UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORT SILL APACHE TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:14-cv-958-RMC
	)	
	)	Judge Rosemary M. Collyer
NATIONAL INDIAN GAMING COMMISSION, et al.,	)	
	)	
Defendants.	)	
_____	)	

FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION AND PARTIAL DISMISSAL OF PLAINTIFF'S SECOND AMENDED COMPLAINT

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I. INTRODUCTION

Federal Defendants respectfully move for a reconsideration under Federal Rule of Civil Procedure 54(b) of the Court's July 7, 2017, Order granting Plaintiff's Motion for Leave to Amend its First Amended Complaint and for partial dismissal of Plaintiff's Second Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiff's Second Amended Complaint requests that the Court: (1) declare that the 2015 Final Decision and Order ("2015 Decision") issued by the National Indian Gaming Commission ("NIGC") is arbitrary and capricious (Count 1); (2) declare that a Notice of Violation (NOV-09-35) issued by NIGC's Chairman was arbitrary and capricious because it in effect forced a closure of Plaintiff's gaming facility (Count 2); (3) find Federal Defendants in breach of a 2007 Comanche Settlement Agreement (Count 3); and (4) find that the NIGC's issuance of a letter in 2017 for settlement purposes was arbitrary and capricious (Count 4). Plaintiff fails to state a claim as to Counts 2 through 4 and these claims should be dismissed.

First, Plaintiff cannot state a claim that NOV-09-35 is arbitrary and capricious because it effectively forced a closure of its gaming facility (Count 2). The Court, in ruling on Federal Defendants' motion to dismiss Plaintiff's initial complaint found that NOV-09-35 did not constitute judicially-reviewable final agency action and that Plaintiff elected to close its gaming facility to avoid the imposition of fines. Plaintiff cannot reassert this claim. Plaintiff, therefore, fails to state a claim for Count 2 and it should be dismissed.

Second, Plaintiff fail to state a claim that Federal Defendants are in breach of paragraph 7(j) of the Comanche Settlement Agreement (Count 3). This provision, however, is merely a recital and contains no operative obligations. In addressing the same paragraph, the district Court for the Western District of Oklahoma held that paragraph 7 is only a series of

representations that impose no contractual undertakings. Plaintiff, therefore, cannot allege a breach of the Comanche Settlement Agreement.

Third, Plaintiff cannot state a claim that the NIGC 2017 Letter is final agency action and arbitrary and capricious (Count 4). Federal Defendants seek reconsideration of the Court's findings incorporated in its July 7, 2017, Order that the NIGC 2017 Letter is final agency action. Respectfully, that letter cannot be deemed final agency action because the Indian Gaming Regulatory Act (IGRA) precludes the NIGC from making such a final decision as a matter of law. IGRA, enumerates four specific categories of actions that are final agency actions reviewable under the APA. Here, the NIGC 2017 Letter did not fall into any of those categories. The letter was not the result of the agency's customary and required administrative process. Accordingly, it is not final agency action.

Even if IGRA does not preclude judicial review, the NIGC 2017 Letter is not final agency action because it does not represent the consummation of the agency's decision-making process and is not an action from which legal consequences flow. Separately, and very respectfully, Federal Defendants request that the Court reconsider its statement that the NIGC 2017 Letter was intended to be final agency action. As detailed below, the lengthy history of this case, prior filings, and prior orders and statements from this Court directly contravene Plaintiff's claims that the letter was intended to be final agency action. Indeed, if the Court found in favor of Plaintiff on the merits of its claim that the NIGC 2015 Decision was arbitrary, that merits finding would result in a remand to NIGC with a directive to issue a new final agency action. Federal Defendants raised this concerns in numerous filings and on the record. The Court ultimately agreed with Federal Defendants and made clear that the NIGC 2017 Letter was only intended to be for settlement purposes. The Court later found in its Order on Plaintiff's Motion

to Enforce that NIGC compiled with the Court's directive to issue the NIGC 2017 Letter. However, at the June 29th hearing, the Court indicated that it intended the letter to be final agency action. But, as a matter of law, the Court could not direct NIGC to issue final agency action without finding for Plaintiff on the merits and issuing a remedy finding against NIGC. Therefore, the NIGC 2017 Letter cannot be final agency action and the Court should reconsider this finding.

Even if, however, the letter could be deemed final agency action, Plaintiff still fails to state a claim that it is arbitrary and capricious because the letter does not violate a memorandum of understanding between Interior and NIGC and does not violate NIGC regulations. Plaintiff's claims in Count 4 should, therefore, be dismissed.

At the end of the day, Plaintiff has one judicially-reviewable claim, whether NIGC's 2015 Decision is arbitrary and capricious. That claim, Count 1 of the Second Amended Complaint, is pending and the NIGC filed its administrative record for the decision, which Plaintiff is in the process of reviewing. That challenge should go forward and the parties and the Court's time and resources are best spent bringing that claim to a conclusion.

II. STATUTORY BACKGROUND

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]" 25 U.S.C. § 2702(1); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayer, J., concurring) (noting the importance of tribal gaming operations to "core governmental functions" in light of "the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means."). Under IGRA, a tribe may conduct

gaming only on "Indian lands," which are defined either as lands within an Indian reservation, 25 U.S.C. § 2703(4)(A), or as lands held in trust or subject to a restriction against alienation and over which a tribe exercises government power, *id.* § 2703(4)(B).

However, IGRA generally prohibits tribal gaming on lands acquired in trust "after October 17, 1988," *id.* § 2719(a), unless the acquisition falls within the scope of one of the exceptions listed in 25 U.S.C. §§ 2719(a)-(b). One exception to this bar occurs when the lands are taken into trust as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process[.]" *Id.* § 2719(b)(1)(B)(ii). This exception is known as the "Initial Reservation" exception. Another exception occurs when lands are taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii). This is known as the "Restored Lands" exception.

IGRA established the NIGC and set out a comprehensive framework for the regulation of gaming on Indian lands. The Commission consists of three members and has specified regulatory authority related to gaming on Indian lands. *See id.* §§ 2704-2708, 2713, 2715-2717. IGRA divides tribal gaming into three "classes," each subject to differing levels of state, tribal, and federal regulation. *See, e.g.*, *id.* §§ 2703)6)-(8), 2710. Class I games consist mostly of "social games with small prizes" and are regulated exclusively by Indian tribes. *Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1178 n.5 (E.D. Cal. 2003) (*Artichoke Joe's*). Class II games, which include certain types of bingo and card games "that are explicitly authorized by the laws of the State, or . . . are not explicitly prohibited by the laws of the State and are played at any location in the State[,]" are regulated by both tribal government and the federal government. *Id.* (citing 25 U.S.C. § 2703(7)(A) and § 2710(d)). Class III games, defined as "all forms of gaming that 'are not class I gaming or class II gaming[,]' § 2703(8)[,]" permits

games such as electric "game[s] of chance or slot machines of any kind." *Artichoke Joe's*, 278 F. Supp. 2d at 1178, n.5. To conduct class III gaming, generally, a tribe must first enter a compact with the state, and the Secretary of the Interior must approve that compact. 25 U.S.C. §§ 2710(d)(3), (8).

To conduct class II or class III gaming, a Tribe must have a tribal gaming ordinance approved by the NIGC Chair pursuant to 25 U.S.C. §§ 2710(b) or 2710(d), respectively. Section 2713 authorizes the Chairman to take enforcement action, including the issuance of civil penalties and temporary closure orders, for class II or class III gaming conducted in violation of IGRA, implementing regulations, or an approved tribal gaming ordinance. IGRA provides that "[d]ecisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5." 25 U.S.C. § 2714.

IGRA contains enforcement procedures set forth in 25 U.S.C. § 2713 and IGRA's implementing regulations at 25 C.F.R. § 573.3. When the NIGC finds that a tribal operator of gaming fails to comply with the statutory and regulatory guidelines, the Chairman may issue a Notice of Violation to the tribal operator. The Notice of Violation contains a citation to the violated federal or tribal requirement, a description of the surrounding circumstances, measures required to correct the violation, a time limit for such correction with a notice of right to appeal to the full Commission. *See* 25 C.F.R. § 573.3 (Notice of Violation). The Notice of Violation and any subsequent civil penalties or temporary closures imposed by the Chairman may be appealed to the full Commission. *See Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1161 (N.D. Okla. 2002) (citing 25 U.S.C. § 2714). If the Commission upholds the Chairman's issuance of the Notice of Violation, judicial review is

available in Federal district court. *Id.*

III. FACTUAL BACKGROUND

A. Initial Administrative Proceedings Concerning Akela Flats

The Fort Sill Apache Tribe is a federally recognized Indian Tribe with its headquarters in Apache, Oklahoma. Second Amend. Compl. ("Compl."), ¶ 7 (ECF No. 80); Ex. 1, May 5, 2015, Final Decision and Order ("2015 Decision") at 2 (ECF No. 80-1); and Ex. 3, July 21, 2009, Notice of Violation ("NOV-09-35") at 4 (ECF No. 80-3). At issue in this litigation is a parcel of land, Akela Flats, located in Deming, New Mexico. Compl. ¶ 2. The United States took the parcel into trust on Plaintiff's behalf on June 26, 2002. NOV-09-35 at 4. In January 2008, the NIGC became aware that Plaintiff planned to open an unlawful Class II gaming operation at Akela Flats. 2015 Decision at 5.

On February 27, 2008, the NIGC informed Plaintiff that after a preliminary review, the Office of General Counsel concluded that Akela Flats was not Indian lands eligible for gaming. *Id.* at 6-7. The Office of General Counsel noted that the property was subject to the general prohibition against gaming on lands acquired into trust after October 17, 1988, and that based on the evidence available, it did not appear that Akela Flats met any of the exceptions specified in IGRA at 25 U.S.C. § 2719. *Id.* at 7.

On March 10, 2008, Plaintiff submitted a gaming ordinance amendment to the NIGC for the Chairman's consideration. *Id.* The submitted ordinance specifically defined Akela Flats as Indian lands eligible for gaming. *Id.* Because the ordinance specified a particular parcel of land for gaming, the Office of General Counsel prepared an Indian lands opinion for the NIGC Chairman to consider as part of his gaming ordinance review. The prepared Indian lands opinion concluded that the Akela Flats parcel is not eligible for gaming because it did not meet any of

these exceptions to IGRA's general prohibition of gaming on after acquired land ("2008 Opinion"). *Id.* at 8. Plaintiff withdrew the ordinance from consideration. *Id.*

B. The Comanche Nation Litigation in the United States District Court for the Western District of Oklahoma

On March 11, 2008, Plaintiff filed its First Motion to Enforce Agreement of Compromise and Settlement ("Motion to Enforce") in the case of *Comanche Nation v. United States*, Case No. CIV-05-328-F (W.D. Okla.).[1] W.D. Okla. ECF No. 84; *see also* Compl. Ex. 5, Agreement of Compromise and Settlement Recitals ("Comanche Settlement Agreement") (ECF No. 80-5). In the *Comanche Nation* litigation, the Comanche Nation challenged Interior's transfer of trust title to Plaintiff for a parcel of land within an original Comanche Allotment[2] located in lands of the former Kiowa, Comanche, and Apache Reservation ("KCA Reservation"). *Id.* at 1. The United States acquired the parcel in trust without the written consent of the Comanche Tribe, the predecessor in interest to the Comanche Nation. *Id.* Plaintiff had operated a gaming facility on the parcel. The Comanche Nation sought a declaration voiding the trust transfer and an injunction preventing publication in the Federal Register of a Class III gaming compact between Plaintiff and the State of Oklahoma. *Id.* at 2. In May of 2005, the district court granted a preliminary injunction preventing publication in the Federal Register and referred the case to a settlement conference. *Id.* at 2.

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[1] References to the *Comanche Nation* litigation in the United States District Court for the Western District of Oklahoma will be referred to as "W.D. Okla. ECF No."

[2] The Comanche Settlement Agreement defines an original Comanche Allotment as "any parcel of land held in trust within the KCA Reservation that was originally allotted to a member of the Comanche Nation or any predecessor tribal entity, notwithstanding the tribal affiliation of the current allottee(s) or owner(s) of that parcel, provided that . . . original Comanche Allotment does not include (a) those parcels of land specified in Attachment A [land transferred to individual Chiricahua and Warm Springs Apache in or about 1913 and 1914]; and (b) those parcels of land specified in Attachment B [trust transfers made with the consent of the Comanche Nation to Plaintiff before the date of the Agreement]." *Id.* at ¶ 4.

On January 9, 2007, Plaintiff, the Comanche Nation, and the United States entered into the Comanche Settlement Agreement. *Id.* Pursuant to the Comanche Settlement Agreement, Plaintiff agreed to withdraw and abandon all applications currently pending with Interior for land trust transfers related to any original Comanche Allotment. *Id.* at ¶ 3. The United States agreed that Interior would not approve any trust transfers of real property located within an original Comanche Allotment without prior written consent from the Comanche Nation, however, such consent was not required for the transfer of original Comanche Allotments among individuals and remaining in trust provided the Comanche Nation retained tribal jurisdiction over the parcel. *Id.* at ¶ 4. Plaintiff agreed to adhere to the notice and consent requirements regarding transfers of original Comanche Allotments. *Id.* In addition to these terms, the parties included several recitals in the Comanche Settlement Agreement. *Id.* at ¶ 7 (a) – (l). The Court denied Plaintiff's Motion to Enforce on October 17, 2008. Order at 5 (W.D. Okla. ECF No. 115); 2015 Decision at 8.

C. The Notice of Violation and Plaintiff's Second Failed Attempt to Alter the Terms of the Comanche Settlement Agreement

On or about April 9, 2009, Plaintiff opened its gaming facility, Apache Homeland Casino, at Akela Flats and began conducting Class II gaming. 2015 Decision at 9. In July, 2009, then-NIGC Chairman Hogen issued NOV-09-35 against Plaintiff for gaming on ineligible Indian lands. *See* Compl. ¶ 83; Ex. 3, NOV-09-35. NOV-09-35 concluded that Akela Flats did not meet any exception to IGRA, 25 U.S.C. § 2719. NOV-09-35 at 5. NOV-09-35 informed Plaintiff of its right to appeal the decision within thirty days of service by submitting a notice of appeal to the NIGC. *Id.* NOV-09-35 also stated that "[t]he violation cited above *may* result in the assessment of a civil fine against Respondent . . . . Under 25 C.F.R. § 575.5(a), Respondent may submit written information about the violation to the Chairman within fifteen (15) days after

service of this notice of violation (or such longer period as the Chairman may grant for good cause)." *Id.*

In response, Plaintiff filed a second motion in federal district court to enforce the Settlement Agreement in the *Comanche Nation* litigation. *See* July 29, 2009, Second Motion and Brief in Support of Enforcement of Agreement of Compromise and Settlement (W.D. Okla. ECF No. 116). Plaintiff argued, in part, that NOV-09-35 was inconsistent with and in violation of Comanche Settlement Agreement paragraph 7. *Id.* Plaintiff requested that the NIGC stay any fines related to the NOV in light of its pending motion, which the NIGC did. Tr. 7:11-19, Aug. 21, 2009. The district court denied Plaintiff's motion, finding that it did not have before it "any final agency action violative of any contractual undertaking in the settlement agreement." *Id*. at 31:17-19.

Plaintiff then appealed NOV-09-35 to the Commission pursuant to NIGC regulations. 2015 Decision at 9. Plaintiff waived its right to a hearing before a presiding official, electing instead to have the matter proceed directly to the full Commission. *Id.* On September 11, 2009, the NIGC Chairman agreed to stay the imposition of a civil fine assessment if Plaintiff agreed to cease gaming pending resolution of its appeal, which Plaintiff agreed to do. Compl. ¶¶ 87, 88. The State of New Mexico intervened in Plaintiff's appeal in order to object to Plaintiff's gaming on Akela Flats. 2015 Decision at 9-10. The Commission set forth a briefing schedule, which it amended several times in response to the parties' requests. Four years later, the Commission issued the 2015 Decision. *Id.* at 1-2.

D. The Present Lawsuit

1. Plaintiff's Complaint and First Amended Complaint

In June 2014, Plaintiff filed this suit against the NIGC seeking declaratory and injunctive

relief as a result of the issuance of the NOV. (ECF No. 1). On May 5, 2015, the Commission issued the 2015 Decision upholding NOV-09-35. Compl. ¶ 103; 2015 Decision. Plaintiff then filed its First Amended Complaint, which added the Interior defendants, and alleged that (1) Count 1: the 2015 Decision is arbitrary and capricious because it failed to find that the Akela Flats property was eligible for gaming; (2) Count 2: the issuance of NOV-09-35 is arbitrary and capricious because it purportedly forced the closure of Plaintiff's Akela Flats gaming facility; and (3) Count 3: NIGC and Interior violated the Comanche Settlement Agreement. *See* ECF No. 30.

Shortly after the amended complaint, the parties began settlement discussions and at their request, the Court stayed active litigation. Minute Order dated October 14, 2015. During the stay, the parties engaged in a good faith effort to resolve Plaintiff's claims. Interior conducted extensive internal deliberations and devoted significant resources to exploring the potential for settlement. The parties, along with counsel, met several times to discuss different potential avenues for resolving the claims. *See* ECF Nos. 42-47, 49. During these confidential discussions and at all times, Interior and NIGC were clear in indicating that no outcome was guaranteed from their participation in the discussions. These representations were wholly consistent with the law as only the attorney general or his designee — here the Assistant Attorney General for the Environment and Natural Resources Division — has the authority to settle legal claims against the United States. *See* 28 C.F.R. § 0.161 (settlement authority delegated by the Attorney General to the Assistant Attorney General and USAM 5-7.600 (Environment and Natural Resources Division settlement and dismissal of cases generally).[3]

[3] "Included within this broad grant of plenary power over government litigation is the power to compromise and settle litigation over which the Attorney General exercises supervisory authority." The Attorney Gen.'s Role as Chief Litigator for the United States, 6 U.S. Op. Off.

There was no dispute — in fact, there was uniform agreement and acknowledgment — that the discussions were being undertaken for settlement purposes only and that Fed. R. Civ. P. 408 applied. 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.

2. The Court Mandated Settlement Process

During an August 2016 status conference, the Court acknowledged the good faith of the parties, and in order to facilitate the settlement process, entered an order directing Interior to issue a letter, for settlement purposes, setting forth Interior's position regarding Plaintiff's gaming eligibility. ECF No. 51; Tr. 8:5-7, Aug. 12, 2016 ("It's clear that everybody has acted in good faith."). The Court also directed, as part of the settlement process, that NIGC consider Interior's anticipated letter and issue its own letter in response. ECF No. 51. Finally, the Court extended the stay of the case until October 14, 2016. *Id.* In issuing the Order, the Court indicated that any party may seek, by motion, the reinstatement of litigation. *Id.*

3. Agreement that the NIGC Letter was only Intended to Aid the Settlement Process

Following the August hearing, Interior continued to work diligently to consider Plaintiff's claims and determine whether there was a path toward settlement. ECF No. 52 at ¶ 6. 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. *Id.* Federal Defendants believed that the potential resolution of this lawsuit was best achieved by allowing Interior the time necessary to engage in and conclude their internal deliberations. *Id.*

Legal Counsel 47, 59 (1982). *See* 5 U.S.C. § 3106 and 28 U.S.C. §§ 516, 519. Thus, it is wholly appropriate for Department of Justice attorneys to have a substantial and fulsome role in providing settlement advice to clients, given that the decision to approve settlements resides with the Attorney General and his delegates, and not with client agencies.

Accordingly, Federal Defendants filed two motions. The first motion requested that the Court "vacate[] the deadlines in the August Order and allow[] the parties an additional 90 days to conclude their settlement. If at that time the parties have not finalized a settlement, then the case should be reinstated to active litigation." *Id.* at ¶ 8. In the alternative, Federal Defendants requested an enlargement of time of the August Order dates of sixty days. *Id.* at ¶ 10. Federal Defendant's motion, 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 May 2015 Decision is arbitrary and capricious and its request that the decision be vacated, remanded, and reconsidered. Federal Defendants specifically stated:

> Defendants hereby request that the Court vacate the August Order requiring that Interior and NIGC issue letters. If the Court's August Order stands and Interior and NIGC are directed to submit these letters, it could be viewed as making a merits decision on the Tribe's claim that the 2015 Decision is arbitrary and capricious and its request that the decision be vacated, remanded, and reconsidered. Indeed, the directive to issue letters would be tantamount to a final judicial decision on both liability and remedy in the Tribe's favor.

ECF No. 51 at ¶ 7.

Federal Defendants again objected to the directed settlement letters during a September 18, 2016, court conference and followed up those objections in a second motion requesting 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, Federal Defendants requested a termination of the stay and resumption of the case to active litigation. *Id.* Federal Defendants stated:

> Federal Defendants noted that if the Court's August Order stands and Interior and NIGC are directed to submit a letter and a decision, they would effectively be undertaking new agency action which is the very relief Plaintiff seeks in this case and, therefore, the Tribe would for all practical purposes be the beneficiary of what could be viewed as a merits decision on its claim that the 2015 Decision is arbitrary and capricious and its request that the decision be vacated, remanded, and reconsidered. Indeed, the directive to issue a

> letter and decision would be tantamount to a final judicial decision on both liability and remedy in the Tribe's favor.

Id. at ¶ 7.

Following Federal Defendants' motions, the Court made clear that its August Order was only intended to conclude the settlement discussions:

> Well essentially what I was ordering was conclude the settlement by August.

Tr. 3:14-15, Sept. 16, 2016.

> All I was trying to do was say its time to decide [on settlement]. You've had plenty of time to negotiate, and now you have to decide. And you're deciding on settlement which is a compromise.

Id. at 7:2-4.

The Court stated that it issued the August 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.

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

While the above makes clear that the August Order was not intended to result in a final agency action, the Court directly stated:

> I can see why the department would be concerned about that [i.e. whether the August Order essentially constituted a merits decision]. I don't think that that actually is what happened.

Id. at 7:8-24.

The Court reconfirmed during a September 30, 2016, hearing that the ordered letters were part of a settlement process and nothing more:

> I will say Ms. Schwarz that you might report back that the [August] 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 . . . .

Tr. 3:11 -15, Sept. 30, 2016.

> [The August Order] was not intended to be and for all of the reasons stated by the tribe, it should not be construed as a ruling on the merits.

Id. at 23-25.

The Court also recognized that Plaintiff could not compel Federal Defendants to enter into a settlement of the litigation: "the tribe cannot force Interior into a settlement if Interior will not go." *Id.* at 8:16-17.

On December 1, 2016, Federal Defendants filed a motion seeking to modify the schedule. ECF No. 62. As part of that motion, Federal Defendants stated

> Given recent settlement process impediments, Federal Defendants request that the Court modify the schedule set forth in it October 21 Order and extend the dates for Interior to issue a letter providing Interior's position regarding Plaintiff's gaming eligibility under IGRA and certain other matters addressed in NIGC's 2015 Decision to on or before December 13, 2016. If Interior is unable to issue a letter that would facilitate settlement, it will notify the Tribe and seek by motion the reinstatement of litigation. The request is made in good faith and to conserve the Parties' and judicial resources

Id. at ¶ 2. At a December 2, 2016, hearing, the Court required Interior to submit its letter on December 9, 2016, and denied the remainder of Federal Defendants' request. Minute Order dated December 2, 2016. On December 9, 2016, pursuant to the Court's direction, Interior sent a letter to NIGC regarding Plaintiff's gaming eligibility at Akela Flats. Although Interior raised concerns with filing its settlement materials with the Court *in camera*, Tr. 7:7-20, Sept. 30, 2016, Interior, pursuant to the Court's December 2, 2016, Minute Order, also submitted a copy of the letter to the Court *in camera*. Notice of In Camera Submission to Court, ECF No. 63. Interior's letter was only for settlement purposes and subject to FRE 408 and the deliberative process, attorney work product, and attorney client privileges. *See* ECF No. 63 ("[Federal Defendants]

hereby give notice that on December 9, 2016, Interior submitted to the NIGC its confidential and privileged letter related to settlement providing Interior's position regarding the Fort Sill Apache Tribe's gaming eligibility . . . .").

On January 12, 2016, pursuant to Court Order, NIGC sent by certified mail its letter to Plaintiff ("NIGC 2017 Letter"). The NIGC letter was for settlement purposes only and provided NIGC's determination of reconsideration of the 2015 Decision. ECF No. 66 (providing notice that "[O]n January 12, 2017, NIGC sent by certified mail its letter to the Fort Sill Apache Tribe pursuant to Court order and for settlement purposes only providing NIGC's determination of reconsideration of its May 5, 2015, Final Decision and Order in re: Fort Sill Apache Tribe of Oklahoma Appeal of NOV-09-35."). NIGC's letter was a confidential settlement communication under Rule 408. *See* ECF No. 74-6 (Letter heading stating that letter is "FOR SETTLEMENT PURPOSES ONLY PURSUANT TO COURT ORDER" and was "not provided as the result of or pursuant to an agreed upon settlement . . ."). Pursuant to the Court's minute order, NIGC provided a copy of its settlement letter to the Court. *Id.*

4. Plaintiff's Motion to Enforce

After NIGC delivered its letter, Plaintiff filed an Emergency Motion to Enforce and for an Order to Show Cause, ECF No. 67, arguing that the NIGC 2017 Letter failed to comply with the Court's order because the NIGC "failed to issue a new Decision and Order incorporating its consideration of [Interior's] letter." *Id.* at ¶ 4. Plaintiff further argued that the NIGC was "attempting to recast and ignore the agreement of the parties made in the Fall of 2015." *Id.* at ¶ 6. Plaintiff requested that the Court order the NIGC and its Chairman to appear before the Court to show cause why they should not be held in contempt. *Id.* at ¶ 13.

On February 17, 2017, the Court denied Plaintiff's motion. The Court found that:

> NIGC's letter does not violate [its] order. The letter indicates that NIGC reviewed the material provided by Interior and considered whether that information warranted a reexamination of NIGC's initial decision. NIGC concluded that it did not, and informed the Tribe of that fact in the form of a letter. In doing so, the Court finds that NIGC by all appearances acted in good faith and in substantial compliance with the Court's order.

ECF No. 70 at 3. The Court recognized that "[w]hile the intent of the parties' plan was to promote a settlement of the dispute, that appears now to have been unsuccessful." *Id.* The Court directed the parties to meet and confer and propose a schedule for the next phase of litigation. The parties met and conferred, each submitting proposed schedules. ECF Nos. 72 and 73.

5. Plaintiff's Motion to Amend

On March 22, 2017, Plaintiff filed its motion to amend seeking leave to file a second amended complaint ("Motion to Amend"). ECF No. 74. In its proposed second amended complaint, Plaintiff sought leave to add four additional counts: (1) a breach of contract against NIGC and Interior concerning the parties' settlement process; (2) breach of trust against NIGC; (3) breach of trust against Interior; and (4) an APA claim regarding the NIGC 2017 Letter.

On June 29, 2017, the Court held a hearing on Plaintiff's Motion to Amend. At the hearing, in responding to the parties' disagreement over the operative effect of the NIGC 2017 Letter, the Court stated that "I believe the intent and explicit language of my order was to the effect that that would be a new final decision from the agency. That was the party's request to me, all parties. That was the order. That is the result. So to that extent, yes, the tribes can amend the complaint to add that final agency decision." Tr. 5:7-12, June 29, 2017. The Court, however, did not issue a memorandum that addressed the merits of Federal Defendants' opposition to the motion to amend.

The Court further stated that "[t]he rest of the points the tribe wishes to add I think have no merit and aren't worth litigating. I'm not going to tell you, that's not a ruling." *Id.* at 5:13-

14. The Court set a schedule for Plaintiff to file its second amended complaint, for the NIGC to file the administrative record for the 2015 Decision and a report as to when it would have an administrative record for the NIGC 2017 Letter, and for Federal Defendants to file their response to Plaintiff's second amended complaint. The Court then directed that at the appropriate time, the parties meet and confer to determine a briefing schedule.

On July 7, 2017, based on the submissions of the parties, and for the reasons stated in open court on June 29, 2017, the Court entered a Minute Order granting Plaintiff's Motion for Leave to Amend the First and deeming Plaintiff's Second Amended Complaint filed. July 7, 2017, Minute Order.

IV. STANDARDS OF REVIEW FOR A MOTION TO RECONSIDER

Federal Rule of Civil Procedure 54(b) governs reconsideration of orders that do not constitute final judgments in a case. *Powers-Bunce v. Dist. of Columbia*, 576 F. Supp. 2d 67, 68-69 (D.D.C. 2008) (citing *Singh v. George Wash. Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005). Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Revision may be permitted when the Court has "'patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court.'" *Powers-Bunce*, 576 F. Supp. 2d at 69 (quoting *Singh*, 383 F. Supp. 2d at 101 (quoting *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004))). Errors of apprehension may include a Court's failure to consider "controlling decisions or data that might reasonably be expected to

alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). The burden is on the movant to show that some harm would accompany a denial of the motion to reconsider. "In order for justice to require reconsideration, logically, it must be the case that, some sort of 'injustice' will result if reconsideration is refused. That is, the movant must demonstrate that some harm, legal or at least tangible, would flow from a denial of reconsideration." *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005).

V. STANDARDS OF REVIEW FOR A MOTION TO DISMISS

A. Subject Matter Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a claim if the court lacks subject matter jurisdiction over a claim. A party seeking federal court jurisdiction bears the burden of demonstrating that jurisdiction exists. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007); *El Paso Natural Gas Co. v. United States*, 605 F. Supp. 2d 224, 227 (D.D.C. 2009) ("When evaluating subject matter jurisdiction, plaintiffs bear the burden of proof."), *aff'd* 632 F.3d 1272 (D.C. Cir. 2011). The Supreme Court presumes that federal courts lack jurisdiction unless the contrary appears affirmatively from the record. *See Dep't of Energy v. Ohio*, 503 U.S. 607, 615-16 (1992); *Renne v. Geary*, 501 U.S. 312, 316 (1991).

As courts of limited jurisdiction, federal courts may only decide cases after the party asserting jurisdiction demonstrates that the dispute falls within the court's Constitutional and statutory jurisdiction. *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (federal courts "possess only that power authorized by Constitution and statute")). "[I]n deciding a 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint but may consider

material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." *Bennett v. Ridge*, 321 F. Supp. 2d 49, 52 (D.D.C. 2004); *aff'd* 425 F.3d 999 (D.C. Cir. 2005); *Haase v. Sessions*, 835 F.2d 902, 905-906 (D.C. Cir. 1987) (holding that a court's consideration of materials outside the pleadings in deciding a 12(b)(1) motion does not require that the court treat the motion as one for summary judgment).

B. Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) also forms a basis for dismissal of Plaintiff's claims. Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41 (1957)). Although the court must accept plaintiff's allegations of fact as true, it is not required to accept as correct the legal conclusions the plaintiffs would draw from such facts. "Legal conclusions . . .," "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," and "'naked assertion[s]' devoid of further factual enhancement." do not suffice to state a cause of action and must be disregarded. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Neitzke*, 490 U.S. at 327 (quoting *Hishon*, 467 U.S. at 73). Thus, claims should be dismissed under Rule 12(b)(6) where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his legal claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

VI. ARGUMENT

A. Plaintiff's Count 2 Should be Dismissed because the Court lacks Jurisdiction

Plaintiff's Count 2—that Federal Defendants breached the Comanche Settlement Agreement—is not properly before this Court. In suits against the government, subject matter jurisdiction turns on at least "two different jurisdictional questions." *Yee v. Jewell*, --- F. Supp. 3d ---, 2017 WL 78473, *3 (D.D.C. Jan. 9, 2017) (quoting *Trudeau v. FTC*, 456 F.3d 178, 183 (D.C. Cir. 2006)). First, a court must consider whether Congress has provided an affirmative grant of subject matter jurisdiction and second, a court must consider whether Congress has waived the United States' immunity to suit. *Id.* Here, for the first consideration, although Plaintiff does not plead the specific grounds for the Court's subject matter jurisdiction over its breach of contract claim, Plaintiff alleges that the APA, the Comanche Settlement Agreement, and the parties' resolution process establish the waiver of sovereign immunity for its Second Amended Complaint. Compl. ¶ 20. The Comanche Settlement Agreement and the parties' discussions do not provide affirmative grants of subject matter jurisdiction. While the APA may provide that grant, it does not do so here where Plaintiff pleads a breach of contract.

As to the second consideration, however, Plaintiff cannot demonstrate that Federal Defendants have waived their sovereign immunity for a federal district court to consider this claim. The APA waives sovereign immunity for most suits against the United States for nonmonetary relief, *see* 5 U.S.C. § 702, but the Tucker Act forbids federal courts from granting declaratory or injunctive relief for breach of contract, *see* 28 U.S.C. § 1491; *Robbins v. Bureau of Land Mgmt.*, 438 F.3d 1074, 1082 (10th Cir. 2006) ("[T]he APA does not waive sovereign immunity for claims that arise out of a contract and that seek specific performance of the contract as relief."); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982) ("[A]n action against

the United States which is at its essence a contract claim lies within the Tucker Act and [ ] a district court has no power to grant injunctive relief."). The APA's waiver of sovereign immunity may not be used "to circumvent the jurisdictional and remedial limitations of the Tucker Act." *Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 893 (D.C. Cir. 1985).

In *Megapulse*, the D.C. Circuit explained that whether a claim is "founded upon" a contract for purposes of the Tucker Act "depends both on the source of the rights upon which the plaintiff bases its claim, and upon the type of relief sought (or appropriate)." *Megapulse*, 672 F.2d at 968; *see also Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 601 (D.C. Cir. 1992) (ruling that the district court "did not have jurisdiction over [the plaintiff's] pure contract claims" but properly considered the merits of the plaintiff's statutory and due process claims against the United States). Here, Plaintiff contends that Federal Defendants' actions breached the Comanche Settlement Agreement and seek injunctive relief—the enforcement of the agreement. *See* Compl. ¶¶ 157-161; Prayer for Relief ¶ 4. Hence, Plaintiff's claim is based on its rights under a contract—the Comanche Settlement Agreement—and is therefore not within the subject matter jurisdiction of this Court and must be dismissed.

B. Plaintiff's Count 2 Should be Dismissed Because Plaintiff Fails to State a Claim

Even if the Court determines it has jurisdiction to consider Plaintiff's Count 2, Plaintiff fails to state a claim that the NIGC Chairman's issuance of NOV-09-35 was arbitrary and capricious because it effectively ordered closure of Plaintiff's casino. Its claims have already been denied and Plaintiff fails to plead any facts establishing a cause of action. Compl. ¶¶ 148-51. First, this Court has already found that the issuance of NOV-09-35 was not final agency action. *Ft. Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 103 F. Supp. 3d 113, 121 (D.D.C. 2015) (finding that judicial review under section 706(2) was precluded because NOV-09-35 was

not final agency action); *see also Comanche Nation* litigation Tr. 31:17-19; 32:4-12, Aug. 21, 2009 (court found that the same NOV challenged in this case was not a final agency action subject to judicial review); *In re: Sac & Fox Tribe of Miss. in Iowa*, 340 F.3d at 756 ("The IGRA by its express terms makes the actions of the Chairman in issuing an NOV or temporary closure order preliminary and intermediate."). Because there is no final agency action with respect to NOV-09-35, Plaintiff has failed to state a claim. *Ft. Sill Apache Tribe*, 103 F. Supp. 3d at 122.

In defense of its initial complaint, Plaintiff argued that NOV-09-35 could be deemed a final agency action because of its practical effects and that its consequences were indistinguishable from a temporary or permanent closure order. *Id.* at 121. In holding that NOV-09-35 was not final agency action, the Court noted that Plaintiff made the decision to close its gaming facility because it could not afford the substantial fines threatened in the NOV. *Id.* at 121-22. As the Court found, NOV-09-35 did not mandate the closure of the gaming facility, it was a decision made by Plaintiff. *Id.* Therefore, the Court held that judicial review under the APA was precluded because there had been no final agency action. *Id.* at 122. Plaintiff's attempts to again assert that NOV-09-35 was in effect a formal closure order should be denied. Plaintiff still cannot plead that NOV-09-35 was final agency action subjecting it to review under section 706(2) and its Count 2 should be dismissed.

Second, Plaintiff fails to adequately allege that the NIGC, through issuance of NOV-09-35, effectively ordered the closure of its gaming facility and thus violated NIGC regulations. Compl. ¶¶ 149-51. Notices of violation and temporary closure orders are distinct actions governed by IGRA. 25 U.S.C. § § 2713 (a) and (b). A temporary closure order is issued as a result of substantial violations of IGRA, NIGC Regulations or tribal regulations, ordinances, or resolutions, and requires a respondent to close its gaming facility. *Id.* § 2713(b). Because a

respondent must temporarily close its facilities, IGRA provides a time frame for conducting a hearing to determine if the order should be made permanent or dissolved. *Id.* § 2713(b). A notice of violation, on the other hand, is a complaint that puts a respondent on notice that the Commission has reason to believe that it is engaged in activities that may result in the imposition of a fine or, if a substantial violation, a temporary closure order. *Id.* § 2713(a)(3).

Here, the NIGC did not levy or collect any fines or require Plaintiff to cease gaming at Akela Flats. NOV-09-35 at 6. It was not a closure order. *Id.* NOV-09-35 provides:

> The violation cited above *may result in the assessment of a civil fine* against Respondent in an *amount not to exceed $25,000 per violation per day*. Under 25 C.F.R. § 575.5(a), Respondent may submit written information about the violation to the Chairman within fifteen (15) days after service of this notice of violation (or such longer period as the Chairman may grant for good cause). The Chairman shall consider any information submitted in determining the facts surrounding the violation and *the amount of the civil fine, if any*.

NOV-09-35 at 6 (emphasis added). The Chairman had not even issued a proposed civil fine assessment when Plaintiff decided to close its facility to avoid any fines. *Ft. Sill Apache Tribe*, 103 F. Supp. 3d at 121. Accordingly, there was no final agency action with respect to NOV-09-35 as this Court has previously found. *Id.* at 121-22

C. Plaintiff's Count 3 Should be Dismissed Because Plaintiff has Failed to State a Claim that Federal Defendants are in Breach of the Comanche Settlement Agreement

Plaintiff's Claim 3, breach of the Comanche Settlement Agreement should be dismissed because Plaintiff fails to state a claim. Specifically, Plaintiff alleges that Federal Defendants breached the Comanche Settlement Agreement: (1) by taking positions in NOV-09-35 and advisory opinions that contradict the recitals contained in paragraph 7 of the agreement; (2) in issuing the 2015 Decision and the NIGC 2017 Letter; (3) in communications between NIGC and Interior; and (4) in NIGC's consideration of the application of IGRA exceptions to Akela Flats.

Compl. ¶¶ 157-61. But the Comanche Settlement Agreement contains no such affirmative obligations and Federal Defendants could not have breached the agreement in the ways Plaintiff suggests. Federal Defendants' only operative commitments under the Comanche Settlement Agreement were to (1) accept and timely process Plaintiff's application for a reservation proclamation, Comanche Settlement Agreement at ¶ 7(l); and (2) withdraw two Associate Solicitor's Opinions and disclaim any reliance on them, *Id.* at ¶ 8. Plaintiff's allegations cannot constitute a breach of these obligations. As such, Plaintiff fails to state a claim for breach of the Comanche Settlement Agreement.

1. NOV-09-35 and Advisory Opinions

As an initial matter, the Western District of Oklahoma already found that NIGC's issuance of NOV-09-35 and positions taken in advisory opinions did not breach the Comanche Settlement Agreement. As discussed above, *supra* III.B.-C., in 2008 and 2009, Plaintiff filed motions in the Western District of Oklahoma arguing that NOV-09-35 and two associated advisory opinions violated the Comanche Settlement Agreement. W.D. Okla. ECF Nos. 84, 102, and 116. The district court denied Plaintiff's motion each time. In addressing Plaintiff's second motion to enforce the Comanche Settlement Agreement, in which Plaintiff argued that the advisory opinions and NOV-09-35 breached the settlement agreement, the district court stated

> However, I do not have before me any final agency action violative of any contractual undertaking in the settlement agreement. We've been here before. We have looked at . . . Section 7. We've looked at the various recitals in Section 7. We have looked, in particular, at considerable length at subsection (i) of Section 7. And the Fort Sill Apache Tribe may well, with good reasons, be concerned about where the ultimate outcome of the administrative phase of the process will leave it vis-à-vis its desire to conduct gaming operations at Akela Flats.
>
> The Fort Sill Apache Tribe may have some concerns about where it will come out in the administrative phase of the process with respect to its desire to reach a conclusion and reach a result for which the recital in subdivision (i) of Section 7

> will be one building block. But that does not alter the fact that we have no final agency action violative of any contractual undertaking in the settlement agreement. Even if we did, the fact is that subdivision (i) of Section 7 is only a recital.
>
> I have confirmed that recital in my October 7 order. It is not only non-incumbent upon this Court, but not appropriate for this Court with this case in its present posture to go any further than that. For that reason, the motion we have . . . is in all respects denied.

Tr. 31:17-25; 32:1-18, Aug, 21, 2009. *See also Kansas ex rel. Schmidt v. Zinke*, --- F.3d ---, 2017 WL 2766292, *3-4 (10th Cir. June 27, 2017) (holding that NIGC legal opinion regarding eligibility of Indian lands for gaming was not reviewable final agency action under IGRA).

Likewise, the Court should find that Plaintiff's claims that Federal Defendant's breached paragraph 7(j) of the Comanche Settlement Agreement by issuing NOV-09-35 and the advisory opinions without merit. First, as the Western District of Oklahoma found, NOV-95-35 and the two advisory opinions are not final agency action violative of any contractual undertaking. *See also Ft. Sill Apache Tribe*, 103 F. Supp. 3d at 121-22. Second, as the district court recognized when it considered the consequence of paragraph 7(i), paragraph 7(j) is only a recital. It is well-established that recitals such as this "cannot create any right beyond those arising from the operative terms of the document." *Grynberg v. F.E.R.C.*, 71 F.3d 413, 416 (D.C. Cir. 1995) (quotations and citations omitted). Plaintiff's claim that these actions are in breach of the Comanche Settlement Agreement should be dismissed.

2. Communications between Interior and DOI

For the same reason, Plaintiff's argument that Interior "breached the Comanche Settlement Agreement because, in communications between the DOI and the NIGC concerning the validity of NOV-09-35, [Interior] failed to consider and comply with the intent of its agreements in the Comanche Settlement Agreement on the NIGC's application of the IGRA

exceptions to the Akela Flats land[,]" Compl. ¶ 160, fails to state a claim. Communications between agencies are not final agency actions and any communications are not violative of any contractual undertaking in the settlement agreement. "As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177–78 (internal citations and quotation marks omitted); *see AT & T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). Any communications between Federal Defendants fail to satisfy either condition: they neither mark the consummation of the agencies' decisionmaking process nor determine Plaintiff's legal rights or obligations. They are, at best, informal discussions and not formal positions adopted by the agencies. *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1192 (10th Cir. 2013) (emails were preliminary opinion by an individual employee, and not a formal position adopted by the agency). As such, Plaintiff cannot assert a breach of the Comanche Settlement Agreement arising from any communications between Federal Defendants.

3. NIGC's Consideration of IGRA Exceptions to Akela Flats

As to Plaintiff's allegation in Count 3 that "[t]he NIGC breached the Comanche Settlement Agreement because it failed to consider and comply with the United States' agreements in the Comanche Settlement Agreement on the application of the IGRA exceptions to the Akela Flats land," Compl. ¶ 161, Plaintiff fails to state a claim because it cannot show that the complained of activities "breach" or otherwise "violate" the settlement agreement. The Comanche Settlement Agreement contained no operative obligations on the United States concerning application of the IGRA exceptions to Akela Flats land, nor could it. The parties to

the agreement could not contractually agree as to Akela Flats eligibility for gaming under IGRA's exceptions. Plaintiff attempts to read language into the Comanche Settlement Agreement that is not there and fails to demonstrate any obligation or duty arising under the Comanche Settlement Agreement relating to the application of the IGRA exceptions to gaming on Akela Flats. This claim should therefore be dismissed.

4. Issuance of the 2015 Decision and NIGC 2017 Letter

Plaintiff's remaining allegations in Count 4 that Federal Defendants "[have] continued to breach the Comanche Settlement Agreement. The [2015 Decision] and the [NIGC 2017 Letter] directly contradict the Comanche Settlement Agreement," Compl. ¶ 158, also fail to state a claim. Specifically, Plaintiff alleges that Federal Defendants breached, paragraph 7(j) of the Comanche Settlement Agreement, which is a recital and created no obligation on Federal Defendants.[4] To prevail on a claim of breach of contract, a party must establish (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach. W*indow Specialists, Inc. v. Forney Enterprises, Inc.*, 106 F. Supp. 3d 64, 88 (D.D.C. 2015) (citing *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). A "breach" is "an unjustified failure to perform all or any part of what is promised in a contract entitling the injured party to damages." *Window Specialists*, 106 F. Supp. 3d at 88 (quoting *Fowler v. A & A Co.*, 262 A.2d 344, 347 (D.C.1970)). A party breaches a contract by "failing to perform one's own promise." Black's Law Dictionary (10th Ed. 2014) (A "breach" of an agreement means a "failure, without legal excuse, to perform any promise which forms the whole or part of a contract.").

[4] This argument assumes that the NIGC 2017 Letter is final agency action, which Federal Defendants assert it is not. As Federal Defendants have argued, the NIGC 2017 Letter is not final agency action that is in violation of any contractual undertaking in the settlement agreement.

The Commission's issuance of the 2015 Decision and the 2017 letter did not breach paragraph 7(j) of the Comanche Settlement Agreement because this paragraph is a recital. *See* Tr. 31:17-19; 32:4-12, Aug. 21, 2009 (ECF No. 10-3) ("paragraph 7 purports only to be a series of representations. And as my contacts professor tried to drum into me, if you're going to sue for breach of contract, you better have a contractual undertaking as opposed to a representation."). Paragraph 7(j) provides:

> On or about August 16, 1976, the Commissioner of Indian Affairs formally approved the Constitution of the Fort Sill Apache Tribe, and thereafter the United States acknowledged the Fort Sill Apache Tribe to be a Federally Recognized Tribe, and has maintained a government-to-government relationship with the Fort Sill Apache Tribe since that date. *See* 70 Fed. Reg. 71194.

Comanche Settlement Agreement, ¶ 7(j). This paragraph is simply a factual statement. The paragraph explains that the Commissioner of Indian Affairs approved Plaintiff's constitution in 1976 and that thereafter the United States acknowledged Plaintiff as a federally recognized tribe. No one disagrees with this statement. NIGC agrees; Interior agrees; and Plaintiff agrees. Indeed, NIGC recognized in its 2015 Decision that "[t]he Tribe is a federally recognized Indian tribe with its headquarters in Apache, Oklahoma." *Id.* ¶ 4. The 2015 Decision even quotes the exact language from the Comanche Settlement Agreement:

> On or about August 16, 1976, the Commissioner of Indian Affairs formally approved the Constitution of the Fort Sill Apache Tribe, and thereafter the United States acknowledged the Fort Sill Apache Tribe to be a Federally Recognized Tribe, and has maintained a government-to-government relationship with the Fort Sill Apache Tribe since that date. Agreement of Compromise and Settlement Recitals ¶ 7(j), *Comanche Nation v. United States*, No. Civ-05-328 (W.D. Okla. March 8, 2007).

2015 Decision, p. 13.

But Plaintiff takes this language several steps further and alleges that what the provision really means is that not only did the United States affirm that Plaintiff is federally recognized,

but that Plaintiff was federally recognized as an "'Indian tribe acknowledged under the Federal acknowledgement process' as required by 25 U.S.C. § 2719(b)(1)(B)(ii)." Compl. ¶ 162. Thus, Plaintiff claims that this paragraph really means that it meets the initial reservation exception to the general IGRA prohibition for gaming on lands acquired after October 17, 1988. This is not a description of a breach. This is Plaintiff attempting to read language into a recital that is not there, which it cannot do.[5]

A mere belief about the legal implications of a recital in a contract is not a breach of the contract. It is well-established that recitals such as this, "cannot create any right beyond those arising from the operative terms of the document." *Grynberg*, 71 F.3d at 416; *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2d Cir. 1985); *Genovese Drug Stores v. Connecticut Packing Co.*, 732 F.2d 286, 291 (2d Cir. 1984) ("recitals . . . cannot control the clearly expressed stipulations of the parties; and where the recitals are broader than the contract stipulations, the former will not extend the latter."); *GHH Invests., LLC v. Chesterfied Mgmt., Assocs.*, 262 S.W.3d 687, 693 (Mo. Ct. App. 2008) ("recitals are not strictly part of the contract because they do not impose contractual duties on the parties"); *Chies v. Highland Bank*, No. C8-00-1630, 2001 WL 214693, *1 (Minn. App. 2001) ("The recital is not part of the contractual obligations assumed by the terms thereof.").

The key to a breach of contract claim is the existence of a "breach." Plaintiff has not pointed to any breach; Plaintiff has pointed to a recital, one which Federal Defendants have affirmed. Plaintiff complains about "communications between NIGC and Interior" and their consideration of the "application of IGRA exceptions to Akela Flats." Compl. ¶¶ 160-61. But

[5] Plaintiff's interpretation of this recital also runs afoul of the agreement's merger clause, which states that the agreement "sets forth the entire agreement and understanding between the parties on the subject matter hereof and merges all prior discussions and negotiations between and among them." Comanche Settlement Agreement, ¶10.

Federal Defendants have taken no actions prohibited by the agreement and they are not refusing to do anything required by the agreement. In fact, the one operative action that Interior was required to take, accepting and processing an application for a reservation proclamation for Akela Flats, Comanche Settlement Agreement at ¶ 7(l), was performed. 2015 Decision at 29; *see also* Tr. 38:14-20, Aug. 7, 2008 ("My reading of paragraph 7 suggests that the only contractual undertaking as opposed to representation in paragraph 7 is to be found in the last sentence of paragraph (l), which is the last sentence of paragraph 7. Specifically, the United States agrees to accept and timely process the application. That is an express undertaking."). Federal Defendants have not broken any promise in the settlement agreement. Therefore, there can be no breach or "violation," as alleged by Plaintiff and Count 3 should be dismissed.

D. Count 4 Should be Dismissed

In opposing Plaintiff's Motion to Amend, Federal Defendants set forth multiple reasons why Plaintiff could not state a claim with respect to the NIGC 2017 Letter. ECF No. 77. The Court granted Plaintiff's motion in part without issuing a written decision on the merits or substantively addressing Federal Defendants' arguments. *See* July 7, 2017, Minute Order. Federal Defendants hereby, respectfully request that the Court reconsider the findings as to final agency action that it made during the June 29, 2017, hearing and incorporated into its July 7 Order. Federal Defendants also advance additional arguments that were not made in its opposition to the motion to amend.

1. The Finding of Final Agency Action Should be Reconsidered

The Court should reconsider its finding that the NIGC 2017 Letter constitutes agency action because it did not consider controlling decisions and data that might reasonably alter its conclusion. *Singh*, 383 F. Supp. 2d at 101 (citing *Shrader*, 70 F.3d at 257). Plaintiff's First

Amended Complaint included a cause of action to seeking to set aside NIGC's 2015 Decision as arbitrary and capricious. ECF No. 80 (Count 1). Under black letter APA law and Supreme Court and D.C. Circuit precedence, if successful on the merits, the Court would remand the 2015 Decision to NIGC at which point a new final agency decision could be rendered. *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-151 (D.C. Cir. 1993). Accordingly, if the Court found in favor of Plaintiff on Count 1 of the First Amended Complaint, a merits decision would result in a directive to NIGC to reconsider its 2015 Decision and NIGC would issue a new final agency action. To put it another way, under the judicial review constraints in an APA case, the only way for the Court to direct an agency to issue a new final agency action would be to issue a merits decision against it. It is for this reason that Federal Defendants confirmed and re-confirmed on multiple occasions that the August Order did not constitute a merits decision. *See supra* III.D.3.; ECF No. 51 at ¶ 7 ("Defendants do not read the Court's order or comments at the status conference to constitute a merits decision"); ECF No. 54 at ¶¶ 6-7; Tr. 3:10-14, Sept. 30, 2016 ("the order is not intended and . . . does not constitute a ruling on the merit"); and Tr. 4:13-17, Dec. 2, 2016 ("by ordering them to produce the letter you're addressing the merits . . .").

Very respectfully, recognizing this concern, the Court agreed throughout the settlement process that it was in fact *not* issuing a merits determination by way of the August Order and thus, NIGC could not have been directed to issue new final agency action. Tr. 6:14-17, Sept. 16, 2016 ("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."); *Id.* at 7-8:24-1 ("I can see why the department would be concerned about that [i.e. whether the August Order essentially constituted a merits decision]. I don't think that that actually is what happened."); Tr. 3:11-15, Sept. 30, 2016 ("the [August] order is certainly not intended and I think does not constitute a ruling on the

merits."); Tr. 4:18-21, Dec. 2, 2016 (rejecting Interior's concern that by ordering agency to produce letter, Court was addressing the merits of the case). In addition, the Court also found in a written opinion denying Plaintiff's Motion to Enforce that NIGC complied with the August Order when it issued the NIGC 2017 Letter. February 17, 2017, Memorandum Opinion, ECF No. 70 ("the Court finds that NIGC by all appearances acted in good faith and in substantial compliance with the Court's order."). Notably, the NIGC 2017 Letter directly stated that it "does not . . . constitute final agency action." *Id.* However, at the hearing on June 29, the Court stated that "I believe the intent and explicit language of my order was to the effect that that would be a new final decision from the agency. That was the party's request to me, all parties." Tr. 5:7-10, June 29, 2017. Respectfully, as a matter of law, the Court could not direct NIGC to issue a final agency action without finding for Plaintiff's on the merits and issuing a remedy order against NIGC.

Although Plaintiff requests in its Second Amended Complaint that the Court reverse the 2015 Decision and vacate NOV-09-35, in an APA action such as this, that requested relief is not automatic, even if Plaintiff was successful on its claims. Even if Plaintiff could show that the NIGC's decision was arbitrary or capricious (which Federal 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 such as vacatur 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*, 988 F.2d at 150. 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 directive to issue a new 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. Again, very respectfully, the record outlined above shows that Federal Defendants did not agree to issue a new final decision (indeed, they objected to any notion that the letter would be anything other than a settlement document) and the Court also made clear that it agreed that the August Order was for settlement purposes only and was specifically not a merits decision. Federal Defendants will suffer legal harm if their request for reconsideration is denied. *See Powers-Bunce*, 576 F. Supp. 2d at 69 (the movant must demonstrate that some harm, legal or at

least tangible, would flow from a denial of reconsideration). A denial will result in an agency action being considered final and subject to judicial review (subject to Federal Defendants many other dismissal arguments here) when it was not intended to be. Accordingly, Federal Defendants respectfully request that in light of the various filings, transcripts, and records from this case as well as the APA standard of review, that the Court reconsider its June 29th finding with respect to final agency action for the NIGC 2017 Letter and hold that there was no final agency action as a result of the August Order.

2. IGRA Precludes APA Review of the NIGC 2017 Letter as a Matter of Law under Sections 2710-2713

The APA does not create an independent basis of jurisdiction. *Califano v. Sander*s, 430 U.S. 99, 105-07. Rather, it confers a cause of action upon person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. But that cause of action is limited to the extent that a relevant statute "preclude[s] judicial review," 5 U.S.C. § 701(a)(1). The relevant statute here, IGRA, enumerates four specific categories of actions that are "final agency actions" reviewable under the APA:

> Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5.

25 U.S.C. § 2714; *see also id.* § 2713(c) ("A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code."). Reviewable final agency decisions therefore only include decisions "made by the Commission" on tribal gaming ordinances, 25 U.S.C. § 2710; on management contracts, *id.* § 2711; on existing ordinances and contracts, *id.* § 2712; and on civil penalties or closures, *id.* § 2713. Each of the enumerated actions requires a *decision* by the full Commission—rather than,

for instance, an advisory letter from the Commission clarifying the status of a prior Commission decisions—and has attendant administrative processes that result in the reviewable final decision. 25 C.F.R. Pts. 522, 533, 573, 575, 580-585. Here, the NIGC 2017 Letter does not fall into any of these categories. The parties agree, as they must, that the letter is not a decision on an ordinance or management contract. Therefore, sections 2710, 2712, and 2712 are inapplicable. And the NIGC 2017 Letter did not address NOV-09-35 nor was it a decision with respect to that NOV. The 2017 NIGC Letter was only related to a letter issued by Interior. There is no plausible argument that the NIGC 2017 Letter was issued under Sections 2710, 2711, 2712, and 2713. Accordingly, IGRA precludes judicial review of the NIGC 2017 Letter because it is not one of the four enumerated categories of decisions enumerated in the statute as final agency actions for purposes of judicial review.

In a decision issued last month, the Tenth Circuit as confirmed this principle. That court found that the text of IGRA, in specifying which NIGC actions are final agency decisions for the purposes of APA review results in the "implied corollary . . . that other agency actions are not final, and ergo, not reviewable." *Kansas ex rel. Schmidt v. Zinke*, --- F.3d ---, 2017 WL 2766292, *3-4 (10th Cir. June 27, 2017) (citing *Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1171 (N.D. Okla. 2002)); *see also Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) ("the legislative history of the [IGRA] reflects an intent to limit judicial review only to certain agency decisions, thereby overcoming the APA's presumption of judicial review."); *Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d 141, 150 (D.D.C. 2011) ("[j]udicial review of the NIGC's decisions is restricted to final decisions under 25 U.S.C. §§ 2710-13."); *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1049 (11th Cir. 1995) ("In the

face of these express rights of action [in 25 U.S.C. § 2714], we adhere to '[a] frequently stated principles of statutory construction[:] when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'") (quoting *Nat'l R.R. Passenger Corp. v. Nat'l Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974)); *In re: Sac & Fox Tribe of the Miss. in Iowa*, 340 F.3d 749, 756-57 (8th Cir. 2003) (IGRA precludes review of temporary closure order). This conclusion is further reinforced by IGRA's statutory scheme because sections 2710 to 2713 confer upon the Chairman the authority to take specified actions related to regulation of gaming on Indian lands (*e.g.*, approval and disapproval of ordinances and management contracts, and enforcement action).[6]

In *Oklahoma v. Hobia*, 775 F.3d 1204 (10th Cir. 2014), the court held that a letter issued by the NIGC Chair (adopting a General Counsel's opinion letter) determining that a tribe lacked jurisdiction to conduct gaming on particular property did not moot the State's claim alleging that the property was ineligible for gaming because

> The letter did not constitute 'final agency action' under IGRA. *See* 25 U.S.C. § 2714 (defining what constitutes 'final agency action' under IGRA).

*Id.*at 1210. The court noted that the letter did not involve an approval of any proposed tribal ordinance or resolution authorizing gaming or a tribal-state gaming compact under § 2710, nor concern the Chair's authority under 25 U.S.C. § 2711 of § 2712. *Id.* at 1210 n.1. This case provides another direct example that final agency actions under IGRA are limited. As in *Hobia*, the 2017 NIGC letter simply does not fall within one of the four specifically statutorily

[6] While provisions of the Act confer investigative and administrative powers upon the Commission or its Chairman, these types of activities are ordinarily not judicially reviewable under the APA. *See, e.g.*, 25 U.S.C. § 2706 (Commission's non-delegable power to approve budget and establish fees; *id.* § 2707 (Chair's power to staff); *id.* § 2708 (Agency's access to information of other federal agencies; *id.* § 2715 (Commission's authority to issue subpoenas and take depositions).

authorized categories of final agency action. Therefore, the NIGC 2017 letter is not a final agency action as a matter of law and is not challengeable in an APA case. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (holding that if there is no final agency action, claimant would lack a cause of action under the APA).

The legislative history of IGRA reflects a specific intent to limit judicial review to certain agency decisions. Congress did not intend every action of the Commission to be subject to APA review. Before enacting IGRA, the Senate stated that Section 15 of the Act, which enumerates the actions of the Commission that are judicially reviewable of the Act, provides "that certain Commission decisions will be final agency provisions for the purposes of court review." *See* S. Rep. No. 100–446 at 20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3090. Congress therefore directly intended that only a specific statutorily defined "final agency action" can serve as a prerequisite for judicial review. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians*, 360 F. Supp. 2d at 67 ("the legislative history of the [IGRA] reflects an intent to limit judicial review only to certain agency decisions, thereby overcoming the APA's presumption of judicial review."); *Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d 141, 150 (D.D.C. 2011) ("[j]udicial review of the NIGC's decisions is restricted to final decisions under 25 U.S.C. §§ 2710-13."); *Cheyenne-Arapaho Gaming Comm'n*, 214 F. Supp. 2d at 1171-72 (holding that the language of IGRA and the legislative history indicate that Congress intended that there be a decision by the Commission pursuant to certain sections of IGRA as a prerequisite for judicial review). Here, Plaintiff's Count 4 does not fall within any of the statutory categories for which IGRA provides judicial review. Accordingly, for Plaintiffs to state a valid claim under the IGRA or the APA, Plaintiff must show that its claims involve a final agency decision for which IGRA provides judicial review. Plaintiff fails to do so and its Count 4 should be dismissed.

3. The NIGC 2017 Letter was not the Result of an Administrative Process and therefore cannot be a final agency action as a matter of law

There is also no legitimate dispute that consideration of an agency decision must be accompanied by and be a part of an attendant administrative process, which ultimately results in reviewable final decision. *See* 25 C.F.R. Pts. 522, 533, 573, 575, 580-585. When a party appeals a decision to the Commission, as Plaintiff did regarding NOV-09-35 (which resulted in the 2015 Decision), NIGC regulations provide an appeals process that sets forth the requirements and the parties' duties when appealing a decision before the Commission. One aspect of the appeals process is that interested parties may seek to intervene and participate in the pending appeal. 25 C.F.R. §§ 584.5 and 585.5. In this matter, the State of New Mexico filed a petition to intervene in Plaintiff's appeal of NOV-09-35, which the Commission granted on September 18, 2009. New Mexico, however, did not participate in the parties' settlement process for this litigation and was afforded no opportunity to submit comment or present evidence on the NIGC 2017 Letter. 94–1031

Another aspect of the appeals process involves reconsideration of the Commission's decision. The Commission's decision on appeal is a final agency action for purposes of judicial review. 25 C.F.R. § 580.10. Once the Commission issues a final decision on appeal, a party to the proceeding may file a motion for reconsideration of the Commission's final decision. 25 C.F.R. § 581.6. Under NIGC regulations, for the Commission to reach a decision on a motion to reconsider, a number of procedural steps must occur, including: (1) the movant must file its motion within 30 days (which the Commission may waive, *see* 25 C.F.R. § 580.4(f)) of the Commission's final decision, and the motion must be served on all parties, including intervenors (here, the State of New Mexico), 25 C.F.R. § 581.6(b); (2) a motion for reconsideration must

explain the circumstances requiring reconsideration, *id.*; (3) opposition briefs to the motion for reconsideration must be filed within twenty days, *id.* at § 581.6(d); (4) a reply brief in support of the motion for reconsideration must be filed within fifteen days of the opposition brief, *id.* at § 581.6(e); and (5) the Commission must issue a decision on reconsideration within thirty days of the filing with a brief statement of its decision, *id.* But here, Plaintiff never filed a motion to reconsider pursuant to 25 C.F.R. § 581.6, which triggers the procedures listed above. As a result, one of the parties to the appeal, New Mexico, was unable to participate in a process in which it has significant interest. And no other parties with significant interest in the matter, including the public and other affected tribes, had the opportunity to participate as provided for in 25 C.F.R. § 582.5. Because the NIGC 2017 Letter did not follow NIGC regulations, it is not final agency action.

Moreover, the NIGC 2017 Letter cannot legally constitute a formal reconsideration because there was no new information provided to give the Commission grounds to reconsider its prior decision. For the Commission to have sua sponte issued a new final agency action subject to judicial review on Plaintiff's underlying claim that Akela Flats is eligible for gaming, it would have had to be provided new information on which it could act. *See I.C.C. v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 279 (1987). Here, there was no new information. The letter from Interior did not provide any grounds on which the Commission could revisit any portion of its 2015 Decision. *See* NIGC 2017 Letter. Therefore, because the letter was not the result of the Commission's customary and required administrative process and there was no new information for the Commission to consider, Plaintiff fails to state a claim. Therefore, Count 4 of Plaintiff's second amended complaint and it should be dismissed.

4. The APA Precludes Review of the NIGC 2017 Letter Because It Is Not Final Agency Action

Assuming for the sake of argument that IGRA's list of final NIGC actions subject to judicial review under the APA is not exhaustive and that IGRA does not preclude APA claims challenging actions not listed in section 2714, Plaintiff's claim still fails because there is no final agency action that is judicially reviewable. The APA provides a generic cause of action to "[a] person affected or aggrieved by *agency action*." 5 U.S.C. § 702 (emphasis added). Review under the APA is further limited to "*final* agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added). "Whether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable." *Id.*

The APA defines an "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof[.]" 5 U.S.C. § 551(13). While this list is expansive, the D.C. Circuit has "long recognized that the term [agency action] is not so all-encompassing as to authorize [the court] to exercise judicial review over everything done by an administrative agency." *Fund for Animals, Inc. v. Bureau of Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006); *see also Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004). "Much of what an agency does is in anticipation of agency action." *Fund for Animals*, 460 F.3d at 19-20. "Agencies prepare proposals, conduct studies, meet with members of Congress and interested groups, and engage in a wide variety of activities that comprise the common business of managing governmental programs." *Id.* at 20 citing *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427.

An agency action is "final" when (1) the agency reaches the "consummation" of its decision-making process and (2) the action determines the "rights and obligations" of the parties

or is one from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Absent "agency action" within the meaning of the APA, the action is not reviewable. And section 704 specifies that agency action is not final for purposes of section 704 if the agency "requires by rule[,] and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. In other words, agency action is not final for purposes of section 704 until "an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule[.]" *Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

The D.C. Circuit has consistently refused to review agency orders "that do [] not [themselves] adversely affect complainant[s] but only affect[] [their] rights adversely on the contingency of future administrative action." *Fund for Animals*, 460 F.3d at 22 (citation omitted) (some alterations in original, some added). *See also Lac Vieux Desert Band of Lake Superior Chippewa Indians of Mich.*, 360 F. Supp. 2d at 68 (because advisory letters from the General Counsel of NIGC and a Department of Justice official did not constitute final agency action, the "Court lack[ed] jurisdiction to review the actions of the NIGC to date and to order pre-emptive declaratory and injunctive relief regarding possible enforcement action . . ."). Here, Plaintiff argues that NIGC's letter constitutes final agency action. This argument fails for a number of reasons.

As a matter of law, NIGC's letter could not constitute final agency action. 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. ECF No. 67 at ¶ 8. In order to reopen a decision for the purposes of issuing final agency action, the NIGC may require briefing, may hold a hearing, or seek to engage the public and interested third parties. For every decision on appeal, whether it be an initial decision or a decision on

reconsideration, the full Commission considers the record before it and votes on the proposed decision. That vote is reflected in an internal notation document recording the results of that vote. In this case, no such vote occurred because, as the Commission made clear in its letter to the Tribe, there were no grounds to revisit its prior decision. ECF No. 74-6. NIGC's letter by no means marks the consummation of its decision-making process and did not determine any rights or result in legal consequences. *Bennett*, 520 U.S. at 178. The NIGC specifically stated that the letter "does not amend, supplant or otherwise have any legal effect on the May 5, 2015 Final Decision and Order or constitute final agency action." ECF No. 74-6. The letter was issued for settlement purposes only. *Id.* Plaintiff's rights and obligations remain the same as before the letter was sent, and remain the same as if no letter had been issued at all. Where "the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purposes of judicial review." *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 16 (D.C. Cir. 2005) (no final agency action where a party's liability remained exactly as it was before the action). Because NIGC's letter was issued as part of litigation settlement discussions, did not the result of any consummation of an NIGC decisionmaking process, and has no legal effect on the May 2015 Decision, it cannot be final agency action for which judicial review is available under the APA. *See DRG Funding Corp. v. Sec'y of Housing & Urban Dev.*, 76 F.3d 1212, 1214-15 (D.C. Cir. 1996) (court found that agency designee's written determination did not constitute final agency action because it did not directly affect the parties or determine their rights or obligations and was only an intermediate decision).

5. The NIGC 2017 Letter does not violate the NIGC-Interior Memorandum of Agreement

Plaintiff's claim that the NIGC letter is arbitrary and capricious because it violates an expired January 14, 2009, Memorandum of Agreement between NIGC and Interior ("2009

MOA") is subject to dismissal as a matter of law. Federal Defendants have demonstrated that Plaintiff cannot allege that the NIGC's letter was final agency action. But, even if the NIGC letter may be considered final agency action, which Federal Defendants assert it was not, Plaintiff fails to state a claim that NIGC's action violated the 2009 MOA. The 2009 MOA was an agreement between NIGC and Interior that addressed situations in which the parties may need legal advice on whether lands may be Indian lands on which a tribe may conduct gaming and the time frame for providing that advice when requested. ECF No. 80-4. Because this was an MOA on legal advice, it set forth how Interior's Office of Solicitor and NIGC's Office of General Counsel would interact. It set forth the steps the parties would follow when requesting legal advice and provided further recitals on the parties' good faith cooperation and attempt to reach agreement on opinions.

As an initial matter, NIGC's letter could not violate the 2009 MOA because, by its terms, the agreement is expired and has been for some time. 2009 MOA at ¶ 15 ("This [MOA] . . . will terminate 1 year after the date of execution, unless extended by mutual agreement."). Second, the 2009 MOA provided guidance for which agency was responsible for issuing a legal opinion on a given subject and the time period for providing that legal advice. 2009 MOA at ¶¶ 1-3. Under the 2009 MOA, the NIGC agreed that the Secretary of the Interior was responsible for making a decision as to whether a tribe met an IGRA exception when deciding whether to acquire land into trust for gaming purposes. *Id.*at ¶ 3. Interior agreed that the decision as to whether gaming is being conducted on Indian lands is a basic and essential jurisdictional requirement for the NIGC under IGRA. *Id.* at ¶ 2. With those agreements, the 2009 MOA provided a framework for which counsel was responsible for drafting a legal opinion regarding a particular parcel of land's eligibility for gaming, how the parties would work together, and a

timeframe for doing so. *Id.* at ¶¶ 3-12. The MOA 2009 is inapplicable here because, even if the letter were final agency action, the 2009 MOA does not apply to Commission decisions, does not apply to the parties' settlement discussions, and imposes no procedures or requirements on NIGC. Interior did not provide NIGC with a legal opinion pursuant to the expired 2009 MOA and NIGC was not required to provide any written submission. The parties in this case explored a settlement process for the claims in this case, which ultimately was unsuccessful. The 2009 MOA was not applicable to the process and Plaintiff's claim should be denied.

6. The NIGC 2017 Letter does not violate NIGC's Part 581 Regulations Regarding Motions for Reconsideration of Final Decisions on Appeal before the NIGC

Plaintiff is also incorrect in arguing that the NIGC letter is arbitrary and capricious because it violates NIGC's Part 581 regulations. Compl. ¶¶ 176-85. As stated before, under the APA, judicial review is only authorized for "[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added). Federal Defendants have demonstrated that Plaintiff cannot allege that the NIGC's letter was final agency action. But, even if the NIGC letter may be considered final agency action, which Federal Defendants assert it was not, Plaintiff fails to state a claim that NIGC's action violated its Part 581 regulations. The regulations, "Part 581, Motions in Appeal Proceedings Before the Commission," have no application to this case. NIGC's Part 581 regulations govern motion practice before the NIGC for appeals made under Parts 582 – 585. Under these regulations, if the NIGC made a final agency decision, and a party chose to seek reconsideration of that decision to the full Commission, they would follow the internal procedures set forth in the Part 581 Regulations.

The specific regulation Plaintiff cites, "25 C.F.R. § 581.6, How do I file a motion for reconsideration?", provides the steps a party must follow when filing a request to the NIGC to reconsider a final decision on appeal before the Commission. Plaintiff selectively quotes from 25 C.F.R. § 581.6 in order to give the appearance that the regulation not only applies to the case at hand, but that the NIGC also is in violation of this regulation. Plaintiff is wrong. First, Plaintiff never filed a motion for reconsideration of the Commission's final decision, which would have triggered the procedures Plaintiff claims the Commission failed to follow. Second, these regulations only apply to appeals *within* the NIGC and have no bearing on a district court litigation. They simply do not create a cause of action and Plaintiff has not met its burden to establish otherwise. The Part 581 regulations do not apply to the NIGC's letter, which was issued for settlement purposes only pursuant to the Court's Order and under no circumstance was a final agency action or even an appealable decision within the NIGC's internal administrative process. Therefore, Plaintiff's claim in Count 4 alleging that the NIGC 2017 Letter violates NIGC regulations should be dismissed.

VII. CONCLUSION

Federal Defendants, therefore, respectfully request that the Court reconsider its July 7, 2017, Order and statements on the record that the NIGC 2017 Letter constitutes final agency action. Federal Defendants further request that the Court dismiss Counts 2 through 4 of Plaintiff's Second Amended Complaint for failure to state a claim.

Respectfully submitted this 28th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filings to the parties entitled to receive notice.

s/ Jody H. Schwarz