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' REPLY IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION AND PARTIAL DISMISSAL OF PLAINTIFF'S SECOND AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiff fails to meet its jurisdictional burden for its Count 2 claim that the NIGC forced closure of its casino without due process and its Count 3 claim that Federal Defendants violated the Comanche Settlement Agreement, and they must be dismissed. Plaintiff still fails to state a claim that the NIGC forced closure of its casino because the basis for its allegations – issuance of NOV-09-35 – is not a final agency action and this Court already found that Plaintiff, and not the NIGC, ultimately decided to close the casino. The Court should decline Plaintiff's invitation to exercise ancillary jurisdiction over the claimed violation of the Comanche Settlement Agreement because the claim is defective. Plaintiff is incorrect in asserting that because it alleges violations of the APA and IGRA, it somehow means that Plaintiff may state a claim for breach of contract. Plaintiff must point to the plain language of the agreement and demonstrate how the operative terms of the agreement support its assertions. Plaintiff cannot do so because the Comanche Settlement Agreement's plain language does not support Plaintiff's overbroad interpretation. Plaintiff pleads no facts supporting its allegations, only legal theories, which fail to state a claim and should be dismissed.

As to Plaintiff's Count 4 claim that the 2017 NIGC Letter is arbitrary and capricious, Federal Defendants have shown that reconsideration of the Court's finding that the 2017 NIGC Letter constitutes final agency action is appropriate and that harm and a legal impossibility would result if reconsideration were denied. Federal Defendants do not seek to rehash arguments made before the Court, but rather respectfully point out that consideration of controlling decisions and data might reasonably alter the Court's conclusions. The Court based its finding that the letter was final action on its statement that in entering its orders, its intent was that NIGC would be issuing a new final decision. But, as Federal Defendants have pointed out,

the Court could not, as a matter of law, direct the NIGC to issue a final agency action without finding for Plaintiff on the merits. Although Plaintiff asserts that because it does not seek vacatur, the Court is not issuing a merits determination, the form of relief requested is not what makes the Court's decision a merits determination. The Court's finding is a merits determination because under the judicial review constraints in an APA case, the only way for a Court to direct an agency to issue a new final agency action is to issue a merits decision against the agency. It is for this reason that Federal Defendants sought and obtained, on multiple occasions, confirmation from the Court that the Court was in fact only directing the conclusion of the settlement process by was of the Interior and NIGC letters.

Separately, the Court lacks subject matter jurisdiction over Count 4 because the operative statute, IGRA, does not allow the 2017 NIGC Letter to constitute reviewable final agency action as a matter of law. Plaintiff does not dispute that IGRA limits what agency actions are reviewable in district court. Plaintiff disputes the factual scenarios of the case authorities cited in Federal Defendants' motion. But Federal Defendants did not cite the cases for their spot on factual situations; Federal Defendants cited the cases because they discuss and apply the law. The cases' holdings, that IGRA limits judicial review to four categories of decisions, none of which cover the 2017 NIGC Letter, are what is important for this Court's consideration. And as the case holdings confirm, IGRA precludes APA review of the 2017 NIGC Letter.

But even if IGRA did not preclude judicial review of the 2017 NIGC Letter, Plaintiff still fails to state a claim that it is arbitrary and capricious under the APA. First, the 2017 NIGC Letter does not violate a 2009 memorandum of agreement ("2009 MOA") between Interior and NIGC because (among many other reasons) the 2009 MOA expired by its terms and has not been re-implemented. Additionally, the 2009 MOA never applied to Commission decisions. Second,

NIGC appellate regulations are inapplicable because Plaintiff never appealed and sought reconsideration of the 2015 Decision after it was issued, the only situation to which the regulations would apply. Third, the Court reviewed the Interior letter *in camera* and has already held that the 2017 NIGC Letter did not violate the Court's order to consider the Interior letter as part of the settlement process. The Court found that the NIGC acted in good faith and denied Plaintiff's motion arguing that NIGC failed to comply with the Court's directive to issue the letter. Plaintiff's claims in Count 4 should, therefore, be dismissed for failure to state a claim.

Finally, Federal Defendants are compelled to respond to several inaccuracies in Plaintiff's opposition. First, this issue presented on reconsideration was not before the Court on four prior occasions. Plaintiff, of course, can point to no court opinion to support that proposition. As Federal Defendants' motion points out, throughout the long history of this case the Court has made clear that it was not ordering final agency action via the settlement process. *See* Tr. 3:14-15, 6:14-17, 7:2-4, 8-24; Tr. 3:11-15, 8:16-17, Sept. 30, 2016. This is Federal Defendants first and only motion on the subject, and the legal issues raised in Federal Defendants' prior opposition to Plaintiff's motion to amend have not been previously addressed, nor have the arguments that Federal Defendants are advancing for the first time in their motion to dismiss. Federal Defendants have shown why there could be no final agency action as a matter of law and Plaintiff cannot avoid its responsibility to oppose with any supportable legal argument it may have. Plaintiff, however, has not done so and instead frequently relies upon unfortunate hyperbole that permeates Plaintiff's filing. Second, the Interior Department has not issued any new "Indian Lands Opinion." Interior issued a confidential and privileged intra-government settlement communication as directed by the Court. That internal Interior letter – which Plaintiff contents Plaintiff only assumes – has no legal effect on this case. Third, there has been no delay

in resolving this case by the Federal Defendants. On the contrary, the Federal Defendants sought to return this case to active litigation in September 2016, ECF No. 54, which Plaintiff opposed. The Federal Defendants have agreed since the filing of the Amended Complaint in July 2015 that Plaintiff can challenge NIGC's 2015 Decision. A final decision on that claim will resolve all of the substantive legal arguments that Plaintiff has presented. The administrative record has been filed and summary judgment briefing can proceed at once. Plaintiff, however, has refused to directly address these dispositive legal issues and instead has sought to expand this suit to challenge a contract by going beyond its plain language and to challenge decisions that they know do not actually exist. This strategy has only served to delay the rightful conclusion of this case.

II. ARGUMENT

A. NOV-09-35 is not Final Agency Action and did not Mandate Closure of Plaintiff's Casino

Plaintiff's Count 2, which alleges that NOV-09-35 acted as an unlawful closure order and denied Plaintiff due process protections, fails to state a claim. As this Court has recognized, NOV-09-35 is not final agency action and NIGC did not mandate closure of Plaintiff's casino. Plaintiff argues that the Court's decision finding that NOV-09-35 is not final agency action no longer applies because through issuance of the 2015 Decision and 2017 NIGC Letter, NIGC reaffirmed and converted NOV-09-35 into final action. Plaintiff, however, misconstrues its own pleadings and wholly ignores the rationale of the Court's previous decision. The Court did not find that NOV-09-35 was not final agency action because Plaintiff's appeal of it was still pending. The Court, in response to Plaintiff's argument that the practical effects of NOV-09-35 had the same impact on its rights as an outright denial of relief, found that it was not

NIGC action that closed Plaintiff's casino, rather it was Plaintiff's own independent action. *Ft. Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 103 F. Supp. 3d 113, 121-22 (D.D.C. 2015).

Had the Chairman intended to close the casino, IGRA provides a mechanism for doing so. Notices of violation and a temporary closure orders are distinct actions governed by IGRA. A temporary closure order requires a respondent to close its gaming facility and is issued for substantial violations of IGRA, NIGC regulations or tribal regulations, ordinances, or resolutions. 25 U.S.C. § 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, followed by an order on whether to order permanent closure. 25 U.S.C. § 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. 25 U.S.C. § 2713(a)(3). Although a notice of violation may state that the respondent cannot cure the past violation and must cease gaming to correct any on-going violation, it does not require a respondent to close its facilities, as NOV-09-35 provided. The penalty facing the respondent is the imposition of fines. In this case, rather than request that the fine be minimal or not assessed at all, Plaintiff offered to close its facility, thus suspending the accrual of any potential fines, and proceed with an appeal of NOV-09-35. Plaintiff's decision to pursue its appeal in this manner cannot now be used as a basis to argue that the NIGC effectively ordered the closure or deprived Plaintiff of any due process protections.

Count 2 alleges that in issuing NOV-09-35, the NIGC effectively ordered the closure of its casino and denied it due process protections. SAC at ¶¶ 148-151. This count is exactly what the Court addressed in its previous decision. *See Ft. Sill Apache Tribe v. Nat'l Indian Gaming*

Comm'n, 103 F. Supp. 3d 113, 121 (D.D.C. 2015) (Plaintiff argued that NOV-09-35 could be deemed final agency action because the consequences of NOV-09-35 were indistinguishable from a permanent closure order). The Court found, however, that NOV-09-35 was not final agency action and was not a closure order. *Id.* The Court stated that "[a]s alleged in the Complaint, the Tribe closed the casino, not NIGC," and that "[n]onetheless, the Tribe acknowledges that it decided to close the casino due to an overriding interest in avoiding fines . . . ." *Id.* (quoting Plaintiff's complaint, which alleged "the Tribe could not afford the substantial fines threatened in the NOV. For that reason, the Tribe closed the Apache Homelands Casino.").

In its Second Amended Complaint, Plaintiff makes the same allegation, "the Tribe could not afford the substantial fines threatened in the NOV. For that reason, the Tribe closed the Apache Homelands Casino." SAC ¶ 88. Plaintiff cannot seek to side-step its decision to close by now asserting that the 2015 Decision and the 2017 NIGC Letter can revive this claim. As the Court found and Plaintiff admits, closure was a decision Plaintiff made alone. *Ft. Sill Apache Tribe*, 103 F. Supp. 3d at 121-22. To the extent Plaintiff believes that the 2015 Decision is arbitrary and capricious under the APA, it has already plead those allegations in Count 1. But any argument that NIGC's actions in issuing NOV-09-35, regardless if it was affirmed by the 2015 Decision (setting aside the issue of whether the 2017 NIGC Letter is final agency action, as discussed below), were arbitrary and capricious because they effectuated a closure of Plaintiff's casino have already been dismissed and should be dismissed again. The Court should, therefore, dismiss Count 2 for failure to state a claim.

B. Plaintiff cannot allege Breach of a Recital in the Comanche Settlement Agreement

Plaintiff's support of Count 3, breach of the Comanche Settlement Agreement, comes down to three arguments: (1) the Court has ancillary jurisdiction to hear the claim; (2) the

Western District of Oklahoma's decision was premised solely on NOV-09-35 being final agency action; and (3) the Comanche Settlement Agreement really meant something other than what its plain language states. These arguments all fail. First, while Federal Defendants do not disagree that sometimes courts may exercise ancillary jurisdiction over certain claims incident to its exercising jurisdiction over other claims, Pl.'s Br. at 32, this does not replace a waiver of sovereign immunity or overcome the exclusive jurisdiction over the claim of the Court of Federal Claims under the Tucker Act. *Presidential Gardens Assocs. v. U.S. ex rel. Sec'y of Hous. & Urban Dev.*, 175 F.3d 132, 140 (2d Cir. 1999);

> Whether ancillary jurisdiction exists, however, has no impact whatsoever on the issue of sovereign immunity or its waiver. For example, ancillary jurisdiction is almost always present with regard to cross-claims and counterclaims. 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3523, at 102 (2d ed.1984). But sovereign immunity still bars such claims from being brought against the government absent a waiver, except with regard to one very narrow exception that does not apply here. *See United States v. Forma*, 42 F.3d 759, 764 (2d Cir. 1994) (stating rule and acknowledging exception where defendant seeks simply to offset amount of sovereign's recovery.

Id. at 140. Whether the settlement claim has any viability, "since Congress has not "displaced Tucker Act jurisdiction in favor of [any] other remedial scheme," *Massie v. United States*, 166 F.3d 1184, 1188 (Fed. Cir. 1999) (quoting *Del–Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1367 (Fed. Cir. 1998), the Court of Federal Claims has exclusive jurisdiction. *Id*. at 141; *Sanborn v. United States*, 453 F. Supp. 651, 655 (E.D. Cal. 1977) ("However, plaintiffs offer no authority for the startling idea that the doctrine of pendent or ancillary jurisdiction may be utilized by a district court to avoid the well-established requirement of a waiver of sovereign immunity."); *Woodruff v. U.S. Dep't of Transp*., 448 F. Supp. 2d 7, 12 (D.D.C. 2006) (refusal to ignore exclusive jurisdiction where "artful pleadings" attempt to disguise monetary claim).

Moreover, even if the court had jurisdiction, Plaintiff fails to state a breach of contract claim because the plain language of the Comanche Settlement Agreement does not support its

overbroad assertions, which amount to nothing more than legal theories and not fact. As such, the Court cannot exercise jurisdiction over a claim for which it would have no jurisdiction.

Second, the Western District of Oklahoma's decision was not decided only upon that Court's finding that NOV-09-35 was not a final agency action. As pointed out in our opening brief, the Western District held that even if NOV-09-35 was a final agency action, paragraph 7(j) of the Comanche Settlement Agreement is only a recital and creates no rights beyond those arising from the operative terms of the document. Defs.' Br. at 25. Thus, Plaintiff's claims that the 2015 Decision and the 2017 NIGC Letter are in breach of the Comanche Settlement Agreement still fail because paragraph 7(j) is a recital and created no obligation on Federal Defendants that Plaintiff may seek to enforce.

Third, Plaintiff's breach of contract argument requires reading language into the Comanche Settlement Agreement that does not exist. Specifically, Plaintiff requests that the Court read into the agreement a requirement that the United States "is bound . . . to recognize the Tribe as an 'Indian tribe acknowledged under the Federal acknowledgment process' as required by 25 U.S.C. § 2719(b)(1)(B)(ii) [sic]." SAC at ¶ 162. In other words, Plaintiff seeks to include in the Comanche Settlement Agreement a requirement that Federal Defendants are bound to recognize it as an Indian tribe that was recognized under the Part 83 process. But Plaintiff cannot read into the recitals of a contract language that does not exist. The language of the Comanche Settlement Agreement is clear and unambiguous. The parties do not dispute that Comanche Settlement Agreement acknowledges that Plaintiff is a federally recognized tribe. Defs.' Br. at 28. Plaintiff, however, cannot now seek to alter the agreement's terms by incorporating into it new language in an attempt to buttress its litigating position. One of Plaintiff's claims in its APA challenge to the 2015 Decision is that the NIGC wrongly found that

it was not acknowledged through the Federal acknowledgment process under Part 83. SAC ¶¶ 130-32. As the NIGC stated in the 2015 Decision, in order to qualify for the IGRA exemption, a tribe must be recognized under the Part 83 process. ECF No. 80-1 at 30-31. NIGC found that Plaintiff was not. Therefore, important to this litigation will be the question of how Plaintiff was federally recognized. That will require the Court to review the parties' arguments, the relevant law, and the administrative record. Plaintiff cannot seek to resolve this issue in its favor by hijacking the plain language of an agreement.

Plaintiff's argument falls squarely on its false narrative that the Comanche Settlement Agreement requires Federal Defendants to recognize Plaintiff as an Indian tribe acknowledged under the Part 83 process, SAC at ¶ 162, and that any action taken by the NIGC in contravention of that is wrong. Pl.'s Br. at 35-36. As discussed, the Comanche Settlement Agreement contains no such language. The Comanche Settlement Agreement states "the United States acknowledged the Fort Sill Apache Tribe to be a Federally Recognized Tribe." Comanche Settlement Agreement, 7(j).

Plaintiff takes this language several steps further to allege that the parties really intended for this recital to mean that Plaintiff was recognized under the Part 83 process. Pl.'s Br. at 35. Plaintiff asserts that it is merely incorporating into the terms the understandings, agreements, and representations of the parties. *Id.* As an initial matter, Plaintiff's attempt to expand the language of the Comanche Settlement Agreement 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. Plaintiff's interpretation is not a description of a breach, it is Plaintiff's belief about the legal implications of a recital in a

contract, which, as the Western District of Oklahoma district court already found, does not constitute a breach. *See* Tr. 31: 17-19; 32: 4-12, Aug. 12, 2009 (ECF No. 10-3) ("paragraph 7 purports only to be a series of representations. And as my contracts 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."). Plaintiff's Count 3, therefore, fails to state a claim and should be dismissed.

C. Federal Defendants have Demonstrated that Reconsideration is Proper and that Count 4 Fails to State a Claim

The standard of review for an interlocutory judgment differs from the standards applied to final judgments under Rules 59(e) and 60(b). *Judicial Watch v. Dep't of Army*, 466 F. Supp. 2d 112, 123 (D.D.C. 2006) (citations omitted). Reconsideration of an interlocutory decision is available under the standard, "as justice requires." *Id.*, 466 F. Supp. 2d at 123 (quoting *Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000); *Singh v. George Wash. Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005)). "As justice requires" indicates concrete considerations of whether the court "has patently misunderstood a party, has made a decision outside the adversarial issues presented to the [c]ourt 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." *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004) (internal citation omitted). These considerations leave a great deal of room for the court's discretion and, accordingly, the "as justice requires" standard amounts to determining "whether reconsideration is necessary under the relevant circumstances." *Id.* Nonetheless, the court's discretion under 54(b) is limited by the law of the case doctrine and should not allow the parties to "battle" for the court's decision a second time. *Singh*, 383 F. Supp. 2d at 101 (internal citations omitted). But that is not what is occurring here. Indeed, "the Court may nevertheless elect to grant a motion

for reconsideration if there are other good reasons for doing so." *Lovely-Coley v. Dist. of Columbia*, --- F. Supp. 3d ---, 2017 WL 2533339 at *5 (D.D.C. June 9, 2017) (quoting *Cobell v. Norton*, 355 F. Supp. 2d 531, 540 (D.D.C. 2005)).

Federal Defendants have demonstrated that reconsideration is necessary and that there are good reasons for doing so. First, the law of the case doctrine does not apply to interlocutory decisions. *Sloan v. Urban Title Servs., Inc.*, 770 F. Supp. 2d 216, 224 (D.D.C. 2011) (quotations omitted) ("the doctrine has no direct applicability where, as here, the underlying decision is interlocutory); *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997) (same).

Second, Plaintiff is incorrect in arguing that Federal Defendants are seeking to reargue prior decisions. As an initial matter, the Court did not address the substantive legal arguments Federal Defendants made in opposition to the motion to amend and, in any event, Plaintiff does not dispute that Federal Defendants have, for the first time, made various other dispositive arguments that have established why Plaintiff's Count 4 cannot proceed as a matter of law. More importantly, however, the pursuit of justice supports reconsideration because there can be no claim for final agency action as a matter of law. Federal Defendants have the absolute right, if not the obligation, to seek dismissal of claim that is not properly before this Court. As Federal Defendants noted in their motion, the Court issued multiple statements and orders making clear that the Interior and NIGC letters were not intended to constitute a decision on the merits. Defs.' Br. at 31. But the Court's June Order finding that the 2017 NIGC Letter constitutes final agency action lies in direct contravention of the prior orders. Federal Defendants have explained how Plaintiff's theory that an order to undertake final agency action is not tantamount to a merits determination is a legal fallacy. *Id.* at 31-33. Federal Defendants do not seek to rehash arguments made before the Court. Instead, they respectfully point out that consideration of

controlling decisions – including this Court's own prior decisions as well as controlling Indian and APA law – and data might reasonably alter the Court's conclusions.[1] In addition, the Federal Defendants advance additional dispositive arguments that were not presented in opposition to the motion to amend. *Id.* at 34-39.

1. Plaintiff Has Not Attempted to Dispute that the 2017 NIGC Letter Was For Settlement Purposes Only Nor Has It Responded To Federal Defendants' Arguments For Reconsideration

Federal Defendants' opening brief established that they relied on this Court's prior conclusions and statements (which was consistent with the parties' representations) as to the settlement process. The Court made clear that its August Order was only intended to complete the settlement discussions. As stated by the Court "[w]ell essentially what I was ordering was conclude the settlement by August. Tr. 3:14-15, Sept. 16, 2016. The Court also stated "[all I was trying to do was say it's 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

[1] Very respectfully, the parties are faced with inconsistent decisions from the Court. The Court has stated on the record on numerous occasions that it was only directing settlement communications and nothing more. *See* Tr. 3:14-15, Sept. 16, 2016 ("Well essentially what I was ordering was conclude the settlement by August."); i*d.* at 7:2-4 ("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."); Tr. 6:14-17, Sept. 16, 2016 ("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."); *id.* at 7:8-24 ("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 ("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 . . . ."); *id.* at 23-25 ("[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."). The Court then found, in a written order, that NIGC and Interior fully complied with the Court's directive to issue settlement letters. ECF No. 70. Again, very respectfully, the Court's statements during the various hearings and its written order are in direct contradiction with its conclusion on June 9 that it ordered NIGC to undertake final agency action. This fact alone supports reconsideration.

compromise." *Id.* at 7:2-4; *see also* Tr. 6:14-17, Sept. 16, 2016 ("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."). 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.

Plaintiff's opposition fails to address any of these statements that confirm the parties' agreement that the letters were for settlement purposes only. Plaintiff also fails to interpose a cogent reason as to why this Court should not reconsider its June 9 finding, in light of these prior holdings. There is no dispute that NIGC relied on the Court's representations in issuing the 2017 NIGC Letter for settlement purposes. Plaintiff's only attempt at addressing the prior Court hearings is to grossly misconstrue statements made by NIGC's counsel. Pl.'s Br. at 20. During the September 30, 2016, hearing, counsel explained the administrative process of issuing a new decision. A complete reading of the transcript unequivocally shows that counsel's statement did not constitute an agreement that NIGC was undertaking a new agency action as part of the settlement process. Counsel was merely summarizing the administrative process.[2] Even after that statement, Federal Defendants repeatedly sought and received assurances throughout the

[2] Plaintiff cannot reconcile its interpretation of the hearing transcript with the fact that the administrative process is set forth in statutes and regulations and an attorney cannot alter that lawful process via statements on the record and thus an attorney could not agree to any agency undertaking final agency action when there is no authority for the agency to do so.

settlement process that the NIGC and Interior letters were for settlement purposes only. *See* ECF Nos. 52, 54, 62. Plaintiff completely failed to respond to Federal Defendants' insurmountable evidence in this regard.

2. The 2017 NIGC Letter is not Reviewable Agency Action

Federal Defendants have demonstrated that the Court could not direct the NIGC to issue a final agency action without finding for Plaintiff on the merits. Although Plaintiff asserts that it seeks different relief other than vacatur under the APA, the form of relief requested is irrelevant to the Court's consideration. What is relevant is the fact that a finding of final agency action is a merits determination and remedy under the APA. To put it another way, the Court could not direct an agency to issue a new final agency action without first finding against the agency on the merits. *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). This is black letter APA law.

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 prior 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, and the NIGC was only determining whether it could settle this case. ECF No. 74-6. NIGC's letter by no means marks the consummation of its decision-making process (indeed, no process has been

commenced) and did not determine any rights or result in legal consequences. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). 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.* Because NIGC's letter was issued as part of litigation settlement discussions, and was not the result of any consummation of an NIGC decision-making 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 affirming that HUD had authority to effect certain offsets and directing an administrative law judge to proceed with the administrative proceeding 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).

Plaintiff cites to three cases in an attempt to support its argument that the 2017 NIGC letter constitutes final agency action. Pl.'s Br. at 23. These cases are unavailing. In *I.C.C. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), the Interstate Commerce Commission ("ICC") issued an order addressing railroad track rights. *Id.* at 274. Interested labor unions filed a petition for clarification with the ICC asking the commission to clarify its order. *Id.* The ICC denied the petition in a second order. *Id.* at 275. Under the ICC's regulations for filing petitions for administrative review, the labor unions sought reconsideration of ICC's denial of their request for clarification. *Id.* at 276. The ICC denied that petition to reopen in a third order. *Id.* The labor unions then petitioned for judicial review of the ICC orders refusing to clarify and refusing to reconsider and reopen. *Id.* In the case, there was no

question that the ICC's second order denying clarification was reviewable under the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, which provides judicial appeal rights for parties contesting final orders of the ICC. The question before the court was whether the ICC's third order, in which it refused to reopen its previous order, was reviewable or whether the court could consider only the lawfulness of the refusal. *Id.* at 277-78.

The court held that where a party petitions an agency for reconsideration on the grounds of "material error," based on the same record before the agency when it rendered its original decision, the order denying rehearing is not reviewable. The court further held that if the petition to reopen involves alleging new evidence or changed circumstances, it may be reviewable. *Id.* at 279. Here, the court's ruling in *I.C.C.* is simply inapplicable. The instant matter does not involve a situation in which Plaintiff has petitioned an agency to reopen a matter and reconsider a final decision and the agency has denied that petition. Rather, the parties explored the possibility for settlement and were unable to resolve the matter outside of litigation. There was no petition and there was no formal disposition to the agency's underlying order. The NIGC specifically stated that the letter had no effect on the May 2015 Decision and did not constitute final agency action. ECF No. 74-6. *I.C.C.* in no way supports Plaintiff's Motion.

Plaintiff also cites to *Sendra Corp. v. Magaw*, 11 F.3d 162 (D.C. Cir. 1997), which likewise provides Plaintiff no support for its arguments that the NIGC's letter represents final agency action.[3] In *Sendra*, the plaintiff company submitted machinegun registration applications to the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). *Id.* at 163. In a 1987 letter, ATF declined to register the guns. *Id.* After discussions and correspondence between Sendra and

[3] Plaintiff cites to *Harris v. F.A.A.*, 353 F.3d 1006, 1011 (D.C. Cir. 2004). This case, however, merely cites to *Sendra*'s holding, which as discussed, only enforces the fact that NIGC's letter does not constitute final agency action subject to judicial review under the APA.

ATF, ATF issued a final letter in 1993 denying Sendra's request that ATF reconsider its previous denials. *Id.* at 165. In 1994, Sendra filed a district court action and ATF argued that the statute of limitations bared Sendra's claim because it first accrued in 1987. *Id.* at 165. Sendra argued its claim was timely because ATF's 1993 letter was reviewable as a reopened, final agency action timely filed. *Id.*

In reviewing the claims, the court first noted that if an agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on the merits under the APA even though the agency reaffirms its original decision. *Id.* at 167. The court then noted the corollary to this statement is that "[o]nly 'when the agency has clearly stated or otherwise demonstrated' that it has reopened the proceeding will the resulting agency decision be considered a new final order subject to judicial review under the usual standards." *Id.* (quoting *Morris v. Sullivan*, 897 F. 2d 553, 558 (D.C. Cir. 1990)). The court stated that it "makes no sense" to find that when an agency affirms a prior denial it in effect reopened the proceeding and issued a new, judicially-reviewable decision. *Id.* at 167. Unless the agency clearly states or indicates that it has reopened the matter, its refusal to reconsider its prior decision "will be treated as simply that." *Id.* In *Sendra,* the Court found that ATF did not state that it was reopening the proceeding and the court held that its denial letter was thus not judicially reviewable. *Id.* Here, it too makes no sense to find that NIGC's letter is somehow final agency action subject to judicial review. Like the ATF letter, NIGC's letter did not expressly state that it had reopened the matter and, in fact, stated the opposite

> This letter is written pursuant to the court's October 21, 2006 order as part of litigation settlement discussions. It is not provided as the result of or pursuant to an agreed upon settlement and 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 NIGC did not reopen the matter and issue a new, judicially-reviewable decision and the 2017 NIGC Letter does not constitute final agency action.

3. IGRA Precludes Review of the 2017 NIGC Letter

Further, the Court lacks subject matter jurisdiction over Count 4 because the 2017 NIGC Letter does not constitute final agency action that can be reviewed under IGRA. IGRA enumerates four specific categories of actions that are "final agency actions" reviewable under the APA, which 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. Plaintiff does not dispute that IGRA limits what agency actions are reviewable in district court. Plaintiff merely disputes the cases cited on the grounds that they are not the exact fact scenario presented in this case. Pl.'s Br. at 22-23. But Plaintiff's opposition fails to address the fact that the 2017 NIGC Letter is not one of the limited final agency actions permitted by IGRA to be reviewed in court. *See* 25 U.S.C. §§ 2410-2713; *Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1170-71 (N.D. Okla. 2002). The parties agree, as they must, that the letter is not a decision on an ordinance or management contract. Therefore, sections 2710, 2712, and 2713 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.

To overcome this flaw, Plaintiff argues that the 2017 NIGC Letter is final agency action because it was a final decision for which rights and obligations flow and thus is reviewable under the APA. Pl.'s Br. at 23. But the APA does not provide a waiver of sovereign immunity where, as here, review is precluded by another statute. 5 U.S.C. § 701(a)(1); *see also Block Cmty. v. Nutrition Instit.*, 467 U.S. 340, 345 (1984). As Federal Defendants discussed, "[a]n analysis of IGRA, the 'relevant statute' in this case, illustrates Congress' clear intent to limit judicial review to certain final agency actions taken under the statute." Defs.' Br. at 36-37. 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 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."); *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). Because the 2017 NIGC Letter does not involve a final agency decision for which IGRA provides judicial review, Count 4 fails to state a claim and should be dismissed.

4. The 2017 NIGC Letter does not Violate a 2009 MOA

Federal Defendants have demonstrated NIGC's letter could not be final agency action as a matter of law. But, even if the NIGC letter may be considered final agency action Plaintiff still fails to state a claim that NIGC's action violated the 2009 MOA and NIGC regulations. Plaintiff argues that the 2009 MOA applies to the 2017 NIGC Letter because the 2009 MOA was in effect at the time NOV-09-35 was issued and because the 2017 NIGC Letter is a consideration of NOV-09-35. Pl.'s Br. at 28-29. Plaintiff also argues that due process considerations require that it be followed. *Id.* But Plaintiff cannot plead that the 2009 MOA is applicable. The 2009 MOA, when it was in effect, applied to the NIGC's Office of General Counsel's legal opinions. The 2009 MOA did not apply to Commission decisions, did not apply to the parties' settlement discussions, and imposed no procedures or requirements on NIGC. Moreover, Interior does not concur in Commission decisions. The 2017 NIGC Letter was not a legal opinion; the Commission was following a settlement process. The 2009 MOA was not applicable to the process and Plaintiff's claim should be denied.

5. The 2017 NIGC Letter does not Violate Part 581 Regulations

Plaintiff still fails to state a claim that the 2017 NIGC Letter violates NIGC's Part 581 regulations because it cannot plausibly assert that they apply to this case. Plaintiff argues that the Part 581 regulations apply because the NIGC's letter is a reconsideration and any reconsideration must be subject to the agency's appellate rules. ECF No. 79 at 21. Plaintiff ignores the fact that NIGC's Part 581 regulations only govern motion practice before the NIGC for appeals made under Parts 582 – 585, which was not the case here. Plaintiff did not file a motion for reconsideration of the Commission's final decision, which would have triggered the

procedures Plaintiff claims the Commission failed to follow. Plaintiff's claim in Count 4 alleging that the NIGC 2017 Letter violates NIGC regulations should be dismissed.

6. The 2017 NIGC Letter is not Arbitrary and Capricious

Finally, Plaintiff fails to state a claim that the 2017 NIGC Letter ignored Interior's 2016 Letter and, therefore, is arbitrary and capricious. Pl.'s Br. at 30. Plaintiff's claim is based on supposition, not facts. The Court already considered whether the 2017 NIGC Letter violated her order, and found that it did not, holding that the NIGC reviewed the material submitted by Interior and considered whether that information warranted a reexamination of its initial decision. The Court found that in doing so, the NIGC acted in good faith and substantial compliance. Defs.' Br. at 16 (quoting ECF No. 70 at 3). Plaintiff cannot now argue that NIGC acted arbitrarily and capriciously where the Court found that it did, in fact, consider and review the material submitted by Interior and complied with the Court's order that directed NIGC to do so. Plaintiff pleads mere speculation and cannot overcome the Court's findings. The 2017 NIGC Letter did not contain any new information because the letter provided by Interior did not provide any ground on which the Commission could revisit any portion of its 2015 Decision. *See* NIGC Letter.[4] It was issued as part of a settlement process and was not issued as a formal reconsideration of a prior Commission decision. The 2017 NIGC Letter has no bearing on Plaintiff's legal claims and its challenge to the NIGC's 2015 Decision. It does not opine on Plaintiff's recognition status. Instead, the 2015 Decision constitutes the final decision and the consummation of the process. Plaintiff's claim in Count 4 alleging that NIGC did not consider the Interior letter already has been rejected by the Court and should be dismissed.

[4] Federal Defendants note that the 2016 Interior letter is a privileged and confidential document subject to, among other protections, the attorney-client privilege, the attorney work product privilege and is a confidential settlement communication issued pursuant to FRCP 408 and Court order. Federal Defendants, therefore, cannot further discuss the letter.

III. CONCLUSION

Federal Defendants respectfully request that the Court reconsider its July 9, 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 8th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 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