IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CONNECTICUT, MOHEGAN TRIBE OF INDIANS OF CONNECTICUT, AND MASHANTUCKET PEQUOT TRIBE, Plaintiffs, v. RYAN ZINKE in his official capacity as Secretary of the Interior, and UNITED STATES DEPARTMENT OF INTERIOR, Defendants.	Case No. 17-cv-2564-RC

REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

In Defendants' motion for partial dismissal and supporting memorandum (ECF No. 18) ("Defendants' Memorandum"), Defendants demonstrated that claims asserted by or related to the Mashantucket Pequot Tribe ("Pequot") should be dismissed because Pequot operates not under a tribal-state compact, but under Class III gaming procedures prescribed by the Secretary ("procedures"). Plaintiffs assert that the Secretary violated certain deadlines for the approval or disapproval of amendments to tribal-state gaming compacts and thus that the proposed amendments must be deemed approved. Such deadlines apply only to tribal-state compacts, not procedures, and therefore Plaintiffs' claims with regard to Pequot's procedures must be dismissed.

Plaintiffs oppose the Secretary's motion, calling the argument "hyper-technical." Pls.' Opp'n to Defs.' Partial Mot. to Dismiss ("Pls.' Opp'n") at 1, ECF No. 27. In so arguing, Plaintiffs admit, as they must, that IGRA's plain language supports Defendants' argument.

Because IGRA's plain language speaks directly to the issue, it controls this Court's determination, but to the extent that this Court finds it needs to look beyond IGRA's plain language, Plaintiffs have not shown that the Secretary's approach is unreasonable. They do not and cannot demonstrate that Defendants' position violates the language or intent of IGRA, and Defendants' position is consistent with its past positions. Nor does Defendants' argument violate any principles of statutory construction, exceed the Secretary's authority, or deprive the Pequot of safeguards and benefits in the compact. It is also clear that the Pequot operates pursuant to procedures and not a de facto compact with the state. For these reasons, and those explained in Defendants' Memorandum, this Court should dismiss the claim regarding Pequot.

II. ARGUMENT

A. The plain language of IGRA controls and supports Defendants' position.

The plain language of IGRA controls here. Plaintiffs, by referring to Defendants' argument as "a hyper-technical reading of the law" that elevates "form over substance," concede, as they must, that IGRA's plain language contains specific time frames and a "deemed approved" provision only for the Secretary's review of tribal-state compacts, not procedures or amendments thereto.

It is well-established that in statutory construction, the court looks first to the plain language of the statute. *AT&T, Inc. v. FCC*, 452 F.3d 830, 835 (D.C. Cir. 2006) (noting that the court should ask whether Congress has spoken to the issue in question, looking first to the plain language of the statute); *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("In construing a statute, the court begins with the plain language of the statute."). "[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all

but the most extraordinary circumstance, is finished." *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995).

IGRA has spoken to the issue by establishing different requirements for approval of procedures than of tribal-state compacts. For procedures, IGRA provides that the Secretary "shall prescribe, in consultation with the Indian tribe, procedures" that are consistent with the mediator's proposed compact, the provisions of IGRA, and relevant state law. 25 U.S.C. § 2710(d)(7)(B)(vii). This section does not contain any time constraints for the Secretary to review the mediator's proposed compact and prescribe Class III gaming procedures. Nor does this section contain a provision stating that gaming procedures will be "deemed approved" if the Secretary does not act within a certain timeframe.

In contrast, § 2710(d)(8) involves the Secretary's review of proposed tribal-state compacts and places several constraints on the Secretary. The Secretary can disapprove the proposed tribal-state compacts only for certain specified reasons. 25 U.S.C. § 2710(d)(8)(C). And, more importantly for purposes of this lawsuit, the Secretary must approve or disapprove a tribal-state compact within forty-five days of submission to the Secretary, or "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter." 25 U.S.C. § 2710(d)(8)(C). This provision specifically refers to the Secretary's approval or disapproval of "a compact described in subparagraph (A)", which refers to "any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." *See* 25 U.S.C. § 2710(d)(8)(C) (referring to 25 U.S.C. § 2710(d)(8)(A)). Thus, IGRA's plain language regarding time frames for approval or disapproval of tribal-state compacts and the "deemed approved" language refers only to tribal-state compacts, not procedures.

IGRA also distinguishes between tribal-state compacts and procedures in other ways, showing that the two terms are not used interchangeably. Section 2710(b)(7)(A) gives United States district courts jurisdiction over causes of actions by tribes or states "conducted in violation of any tribal-state compact entered into under paragraph (3) that is in effect," as well as "any cause of action initiated by the Secretary to enforce" Class III gaming procedures prescribed by the Secretary under § 2710(d)(7)(B)(vii). 25 U.S.C. § 2710(b)(7)(A). The plain language of IGRA thus shows that tribal-state compacts are treated differently than procedures. The portions of IGRA upon which Plaintiffs base their claims — the time frames for approval or disapproval and the "deemed approved" provision of § 2710(d)(8) — apply only to tribal-state compacts, not procedures.

1. The Indian canon of construction does not apply here.

Plaintiffs also argue that the Indian canon of construction weighs in their favor. This canon generally requires that "statutes passed for the benefit of Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Cobell v. Norton*, 240 F.3d 1081, 1103 (D.C. Cir. 2001). This canon does not, however, apply here. First, the plain language of IGRA controls and the Court need not consider the Indian or other canons of construction. *See El Paso Nat. Gas Co. v. United States*, 632 F.3d 1272, 1278 (D.C. Cir. 2011) ("This canon, however, has force only where a statute is ambiguous.").

In addition, it is not clear here that interpreting IGRA to include additional restrictions on the Secretary's review of procedures would always weigh in tribes' favor. *See Fort Indep. Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1178 (E.D. Cal. 2009) (holding that the relevant question for determining whether canon applies is "interest of tribes generally," not interest of a specific tribe); *see also, e.g.*, *Confederated Tribes of Grand Ronde Cmty. of Or. v.*

Jewell, 75 F. Supp. 3d 387, 396 (D.D.C. 2014) ("[T]the Indian canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe."), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016). It may benefit tribes for the Secretary to have additional time to review procedures or to have options beyond the three (approve, disapprove, or have deemed approved) specified in § 2710(d)(8). In addition, as discussed further below, the Pequot have used the differences between gaming procedures and tribal-state compacts in their favor to argue that they have not waived sovereign immunity. *See supra* at II.D. Thus, the Indian canon of construction does not compel a finding that the requirements in § 2710(d)(8) apply to procedures.

2. Plaintiffs have not shown congressional intent to apply the review provisions for tribal-state compacts to procedures.

Plaintiffs argue it frustrates congressional intent to interpret IGRA's provisions establishing deadlines and requirements for the Secretary's review of compacts to apply only to tribal-state compacts and not procedures. Specifically, Plaintiffs argue that IGRA is meant to be a comprehensive approach to regulating tribal gaming and "[g]iven congressional recognition of the importance of tribal-state compacts and its care in providing two alternative ways for tribes and states to establish them, differentiating between" compacts and procedures would frustrate Congress's intent. Pls.' Opp'n at 13. This argument should be rejected.

First, IGRA itself does not refer to amendments either to tribal-state compacts or procedures, so no intent can be inferred from IGRA itself. Plaintiffs point to no legislative history or other indication that Congress intended procedures to be subject to the same limitations on review as tribal-state compacts. *See Pharm. Research & Mfrs. of Am. v. Thompson,* 251 F.3d 219, 224 (D.C. Cir. 2001) (examining "text, structure, purpose, and legislative history"). Nor do Plaintiffs make clear how having different procedures for approval

of tribal-state compacts and procedures would violate Congress's intent, particularly given IGRA's language and separate provisions for the establishment of Class III gaming procedures and tribal-state compacts.

Second, Congress specifically established procedures to be entered over the objections of the state. Plaintiffs correctly note that IGRA aims to encourage the formation of tribal-state compacts. In particular, IGRA's provisions in § 2710(d)(7)(b) are aimed at encouraging tribes and states to reach a mutually-agreeable compact through the use of mediation. "Each step permits the State the opportunity to work with, rather than against, the Tribe." Mem. from Solicitor to Assistant Secretary – Indian Affairs re: Mashantucket Pequot Gaming Procedures, ECF No. 28-5 at 6. But, as Plaintiffs also acknowledge, Congress did not allow states a veto power over tribal gaming. *See* Pls.' Opp'n at 3. As the Secretary has stated, one purpose of IGRA is "to afford an opportunity for States to participate in the establishment and conduct of Indian gaming through Tribal-State compacts, but also to make a Federal backstop available should a consensual Tribal-State compact not be reached." Class III Gaming Procedures, 63 Fed. Reg. 3,289, 3,291 (Jan. 22, 1998).

Consequently, IGRA provides a mechanism for tribes to engage in Class III gaming under procedures in situations such as this one where the state would not agree to enter into a tribal-state compact.[1] Issuance of procedures is the last step of IGRA's carefully crafted remedial provisions. Under IGRA's remedial provisions, states are given a last chance to consent to the parties' last, best offer compact that the court-appointed and supervised mediator determines "best comports with [IGRA,]" other federal law, and the court's order and findings.

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[1] In this case, the mediator selected the state's proposed compact, but the state would not agree to enter into said compact. 56 Fed. Reg. 15,746.

25 U.S.C. § 2710(d)(7)(B)(iv). It is only after a state has failed to consent within sixty days to the mediator's selected compact that the state is removed from the process and "the mediator shall notify the Secretary, and the Secretary shall prescribe" class III gaming procedures. *Id.* § 2710(d)(7)(B)(vii). Thus, that IGRA aims to establish tribal-state compacts does not, as Plaintiffs argue, indicate that Congress intended tribal-state compacts and procedures to be treated the same. Congress established procedures as a last resort to be undertaken over the state's objections when the process for reaching a tribal-state compact has failed.

In addition, proposed amendments to IGRA demonstrate that IGRA does not contain time limitations on the Secretary's issuance of procedures. One proposed provision was an amendment to § 2710(d)(7)(B)(vii), "dealing with gaming procedures issued by the Secretary in lieu of a compact," that would have required the Secretary to act on proposed procedures within 180 days. *See* S. Rep. No. 108-380, at 14 (2004). The report noted that several tribes had requested that procedures be issued, but the Secretary had not acted on such requests. In addition, the Acting Deputy Assistant Secretary for Policy and Economic Development in the Office of the Assistant Secretary – Indian Affairs at Interior, George Skibine, testified before the Senate's Committee on Indian Affairs on the proposed amendments. Mr. Skibine noted that the bill would provide "time frames for the Secretarial issuance of class III gaming procedures to a tribe after a mediator's notification of his or her determination." Statement of George Skibine Acting Deputy Assistant Secretary – Policy and Economic Development Before the Committee on Indian Affairs United States Senate on S. 1529 "The Indian Gaming Regulatory Act Amendments of 2003," found at www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc008176.pdf (last visited March 26, 2018). Mr. Skibine testified in favor of extending a proposed ninety day timeframe because it would not provide sufficient time for the Secretary "to carefully examine

difficult questions of state and federal law that are usually involved in this process." *Id.* at 2. The amendments were not passed.

Thus, to the extent it is relevant, the legislative history demonstrates that IGRA does not include a time frame in for the Secretary to prescribe gaming procedures, and thus treats review of procedures differently than review of proposed tribal-state compacts. It seems likely that in passing IGRA, Congress did not anticipate a scenario such as this one, where the Secretary prescribed procedures because the state refused to enter into a compact, but the state and the tribe later together seek an amendment to those procedures.

B. To the extent IGRA is silent or ambiguous as to the issue, the Secretary's interpretation is reasonable and should be upheld.

1. The Secretary's interpretation is reasonable.

Even if this Court finds that Congress has not spoken directly to the precise question at issue, the Secretary's approach should be sustained because it is "based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984)). IGRA is silent about the process for amending procedures, as well as the process for amending tribal-state compacts. Thus, the process is left to the Secretary's discretion. Given IGRA's plain language, the Secretary's approach is reasonable and must be sustained. As such, their claims regarding Pequot's procedures must be dismissed.

In addition, it is logical to have strict time frames and limited reasons for disapproval when the Secretary is reviewing a tribal-state compact but not apply the same requirements to procedures. The limited time frames and limited review are designed to protect carefully crafted agreements negotiated between the state and the tribe. As Plaintiffs state, the "safeguards" in § 2710(d)(8) "ensure that tribes and states are not stymied by bureaucratic delays that would prevent them from realizing the fruits of their labors after long and arduous compact

negotiations." Pls.' Opp'n at 20. "They further ensure that an agreement mutually acceptable to a tribe and a state is not overridden by the Secretary except in limited, justifiable circumstances." *Id.*

But the Secretary's review of proposed amendments to procedures is different. Necessarily, when acting under § 2710(d)(7)(B)(vii) to prescribe procedures, the state and the tribe have not reached an agreement mutually acceptable to both parties. Similarly, in scenarios where a tribe might seek amendment to prescribed procedures, it cannot be assumed that the state would play a role in, much less support, the proposed amendment because procedures are entered into only when the state has refused to consent to the parties' last, best offer compact. 25 U.S.C. §§ 2710(d)(7)(B)(iv)–(vii). Thus, when either prescribing initial procedures or amendments to procedures, the Secretary may not be reviewing a carefully crafted negotiated agreement. Further, as part of the review of the mediator's proposed compact, the Secretary must determine whether the proposed compact is "consistent with . . . the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii). As the Solicitor noted in a memorandum on the Pequot gaming procedures, a negotiated compact could permit "a type of gaming which was not allowed by that State 'for *any* person, organization, or entity' under 25 U.S.C. § 2710(D)(1)(B)," but "[t]he Secretary could not establish procedures to implement that type of gaming." ECF No. 28-5 at 6. Section 2710(d)(7)(B)(vii) also directs the Secretary to prescribe procedures, unlike § 2710(d)(8), which allows the Secretary to approve a compact, disapprove it for certain reasons, or allow the compact to "be considered to have been approved by the Secretary." There are therefore significant differences between review under § 2710(d)(7)(B)(vii) and § 2710(d)(8).

Thus, given the differences between the Secretary's review of negotiated tribal-state compacts and review of a mediator's submission to the Secretary of a proposed compact for the

purpose of prescribing gaming procedures, it would be inappropriate to impose the restrictions from § 2710(d)(8) onto procedures. Likewise, it would be inappropriate to deem the mediator's proposed compact approved after forty-five days because the Secretary must review the compact to ensure that it is consistent with the relevant provision of state law, and such review takes time. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). The Secretary may also modify the mediator's compact selection or he may unilaterally propose an amendment to the Secretary's procedures, after consultation with the tribe, which clearly demonstrates the need for a thorough review. In the case of procedures, there is less need for quick action to protect a negotiated agreement and more need for careful consideration of the proposed compact and relevant state and federal law.

In short, even if this Court finds that Congress has not directly spoken to the issue, the Secretary's interpretation is reasonable and should be upheld.

2. Defendants' position is consistent with its past positions.

Plaintiffs argue that Defendants' position here is inconsistent with its past positions. Specifically, Plaintiffs refer to Interior's statements that provisions making gaming on Indian lands illegal unless it is conducted pursuant to a tribal-state compact necessarily also exempt gaming conducted pursuant to procedures. Pls.' Opp'n at 13–15. These two positions are consistent.

The Secretary has concluded that criminal prohibitions in section 23 of IGRA, 25 U.S.C. § 2710(d)(6), and in the Johnson Act, 18 U.S.C. § 1166, making gaming in Indian country illegal unless conducted under a tribal-state compact that is in effect also exempt gaming conducted under procedures. *See* 63 Fed. Reg. at 3,292; ECF No. 28-5 at 4–5. Specifically, the Secretary found that "the statute must be read to mean that all Secretarial-sanctioned gaming is exempt from the provisions of the Johnson Act and section 23 of IGRA." 63 Fed. Reg. at 3292; *see also* ECF No. 28-5 at 7.

The Secretary reached this determination because a literal reading of the provisions, where class III gaming is only legal when conducted pursuant to a tribal-state compact and not procedures, would read the procedures provisions entirely out of IGRA. Under this interpretation, "Class III gaming would remain unlawful even if procedures were set in place by the Secretary after completion of the judicially-supervised mediation process." 63 Fed. Reg. at 3,292. Because statutes should "be read to give effect to every provision," *id.* (citing *Rake v. Wade*, 508 U.S. 464, 471 (1994)), the Secretary concluded that procedures adopted by the Secretary "are properly viewed as a full substitute for the compact that would be 'in effect' if a voluntary agreement had been reached, and thus qualify for the exemption to the criminal prohibitions on gaming." *Id.* "Under this unified, more consistent interpretation, IGRA permits both a negotiated compact and a mediator chosen compact to allow gaming in a manner differing from state law." ECF No. 28-5 at 7.

This interpretation of the criminal prohibitions is not in conflict with the Secretary's position here. The Secretary found that interpreting criminal prohibitions on gaming to exempt only gaming conducted pursuant to tribal-state compacts would read the procedures provisions entirely out of IGRA. Interpreting IGRA's plain language establishing different provisions for approval of procedures and tribal-state compacts, on the other hand, does not negate any other provision of IGRA. The provisions for approval of tribal-state compacts still have meaning and can be applied.

Further, a finding that procedures are "a full substitute" for a tribal-state compact for the purposes of criminal prohibitions on gaming is not the same as concluding that all references to "tribal-state compact" in IGRA include procedures. The Secretary reached no such conclusion. Consequently, the Secretary's position that IGRA requires Secretarial procedures under

§ 2710(d)(7)(B)(vii) to be treated differently than tribal-state compacts will not lead to absurd results, as Plaintiffs allege.

Similarly, Interior's Part 293 regulations also demonstrate that Interior has treated approval of tribal-state compacts differently than procedures. Interior established procedures for submission of tribal-state compacts and compact amendments and for the Secretary's review of such tribal-state compacts or compact amendments. 25 C.F.R. § 293.1. These regulations specifically state that "compact or Tribal-State Gaming Compact means an intergovernmental agreement executed between Tribal and State governments under the [IGRA] that establishes between the parties the terms and conditions for the operation and regulation of the tribe's Class III gaming activities." 25 C.F.R. § 293.2. The regulations also note that "The Secretary has the authority to approve compacts or amendments 'entered into' by an Indian tribe and a State, as evidence by the appropriate signature of both parties." 25 C.F.R. § 293.3. Clearly, these regulations demonstrate that they are meant to apply only to tribal-state compacts, not procedures, which would not be between tribal and state governments or signed by the State.

Further, the Secretary has not prescribed gaming procedures within forty-five days after notification by the mediator in this or other cases. In this case, the mediator informed the Assistant Secretary – Indian Affairs on December 24, 1990, that the state did not consent to the compact within the sixty days prescribed by 25 U.S.C.§ 2710(d)(7)(B)(vii), and forwarded the proposed compact to the Secretary. *See* McCune Decl., Ex. 1. The final Federal Register notice prescribing procedures was published May 31, 1991, well over forty-five days from the notice.

In other cases, as well, more than forty-five days elapsed between notification by the mediator and the prescription of gaming procedures. The Secretary prescribed the initial Class III gaming procedures for the Northern Arapaho tribe on September 1, 2005, more than two

years after the conclusion of the mediation process. *See* Letter Approving Northern Arapaho Gaming Procedure Amendments, found at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-033877.pdf (last visited March 26, 2018). Similarly, the Secretary prescribed procedures for the Rincon Band of Luiseno Indians on February 8, 2013, nearly five months after the mediator sent the Secretary the proposed compact on September 18, 2012. *See* Letter Approving Rincon Gaming Procedures, found at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-026439.pdf (last visited March 26, 2018). And the North Fork Rancheria procedures were prescribed "[a]fter more than 90 days of review." Letter Approving North Folk Rancheria Procedures at 1 (July 29, 2016). https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/pdf/idc2-056230.pdf (last visited March 26, 2018). In short, the Secretary's past practice of issuing procedures more than forty-five days after the mediator's notification and submission of a proposed compact shows that the Secretary has long interpreted § 2710(d)(8) as not applying to procedures established under § 2710(d)(7)(B)(vii).

3. NIGC's regulations do not use the terms "tribal-state compacts" and Secretarial procedures interchangeably.

Plaintiffs also argue that NIGC's regulations use the word "compacts" generally to mean both tribal-state compacts and procedures. Pls.' Opp'n at 18–19. But NIGC's regulations do not actually do so. Plaintiffs cite the definition for "Tribal-State compact" in 25 C.F.R. § 502.21, which refers solely to "an agreement between a tribe and a state about Class III gaming under 25 U.S.C. § 2710(d)," and argue that because NIGC regulations apply to both procedures and compacts, the definition of compact must necessarily include procedures. But NIGC's regulations specifically refer to procedures. For example, the regulations state that Tribes "shall conduct gaming operations according to the requirements of the [IGRA], the regulations of this

chapter, tribal law and, where applicable, the requirements of a compact or procedures prescribed by the Secretary under 25 U.S.C. § 2710(d)." 25 C.F.R. § 501.2. In fact, this section was amended "to indicate that class III gaming may be authorized under procedures that are prescribed by the Secretary of the Interior under section 2710(d)(7)(B)(vii)." *See* Approval of Class II and Class III Gaming Ordinances, 58 Fed. Reg. 5,802, 5,803 (Jan. 22, 1993). Other provisions also refer to Secretarial procedures. *See* 25 C.F.R. § 559.4 (discussing submission requirements "including standards under a tribal-state compact or Secretarial procedures"). Thus, the regulations' definition of "tribal-state compact" to mean a compact and not procedures does not support Plaintiffs' argument.

4. Defendants are acting within their authority.

Plaintiffs also argue that Defendants' interpretation would give "the Defendants unchecked power over amendments to compacts entered into under § 2710(d)(7)(B)(vii)." Pls.' Opp'n at 19. As noted above, there is no indication from IGRA's plain language, which addresses procedures in a different section than tribal-state compacts, or otherwise that Congress intended to limit the Secretary's authority to prescribe procedures other than in the ways listed in § 2710(d)(7)(B)(vii). This is consistent with Congress's delegation to the Executive under 25 U.S.C. §§ 2 and 9 broad authority to issue regulations necessary to manage Indian affairs and carry into effect legislation relating to such affairs. The courts on many occasions have upheld the exercise of this authority. *See James v. U.S. Dep't. of Health and Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987); *United States v. Eberhardt*, 789 F.2d 1354, 1360–61 (9th Cir. 1986). Defendants' actions, moreover, are generally subject to the Administrative Procedure Act and its requirements. 5 U.S.C. §§ 701–06. Thus, Defendants are acting within their authority and do not have unchecked power over amendments to compacts.

C. Defendants' position does not deprive the Pequot of benefits and safeguards in the Pequot compact.

The Secretary's procedures for the Pequot provide that they may be amended by written agreement of "both parties"[2] and publication of notice of approval by the Secretary in accordance with 25 U.S.C. § 2710(d)(3)(B). Section 2710(d)(3)(B) states that "Any State and any Indian tribe may enter into a tribal-state compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." Plaintiffs argue that somehow this provision necessarily incorporates the restriction in § 2710(d)(8), but there is no support for this proposition. Section 2710(d)(3) does not refer to § 2710(d)(8), nor do the procedures themselves. It would be error to impose § 2710(d)(8)'s requirements here given the utter absence of any indication that the parties or the Secretary intended to do so.

D. The Pequot operate under procedures, not a de facto compact.

Plaintiffs make the argument that the Pequot and Connecticut in fact have a valid compact and thus Interior should have analyzed the proposed amendments under the requirements for tribal-state compacts rather than procedures. Pls.' Opp'n at 22–23. It cannot seriously be contested that Pequot operate pursuant to procedures established by the Secretary. *See, e.g.,* Notice of Final Mashantucket Pequot Gaming Procedures, 56 Fed. Reg. 24,996 (May

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[2] The Secretary generally adopted "the gaming compact, as amended, which was proffered by the State of Connecticut, chosen by the mediator and proposed as procedures in an April 17, 1991, Federal Register notice," and specified particular amendments. 56 Fed. Reg. 24,996-01. Thus, the procedures refer to the state as a party although the state ultimately declined to enter into a tribal-state compact. The procedures are found at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-026009.pdf (last visited March 26, 2018).

31, 1991). The Connecticut Attorney General has affirmed this fact on a number of occasions. *See* 1993 Att'y Gen. Op. No 93-004, 1993 WL 378477, at *2 (Conn. A.G. Feb. 11, 1993); 1994 Att'y Gen. Op. No. 94-010, 1994 WL 275088, at *6 (Conn. A.G. May 18, 1994) (noting that "the unique history and nature of the Mashantucket Pequot Gaming Procedures . . . make them very different from the Mohegan Compact"); 1995 Att'y Gen. Op. No. 95-011, 1995 WL 774643, at *1 (Conn. A.G. Mar. 22, 1995) (noting that Pequot gaming is not pursuant to a compact but "is governed by Procedures promulgated by the Secretary of the Interior, which Procedures have the full force and effect of federal law"); 2008 Att'y Gen. Op. No. 2008-005, 2008 WL 714081, at *3 n.5 (Conn. A.G. Mar. 13, 2008) (noting that "[t]he document that governs the Mashantucket Pequot Tribe's gaming operations is not technically a 'compact' because it was imposed on the State by the Secretary of the Interior under the IGRA"); 2016 Att'y Gen. Op. No. 2016-03, 2016 WL 1610641, at *2 n.2 (Conn. A.G. Apr. 18, 2016) (noting that "[t]he Mashantucket Procedures are not technically a gaming compact, but rather procedures approved by the Secretary of the Interior following a mediation process pursuant to IGRA").

In addition, in litigation in federal court, the Pequot argued that they had not waived their sovereign immunity because "the Gaming Procedures are not a compact at all. There is no agreement entered by the Tribe and the State of Connecticut but, instead, regulations promulgated by the Secretary of the Interior pursuant to 25 U.S.C. 2710(d)(7)(B)(vii)." *Tassone v. Foxwoods Resort Casino*, No. 3:11-01718-WWE, 2012 WL 12548954 (D. Conn. filed Mar. 23, 2012). They made the same argument before the Second Circuit: "[I]t is important to note that the Gaming Procedures were not reached by agreement of the parties; rather, they were promulgated by the United States Secretary of the Interior pursuant to 25 U.S.C. §

2710(d)(7)(B)(vii).” *Tassone v. Foxwoods Resort Casino*, No. 12-1236-CV, 2012 WL 6622638, at *17 (2d Cir. filed Dec. 12, 2012). Plaintiffs cannot change the facts here.

Further, Pequot and Connecticut clearly have not “executed” the tribal-state compact under IGRA. Pls.’ Opp’n at 22–23; 25 C.F.R. § 293.2. As Plaintiffs are well-aware, a tribal-state compact under IGRA does not take effect merely because the parties sign it (which Plaintiffs do not allege) or because the parties act pursuant to it. The Secretary must approve the compact, or it must be deemed approved, and notice of such must be published in the Federal Register. 25 U.S.C. § 2710(d)(8). Plaintiffs’ argument that they in fact have a tribal-state compact must be rejected.

E. Connecticut and Mohegan lack standing to assert claims regarding the Pequot procedures.

As discussed in Defendants’ memorandum, Connecticut and Mohegan both lack standing to raise issues related to Pequot’s procedures. Defs.’ Mem. at 10. Plaintiffs argue that Connecticut has standing because the Pequot procedures set out terms and conditions that are binding on the State, and because the State is a party to the amendments that Pequot seeks to have approved. Pls.’ Opp’n at 26. Again, however, the State declined to enter into a tribal-state compact with Pequot, and is not a party to Pequot’s procedures. As such, it does not have standing to assert claims regarding the Secretary’s amendment of those procedures. Any undertakings by the State are not dictated by the procedures because the State declined to enter into a bilateral contract with Pequot. Pequot thus is the only plaintiff who can make such claims regarding amendments to the Secretary’s procedures for Pequot.

III. CONCLUSION

Plaintiffs argue essentially that references to “tribal-state compacts” in IGRA apply not only to tribal-state compacts, but also to Secretarial procedures. IGRA’s plain language rebuts

this interpretation. The Secretary's position that the restraints on his review of tribal-state compacts under § 2710(d)(8) do not apply to procedures under § 2710(d)(7)(B)(vii) is reasonable and should be upheld. For the foregoing reasons and those stated in Defendants' motion for partial dismissal, the Pequot should be dismissed as a plaintiff and the claims relating to Pequot's procedures should be dismissed.

Respectfully submitted this 26th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March, 2018, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Devon Lehman McCune
Devon Lehman McCune
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