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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KALISPEL TRIBE OF INDIANS, a federally recognized Indian tribe,	
Plaintiff,	Court File No. 2:17-cv-138
v.	**Complaint for Declaratory and and Injunctive Relief**
UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN ZINKE, Secretary of the	

Interior; MICHAEL BLACK, Acting Assistant Secretary of the Interior for Indian Affairs; BUREAU OF INDIAN AFFAIRS; and STANLEY M. SPEAKS, Northwest Regional Office, Bureau of Indian Affairs,)

Defendants.)

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

INTRODUCTION

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

gaming facility, Northern Quest Resort & Casino ("Northern Quest"). Economic data establishes that West Plains will have a devastating impact on Northern Quest, which funds nearly all of the Kalispel Tribe's government operations.

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

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

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

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

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

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

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

PARTIES

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

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

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

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

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

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

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

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

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

15. This complaint will use "Defendants" to refer to the 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

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

LEGAL BACKGROUND

The Indian Gaming Regulatory Act

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

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

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

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

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

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

The National Environmental Policy Act

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

the West Plains environmental impact statement ("EIS") to evaluate the impacts of West Plains.

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

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

27. NEPA's implementing regulations allow a federal agency to hire a contractor to prepare an EIS, but the responsible federal agency must "participate in the preparation" of the EIS and "independently

evaluate the statement prior to its approval." 40 C.F.R. § 1506.5(c). Moreover, when choosing a contractor, the agency should "avoid any conflict of interest." *Id.*

The Federal Trust Responsibility

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

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

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

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

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

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

FACTUAL BACKGROUND

The Kalispel Tribe

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Spokane Tribe

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

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

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

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

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

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

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

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

The West Plains Environmental Review Process

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

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

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

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

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

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

Scoping Phase

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

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

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

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

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

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

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

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

improve the [Spokane] Tribe's short-term and long-term economic condition and promote its self-sufficiency, both with respect to its government operations and its members."

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

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

2011 Innovation Group Report

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

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

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

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

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

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

Impacts of New Openings on Existing Casinos

	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

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

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

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

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

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

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

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

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

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

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

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

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

Draft Environmental Impact Statement

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

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

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

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

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

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

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

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

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

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

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

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

The DEIS did not provide any support for this statement.

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

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

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

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

93. Moreover, the Defendants' job was not to determine whether West Plains would cause closure of a competing facility. Rather, it was required to assess precisely what the socioeconomic impacts would be under NEPA and, ultimately, to determine whether it would be "detrimental" to the "surrounding community" under IGRA.

94. The DEIS claimed that the substitution effects were "likely to diminish after the first year of the project's operation." But again, the DEIS failed to explain *how much* the substitution effects would diminish.

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

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

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

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

PKF Report

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

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

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

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

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

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

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

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

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

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

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

Tribal Financial Advisors' Report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

119. Because they do not fit the definition of any entity that can declare bankruptcy, most scholars believe—and some courts have held—that tribal governments cannot declare bankruptcy. *See, e.g.*, Blake F. Quackenbush, *Cross-Border Insolvency & The Eligibility of Indian Tribes to Use Chapter 15 of The Bankruptcy Code*, 29 T.M. Cooley L. Rev. 61 (2012). As a result, each tribal debt restructuring requires a highly negotiated settlement between the borrower and lenders, and the tribe bears the cost of legal and financial advisory services, which can total several millions of dollars.

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

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

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

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

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

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

Nathan Associates Report

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

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

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

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

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

129. In fiscal year 2011, the most recent year for which data were available at the time the Nathan Report was prepared, Northern Quest supplied nearly 85% of the Kalispel Tribe's total government revenue. Another 15% was derived from grants, which are restricted to specific uses. Other income, such as fees, settlement payments, and lease income, accounted for one-half of a percent of the Tribe's government revenue.

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

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

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

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

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

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

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

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

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

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

The Kalispel Tribe's DEIS Comments

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

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

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

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

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

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

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

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

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

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

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

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

Innovation Group's Response to DEIS Comments

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

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

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

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

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

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

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

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

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

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

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

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

Final Environmental Impact Statement

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

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

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

The Kalispel Tribe's FEIS Comments

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

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

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

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

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

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

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

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

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

It should be noted that, because these reports were created at slightly different points in time, they were each based on different assumptions about when the new casino development would be complete. The 2011 Innovation Group report was based on a 2013 completion date for Phase 1, whereas the original PKF Report was based on a 2014 completion date. And the Innovation Group report had predicted a 2015 completion date for full build-out of the Preferred Alternative, whereas the original PKF Report had predicted the Preferred Alternative would be open by 2020. Still, the predictions in these reports are remarkably similar.

Innovation Capital Response to Debt Service Letter

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

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

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

169. But Innovation Capital's conclusions were based on flawed express and implied assumptions.

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

171. By assuming that KTEA's maintenance capital expenditures could be kept at 3% (roughly half of KTEA's historical maintenance capital expenditures), Innovation Capital ignored the impact that reducing maintenance capital expenditures would have on revenue. Although there may be minimal impact in the short-run, over the long-

run reducing maintenance capital expenditures inherently puts revenue at risk.

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

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

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

tribal distributions and voluntary Term Loan repayments" would moderate the impact from West Plains.

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

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

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

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

Market Saturation Analysis

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

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

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

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

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

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

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

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

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

Record of Decision

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

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

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

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

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

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

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

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

The Two-Part Determination

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

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

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

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

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

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

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

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

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

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

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

201. Effectively, the Department decided that cannibalizing one-third of a nearby tribe's casino revenue is not "detrimental to the surrounding community." If this were the correct application of the phrase "detrimental to the surrounding community," there would be very few scenarios in which the Department *could* find a detrimental impact.

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

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

Response to Market Saturation Analysis

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

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

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

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

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

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

A. Incorrect interpretation of the phrase "detrimental to the surrounding community"

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

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

Indian tribe" and member of the "surrounding community." *See* 25 C.F.R. § 292.2.

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

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

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

212. IGRA creates two prongs for the two-part determination analysis: (1) whether the gaming establishment will be beneficial to the requesting tribe and (2) whether the gaming establishment will not be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A). The Department's implementing regulations include several factors that

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

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

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

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

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

C. Reliance on faulty and incomplete data

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

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

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

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

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

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

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

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

A. Unreasonably narrow purpose-and-need statement

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

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

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

B. Failure to consider alternatives

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

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

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

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

C. Reliance on faulty and incomplete data

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

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

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

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

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

D. Failure to independently evaluate the work of a contractor

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

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

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

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

THIRD CLAIM FOR RELIEF: BREACH OF TRUST RESPONSIBILITY

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

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

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

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

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

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

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

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

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

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

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

appropriate under the circumstances.

Dated: April 12, 2017

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