

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>Fort Sill Apache Tribe,</b>	)	
	)	Case No. 1:14-cv-958-RMC
Plaintiff,	)	Judge Rosemary M. Collyer
	)	
v.	)	
	)	
<b>National Indian Gaming Commission, et al.,</b>	)	
Defendants.	)	

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S OPPOSED EMERGENCY MOTION  
TO ENFORCE THE COURT’S OCTOBER 21, 2016 AMENDED ORDER  
AND FOR AN ORDER TO SHOW CAUSE**

Defendants oppose Plaintiff’s Emergency Motion to Enforce the Court’s October 21, 2016, Amended Order and for an Order to Show Cause (“Motion”) (ECF No. 67). Plaintiff’s Motion must be denied because Plaintiff relies on the faulty premise that NIGC proceeded outside of the settlement process and that the Court directed NIGC to engage in final agency action in issuing a decision. The NIGC has complied with the Court’s Order and there are no grounds to hold NIGC in contempt and issue an order to show cause. Plaintiff must meet the heavy burden of demonstrating that NIGC violated the Court’s Order, which it cannot do. The NIGC complied with the Court’s order, which was directed at moving the settlement discussions forward and was not a merits determination. At all times, NIGC engaged in good faith to cooperate in the process and issued its letter in full compliance with the Court’s directives in the case. Defendants, therefore, respectfully request that the Court deny Plaintiff’s Motion.

**BACKGROUND**

The Court is familiar with the facts of this case. Plaintiff originally filed this action against the NIGC and its Chair challenging, under the Administrative Procedure Act (“APA”),

the NIGC Chair's issuance of a Notice of Violation ("NOV") of the Indian Gaming Regulatory Act ("IGRA") related to Plaintiff's efforts to conduct gaming on property located in New Mexico. During the pendency of the lawsuit, on May 5, 2015, the NIGC issued its decision ("2015 Decision") upholding the NOV. Plaintiff amended its complaint to challenge the 2015 Decision under the APA, included Interior defendants, and added a claim that all Defendants violated the provisions of a 2007 settlement agreement.

Shortly after Plaintiff amended its complaint, the parties began to engage in settlement discussions to determine whether the parties could resolve Plaintiff's claims without further litigation. Based on these initial discussions, in October 2015, the court stayed active litigation to allow these discussions to continue in order to conserve the parties' and judicial resources. *See Parties' Joint Mot. to Stay Litig. For 30 Days 1*, ¶¶ 3-4 (ECF No. 42) ("The Parties have been diligently engaged in settlement discussions in good faith. . . . Upon conclusion of the stay, the Parties will resume active litigation of this case should they not reach an agreement on settling the litigation . . ."). During that time, the parties engaged in a good faith effort to resolve Plaintiff's claims. Interior conducted extensive internal deliberations and devoted significant resources toward working on a process that could lead to settlement of the claims. The parties met several times to discuss different ideas for resolving the claims. At all times, as represented by Plaintiff in its Motion, the NIGC was upfront that no outcome was guaranteed from its participation in the discussions. There was no dispute—in fact, there was uniform agreement and acknowledgment—that the discussions were being undertaken for settlement purposes only and there was similarly no dispute and full agreement that the agencies were not engaged in any formal decision making as part of the settlement exploration process.

In August 2015, the Court held a status conference to determine briefing for the case and to inquire into the status of the parties' settlement discussions. *See* Status Conf. Tr. 2:9-16, Aug. 15, 2016. At the status conference, the parties represented that they had been engaging in good faith and productive dialogue, but that the process was ongoing. Acknowledging the good faith of the parties, and in order to facilitate the settlement process, the Court entered an order directing that Interior, on or before September 15, 2016, issue a letter providing Interior's position regarding Plaintiff's gaming eligibility under IGRA and certain other matters addressed in NIGC's 2015 Decision. ECF No. 51 at 8:5-7 ("It's clear that everybody has acted in good faith. It's just a very hard process to reach a conclusion."). The Court also ordered that on or before October 14, 2016, the NIGC reconsider its 2015 Decision in consideration of the letter to be provided by Interior. Finally, the Court extended the stay of the case until October 14, 2016. In issuing the Order, the Court indicated that any party may seek, by motion, the reinstatement of litigation.

Following the September hearing, Interior continued to work diligently to consider Plaintiff's claims and determine whether there was a path toward settlement. Despite Interior's best efforts, this was a lengthy process and required a significant amount of internal dialogue, deliberations, briefings, legal research and analyses, consultation, and coordination. Defendants believed that the potential resolution of this lawsuit was best achieved by allowing Interior time necessary to engage in and conclude their internal deliberations. Accordingly, Defendants filed two motions. The first motion requested that the Court vacate its August Order to facilitate the potential resolution of the lawsuit and grant the parties additional time to conclude their settlement. ECF No. 52, ¶ 8. If the parties were unable to finalize a settlement, the case would

return to active litigation. In the alternative, Defendants requested an enlargement of time of the August Order dates of sixty days. *Id.* at ¶ 10. Defendants' second motion requested that the Court vacate the deadlines set forth in its August Order and extend the stay to allow the parties to conclude the settlement process. ECF No. 54 at 1. In the alternative, Defendants requested a termination of the stay and resumption of the case to active litigation. *Id.* Defendants' Motions also, in an abundance of caution, sought confirmation that that the Court's order did not intend to issue a merits decision on Plaintiff's claim that the 2015 Decision is arbitrary and capricious and its request that the decision be vacated, remanded, and reconsidered. *See* Tr. 5:9-10, Sept. 16, 2016 (“[y]our order . . . was intended to facilitate the settlement discussions.”).

After consideration of the parties' motion papers and oppositions, and after holding two telephonic hearings, although the Court denied Defendants' motions on October 4, 2016, it extended the dates in its August Order to November 3, 2016, for Interior to submit its letter, and February 1, 2017, for NIGC to issue its decision on reconsideration. Order (“October 4 Order”) (ECF No. 55), October 4, 2016. The Court stated that its August Order was meant to conclude the settlement discussions. *See* Tr. 3:14-15, Sept. 16, 2016 (“Well essentially what I was ordering was conclude the settlement by August.”). The Court stated that it issued the August 17 Order to aid the parties' settlement process and that the order was not intended to address the merits of the case:

I understand all of that. And I think your memo laid out exactly why there was a concern about whether this was a merits resolution or not which it certainly wasn't intended to be.

Sept. 16, 2016, Tr. 6:14-17.

[T]he order is certainly not intended and I think does not constitute a ruling on the merits. It constitutes an order to complete a negotiation that has been going on for much too long. Now if it's not possible to reach a deal, it's not possible . . .

Sept. 30, 2016, Tr. 3:11-15. The Court also recognized that Plaintiff could not compel Defendants to enter into a settlement of the litigation.

[T]he tribe cannot force Interior into a settlement if Interior will not go.

*Id.* at 8:16-17. Rather, the Court directed Interior to move forward with the settlement process and, for settlement purposes, issued its order that extended the deadlines provided in its previous order, including that on or before February 1, 2017, the NIGC reconsider its 2015 Decision in consideration of a letter to be provided by Interior. ECF No. 55.

Plaintiff objected to the October 4 Order on the grounds that the Court erroneously provided the NIGC with too much time to issue its reconsideration in light of Interior's letter. ECF No. 56. In its motion, Plaintiff noted that NIGC has never asserted that it could not meet the Court's deadlines nor had NIGC requested that its response date be linked to NIGC regulations. *Id.* at ¶¶ 5, 10. Plaintiff requested that the Court reconsider its order and shorten the deadline for NIGC to issue its decision in light of Interior's letter. Defendants and Plaintiff negotiated an agreement to Plaintiff's request, which alleviated the need for the Court to rule on Plaintiff's motion. ECF No. 57. After further discussions between Plaintiff and Interior, the parties later filed a motion requesting that the Court modify the schedule set forth in the October 4 Order and extend the time for Interior to provide a letter to the NIGC. ECF No. 58. The Court granted the parties' request and entered its Amended Order on October 21, 2016, directing Interior to issue a letter providing its position regarding Plaintiff's gaming eligibility under IGRA and certain other matters addressed in NIGC's 2015 Decision on or before December 1, 2016. ECF No. 60. The Court also shortened the time allowed to the NIGC to reconsider its

2015 Decision in consideration of the letter to be provided by Interior, and to issue a Decision and Order incorporating such reconsideration to on or before January 13, 2017. *Id.*

The parties later appeared before the Court on December 2, 2016, after Defendants filed a motion for an additional extension for Interior to provide its letter to NIGC. During the hearing, the Court granted Interior a short extension. On December 9, 2016, pursuant to the Court's direction, Interior sent a letter to NIGC regarding Plaintiff's gaming eligibility at Akela Flats. Interior, pursuant to the Court's December 2, 2016, Minute Order, also submitted a copy of the letter to the Court *in camera*. ECF No. 63. Interior's letter, as directed by the Court, was serious, thorough, and substantive. *See* Dec. 2, 2016, Tr. 12:1-3. Interior's letter was for settlement purposes only under FRE 408 and subject to the deliberative process, attorney work product, and attorney client privileges.

On January 12, 2016, pursuant to Court Order, NIGC sent by certified mail its letter to Plaintiff. The NIGC letter was for settlement purposes only and provided NIGC's determination of reconsideration of the May 2015 Decision. ECF No. 66. The letter was a confidential settlement communication under Rule 408. Pursuant to the Court's minute order, NIGC provided a copy of its settlement letter to the Court. *Id.*

### **STANDARD OF REVIEW**

A court has the power to hold a party in civil contempt to enforce compliance with a court order. *See generally Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). That authority, however, is to be exercised sparingly, with "restraint and discretion." *Id.* at 44. Contempt citations ought to be issued with caution and "only when the rules do not provide the court with sufficient authority to protect their integrity and to prevent abuses of the judicial

process.” *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 11 (D.D.C. 1999) (citing *Shepherd v. ABC, Inc.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995)).

The standard for finding a party in civil contempt is well settled: the moving party has the burden of showing by clear and convincing evidence, not merely a preponderance of the evidence, that (1) a valid court order existed; (2) the putative contemnor had knowledge of the order; and (3) the putative contemnor disobeyed the order. *See Int’l Longshoremen’s Ass’n v. Phila. Marine Trade Ass’n*, 389 U.S. 64, 76; *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1183-84 (D.C. Cir. 1981); *Washington–Baltimore Newspaper Guild v. The Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980); *Food Lion v. United Food and Commercial Workers Int’l Union*, 103 F.3d 1007, 1016–17 (D.C. Cir. 1997)). Any ambiguities must be resolved in favor of the party charged with contempt. *Broderick v. Donaldson*, 338 F. Supp. 2d 30, 47 (D.D.C. 2004) (citing *United States v. Microsoft Corp.*, 980 F. Supp. 537, 541 (D.D.C. 1997)).

To rebut a prima facie showing of civil contempt, the contemnor may assert the defense of “good faith substantial compliance.” To prove this defense, the contemnor bears the burden of proving that it “took all reasonable steps within [its] power to comply with the court’s order.” *Food Lion*, 103 F.3d at 1017 (citations omitted). Importantly, the defense has two distinct components—(1) a good faith effort to comply with the court order at issue; and (2) substantial compliance with that court order. *See id.* “A good faith effort may be a factor in deciding whether a contemnor has substantially complied, and it may be relevant to mitigation of ‘damages;’ however, good faith alone does not excuse contempt.” *Id.* at 1017-18 (quotation omitted). A contempt order should be imposed, if at all, only at the conclusion of a three-stage proceeding involving “(1) issuance of an order; (2) following disobedience of that order,

issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying with the prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled.” *Blevins Popcorn*, 659 F.2d at 1184 (citing *Oil, Chemical & Atomic Workers Int’l Union v. NLRB*, 547 F.2d 575, 581 (D.C. Cir. 1976)).

## ARGUMENT

### A. **The NIGC Complied with the Court’s Order and Plaintiff’s Motion to Enforce Should be Denied**

As set forth in detail above, on December 9, 2016, the NIGC received a Court-ordered letter from the Office of the Solicitor, Department of the Interior setting forth Interior’s position concerning Plaintiff’s eligibility to game on the land in New Mexico. As the Court directed, the letter was substantive and gave due consideration to the issue. *See* Dec. 2, 2016, Tr. 8:23 (“[the letter] has to be substantive.”). A copy of the Interior letter was provided to the Court’s chamber as an *in camera* submission. ECF No. 63. Upon receipt of the letter, the Commission immediately met to discuss the letter. In order to comply with the Court’s directives, the Commission devoted considerable time reconsidering its 2015 Decision, for the purposes of settlement, in light of Interior’s letter. The Commission reviewed Interior’s submission, conducted meetings with counsel, met internally, and conducted a legal analysis of Interior’s letter. However, after significant and careful review, the Commission found that there were no grounds for amending its 2015 Decision. Given Interior’s detailed analysis, there were no further issues for NIGC to discuss and there was no path to settlement, and that the 2015 Decision could not be amended as part of any settlement. After its consideration, the Commission sent its letter to Plaintiff clarifying as much.



From the beginning of settlement discussions with Plaintiff, the NIGC has been clear that no outcome was guaranteed as a result of the discussions. Plaintiff has also represented this to the Court. Pl.'s Mot. 4 at ¶ 8. The Commission's ability and willingness to issue a revised or reconsidered Decision and Order depended on the contents of Interior's letter to the NIGC. The NIGC is an independent Federal agency and, although it works closely with the Department of the Interior on matters related to gaming, is not a part of the Department. As such, the NIGC did not participate in the drafting of Interior's letter and, upon review, determined that it gave the Commission no reasonable basis upon which to change its prior decision. The Court's Order directed NIGC to reconsider its 2015 Decision, and it did just that. After reviewing Interior's letter, the Commission concluded that there were no grounds upon which to issue a new decision for settlement purposes.

Plaintiff bases its argument that the NIGC has not complied with the October 21 Order on the faulty premise that the NIGC's participation in the settlement discussions and consideration of Interior's letter would equate to final agency action. The Court never directed the NIGC to issue final agency action and that was never contemplated by the parties. Rather, the Court's orders were intended to promote the expediency of the parties' settlement discussions and, particularly, Interior's provision of a letter considering Plaintiff's eligibility to game. As the Court stated

[T]he order is certainly not intended and I think it does not constitute a ruling on the merits. It constitutes an order to complete a negotiation that had been going on for much too long. Now if it's not possible to reach a deal, it's not possible, but everybody seems to understand or agree not [to] dispute that the state of the settlement efforts are about where they were described by both sides and what we need is a letter that the tribe can then take to the Gaming Commission and then maybe get this resolved. Maybe not the way they want it to, but at least it would be resolved at the administrative level.

Sept. 30, 2016, Tr. 3:11-21.

Asserting that NIGC issue a final agency action is akin to requesting a merits determination in Plaintiff's favor. A final agency action would be a merits determination because it would represent the final decision-making of the agency under a full administrative procedure that would be subject to judicial review. To allow the settlement process to become final agency action would sidestep the administrative process and is not something to which NIGC agreed, nor could it agree.

**1. Plaintiff is not Entitled to an Order Directing that the NIGC Issue Final Agency Action**

Although Plaintiff requests in its amended complaint that the Court reverse the 2015 Decision and vacate the NOV, in an APA action, that requested relief is not the presumed remedy. Plaintiff's suit seeks judicial review of an agency action under the APA. Even if Plaintiff could show that the NIGC's decision was arbitrary or capricious (which Defendants dispute), under the APA, the Court retains its equitable authority to craft the appropriate remedy. 5 U.S.C. § 702 (“[n]othing herein . . . affects . . . the power or duty of the court to dismiss any action or deny any relief on any other appropriate legal or equitable ground”). Equitable relief is neither presumed nor automatic. Upon consideration of the equities, courts have the discretion to determine that equitable relief should not issue despite a legal violation. *See, e.g., Winter v. Natural Res. Def. Council*, 555 U.S. 7, 23 (2008) (finding public interest outweighed injunction even assuming irreparable harm to plaintiffs).

Vacatur is a form of equitable relief. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.2d 1091, 1096 (10th Cir. 2010). Case law makes clear that courts are not mechanically obligated to vacate an agency decision that they find invalid. *See, e.g., Cal.*

*Communities Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (“Although the district court has power to do so, it is not required to set aside every unlawful agency action.”). In determining whether to vacate an agency decision or to remand it to the agency without vacatur, courts consider a two-part test. *See Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. 1993). Under *Allied-Signal*, the decision whether to vacate an agency decision depends on “[1] the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed.” *Id.* at 150-51. In reaching a determination on any remedy, the parties to the lawsuit are usually afforded a full opportunity to brief their respective positions on what remedy would be appropriate.

There can be no legitimate dispute that a final agency action and a merits determination are one in the same because there can be no final agency action without making a merits determination. To put it another way, the Court could not have ordered the NIGC to undertake a final agency action without having made a liability determination against NIGC. That is precisely what the Court assured all of the parties that it was *not* doing by directing this settlement effort. Sept. 30, 2016, Tr. 3:11-13 (“the order is certainly not intended and I think does not constitute a ruling on the merits. It constitutes an order to complete a settlement negotiation that has been going on for much too long.”). As the Court found, the purpose of the order was not to decide the merits of the dispute. *See Id.* at 9:6-8 (“The concepts that my order means that the merits of the dispute have been decided. No . . . . That’s not correct.”).

The Court’s October 21 Order required the NIGC to reconsider its 2015 Decision. This it has done. Again, the NIGC fully considered and evaluated the letter from Interior and

determined that it could not alter the 2015 Decision for the purpose of reaching a settlement. The October 21 Order did not require that the NIGC issue final agency action. The order was meant to expedite the settlement discussions and not impose a settlement. Plaintiff now seeks to do what the order did not and its Motion should be denied.

**B. There are no Grounds for the Court to Compel NIGC Officials to Appear**

The Court should also deny Plaintiff's request to compel Commission officials to appear before the Court to show cause as to why it should not be held in contempt because, as discussed, the NIGC fully complied with the Court's October 21 Order. Moreover, while Plaintiff is correct that the Court has previously directed Defendants in this case to comply with its orders, Plaintiff fails to distinguish the NIGC from Interior and conflates the Court's directions to the former with the latter.

Plaintiff bases its request for relief on its assertion of statements the Court made during a December 2, 2016, hearing, which were directed at Interior's compliance with the Court's orders. Plaintiff argues that the NIGC also has not complied with the Court's orders and, therefore, an order to show cause is appropriate. Plaintiff is wrong and fails to meet its burden of demonstrating contempt. Although Plaintiff meets the first two prongs, showing that a valid court order existed and that Defendants were aware of the order, Plaintiff cannot show that NIGC did not follow the order. *Washington-Baltimore Newspaper Guild*, 626 F.2d at 1031 (noting that "petitioner in a civil contempt case has a heavy burden of proof, often described as proof by 'clear and convincing evidence', that the respondent violated the court's prior order") (quoting *Schauffler v. Local 1291, Int'l Longshoremen's Ass'n*, 292 F.2d 182, 189-90 (3d Cir. 1961)). Plaintiff cannot meet this heavy burden of proof. Plaintiff asserts that the NIGC decision was

meant to be a final agency action and, therefore, NIGC is in violation of the Court's Order. But as discussed above, the Court did not order NIGC to issue final agency action. Plaintiff cannot read into the order that which clearly was not intended to be there. *See Washington-Baltimore Newspaper Guild*, 626 F.2d at 1031 (court would not read order broadly to find contempt). As the Court stated on several occasions, it was not issuing a merits determination. Plaintiff cannot now argue that one was required in order to support its Motion.

Further, although a finding of bad faith on the part of the contemnor is not required, parties may assert a defense of good faith compliance. *Food Lion*, 103 F.3d at 1017. Here, NIGC made a good faith effort to comply with the Court's Order and, indeed, complied with the Order. The NIGC has approached the Court's directives, as well as the settlement discussions, with respect and seriousness. As discussed above, NIGC could not act until it received Interior's letter. Once it received that letter, NIGC proceeded to evaluate it in good faith to determine if there was a path forward toward settlement. Plaintiff cannot legitimately contend that NIGC did anything less. And as clearly stated throughout the process, NIGC could not determine the outcome of its review and reconsideration until it had the opportunity to review Interior's letter.

Moreover, NIGC cooperated fully in the process and fully complied with a shortened deadline. The Court's October 4, 2016, Order provided NIGC until February 1, 2017, to provide its decision. That deadline was shortened from February 1 to January 13, 2017, as part of the October 21 Order. Despite this reduction in time, the Commission completed its review and reconsideration as required by the Court's order. The NIGC has complied with the Court's order and no cause exists to compel Commission officials to appear. Plaintiff's request should be denied.

**C. Plaintiff's Violation of FRE 408**

Although Plaintiff disputes the purpose of NIGC's letter, the fact remains that NIGC issued its letter as part of the parties' settlement negotiations and did so under the protections of FRE 408, the Court's settlement directive, and designated it as a confidential settlement communication. Plaintiff cannot unilaterally decide that the letter is not a confidential settlement communication and attach it to its Motion without filing it under seal or seeking to have the confidentiality designation waived or removed.

**D. Further Proceedings for the Litigation**

Interior and NIGC engaged in a good faith effort to settlement Plaintiff's claims. Despite the parties' diligence and best faith efforts, they were unable to find a path toward settlement. Accordingly, as the stay of litigation is now expired, Defendants respectfully request that the Court deny Plaintiff's Motion and instead direct the parties to submit within 10 days from the date of the Court's decision, proposals for proceeding with the litigation, including filing the answer, administrative record, and addressing the case on its merits.

**CONCLUSION**

The NIGC fully complied with the Court's October 21 Order. After receipt of Interior's letter, the NIGC reviewed and considered its previous decision, for settlement purposes, finding that grounds did not exist to change it. The Order did not direct that the NIGC issue final agency action and did not require that the NIGC reach a different decision. The NIGC took all reasonable steps to comply with the Court's order and did in fact comply. Plaintiff fails to meet its burden of demonstrating otherwise and its Motion should be denied. Defendants respectfully

request that the Court direct the parties to submit their proposal for further case management and scheduling within 10 days from the date of its decision.

Respectfully submitted this 31st day of January, 2017.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of January 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

*/s/ Jody H. Schwarz*  
Jody H. Schwarz