existing

1 gaming facility, Northern Quest Resort & Casino (“Northern Quest”).  
2 Economic data establishes that West Plains will have a devastating  
3 impact on Northern Quest, which funds nearly all of the Kalispel Tribe’s  
4 government operations.

5           2. The Indian Gaming Regulatory Act (“IGRA”) generally  
6 prohibits Class III gaming on lands acquired after 1988, with specific  
7 exceptions. 25 U.S.C. § 2719(a)-(b). One such exception is known as a  
8 “two-part determination.” *See id.* § 2719(b)(1)(A). Under this exception,  
9 gaming is authorized on newly acquired lands only when the Secretary  
10 of Interior, “after consultation with the Indian tribe and appropriate  
11 State and local officials, *including officials of other nearby Indian tribes,*”  
12 determines that a casino in that location (1) “would be in the best interest  
13 of the Indian tribe and its members” and (2) “*would not be detrimental to*  
14 *the surrounding community.*” *Id.* (emphasis added). After the Secretary of  
15 Interior makes a positive two-part determination, gaming may occur on  
16 the parcel if the Governor of the state where the land is located concurs.

17 *Id.*

1           3.     Although IGRA does not define what constitutes a  
2     “detriment to the surrounding community,” the surrounding text of the  
3     statute dictates that the Secretary of Interior give special consideration to  
4     detrimental impacts on *nearby Indian tribes*. See 25 U.S.C. §§ 2702, 2719.  
5     Further, the federal government has a trust responsibility to all tribes.  
6     This trust responsibility requires the Defendants to protect the Kalispel  
7     Tribe’s ability to provide governmental services to its members.

8           4.     Before issuing a two-part determination, the federal  
9     government must assess the environmental and socioeconomic impacts  
10    of its decision under the National Environmental Policy Act, 42 U.S.C.  
11    §§ 4321 *et seq.* (“NEPA”). During the NEPA process for West Plains, the  
12    Kalispel Tribe provided detailed economic data demonstrating that a  
13    casino two miles away from Northern Quest would seriously impact the  
14    Kalispel Tribe’s government revenues, forcing the Kalispel Tribe to  
15    reduce critical governmental services to its members. But the  
16    Defendants’ contractor summarily dismissed most of the Kalispel Tribe’s  
17    data and analyses. On information and belief, the Defendants adopted

1 their contractors' conclusions wholesale without seriously evaluating or  
2 independently verifying the contractor's work.

3 5. Accordingly, the Kalispel Tribe seeks a declaratory judgment  
4 under the Administrative Procedure Act ("the APA"), 5 U.S.C. §§ 701–  
5 706, that the Defendants abused their discretion and failed to comply  
6 with IGRA and the federal trust responsibility when they determined  
7 that the Spokane Tribe's proposed casino would not be detrimental to  
8 the Kalispel Tribe. The Kalispel Tribe also seeks injunctive relief  
9 prohibiting the Defendants from taking any action under IGRA based, in  
10 whole or in part, upon the favorable two-part determination.

11 6. The Kalispel Tribe further seeks a declaratory judgment that  
12 the Bureau of Indian Affairs violated NEPA by adopting an unduly  
13 narrow purpose-and-need statement, by failing to consider alternative  
14 economic prospects for the Spokane Tribe, by failing to adequately  
15 address the comments that showed an adverse socioeconomic impact to  
16 the Kalispel Tribe, and by adopting the findings and conclusions of the

1 Defendants' contractor without question even though the Kalispel Tribe  
2 presented contrary information.

3 **PARTIES**

4 7. The Kalispel Tribe is a federally recognized Indian tribe.  
5 81 Fed. Reg. 26,826, 26,828 (May 4, 2016). It owns and operates Northern  
6 Quest, a Class III gaming facility on the Kalispel Tribe's reservation in  
7 Airway Heights.

8 8. The Department of Interior is an executive agency of the  
9 United States government. 43 U.S.C. § 1451. Congress has delegated  
10 authority over Indian affairs to the Department of Interior. 43 U.S.C.  
11 § 1457(10).

12 9. Defendant Ryan Zinke is the Secretary of the Interior ("the  
13 Secretary"). The Secretary is the chief executive officer of the Department  
14 of Interior. 43 U.S.C. § 1451. The Kalispel Tribe sues him in his official  
15 capacity.

16 10. Defendant Michael Black is the Department of Interior's  
17 Acting Assistant Secretary for Indian Affairs ("the Assistant Secretary").

1 The Assistant Secretary is authorized to discharge the duties of the  
2 Secretary with respect to Indian affairs. *See* 43 U.S.C. § 1454; 109 Interior  
3 Dep't Manual 8 (2003). The Kalispel Tribe sues him in his official  
4 capacity.

5 11. Hereinafter, the Department of Interior, the Secretary, and  
6 the Assistant Secretary will be referred to collectively as the  
7 "Department."

8 12. The Bureau of Indian Affairs is an executive agency  
9 organized under the Department of Interior. 25 U.S.C. §§ 1–2.

10 13. Defendant Stanley M. Speaks is the Regional Director for the  
11 Bureau of Indian Affairs' Northwest Region, which encompasses  
12 Spokane County. The Kalispel Tribe sues him in his official capacity.

13 14. The Bureau of Indian Affairs and Stanley M. Speaks will be  
14 referred to collectively as the "Bureau."

15 15. This complaint will use "Defendants" to refer to the  
16 Department and the Bureau collectively.

**JURISDICTION AND VENUE**

16. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 (federal-question jurisdiction), 28 U.S.C. § 1337 (action under an Act of Congress regulating commerce), and 28 U.S.C. § 1362 (federal-question action brought by an Indian tribe).

17. This action arises under the Constitution and laws of the United States, including but not necessarily limited to the Indian Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3; IGRA, 25 U.S.C. §§ 2701 *et seq.*; the APA, 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*; the Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202; 43 U.S.C. §§ 1451 *et seq.* (establishment and responsibilities of the Department of Interior); and federal common law.

18. The sovereign immunity of the United States has been waived with respect to the subject matter of this action and the relief requested here by the APA, 5 U.S.C. § 702.

19. Venue is proper in this Court under 28 U.S.C. § 128(a) and 28 U.S.C. § 1391(e)(1)(B), because the Defendants are officers and



1 employees of the United States acting in their official capacities, and a  
2 substantial part of the events or omissions giving rise to the claims in this  
3 complaint have occurred or will occur in this judicial district.

## 4 LEGAL BACKGROUND

### 5 The Indian Gaming Regulatory Act

6 20. During the 1970s and 1980s, Indian gaming became an  
7 important source of revenue for tribal governments, which are  
8 chronically underfunded. Congress enacted IGRA in 1988 to regulate the  
9 development of tribal gaming enterprises, promote tribal economic  
10 development, and protect gaming as a means of generating tribal  
11 revenue. Pub. L. No. 100-497, § 3, 102 Stat. 2467 (Oct. 17, 1988) (codified  
12 at 25 U.S.C. § 2702).

13 21. At the same time, Congress also sought to prevent tribes  
14 from acquiring new off-reservation lands solely for the purpose of  
15 establishing casinos. *See* H.R. Rep. No. 99-493, at 10 (1986) (“These  
16 limitations were drafted to clarify that Indian tribes should be prohibited  
17 from acquiring land outside their traditional areas for the expressed

1 purpose of establishing gaming enterprises.”); 134 Cong. Rec. 25369,  
2 25380 (Sept. 26, 1988) (statement of Rep. Bereuter) (“While proposed  
3 Indian gaming activities on noncontiguous sites was a problem that  
4 affected . . . my own district, it was also a situation that was apparently  
5 about to occur on noncontiguous sites as far as halfway across the United  
6 States from the Indian tribe proposing such sites.”). Consequently, IGRA  
7 generally prohibits gaming on lands acquired by tribes after 1988 (the  
8 year of IGRA’s enactment). 25 U.S.C. § 2719(a).

9       22. Congress created a few specific, narrow exceptions to the  
10 prohibition against gaming on lands acquired after 1988. Thus, gaming  
11 on after-acquired lands is only permissible when the lands are  
12 contiguous to a reservation that existed in 1988, *id.* § 2719(a)(1); within  
13 the boundaries of a tribe’s former reservation or restored lands, *id.*  
14 § 2719(a)(2), (b)(1)(B)(ii)–(iii); acquired as part of a land claim settlement,  
15 *id.* § 2719(b)(1)(B)(i); or when the Department determines that a casino  
16 would be in the best interest of the tribe and would not be detrimental to  
17 the surrounding community, *id.* § 2719(b)(1)(A). The specificity of these

1 exceptions reflects congressional intent to make *limited* exceptions to  
2 IGRA’s general prohibition against gaming on newly acquired lands.  
3 These exceptions were important because some tribes had lost their  
4 reservations due to federal action while others—such as the Kalispel  
5 Tribe—lacked land suitable for development in 1988.

6 23. IGRA’s two-part exception expressly requires the  
7 Department to make two findings. First, the proposed gaming  
8 establishment must benefit the requesting tribe. Second, the  
9 establishment must not be detrimental to the surrounding community.  
10 25 U.S.C. § 2719(b)(1)(A).

### 11 **The National Environmental Policy Act**

12 24. NEPA and its implementing regulations require federal  
13 agencies to evaluate the environmental and socioeconomic impacts of  
14 any “major federal action” that substantially affects the quality of the  
15 human environment. 42 U.S.C. § 4332; 40 C.F.R. § 1508.14. Because a two-  
16 part determination is a “major federal action,” the Department must  
17 conduct an environmental review under NEPA. The Bureau prepared

1 the West Plains environmental impact statement (“EIS”) to evaluate the  
2 impacts of West Plains.

3 25. When preparing an EIS, NEPA requires federal agencies to  
4 take a “hard look” at the environmental and socioeconomic impacts of  
5 their decisions. *See Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2004).  
6 Further, an agency must “[r]igorously explore and objectively evaluate  
7 all reasonable alternatives.” 40 C.F.R. § 1502.14(a) (emphasis added).

8 26. The spectrum of alternatives is shaped by the purpose and  
9 need of the project. *See* 40 C.F.R. § 1502.13. Accordingly, the  
10 environmental review process begins with a statement of purpose and  
11 need. Because a purpose-and-need statement may have the effect of  
12 excluding alternatives, “an agency cannot define its objectives in  
13 unreasonably narrow terms.” *City of Carmel-by-the-Sea v. U.S. Dep’t of*  
14 *Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).

15 27. NEPA’s implementing regulations allow a federal agency to  
16 hire a contractor to prepare an EIS, but the responsible federal agency  
17 must “participate in the preparation” of the EIS and “independently

1 evaluate the statement prior to its approval.” 40 C.F.R. § 1506.5(c).

2 Moreover, when choosing a contractor, the agency should “avoid any  
3 conflict of interest.” *Id.*

#### 4 **The Federal Trust Responsibility**

5 28. The United States’ trust responsibility to tribes is “one of the  
6 primary cornerstones of Indian law.” *Dep’t of Interior v. Klamath Water*  
7 *Users Protective Ass’n*, 532 U.S. 1, 11 (2001) (quoting Felix Cohen,  
8 *Handbook of Federal Indian Law* 221 (1982)). Any federal action that affects  
9 a tribe is subject to this fiduciary duty. *Nance v. E.P.A.*, 645 F.2d 701, 711  
10 (9th Cir. 1981).

11 29. The trust doctrine limits an executive agency’s discretion  
12 with regard to actions that impact tribes. Because of its trust  
13 responsibility, the Defendants’ actions with respect to tribal resources are  
14 held to “the most exacting fiduciary standards.” *Seminole Nation v. United*  
15 *States*, 316 U.S. 286, 297 (1942). Applying the trust doctrine, an action that  
16 may not ordinarily be considered “arbitrary and capricious” under the  
17 APA may nevertheless violate a federal agency’s trust responsibility

1 toward a tribe. *Cohen's Handbook of Federal Indian Law* § 5.05[3][c]  
2 (2012 ed.). The trust responsibility is particularly robust when an Indian-  
3 specific statute imposes explicit obligations on a federal agency that  
4 makes decisions impacting tribal resources.

5 30. A stated purpose of IGRA is “to protect [Indian] gaming as a  
6 means of generating tribal revenue.” 25 U.S.C. § 2702(3). Further, the  
7 Department is not authorized to make a two-part determination *unless*—  
8 after consultation with nearby tribes—it determines that the new gaming  
9 establishment would not be detrimental to nearby tribes. *See id.*  
10 § 2719(b)(1)(A). Because IGRA recognizes a specific duty to protect tribal  
11 government revenue, the Department must adhere to the standard of a  
12 fiduciary when making a two-part determination that impacts a nearby  
13 tribe’s gaming establishment.

14 31. When tribes are involved, NEPA review also implicates the  
15 federal trust responsibility. *Cf. Nance*, 645 F.2d at 711. Specifically, the  
16 trust responsibility heightens the Defendants’ duty to carefully evaluate  
17 the socioeconomic impacts of a major federal action on nearby tribes.

1 And, as fiduciaries, the Defendants are obligated to select impartial,  
2 qualified contractors and to critically evaluate the contractors' work.

### 3 **FACTUAL BACKGROUND**

#### 4 **The Kalispel Tribe**

5 32. Because the United States never concluded treaty  
6 negotiations with the Kalispel Tribe, the Kalispel Tribe was landless at  
7 the beginning of the 20th century. President Woodrow Wilson  
8 established a 4,600-acre reservation for the Kalispel Tribe near Usk,  
9 Washington, by executive order in 1914.

10 33. Unfortunately, the Usk Reservation is wedged between a  
11 river and a mountainside and is subject to frequent flooding; thus, it  
12 proved to be nearly undevelopable. For most of the 20th century, the  
13 Kalispel Tribe was unable to raise revenue and had limited infrastructure  
14 and virtually no government resources. Tribal members lived in deep  
15 poverty.

16 34. In the late 20th century, the Kalispel Tribe sought to acquire  
17 additional reservation land for economic-development purposes. There

1 was no available land in the immediate area of the Usk Reservation,  
2 however, and most of the Kalispel Tribe's aboriginal territory (as defined  
3 by the Indian Claims Commission) is located in Idaho and Montana.

4 35. With no other realistic options available, the Kalispel Tribe  
5 petitioned the Department to acquire 40 acres of land in Airway Heights  
6 on the Tribe's behalf. The Kalispel Tribe intended to establish two  
7 ventures on its Airway Heights land: a tribal business enterprise and a  
8 mental-health and substance-abuse treatment center for tribal members.

9 36. The Department took this land into trust on behalf of the  
10 Kalispel Tribe in 1994. And in 1996, the Department proclaimed the  
11 Airway Heights parcel to be part of the Kalispel Tribe's reservation.

12 37. When its originally planned ventures were unsuccessful, the  
13 Kalispel Tribe requested a two-part determination to allow Class III  
14 gaming on the Airway Heights parcel.

15 38. The Spokane Tribe opposed the Kalispel Tribe's application  
16 for a two-part determination. Although each of the Spokane Tribe's  
17 casinos was over 40 miles from the site of the Kalispel Tribe's proposed



1 casino, the Spokane Tribe nonetheless argued that the new casino would  
2 reduce the Spokane Tribe's gaming revenues. The Spokane Tribe did not  
3 submit any financial data or analysis to support its contention.

4 39. Finding that (1) the casino would be in the best interest of the  
5 Kalispel Tribe and its members and (2) the casino would not be  
6 detrimental to the surrounding community, the Secretary approved  
7 gaming on the Kalispel Tribe's property in Airway Heights. The  
8 Secretary issued his decision in 1997, and the Governor of Washington  
9 concurred in a letter dated June 26, 1998.

10 40. In December 2000, the Kalispel Tribe opened Northern Quest  
11 on its reservation land in Airway Heights.

12 41. Northern Quest is the Kalispel Tribe's primary income-  
13 generating enterprise and bears nearly the entire burden of funding the  
14 Kalispel Tribe's government.

15 42. Despite the revenue from Northern Quest, the Kalispel  
16 Tribe's members continue to suffer from economically related social

1 problems, including unemployment, lack of housing, and substance  
2 abuse. Members rely on the tribal government to obtain critical services.

3 43. Under a memorandum of understanding between the  
4 Kalispel Tribe and Airway Heights, which has been in place since 1996,  
5 the Tribe shares a portion of Northern Quest's revenues with Airway  
6 Heights. These funds are used to support the additional law-  
7 enforcement, emergency, traffic, public-utilities, and other services that  
8 are necessary due to the presence of Northern Quest.

### 9 **The Spokane Tribe**

10 44. A reservation was established for the Spokane Tribe in 1877.

11 45. Today, the Spokane Tribe's reservation consists of 157,376  
12 acres.

13 46. The Spokane Tribe has operated two casinos on its trust  
14 lands since the late 1990s: the Two Rivers Casino and the Chewelah  
15 Casino. The Chewelah Casino, established in 1986, is located off-  
16 reservation and near the Kalispel Tribe's aboriginal territory as defined  
17 by the Indian Claims Commission.

1           47. On August 16, 2001, the Department acquired about 145  
2 acres of land in Airway Heights into trust on behalf of the Spokane Tribe  
3 for economic-development purposes. Because the acquisition was  
4 covered by a categorical exclusion from NEPA that was in place at the  
5 time, the decision was not subject to review under NEPA, although it  
6 would be today.

7           48. On February 26, 2006, the Spokane Tribe requested a two-  
8 part determination for gaming on its land in Airway Heights. This  
9 proposed gaming enterprise evolved into what is became known as the  
10 “West Plains” project.

11           49. The West Plains site is approximately two miles from  
12 Northern Quest.

13           50. This was a precedent-setting request, as the Department had  
14 never granted a two-part determination for a site within two miles of an  
15 existing gaming facility. In fact, before the Spokane two-part  
16 determination, the shortest distance between a facility authorized by a  
17 two-part determination and an existing gaming facility was 22 miles.

1           51. Moreover, on information and belief, there has never been a  
2 situation in which a nearby tribe has presented a detailed economic  
3 analysis to the Bureau that analyzed a proposed casino's impacts on the  
4 nearby tribe's ability to provide government services to its members, as  
5 the Kalispel Tribe presented here.

6                           **The West Plains Environmental Review Process**

7           52. The Bureau retained Analytical Environmental Services  
8 ("AES") to prepare the EIS for West Plains. On information and belief,  
9 the Bureau has a history of relying on AES to prepare environmental  
10 impact statements, and the Bureau tends to adopt AES's analyses  
11 wholesale.

12           53. In turn, AES subcontracts some of its work to other  
13 companies. For example, the Innovation Group prepared some of the  
14 socioeconomic analyses for the West Plains EIS.

15           54. On information and belief, the Bureau has received  
16 comments on other projects in which AES has been involved accusing  
17 AES of bias and producing substandard work.

1           55. Further, commenters on other projects have noted that there  
2 is a startling similarity among the environmental impact statements  
3 produced by AES for various projects.

4           56. On information and belief, neither AES nor the Innovation  
5 Group has *ever* concluded that a project will have a detrimental or  
6 adverse effect on a surrounding community. And, on information and  
7 belief, the Innovation Group generally concludes that a gaming market  
8 can grow under any scenario.

9           57. On information and belief, AES and its subcontractors often  
10 communicate directly with a project’s proponents when preparing an  
11 EIS—sometimes more closely than AES or its subcontractors  
12 communicate with the Bureau. Indeed, the Bureau has been accused of  
13 allowing applicant tribes to “exercise virtually day-to-day control” over  
14 the development of an EIS, with virtually no oversight by the Bureau. *See*  
15 House Subcommittee on Indian and Alaska Native Affairs, Oversight  
16 Hearing on Executive Branch Standards for Land-In-Trust Decisions for  
17 Gaming Purposes 70 (Sept. 19, 2013).

**Scoping Phase**

1  
2 58. On August 19, 2009, the Bureau published a Notice of Intent  
3 (“the Notice”) to prepare an EIS for West Plains. The Notice described  
4 the project as a “mixed-use development” that may include “a variety of  
5 proposed land uses,” such as a casino resort and hotel. 74 Fed. Reg.  
6 41,928. The Bureau subsequently published a notice with corrected  
7 meeting dates on August 27, 2009. 74 Fed. Reg. 43,715.

8 59. The Notice stated that the purpose of West Plains was “to  
9 improve the economy of the [Spokane] Tribe and help their members  
10 attain economic self sufficiency.” 74 Fed. Reg. 43,715, 43,716.

11 60. The Kalispel Tribe’s Chairman, Glen Nenema, immediately  
12 submitted a letter to the Bureau requesting more details about West  
13 Plains. In particular, Chairman Nenema asked the Bureau to specify  
14 whether West Plains would include a gaming facility, as well as the  
15 possible size or scope of such a facility.

16 61. The Bureau held a public scoping meeting on September 16,  
17 2009. Chairman Nenema, Vice-Chairman Ray Pierre, and other members

1 of the Kalispel Tribe attended the scoping meeting and presented  
2 testimony.

3 62. At the scoping meeting, Chairman Nenema expressed  
4 concern that a West Plains casino “could jeopardize the Kalispel Tribe in  
5 many ways,” including the Tribe’s ability to care for its elders, to provide  
6 children with educational opportunities, and to provide services and  
7 programs to its members.

8 63. The Kalispel Tribe submitted more detailed scoping  
9 comments on October 30, 2009. Observing that the Spokane Tribe  
10 proposed a casino within “several miles” of Northern Quest, the Kalispel  
11 Tribe commented that “[i]mplementation of either of [the proposed]  
12 alternatives would have an obvious effect—a significant, detrimental  
13 effect—on the Kalispel Tribe’s governmental revenues which are used to  
14 fund education, health and social services for its members and the larger  
15 community.”

16 64. The Bureau released a scoping report in March 2011. The  
17 scoping report stated that the purpose and need of West Plains was “to

1 improve the [Spokane] Tribe’s short-term and long-term economic  
2 condition and promote its self-sufficiency, both with respect to its  
3 government operations and its members.”

4 65. The scoping report described three alternative development  
5 projects, as well as a no-action alternative. Alternative 1, “Proposed  
6 Casino and Mixed Use Development,” was the “Preferred Alternative.”  
7 It included a casino, hotel, and other retail development. Alternative 2,  
8 “Reduced Casino and Mixed Use Development,” (“Reduced Casino  
9 Alternative”) consisted of a smaller casino and other retail development.  
10 Alternative 3, “Non-Gaming Mixed Use Development,” consisted of only  
11 non-gaming development.

12 66. The scoping report recognized that “[t]he EIS should address  
13 potential financial and social impacts to the Kalispel Tribe.”

14 **2011 Innovation Group Report**

15 67. AES subcontracted with the Innovation Group to prepare an  
16 economic background study and competitive-effects analysis for West  
17 Plains. The Innovation Group issued its report in November 2011.



1           68. In its report, the Innovation Group analyzed the gaming  
2 substitution effects of the proposed project. A “substitution effect” is the  
3 loss of customers from an existing business to a new business.

4           69. When preparing its report, the Innovation Group did not  
5 have financial data regarding Northern Quest, the Kalispel Tribe’s debt,  
6 or the Kalispel Tribe’s government finances.

7           70. Even without these crucial data, the Innovation Group  
8 estimated a large negative impact. The Innovation Group estimated that  
9 the Preferred Alternative would reduce Northern Quest gaming  
10 revenues by 29.5%—nearly one-third—in 2013, when the Innovation  
11 Group predicted that just the first phase of development would be  
12 complete. And the Innovation Group predicted that, if the final phase of  
13 the Preferred Alternative was complete in 2015, Northern Quest’s  
14 gaming revenues would be reduced by an additional 20.9%. In a  
15 subsequent report prepared for the final environmental impact  
16 statement, the Innovation Group clarified that the *cumulative* gaming  
17 substitution effects of the Preferred Alternative would have been 44.2%

1 if the Preferred Alternative was complete in 2015. But the Innovation  
 2 Group claimed that Northern Quest would resume normative revenue  
 3 growth after 12 months.

4 71. The only data in the report that shows the actual effect of a  
 5 new casino on an existing casino is a table that lists the “pre-impact” and  
 6 “post-impact” revenues of seven non-Indian casinos, none of which are  
 7 remotely close to the Pacific Northwest:

	Isle of Capri Bossier, LA	Ameristar St. Charles, MO	Grand Victoria, IN	KC: Harrah's, Argosy, Sam's Town	Harrah's KC	Lake Charles, LA	Blue Chip, IN
Pre-Impact	\$145,986,996	\$144,370,345	\$152,385,379	\$307,158,630	\$209,058,897	\$371,075,492	\$289,125,927
Post-Impact	\$120,068,124	\$111,264,867	\$130,831,346	\$255,273,843	\$188,913,622	\$315,703,999	\$181,942,644
% Impact	-17.8%	-22.9%	-14.1%	-16.9%	-9.6%	-14.9%	-37.1%
Event	Opening of Boomtown Oct 96	Opening of Maryland Heights March 97	Opening of Belterra Oct 2000	Opening of Hilton (Isle and Stations (Ameristar) 1997	Argosy expansion Dec 03	Opening of Delta Downs Racino Feb 02	Opening of Four Winds 2007

8  
 9 The table does not state the geographic proximity of the new casinos to  
 10 the existing casinos. And it does not explain how or when the casinos  
 11 allegedly rebounded.

12 72. The primary example the Innovation Group relied on was  
 13 the Blue Chip Casino in Indiana (“Blue Chip”), which allegedly

1 experienced a 37.1% reduction in revenue due to the opening of new  
2 nearby gaming establishment—the Four Winds Casino in Michigan  
3 (“Four Winds”). According to Google Maps, Blue Chip is a 19-to-23–  
4 minute drive from Four Winds. By contrast, Google Maps shows that  
5 West Plains is a mere 7-to-9–minute drive from Northern Quest.

6 73. The Innovation Group claimed that Blue Chip rebounded  
7 during the second year after Four Winds opened. But in fact, the  
8 Innovation Group improperly aggregated and analyzed the data. Rather  
9 than analyzing 12-month periods based on the date that Four Winds  
10 opened—which is the appropriate methodology—the Innovation Group  
11 aggregated the data by *calendar* year. Aggregating the data by calendar  
12 year skewed the results, because Four Winds opened in the month of  
13 August. Thus, data from the preceding seven months of no competition  
14 was lumped with five months of new competition.

15 74. When the time period is correctly aggregated, publicly  
16 available data show a continuing decline of Blue Chip’s revenue during  
17 the first four years of Four Winds’ operation. Cumulatively, Blue Chip’s

1 revenues declined 39.7% during the first four years of Four Winds'  
2 operation.

3 75. Although the Kalispel Tribe commented on this error, it was  
4 never corrected.

5 76. The Innovation Group further concluded that there would be  
6 no *non-gaming* substitution effects (i.e., cannibalization of existing non-  
7 gaming business) as a result of West Plains. This conclusion was not  
8 based on the Innovation Group's own original analysis. Rather, the  
9 Innovation Group recited the results of a 2009 study that Civic  
10 Economics had prepared on behalf of the Spokane Tribe. The purpose of  
11 the study, titled "West Plains Retail Development Opportunities," was to  
12 "analyze retail development opportunities associated with the site of the  
13 proposed casino at Airway Heights, Washington."

14 77. The Civic Economics study was inapposite because (1) it was  
15 prepared for the purpose of identifying retail *opportunities*, not for the  
16 purpose of assessing substitution effects; (2) it did not address all of the  
17 non-gaming businesses proposed at the West Plains site; and (3) it only

1 assessed a portion of Spokane County, whereas the economic analysis of  
2 the subsequent Draft Environmental Impact Statement (“DEIS”) released  
3 by the Bureau analyzed *all* of Spokane County.

4 78. Moreover, the Civic Economics study ultimately conceded  
5 that there *would* be non-gaming substitution effects in western Spokane  
6 County: “One key to understanding the following [table of retail  
7 development opportunities] is that it assumes no new merchant in the  
8 market area will capture market share from its existing merchants in the  
9 area, which is *clearly not the likely outcome.*” (Emphasis added.)

10 79. Based on the above analyses, the Innovation Group stated  
11 that it expected normative gaming revenue growth to resume at  
12 Northern Quest after one year. The Innovation Group also stated that  
13 “[n]o tribal casino of the magnitude of Northern Quest . . . has ever  
14 closed as a result of new competition.” But the Innovation Group did not  
15 account for the impact that *reduced* revenues at Northern Quest would  
16 have on the Kalispel Tribe’s ability to provide government services.

**Draft Environmental Impact Statement**

1  
2 80. The Bureau issued the West Plains DEIS on January 10, 2012.

3 81. The DEIS stated that the purpose and need for West Plains  
4 was based, in part, on the Spokane Tribe’s “[d]esire to further develop  
5 the Tribe’s property adjacent to the City with tribal economic  
6 enterprises” and the “[p]otential profitability of Class III gaming in  
7 Airway Heights.” Thus, the purpose-and-need statement effectively  
8 excluded alternative sites.

9 82. The DEIS contained essentially the same three action  
10 alternatives as the scoping report: the Preferred Alternative, the Reduced  
11 Casino Alternative, and a non-gaming development alternative.

12 83. The Preferred Alternative consisted of a phased development  
13 plan. The DEIS predicted that Phase 1 would be complete in 2012,  
14 Phase 2 would be complete in 2015, and Phase 3 would be complete in  
15 2019. The DEIS did not explain the discrepancy between its estimated  
16 completion date of 2019 and the Innovation Group’s assumption that  
17 Phase 3 of the Preferred Alternative would be complete in 2015. Nor did

1 the DEIS address whether this four-year gap had any impact on the  
2 predicted economic effects of the Preferred Alternative.

3 84. According to the DEIS, the Reduced-Casino Alternative was  
4 projected to be complete in 2012 and would essentially consist of Phase 1  
5 of the Preferred Alternative.

6 85. Because the purpose-and-need statement specified “Class III  
7 gaming in Airway Heights,” it effectively excluded the non-gaming  
8 alternative—indicating that this alternative was a straw man.

9 86. The DEIS observed that other possible alternatives included  
10 expansion of the Spokane Tribe’s existing casinos. When rejecting these  
11 alternatives, the DEIS cited two studies that were not attached to the  
12 DEIS or explained in detail. Although the Innovation Group report  
13 attached to the DEIS briefly discussed the possibility of expanding the  
14 Spokane Tribe’s existing casinos, the report disposed of these  
15 alternatives in less than one and one-half pages. Moreover, the  
16 Innovation Group did not include enough detail to evaluate the basis for  
17 its conclusion that these alternatives were not feasible.

1           87. The DEIS acknowledged that another possible alternative  
2 was development elsewhere on the Spokane Tribe's 157,376-acre  
3 reservation. Without providing any supporting information, however,  
4 the DEIS stated, "[t]he potential revenue from a casino-resort located  
5 anywhere on the reservation was found to be insufficient to meet the  
6 Tribe's unmet needs as it would be far from a profitable gaming market."

7           88. The DEIS went on to discuss the socioeconomic effects of  
8 West Plains, stating that an "adverse economic, fiscal, or social impact"  
9 occurs when "the effect of the project [is] *to negatively alter the ability of*  
10 *governments to perform at existing levels*, or alter the ability of people to  
11 obtain public health and safety services." (Emphasis added.)

12           89. Although the DEIS attempted to address the gaming  
13 substitution effects of West Plains on nearby *casinos*, it did not analyze  
14 the socioeconomic impacts of West Plains on the Kalispel Tribe's  
15 *government*. Rather, the DEIS included a single conclusory statement  
16 regarding the ability of nearby tribes to provide services to their  
17 members:



1 It is important to note that the addition of a casino in  
2 Spokane County would be likely to expand the gaming  
3 market for the region as a whole. Therefore, substitution  
4 effects resulting from [the Preferred Alternative] to  
5 competing gaming facility revenues would not impact the  
6 ability of the Kalispell [sic] or Coeur D'Alene tribal  
7 government to provide essential services and facilities to its  
8 membership.

9 The DEIS did not provide any support for this statement.

10 90. The Coeur D'Alene Tribe of Indians, which is referenced in  
11 the above statement, operates a casino and resort in Idaho about 33 miles  
12 from the West Plains site.

13 91. In its discussion of impacts on nearby casinos, the DEIS  
14 predicted that Phase 1 of the Preferred Alternative would have a gaming  
15 substitution effect of 22.5%, or \$58.6 million, on the nearest four casinos  
16 altogether.

17 92. The DEIS estimated that, upon completion of the final phase  
18 of development, the Preferred Alternative would reduce the gaming  
19 revenues of the four nearest casinos by 32.7%, or \$81.2 million. The DEIS  
20 concluded that a 32.7% reduction in gaming revenue "would not result

1 in the closure of any competing gaming facilities,” but it did not explain  
2 the basis for this statement.

3 93. Moreover, the Defendants’ job was not to determine whether  
4 West Plains would cause closure of a competing facility. Rather, it was  
5 required to assess precisely what the socioeconomic impacts would be  
6 under NEPA and, ultimately, to determine whether it would be  
7 “detrimental” to the “surrounding community” under IGRA.

8 94. The DEIS claimed that the substitution effects were “likely to  
9 diminish after the first year of the project’s operation.” But again, the  
10 DEIS failed to explain *how much* the substitution effects would diminish.

11 95. Without citing any supporting data, the DEIS also stated that  
12 “the addition of a casino in Spokane County would be likely to expand  
13 the gaming market for the region as a whole.”

14 96. In its discussion of non-gaming substitution effects, the DEIS  
15 cited two studies: (1) a Civic Economics study dated 2009 and (2) a  
16 Harvard University study dated 2000 that had not been discussed in the  
17 Innovation Group’s report. The 2000 Harvard study cited by AES

1 actually contradicted the DEIS's conclusion that there would be no non-  
2 gaming substitution effects.

3 97. Relying in part on the above analyses, the DEIS concluded  
4 that the project would not have adverse economic or social impacts on  
5 the surrounding community.

### 6 **PKF Report**

7 98. Because it was clear that the DEIS lacked information  
8 regarding socioeconomic impacts to the Kalispel Tribe, the Kalispel Tribe  
9 prepared its own detailed reports to understand and predict the impacts  
10 of a West Plains casino.

11 99. First, the Tribe retained PKF Consulting USA ("PKF") to  
12 estimate the financial impact of West Plains on Northern Quest. PKF was  
13 a national firm of management consultants, appraisers, real-estate  
14 brokers, and industry specialists who provide a full range of services to  
15 the hospitality and tourism industries. PKF is now incorporated into  
16 CBRE Hotels.

1           100. PKF prepared a Financial Performance Analysis dated  
2 March 27, 2012. Before preparing the analysis, PKF undertook a detailed  
3 review of Northern Quest, including physical inspections, interviews  
4 with management, and an analysis of Northern Quest's operating  
5 performance over the previous four years. PKF also reviewed Northern  
6 Quest's Player's Club database, which contains the location, visit history,  
7 spending, and age of players.

8           101. Based on Player's Club and market data, PKF forecasted  
9 Northern Quest's performance for the next 10 years. This initial forecast  
10 assumed that the West Plains casino would not open. PKF then  
11 forecasted the performance of Northern Quest under each of the  
12 alternatives presented in the DEIS. PKF compared these forecasts to its  
13 forecast without the West Plains casino alternatives.

14           102. In its report, PKF expressed its professional opinion that,  
15 "given the market limitations and numerous gaming options in the  
16 region, the addition of the proposed Spokane Tribe facility *will not*  
17 *significantly grow the gaming market.*" (Emphasis added.)

1           103. PKF estimated that if the Reduced Casino Alternative (i.e.,  
2 the first phase of the Preferred Alternative) were complete in fiscal year  
3 2014, Northern Quest's revenues would decline by 22.7%, or about \$47.2  
4 million. Gaming revenue alone would decrease 24.4%, or about \$41.8  
5 million.

6           104. According to PKF, Northern Quest's earnings before interest,  
7 taxes, debt, and amortization ("EBITDA") would decrease by 37.4%, or  
8 \$30.6 million. Northern Quest's EBITDA margin—the ratio of EBITDA to  
9 revenue—which is a common measure of profitability, would decrease  
10 from 39.4% to 31.9%.

11           105. PKF estimated that Northern Quest's revenues would decline  
12 by 41.5%, or about \$102.8 million, if the Preferred Alternative were  
13 completed by fiscal year 2020. PKF projected that most of this loss would  
14 be due to a 44.1%, or about \$90.4 million, decline in gaming revenue.  
15 This is almost identical to the percentage of revenue decline predicted by  
16 the Innovation Group (which had predicted a 44.2% cumulative impact

1 assuming a 2015 completion date, as later clarified in the final  
2 environmental impact statement).

3 106. If the Preferred Alternative were complete by fiscal year  
4 2020, PKF estimated that Northern Quest's EBITDA would decrease by  
5 59.5%, or about \$58.3 million. Northern Quest's EBITDA margin would  
6 decrease from 39.6% to 27.4%.

7 107. The Kalispel Tribe later attached the PKF Report to its  
8 comments on the DEIS. Because the PKF Report included detailed  
9 financial data, the Bureau redacted the version of the report that was  
10 available to the public.

### 11 **Tribal Financial Advisors' Report**

12 108. The Kalispel Tribal Economic Authority ("KTEA") retained  
13 Tribal Financial Advisors, Inc., to assess the impact of the West Plains  
14 Project on KTEA's financing agreements.

15 109. KTEA is a tribal government agency that owns and operates  
16 Northern Quest. The Kalispel Tribe created KTEA to raise the standard  
17 of living for the Tribe's members. KTEA has been delegated full

1 governmental authority over the development, operation, and financing  
2 of the Kalispel Tribe's economic enterprises, including Northern Quest.

3 110. Tribal Financial Advisors, Inc. (n/k/a TFA Capital Partners,  
4 Inc.) ("TFA") is a financial advisory and independent investment  
5 banking firm that specializes in tribal finance as well as the gaming and  
6 hospitality industries. It "is the largest team of finance professionals on  
7 or off Wall-Street who are dedicated to tribal financing." TFA is  
8 registered with the Financial Industry Regulatory Authority.

9 111. TFA used data provided by KTEA (including KTEA and  
10 Kalispel Tribe financing documents), as well as data from the PKF  
11 Report and a report prepared by Nathan Associates, Inc. (discussed  
12 below), to analyze West Plains' potential impact on the ability of the  
13 Kalispel Tribe to service and refinance its existing debt.

14 112. At the time that TFA prepared its report ("the TFA Report"),  
15 the Kalispel Tribe and KTEA had two primary debt obligations. First,  
16 KTEA was the named borrower of a \$205 million institutional term loan  
17 and a \$5 million revolving loan. Second, the Kalispel Tribe was the

1 named borrower of tax-exempt and taxable priority-distribution bonds  
2 issued in 2008 in the aggregate amount of \$58.8 million.

3 113. Because Northern Quest's revenues would drop  
4 precipitously in response to any of the West-Plains alternatives, TFA  
5 predicted that KTEA would almost immediately default on its loans.  
6 Specifically, TFA found that KTEA would be unlikely to meet its  
7 leverage covenant (a promise not to exceed a certain ratio of debt to  
8 EBITDA) and its fixed-charge-coverage covenant (a ratio of adjusted  
9 EBITDA to interest expense and principal payments) in its \$205 million  
10 loan, which would force KTEA to either refinance or restructure its  
11 existing credit facility.

12 114. Because of increased interest expense, high transaction and  
13 restructuring costs, and the detrimental impact to KTEA's reputation  
14 within the financial markets, TFA further predicted that refinancing or  
15 restructuring these loans would have a profound impact on the Kalispel  
16 Tribe's long-term financial standing, including reduced access to capital  
17 and higher borrowing costs.



1 115. Under the terms of its credit facilities, the Kalispel Tribe must  
2 satisfy its debt obligations before distributing funds to the tribal  
3 government.

4 116. Because KTEA's debt takes priority over payments to the  
5 tribal government, TFA estimated that distributions from Northern  
6 Quest to the tribal government could decline as much as 82% in 2014  
7 under any of the West Plains development scenarios.

8 117. Worse yet, under the Preferred Alternative, TFA projected  
9 that after KTEA satisfies its obligation to pay \$3 million annually in  
10 regulatory costs, "nearly no cash flow would be available to the Kalispel  
11 Tribe" by 2021. Under any alternative, and irrespective of KTEA's debt,  
12 the reduction in revenue will reduce the cash flow available to the  
13 Kalispel Tribe.

14 118. Based on the projections provided by the Kalispel Tribe and  
15 PKF, TFA estimated that the opening of West Plains would result in a  
16 \$32 million reduction in distributions to the tribal government in 2014  
17 (from \$39 million to \$7 million) under any of the alternatives, and a \$53

1 million reduction in 2021 (from \$57 million to \$4 million) under the  
2 Preferred Alternative, if implemented under the timelines established at  
3 the time of TFA's analysis.

4 119. Because they do not fit the definition of any entity that can  
5 declare bankruptcy, most scholars believe—and some courts have held—  
6 that tribal governments cannot declare bankruptcy. *See, e.g.,* Blake F.  
7 Quackenbush, *Cross-Border Insolvency & The Eligibility of Indian Tribes to*  
8 *Use Chapter 15 of The Bankruptcy Code*, 29 T.M. Cooley L. Rev. 61 (2012).

9 As a result, each tribal debt restructuring requires a highly negotiated  
10 settlement between the borrower and lenders, and the tribe bears the  
11 cost of legal and financial advisory services, which can total several  
12 millions of dollars.

13 120. It can take as long as 18 to 24 months to restructure a tribal  
14 debt. During a restructuring process, the Kalispel Tribe would be subject  
15 to negotiation with the Tribe's creditors. Depending on the amount of  
16 available cash flow, distributions to the tribal government could be  
17 reduced to as little as \$6 million to \$12 million per year.

1 121. Once the Kalispel Tribe defaulted, TFA estimated that  
2 KTEA's refinancing or restructuring costs would be anywhere between  
3 \$3 million and \$10 million. According to TFA, this was a conservative  
4 estimate.

5 122. TFA stated that KTEA "would inherently face higher interest  
6 rates" under any West Plains alternative, "because they would only have  
7 access to high yield debt as KTEA's credit profile would no longer meet  
8 the standards typically required by the commercial bank market."

9 123. TFA stated that the Kalispel Tribe's tax-exempt and taxable  
10 bonds might also require restructuring, which would add additional  
11 costs and time to the restructuring process.

12 124. TFA concluded that the introduction of a West Plains casino  
13 would "materially reduce cash available to support [the Kalispel Tribe's]  
14 essential government functions." The Kalispel Tribe's weak financial  
15 position would reduce its bargaining power, "likely forc[ing] the  
16 Kalispel Tribe into an adverse contractual agreement with its debt  
17 providers whereby the vast majority of cash flow would be used to

1 support debt repayment rather than support the Kalispel Tribe.” Under  
2 any West Plains operating scenario, TFA predicted that the distributions  
3 to the tribal government would materially decrease.

#### 4 **Nathan Associates Report**

5 125. Using data compiled by PKF and TFA, Nathan Associates,  
6 Inc. (“Nathan”), analyzed the overall economic impact that West Plains  
7 would have on the Kalispel Tribe.

8 126. Nathan is an economic consulting firm that serves both the  
9 public and private sectors. Its expertise includes the economic impacts of  
10 public policy, economic-development consulting, and analysis of  
11 infrastructure planning.

12 127. The Nathan Report was prepared by Alan P. Meister, Ph.D.  
13 Dr. Meister is a nationally recognized expert in economic issues related  
14 to Indian gaming.

15 128. In addition to reviewing data compiled by PKF and TFA,  
16 Nathan collected its own data, including financial information from the

1 Kalispel Tribe and information on the Kalispel Tribe's government  
2 operations, programs, and services.

3 129. In fiscal year 2011, the most recent year for which data were  
4 available at the time the Nathan Report was prepared, Northern Quest  
5 supplied nearly 85% of the Kalispel Tribe's total government revenue.

6 Another 15% was derived from grants, which are restricted to specific  
7 uses. Other income, such as fees, settlement payments, and lease income,  
8 accounted for one-half of a percent of the Tribe's government revenue.

9 130. In fiscal year 2011, the Kalispel Tribe spent about 55% of its  
10 revenue on tribal programs and services. The Tribe spent 34.6% of its  
11 revenue on debt payments.

12 131. Nathan concluded that a West Plains casino "would result in  
13 more than just a loss of casino profit—it would result in a loss of tribal  
14 programs and services, economic development, and well-being."

15 132. Nathan stated that "the introduction of any of the Spokane  
16 Tribe casino alternatives would have a significant negative economic  
17 impact on the Kalispel Tribe, so much so that *the Kalispel Tribe would not*

1 *be able to meet existing debt obligations without forgoing most or all of the*  
2 *revenue that is distributed to the Tribe to fund its government operations,*  
3 *economic development efforts, and programs and services that provide for the*  
4 *welfare of tribal members.” (Emphasis added.)*

5 133. Nathan further concluded that the negative impacts would  
6 be evident *immediately*, regardless of which West Plains alternative was  
7 chosen.

8 134. Under any of the West Plains gaming alternatives, Nathan  
9 estimated that the Kalispel Tribe would lose 32% of its total government  
10 revenue, or about \$31 million, in fiscal year 2014. But, accounting for the  
11 fact that the Tribe may only use grant funding for specific purposes,  
12 Nathan estimated that the Kalispel Tribe would lose 37% of its  
13 discretionary government revenue in 2014. This would leave the Tribe  
14 with only approximately \$4.3 million in annual non-grant government  
15 revenue.

16 135. Under the Preferred Alternative, Nathan estimated that the  
17 Kalispel Tribe’s loss would grow to 52% of its total government revenue,

1 or about \$58 million, in fiscal year 2020. Considering restrictions on grant  
2 funding, the Tribe would effectively lose 59% of tribal government  
3 revenue available for discretionary spending in 2020. Thus, the Kalispel  
4 Tribe would be left with only \$728,000 in non-grant government revenue  
5 in 2020.

6 136. The Kalispel Tribe's programs and services funded primarily  
7 by Northern Quest include police, fire, and emergency medical services;  
8 housing; social services; health care; educational assistance; child care;  
9 elderly care; public transportation; judicial and legal services;  
10 community planning and development; and per capita and elder  
11 payments to cover basic needs not covered by other programs or the  
12 members' income.

13 137. Nathan concluded that a reduction in these government  
14 operations, programs, and services would cause a significant number of  
15 tribal members to require federal or state welfare assistance in order to  
16 meet their basic needs.

**The Kalispel Tribe's DEIS Comments**

1  
2 138. On May 16, 2012, the Kalispel Tribe submitted lengthy  
3 comments on the DEIS, as well as comments on the report prepared by  
4 the Innovation Group. The Kalispel Tribe also submitted the PKF Report,  
5 the TFA Report, and the Nathan Report to the Bureau.

6 139. In addition to providing its own original analyses, the  
7 Kalispel Tribe pointed out "factual inaccuracies, erroneous assumptions,  
8 and significant omissions" in the DEIS and stated that "significant  
9 review, supplementation, and revision" was needed before the FEIS  
10 could be issued. In particular, the Kalispel Tribe commented that the  
11 DEIS underestimated the socioeconomic impact of the project on the  
12 Tribe.

13 140. The Kalispel Tribe observed that the DEIS's assertion that  
14 West Plains would not cause any competing gaming facilities to close  
15 was "purely speculative." Noting that the DEIS contained only limited  
16 data regarding a select number of non-Indian commercial casinos, the  
17 Kalispel Tribe commented that these data were not sufficient to support



1 a finding that the impact would diminish over time—particularly  
2 because West Plains would be just down the street from Northern Quest.

3 141. Even assuming that the data in the DEIS were accurate, the  
4 Kalispel Tribe observed that the substitution effects estimated by the  
5 Bureau were significant. Indeed, the substitution effects predicted in the  
6 DEIS were of similar magnitude to that computed by PKF.

7 142. Moreover, the Kalispel Tribe observed that a casino closure is  
8 not required for a project to have an “adverse effect” under the DEIS’s  
9 own definition of the term. Rather, according to the DEIS, an adverse  
10 effect is one that would “negatively alter the ability of a government to  
11 perform at existing levels.” Thus, the DEIS was internally inconsistent.

12 143. Citing the Nathan Report, the Kalispel Tribe stated that West  
13 Plains would cause a significant decrease in revenue to Northern Quest.  
14 This decrease in revenue would “have profound, negative impacts on  
15 [the Kalispel Tribe’s] ability to operate its government, offer tribal  
16 programs and services to tribal members and even non-tribal members,  
17 and provide for the general welfare of its people.”

1           144. The Kalispel Tribe was unable to fully respond to the DEIS's  
2 discussion of non-gaming substitution effects, because the Civic  
3 Economics study had not been attached to the DEIS. But the Tribe did  
4 observe that the study appeared to have been prepared for the purpose  
5 of identifying potential retail opportunities, not for the purpose of  
6 analyzing substitution effects. The Kalispel Tribe also noted egregious  
7 errors in the DEIS's discussion of the Harvard study.

8           145. In addition, the Kalispel Tribe pointed out that the purpose-  
9 and-need statement of the DEIS, which specified that the need for the  
10 project was based on the "potential profitability of gaming in Airway  
11 Heights," was inappropriately narrow.

12           146. The Kalispel Tribe criticized the DEIS's unsupported  
13 elimination of expansion alternatives and alternative locations, noting  
14 that the DEIS and the Innovation Group report only addressed these  
15 possibilities in a cursory fashion.

16           147. Apart from the EIS process, on June 14, 2012, the Kalispel  
17 Tribe submitted detailed comments on the Spokane Tribe's request for a  
Complaint ~ 50

1 two-part determination. These comments detailed the detrimental  
2 impacts that a West Plains casino would have on the Kalispel Tribe, the  
3 deficient economic analysis in the DEIS, and the information in the PKF,  
4 Nathan, and TFA reports.

### 5 **Innovation Group's Response to DEIS Comments**

6 148. The Innovation Group prepared the Bureau's response to the  
7 Kalispel Tribe's comments on the DEIS. The Innovation Group's  
8 response to the Kalispel Tribe's DEIS comments was later attached to the  
9 FEIS as Appendix V.

10 149. The Innovation Group clarified that, according to the figures  
11 presented in its November 2011 report, the cumulative gaming  
12 substitution effects of West Plains on Northern Quest would have been  
13 44.2% in 2015. But, over the course of two sentences—without any  
14 supporting analysis or documentation—the Innovation Group  
15 summarily reduced its estimated substitution effects to 33%:

16 [S]ince [the Preferred Alternative] is now proposed for 2020  
17 and not 2015, the 20.9% additional impact [of the final phase  
18 of construction] would be mitigated by five years of

1 population and income growth, which PKF estimates to be  
2 [redacted]% over this period, reducing the additional impact  
3 of [the Preferred Alternative] to [redacted]. This results in a  
4 combined impact of all phases of [the Preferred Alternative]  
5 of approximately 33% . . . .

6 Moreover, the DEIS had predicted a completion date of 2019—*not* 2015  
7 (as the Innovation Group had predicted in its report attached to the  
8 DEIS)—for the final phase of the Preferred Alternative. The Innovation  
9 Group did not address this inconsistency.

10 150. Although the Innovation Group argued that there were  
11 deficiencies in the PKF Report submitted by the Kalispel Tribe, the  
12 Innovation Group did not acknowledge that its own 2011 report found  
13 nearly the same cumulative substitution effects (44.2%) that PKF had  
14 found (41.5%).

15 151. In regard to non-gaming substitution effects, the Innovation  
16 Group did not address the Kalispel Tribe's comments on the Civic  
17 Economics and Harvard studies. Rather, the Innovation Group simply  
18 cited additional studies. None of these new studies addressed the impact

1 of a new casino on retail operations associated with existing casinos, let  
2 alone substitution effects in the Spokane market.

3 152. The Innovation Group did not address the TFA Report.  
4 Rather, the Innovation Group claimed that the TFA Report had not been  
5 produced and stated, without explanation, that TFA was not an objective  
6 third party.

7 153. Because the Innovation Group did not analyze the TFA  
8 Report, it did not address TFA's assertion that the opening of a West  
9 Plains casino would cause KTEA and the Kalispel Tribe to default on  
10 their debt and force the Kalispel Tribe to refinance or restructure its debt.

11 154. The Innovation Group engaged in a one-page analysis of the  
12 Nathan Report. The Innovation Group acknowledged that the Nathan  
13 Report relied on information in the TFA Report, which the Innovation  
14 Group had not reviewed. The Innovation Group also stated that the  
15 Nathan Report did not conduct a sensitivity test to assess at what level of  
16 casino profit the Kalispel Tribe would go into default.

1 155. The Innovation Group stated that Nathan “makes no claim  
2 that [Northern Quest] would close.” But whether a facility would be  
3 forced to close as a result of a new casino is *not* the correct standard for  
4 whether there is a detrimental impact on the surrounding community  
5 under IGRA. Nor is it the correct standard for whether there is an  
6 “adverse effect,” according to the terms of the DEIS.

7 **Final Environmental Impact Statement**

8 156. The Bureau released a Final Environmental Impact Statement  
9 (“FEIS”) on February 1, 2013. It later extended the public comment  
10 period to May 1, 2013.

11 157. The FEIS did not alter the DEIS’s statement of purpose and  
12 need or its scope of alternatives.

13 158. Relying on the Innovation Group’s analysis, the FEIS  
14 predicted that the Preferred Alternative would have a gaming  
15 substitution effect of 33% on Northern Quest in 2020. The FEIS continued  
16 to assume that gaming substitution effects would diminish after one year  
17 and that there would be no non-gaming substitution effects.

**The Kalispel Tribe's FEIS Comments**

1  
2 159. On April 30, 2013, the Kalispel Tribe submitted comments on  
3 the FEIS.

4 160. In response to the Innovation Group's prediction that gaming  
5 substitution effects would be 33% in 2020 (as opposed to the 44.2% in  
6 2015 that the Innovation Group originally predicted), the Kalispel Tribe  
7 observed that a one-third reduction in revenue is *still* a significant  
8 negative impact. Further, the Kalispel Tribe observed that the Innovation  
9 Group's updated analysis lacked detail and was not adequately  
10 supported.

11 161. The Kalispel Tribe noted that it had given an unredacted  
12 version of the TFA Report to the Bureau for analysis in the  
13 environmental review process. The Kalispel Tribe also reiterated TFA's  
14 qualifications and observed that there was no basis to doubt TFA's  
15 objectivity.

16 162. The Kalispel Tribe responded to the Innovation Group's  
17 statement that the Nathan Report did not include a sensitivity analysis.

1 First, the Kalispel Tribe stated that a sensitivity test would not be  
2 customary for the type of analysis conducted in the Nathan Report.  
3 Second, the Tribe commented that because the Nathan Report relied on  
4 point estimates, not interval estimates, a meaningful sensitivity test  
5 would not be possible. Third, the Tribe observed that the FEIS did not  
6 include any sensitivity tests either.

7 163. The Kalispel Tribe reiterated its comments on the Civic  
8 Economics and Harvard studies. The Tribe also attached a March 9, 2013  
9 letter from Dr. Jonathan Taylor—one of the authors of the Harvard  
10 study—to Dr. Alan Meister of Nathan Associates. The letter stated that  
11 the EIS had misinterpreted and misapplied the Harvard study, yielding  
12 an incorrect conclusion on the existence of non-gaming substitution  
13 effects.

14 164. Further, the Kalispel Tribe observed that none of the eight  
15 additional studies cited in the FEIS were specific to Spokane County and  
16 that some of the studies *did* find non-gaming substitution effects.



1 165. Finally, the Kalispel Tribe requested PKF to re-model its  
 2 market analysis to accommodate for various inputs that the Innovation  
 3 Group had described as “deficiencies” in the PKF Report. The results of  
 4 this remodeling were only marginally different from PKF’s original  
 5 estimate. The chart below compares the gaming substitution effects  
 6 estimated in the original and revised PKF reports with the gaming  
 7 substitution effects estimated in the Innovation Group report:

	<b>2011 Innovation Group Report</b>	<b>Original PKF Report</b>	<b>Revised PKF Report</b>
<b>Phase 1 revenue decrease</b>	29.5%	22.7%	25.5%
<b>Phase 1 EBITDA decrease</b>	---	37.4%	39.8%
<b>Full build-out revenue decrease</b>	44.2%	41.5%	41.0%
<b>Full build-out EBITDA decrease</b>	---	59.5%	59.1%

8 It should be noted that, because these reports were created at slightly  
 9 different points in time, they were each based on different assumptions

1 about when the new casino development would be complete. The 2011  
2 Innovation Group report was based on a 2013 completion date for  
3 Phase 1, whereas the original PKF Report was based on a 2014  
4 completion date. And the Innovation Group report had predicted a 2015  
5 completion date for full build-out of the Preferred Alternative, whereas  
6 the original PKF Report had predicted the Preferred Alternative would  
7 be open by 2020. Still, the predictions in these reports are remarkably  
8 similar.

#### 9 **Innovation Capital Response to Debt Service Letter**

10 166. In a letter dated July 8, 2013—over one year after TFA had  
11 conducted its analysis—Innovation Capital (an affiliate firm of the  
12 Innovation Group) analyzed the TFA Report.

13 167. By the time Innovation Capital conducted its analysis, the  
14 timelines for West Plains had been pushed back. Innovation Capital  
15 estimated that Phase 1 could be finished by October 1, 2014, at the  
16 earliest. The TFA Report had assumed that the first phase would be  
17 finished by October 1, 2013.

1 168. Contrary to TFA, Innovation Capital concluded that  
2 “favorable circumstances and options [were] available to KTEA” to  
3 maintain a strong credit profile and a “reasonable level of distributions.”

4 169. But Innovation Capital’s conclusions were based on flawed  
5 express and implied assumptions.

6 170. The TFA Report had projected that KTEA would have  
7 maintenance capital expenditures of \$12 million for fiscal year 2013.  
8 Innovation Capital contested TFA’s projection, proposing that  
9 “normalized” maintenance capital expenditures for Northern Quest  
10 should be \$6.6 million because “maintenance capital expenditures  
11 typically average around 3% of total gross revenues for Native American  
12 gaming operations.”

13 171. By assuming that KTEA’s maintenance capital expenditures  
14 could be kept at 3% (roughly half of KTEA’s historical maintenance  
15 capital expenditures), Innovation Capital ignored the impact that  
16 reducing maintenance capital expenditures would have on revenue.

17 Although there may be minimal impact in the short-run, over the long-

1 run reducing maintenance capital expenditures inherently puts revenue  
2 at risk.

3 172. The risk of reducing maintenance capital expenditures is only  
4 amplified by introducing a competitor into the market. In fact,  
5 introducing a competing facility would suggest that it is prudent for  
6 KTEA to consider *increasing* maintenance capital expenditures, not  
7 decreasing them.

8 173. In addition, Innovation Capital's reliance on an "average"  
9 maintenance capital expenditure is inherently flawed because it ignores  
10 any unique circumstances KTEA may be facing in operating Northern  
11 Quest in the Spokane gaming market.

12 174. Innovation Capital concluded that, if KTEA reduced its  
13 maintenance capital expenditure, KTEA could take advantage of the  
14 delay in construction to make voluntary repayments to its loans and  
15 therefore avoid default. Specifically, Innovation Capital stated that  
16 "[a]doption of a prudent fiscal policy consisting of proactive reduction to

1 tribal distributions and voluntary Term Loan repayments” would  
2 moderate the impact from West Plains.

3 175. In proposing that KTEA increase its loan repayments,  
4 Innovation Capital ignored the impact of diverting funds from tribal  
5 government programs. In reality, such a strategy could have severe  
6 consequences, ranging from government instability to loss of vital tribal  
7 government programs.

8 176. Innovation Capital also speculated that the “PKF report  
9 likely reflect[ed] conservative KTEA EBITDA projections.” In making  
10 this statement, Innovation Capital ignored the fact that KTEA is a  
11 component of a *tribal government*, not a private enterprise. As tribal  
12 governments are responsible for providing critical services to their  
13 members, they typically do not use “best case scenarios” to plan for  
14 government expenditures.

15 177. Ultimately, Innovation Capital’s erroneous assumptions  
16 revealed a fundamental lack of knowledge of gaming operations as well  
17 as a naïve understanding of tribal finance. Because Innovation Capital’s

1 report was not released until the FEIS phase, however, the Kalispel Tribe  
2 did not have a meaningful opportunity to respond as part of the NEPA  
3 process.

#### 4 **Market Saturation Analysis**

5 178. Representatives of the Kalispel Tribe later met with the  
6 Director of the Office of Indian Gaming (“OIG”) and members of her  
7 staff to discuss the West Plains two-part determination. In response to  
8 questions from OIG staff regarding the gaming market in the Spokane  
9 region, the Kalispel Tribe retained Nathan to prepare a Casino Gaming  
10 Market Saturation Analysis (“Market Saturation Analysis”).

11 179. The Market Saturation Analysis compared the Spokane  
12 gaming market to the gaming markets in other parts of the country. It  
13 found that the Spokane market was saturated and that the opening of a  
14 new casino in this market would lead to cannibalization of existing  
15 gaming facilities due to excess supply.

16 180. The Kalispel Tribe submitted the Market Saturation Analysis  
17 to the Department on January 22, 2015. On January 27, 2015, the Tribe

1 followed up with the Bureau to make sure the Bureau had received the  
2 Analysis.

3 181. On January 28, 2015, Troy Woodward of the Department  
4 emailed B.J. Howerton of the Bureau's Northwest Regional Office,  
5 stating that they had received the Market Saturation Analysis and  
6 "suggest[ed] your office work with a contractor to provide a review and  
7 assessment because we do not have a financial analyst on staff in DC that  
8 can do the analysis."

9 182. Troy Woodward again followed up with Howerton on  
10 March 10, 2015, to find out whether Howerton "had a chance to have  
11 someone review" the Market Saturation Analysis. Ryan Lee Sawyer,  
12 AES's lead consultant on the West Plains EIS, responded on Howerton's  
13 behalf on the same date, saying that the Innovation Group would  
14 prepare a response.

15 183. In an e-mail dated March 19, 2015, Sawyer sent the Bureau a  
16 response to the Market Saturation Analysis. In the e-mail, Sawyer asked  
17 whether Howerton "would like any changes before this goes to Troy" at

1 the Department. A few hours later, Sawyer e-mailed the Innovation  
2 Group's response to Woodward, stating: "Although we coordinated  
3 with BJ Howerton during the preparation of the memo, he has not yet  
4 reviewed this draft; however, I wanted to get a copy to you as soon as  
5 possible to get your feedback."

6 184. The Innovation Group's response to the Market Saturation  
7 Analysis was not included in the administrative record or sent to the  
8 Kalispel Tribe before the Secretary issued his final Decision.  
9 Consequently, the Kalispel Tribe was not afforded an opportunity to  
10 comment on the Innovation Group's response, which did not include  
11 any original analysis and showed a clear misunderstanding of the  
12 fundamental nature of the Market Saturation Analysis.

### 13 **Record of Decision**

14 185. The Department published a Record of Decision ("the ROD")  
15 in May 2015. AES and the Innovation Group prepared supplemental  
16 responses to specific FEIS comments.



1 186. For the same reasons stated in the DEIS and FEIS, the ROD  
2 rejected the alternatives of expanding the Spokane Tribe's existing casino  
3 and developing a casino at a different site.

4 187. The ROD reiterated the conclusions of the DEIS and the FEIS  
5 that the "anticipated substitution effects would not result in the closure  
6 of any of the competing gaming facilities." The ROD did not explain  
7 what—short of closure of a gaming facility (and thus the loss of the  
8 majority of a tribal government's revenue)—would constitute an adverse  
9 impact on the Kalispel Tribe; nor did the ROD explain the relationship  
10 between its finding and the definition of "adverse economic, fiscal, or  
11 social impact" in the EIS.

12 188. The ROD admitted that "[a]s a result of competitive effects to  
13 the Kalispel Tribe's Northern Quest Casino, the development  
14 alternatives could result in economic impacts to the Kalispel Tribe" and  
15 that "the Kalispel tribal government's budget may be impacted by [West  
16 Plains]." But the ROD reiterated the imprecise, unsupported, and  
17 conclusory analyses of the DEIS and FEIS, stating that the gaming

1 substitution effects would dissipate “over time” and would not keep the  
2 Kalispel Tribe from providing essential services to its members.

3 189. In its response to the Kalispel Tribe’s comments on the Civic  
4 Economics study, AES admitted that “the purpose of the Civic  
5 Economics report . . . was to evaluate the retail development *opportunities*  
6 in the vicinity of the Preferred Alternative.” (Emphasis added.)

7 190. The ROD did not dispute the Kalispel Tribe’s comments on  
8 the 2000 Harvard study. Indeed, AES admitted that the Harvard study  
9 was inapplicable. The ROD relied instead on additional studies cited in  
10 the FEIS. But the ROD did not explain why or how the additional studies  
11 cited in the FEIS for non-gaming substitution effects were relevant and  
12 comparable to West Plains, and it ignored the fact that some of these  
13 studies had actually found non-gaming substitution effects.

14 191. Neither the ROD nor its attachments contained a response to  
15 the Market Saturation Analysis submitted by the Kalispel Tribe.

## The Two-Part Determination

1  
2 192. On June 15, 2015, the Department issued a two-part  
3 determination finding that a West Plains casino would be in the best  
4 interest of the Spokane Tribe and would not be detrimental to the  
5 surrounding community. Washington Governor Jay Inslee concurred in  
6 the decision on June 8, 2016.

7 193. Stating that the Airway Heights is within the aboriginal  
8 territory of the Spokane Tribe, the Department said that “it would be  
9 deeply ironic to allow the Kalispel Tribe to develop a casino within the  
10 Spokane Tribe’s aboriginal area, while denying the Spokane Tribe the  
11 opportunity to use its own aboriginal lands for the same purpose.”

12 194. In fact, the Kalispel have historical ties to Chewelah, the site  
13 of one of the Spokane Tribe’s off-reservations casinos, so there are  
14 historical ironies at play for both tribes. Regardless, historical “ironies”  
15 are irrelevant to the issue of whether the new gaming establishment  
16 would be “detrimental to the surrounding community.” 25 U.S.C.  
17 § 2719(b)(1)(A); *see also* 25 C.F.R. 292.18. Indeed, under the Department’s

1 regulations, the requesting tribe's historical connections to the land are  
2 relevant only to the "benefit" prong of the analysis, not the "detriment"  
3 prong. *Compare* 25 C.F.R. §§ 292.17(i), *with id.* § 292.18.

4 195. In response to the Kalispel Tribe's financial concerns, the  
5 Department stated that IGRA does not guarantee that tribes will operate  
6 casinos free from competition. The Department also cited the Kalispel  
7 Tribe's 1997 two-part determination as an example of a decision that  
8 resulted in competition to nearby tribes. But the Department did not  
9 acknowledge an important distinction between the two decisions:  
10 Northern Quest was proposed for a site *over 40 miles* from any existing  
11 casino, whereas West Plains is proposed for a site merely *two miles* from  
12 an existing casino.

13 196. Further, while the Department had faulted the Spokane Tribe  
14 for not including detailed data in its response to the Kalispel Tribe's two-  
15 part-determination request, the Department gave little credence to the  
16 plethora of data the Kalispel Tribe had produced to show that West  
17 Plains would cause detriment to the surrounding community.

1           197. According to the Department's own (faulty) estimation, if  
2 West Plains was built in 2020, Northern Quest would lose 33% of its  
3 projected revenue, reducing the Kalispel Tribe's government funding by  
4 more than 16.7% and eliminating any direct payments to tribal members.  
5 Despite this, the Department concluded that West Plains would not be  
6 detrimental to the Kalispel Tribe.

7           198. Although the Decision admitted that a West Plains casino  
8 would impact the Kalispel Tribe's government budget, the Decision  
9 stated that "these effects are expected to dissipate over time due to  
10 market growth and would not prohibit the Kalispel tribal government  
11 from providing essential services and facilities to its membership." The  
12 Decision did not explain the basis for this statement.

13           199. The Decision only briefly referenced the Market Saturation  
14 Analysis submitted by the Kalispel Tribe, stating: "The Market  
15 Saturation Analysis was reviewed by the [Bureau] and the Innovation  
16 Group. The [Bureau] concluded that no changes in the EIS, including

1 analysis of market conditions, financial projections and findings, are  
2 warranted because of the Market Saturation Analysis.”

3 200. In short, while the Department acknowledged that the  
4 Kalispel Tribe would be detrimentally impacted by declining revenues, it  
5 ignored or misinterpreted the compelling economic analysis the Kalispel  
6 Tribe submitted throughout the comment process showing that it would  
7 be forced to default on its debt—having to refinance or restructure its  
8 debt in a high-yield bond market at higher rates and high financing  
9 costs—and would suffer a catastrophic decrease in the amount of funds  
10 flowing from Northern Quest to the tribal government.

11 201. Effectively, the Department decided that cannibalizing one-  
12 third of a nearby tribe’s casino revenue is not “detrimental to the  
13 surrounding community.” If this were the correct application of the  
14 phrase “detrimental to the surrounding community,” there would be  
15 very few scenarios in which the Department *could* find a detrimental  
16 impact.

1           202. Under the Department's competition-alone-does-not-  
2 constitute-detrimental-impact analysis, a tribe would only be able to  
3 show a "detrimental impact" if it demonstrated that its facility would be  
4 forced to *immediately close* due to a proposed new casino.

5           203. This is an unreasonable interpretation of IGRA and of the  
6 phrase "detrimental to the surrounding community."

7   **Response to Market Saturation Analysis**

8           204. Because the Innovation Group's response to the Market  
9 Saturation Analysis was not attached to any of the environmental review  
10 documents or the Decision, the Kalispel Tribe was forced to submit a  
11 Freedom of Information Act ("FOIA") request to obtain the Innovation  
12 Group's response.

13           205. The authors of the Market Saturation Analysis later adjusted  
14 the Analysis slightly in response to the Innovation Group's critique; yet  
15 they reached essentially the same results. After removing the Kalispel  
16 Tribe's confidential information, the authors published the Market  
17 Saturation Analysis in a peer-reviewed journal. *See* Clyde W. Barrow,

1 David R. Borges & Alan P. Meister, *An Empirical Framework for Assessing*  
2 *Market Saturation in the U.S. Casino Industry*, 20 *Gaming L. Rev. & Econ.*  
3 373, 397 (2016).

4 **FIRST CLAIM FOR RELIEF: VIOLATION OF THE INDIAN**  
5 **GAMING REGULATORY ACT**

6 206. The Kalispel Tribe realleges and incorporates by reference  
7 paragraphs 1 through 205.

8 207. The Decision to authorize the West Plains casino is a final  
9 agency action under the APA.

10 **A. Incorrect interpretation of the phrase “detrimental to the**  
11 **surrounding community”**

12 208. IGRA allows the Department to issue a positive two-part  
13 determination only when the proposed gaming establishment will “not  
14 be detrimental to the surrounding community,” including “nearby  
15 Indian tribes.” 25 U.S.C. § 2719(b)(1)(A). The Department must consult  
16 with nearby tribes before making a no-detriment finding. *Id.*

17 209. Because a portion of the Kalispel Tribe’s reservation is less  
18 than 25 miles from the proposed West Plains project, it is a “nearby



1 Indian tribe” and member of the “surrounding community.” *See*

2 25 C.F.R. § 292.2.

3 210. By concluding that a one-third reduction in casino revenue  
4 would not be detrimental to the Kalispel Tribe, the Department  
5 incorrectly interpreted and applied the standard for “detrimental to the  
6 surrounding community,” 25 U.S.C. § 2719(b)(1)(A).

7 211. Because the Department failed to comply with the text of  
8 IGRA, its two-part determination was arbitrary and capricious, an abuse  
9 of discretion, and otherwise not in accordance with law in violation of  
10 the APA and IGRA.

11 **B. Reliance on factors not contemplated by IGRA or its**  
12 **implementing regulations**

13 212. IGRA creates two prongs for the two-part determination  
14 analysis: (1) whether the gaming establishment will be beneficial to the  
15 requesting tribe and (2) whether the gaming establishment will not be  
16 detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A).

17 The Department’s implementing regulations include several factors that

1 guide each prong of this analysis. When deciding whether a proposed  
2 casino is *beneficial* to a tribe, the Department primarily considers  
3 economic and social impacts on the tribe. *See* 25 C.F.R. § 292.17. The tribe  
4 may also submit evidence of its historical connections to the land, if any  
5 exist, to support a finding of beneficial impact. *Id.* § 292.17(i). Likewise,  
6 the Department considers detrimental economic and social impacts on  
7 nearby tribes. *See id.* § 292.18. But whether the requesting tribe has a  
8 historical connection to the land is not part of the *detrimental-impact*  
9 analysis. *See id.*

10 213. Rather than employing the correct standard to determine  
11 whether a nearby casino would be detrimental to the surrounding  
12 community, the Department stated that it would be “ironic” to deny the  
13 Spokane Tribe’s application when the Department had previously  
14 authorized the Kalispel Tribe’s casino in Airway Heights. But under the  
15 Department’s own regulations, the Spokane Tribe’s historical connection  
16 to Airway Heights is relevant to the *benefit* to the Spokane Tribe, not the  
17 detriment to the Kalispel Tribe. *Compare* 25 C.F.R. § 292.17(i), *with id.*

1 § 292.18. And under the plain text of IGRA, this benefit does not cancel  
2 out the detrimental impact that the gaming establishment will have on  
3 the Kalispel Tribe. *See* 25 U.S.C. § 2719(b)(1)(A). Rather, the Department  
4 was required to independently establish both (1) a beneficial impact and  
5 (2) the absence of a detrimental impact. *See id.*

6 214. Further, any claimed injustice caused by the Department's  
7 approval of Northern Quest was relevant to the Department's two-part  
8 determination for the *Kalispel Tribe*. Whether an earlier decision was  
9 erroneous is not a factor contemplated in IGRA or its implementing  
10 regulations.

11 215. Because the Department relied on factors not contemplated  
12 in IGRA or its regulations, the West Plains two-part determination was  
13 arbitrary and capricious, an abuse of discretion, and otherwise not in  
14 accordance with law in violation of the APA and IGRA.

15 **C. Reliance on faulty and incomplete data**

16 216. When projecting the impact of the West Plains project on the  
17 Kalispel Tribe's government revenues, the Department relied on

1 incomplete and unverified data while failing to address relevant data  
2 submitted by the Kalispel Tribe.

3 217. The Decision runs counter to the evidence in the record.

4 218. The Department failed to adequately explain key  
5 assumptions central to its two-part determination, such as why the  
6 Department thought West Plains' impact on the Kalispel Tribe would  
7 dissipate over time.

8 219. Because the Department relied on incomplete information  
9 and improper factors, the Department's finding that West Plains would  
10 not be detrimental to the Kalispel Tribe was arbitrary and capricious, an  
11 abuse of discretion, and otherwise not in accordance with law in  
12 violation of the APA and IGRA.

13 **SECOND CLAIM FOR RELIEF: VIOLATION OF THE NATIONAL**  
14 **ENVIRONMENTAL POLICY ACT**

15 220. The Kalispel Tribe realleges and incorporates by reference  
16 paragraphs 1 through 205.

1           221. The Record of Decision approving the West Plains EIS was a  
2 final agency action under the APA.

3           **A. Unreasonably narrow purpose-and-need statement**

4           222. An EIS must include a statement of the purpose and need for  
5 the proposed project. 40 C.F.R. § 1502.13. An agency may not define the  
6 purpose and need of a project in unreasonably narrow terms. *City of*  
7 *Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir.  
8 1997).

9           223. By specifying that the purpose and need of West Plains was  
10 to facilitate Class III gaming near Airway Heights, the Bureau defined  
11 the purpose and need of West Plains in unreasonably narrow terms. In  
12 turn, this unreasonably restricted the range of alternatives that the  
13 Bureau ultimately considered.

14           224. The Bureau's definition of the purpose and need of West  
15 Plains was arbitrary and capricious, an abuse of discretion, and  
16 otherwise not in accordance with law, in violation of the APA and  
17 NEPA.

1           **B. Failure to consider alternatives**

2           225. NEPA regulations require federal agencies to evaluate *all*  
3 reasonable alternatives to a proposed project. 40 C.F.R. § 1502.14(a).

4           226. The EIS failed to analyze any alternative sites on the Spokane  
5 Tribe's 157,376-acre reservation. The EIS also failed to analyze the  
6 alternatives of expanding the Spokane Tribe's existing casinos.

7           227. The Bureau provided only a cursory explanation of its  
8 decision to reject alternative sites and expansion alternatives for the West  
9 Plains project. Moreover, the Bureau did not adequately supplement its  
10 explanation in response to the Kalispel Tribe's comments.

11           228. The Bureau's decision to reject all alternative locations for the  
12 West Plains project was arbitrary and capricious, an abuse of discretion,  
13 and otherwise not in accordance with law, in violation of the APA and  
14 NEPA.

15           **C. Reliance on faulty and incomplete data**

16           229. The DEIS and FEIS stated that "[a]n adverse economic, fiscal,  
17 or social impact would occur if the effect of the project were to

1 negatively alter the ability of governments to perform at existing levels,  
2 or alter the ability of people to obtain public health and safety services.”

3 230. The Bureau’s finding that the Kalispel Tribe will not suffer an  
4 adverse economic impact runs counter to the evidence in the record.

5 231. The Bureau failed to adequately explain key assumptions  
6 central to its analysis of adverse impacts in the EIS, such as why it  
7 thought West Plains’ impact on the Kalispel Tribe would dissipate over  
8 time.

9 232. Because the Bureau relied on incomplete information and  
10 improper factors, the Bureau’s finding that West Plains would not have  
11 an adverse impact on the Kalispel Tribe was arbitrary and capricious, an  
12 abuse of discretion, and otherwise not in accordance with law in  
13 violation of the APA and NEPA.

14 **D. Failure to independently evaluate the work of a contractor**

15 233. When a federal agency hires a contractor to prepare an EIS,  
16 the responsible agency must “participate in the preparation” and

1 “independently evaluate the statement prior to its approval.” 40 C.F.R.  
2 § 1506.5(c).

3 234. The Bureau failed to independently evaluate the work of AES  
4 and its subcontractors. Instead, the Bureau accepted their flawed  
5 analyses wholesale.

6 235. The Bureau’s failure to independently evaluate the analyses  
7 of AES and its subcontractors was arbitrary and capricious, an abuse of  
8 discretion, and otherwise not in accordance with law, in violation of the  
9 APA and NEPA.

10 **THIRD CLAIM FOR RELIEF: BREACH OF TRUST**  
11 **RESPONSIBILITY**

12 236. The Kalispel Tribe realleges and incorporates by reference  
13 paragraphs 1 through 205.

14 **A. Failure to adequately evaluate whether the Decision would be**  
15 **detrimental to the Kalispel Tribe as required by IGRA**

16 237. The Decision to authorize West Plains was a final agency  
17 action under the APA.



1           238. The Department has a trust responsibility to the Kalispel  
2 Tribe, which is reinforced by the specific language of IGRA and its  
3 implementing regulations. Because of this trust responsibility, the  
4 Department must give special weight to the harm that may result to the  
5 Kalispel Tribe as a consequence of a two-part determination.

6           239. Because the Department failed to afford sufficient weight to  
7 potential impacts to the Kalispel Tribe when issuing the West Plains two-  
8 part determination, the Decision was arbitrary and capricious, an abuse  
9 of discretion, and otherwise not in accordance with law, in violation of  
10 the APA and IGRA.

11           **B. Failure to comply with NEPA when evaluating the**  
12           **socioeconomic impacts of the Decision on the Kalispel Tribe**

13           240. The ROD approving the West Plains EIS was a final agency  
14 action under the APA.

15           241. The trust responsibility extends to all federal actions that  
16 impact tribes. *Nance v. E.P.A.*, 645 F.2d 701, 711 (9th Cir. 1981).

1           242. NEPA requires federal agencies to evaluate the  
2 socioeconomic impacts of major federal actions. 42 U.S.C. § 4332;  
3 40 C.F.R. § 1508.14.

4           243. When a federal agency undertakes environmental review for  
5 the purpose of making a two-part determination under IGRA – which  
6 specifically requires a finding that a new casino will not be detrimental  
7 to a nearby tribe – the agency must adhere to fiduciary standards when  
8 assessing whether the decision actually will have adverse socioeconomic  
9 effects on nearby tribes.

10           244. Because the Defendants failed to adequately assess the  
11 potential socioeconomic impacts of West Plains on the Kalispel Tribe, the  
12 ROD and accompanying Decision were arbitrary and capricious, an  
13 abuse of discretion, and otherwise not in accordance with law, in  
14 violation of the APA and NEPA.

**PRAYER FOR RELIEF**

**WHEREFORE**, the Kalispel Tribe respectfully asks this Court to:

1. Declare that the Decision issued by the Department on or about June 15, 2015, was arbitrary, capricious, an abuse of discretion, not in accordance with the law, and in violation of the Department's trust responsibility to the Kalispel Tribe;

2. Issue a permanent injunction vacating the Decision and prohibiting the Department from taking any action based upon, in whole or in part, the West Plains parcel constituting "Indian lands" under IGRA;

3. Declare that the Bureau failed to comply with NEPA and violated the trust responsibility when preparing the West Plains EIS and ROD;

4. Issue a permanent injunction vacating the FEIS and ROD and prohibiting the Bureau from taking any further action until it complies with NEPA; and

5. Grant any further relief as the Court may deem

1 appropriate under the circumstances.

2 Dated: April 12, 2017 /s/ Michele Fukawa  
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