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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTICHOKE JOE'S CALIFORNIA  
GRAND CASINO, FAIRFIELD YOUTH  
FOUNDATION, LUCKY CHANCES,  
INC., OAKS CLUB ROOM,  
SACRAMENTO CONSOLIDATED  
CHARITIES,

Plaintiffs,

v.

GALE A. NORTON, Secretary of  
the Interior, AURENE M. MARTIN,  
Acting Secretary of the  
Interior, RONALD M. JAEGER,  
Pacific Regional Director,  
Bureau of Indian Affairs,  
Department of the Interior,  
CITY OF SAN PABLO, and LYTTON  
RANCHERIA OF CALIFORNIA,

Defendants.

CIV-S-01-1530 DFL/GGH

MEMORANDUM OF OPINION AND  
ORDER

Plaintiff card rooms and charities ("plaintiffs") bring suit  
against the Secretary of the Interior and the Pacific Regional  
Director of the Bureau of Indian Affairs (collectively,

1 "Secretary"). The City of San Pablo ("City") and the Lytton  
2 Ranheria of California ("Lytton" or "the Lyttons") are  
3 defendants in intervention. Plaintiffs seek a preliminary  
4 injunction to prevent the Secretary from taking certain land into  
5 trust for Lytton located in San Pablo, California. Plaintiffs  
6 contend that Lytton's plan to conduct class II tribal gaming on  
7 the trust site would violate federal law relating to Indian  
8 gaming and deny plaintiffs equal protection under the Fifth and  
9 Fourteenth Amendments. Defendants move to dismiss the action.  
10 The main bulk of the briefing on both motions is addressed to  
11 whether Lytton properly has been recognized as a tribe by either  
12 the Secretary or the Congress. As will be explained, this issue  
13 cannot and need not be resolved on the present record and  
14 motions.

### 15 I. Facts and Procedural History

16 In 1926, the United States purchased fifty acres of land  
17 located north of Santa Rosa in Sonoma County for the use of  
18 homeless Indians. (Pls.' Mot. for Prelim. Inj. at 3.) The land  
19 tract, called the Lytton Ranheria, was intended for the 102  
20 members of the Dry Creek and Geyersville bands of Indians.<sup>1</sup>  
21 (Id.; Fried Decl. Ex. F at 7.) However, the Dry Creek and  
22 Geyersville Indians never occupied the Lytton Ranheria. In  
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24 <sup>1</sup> Ranherias are small Indian reservations. See, e.g.,  
25 Duncan v. U.S., 667 F.2d 36, 38 (Ct.Cl. 1981) ("Ranherias are  
26 numerous small Indian reservations or communities in California,  
the lands for which were purchased by the Government (with  
Congressional authorization) for Indian use, . . . a program  
triggered by an inquiry in 1905-06 into the landless, homeless or  
penurious state of many California Indians.").

1 1937, the Sacramento Indian Agency of the Department of the  
2 Interior allowed Bert Steele and his brother-in-law, John Myers,  
3 and their families, to move onto the Lytton Rancheria after  
4 Steele's home was destroyed in a flood. (Pls.' Mot. for Prelim.  
5 Inj. at 3-4; Fried Decl. Ex. A, March 17, 1939 letter at 3.)  
6 John Myers and Mary Myers Steele were members of the Pomo band of  
7 Indians, based in Sonoma County. (Id.) Bert Steele was part Pit  
8 Indian and part Nomalaki Indian. (Pls.' Mot. for Prelim. Inj. at  
9 4.) The Geyersville Band protested the presence of the Steele  
10 and Myers families on the Lytton Rancheria, but the Sacramento  
11 Indian Agency allowed the families to stay. (Id. at 5.)

12 In 1958, Congress terminated the federal trust in the  
13 reservation land of over forty California rancherias, including  
14 Lytton. Cal. Rancheria Act, Public Law 85-671, 72 Stat. 619.  
15 Eventually, the Lytton lots were all sold to non-Indians. (Fried  
16 Decl. Ex. F at 7-8.) However, in 1987, the "Lytton Indian  
17 Community" joined as plaintiffs in the case Scotts Valley Band of  
18 Pomo Indians of the Sugar Bowl Rancheria v. United States, No. C-  
19 86-3660 (N.D.Cal.). (Pls.' Mot. for Prelim. Inj. at 6-7.)  
20 Lytton and three other terminated California rancherias  
21 challenged the 1958 terminations as invalid, because Public Law  
22 85-671 § 3(c) required the federal government to "install or  
23 rehabilitate . . . irrigation or domestic water systems [as  
24 agreed]" before the land was distributed, or within a reasonable  
25 time after the land was distributed. Id. at 7. According to  
26 Lytton, the required water system improvements were never made on

1 the Lytton land. Rapport Decl. Ex. D; Fried Decl. Ex. F at 8.  
2 By this time, the Indian Gaming Regulatory Act ("IGRA") had been  
3 enacted,<sup>2</sup> such that a successful outcome for the plaintiff  
4 rancherias could open the way to Indian gaming on the rancherias.

5 In 1991, the Secretary and the four California rancherias  
6 settled the Scotts Valley case. (Pls.' Mot. for Prelim. Inj. at  
7 8.) The stipulation reached as part of the settlement stated  
8 that the termination of the Lytton Rancheria was illegal and that  
9 the Steele and Myers descendants were entitled to the rights and  
10 benefits of individual Indians. It provided that their lineal  
11 descendants could organize under the Indian Reorganization Act  
12 ("IRA").<sup>3</sup> (Id.) The Scotts Valley stipulation also assured  
13 Alexander Valley/Sonoma County landowners, who intervened in the  
14 suit, that the Lyttons would not conduct gaming in Alexander  
15 Valley except in conformity with the County's general plan and  
16 IGRA. (Id.) After the Scotts Valley judgment was entered, the  
17 Secretary listed Lytton as a recognized tribe in the Federal  
18 Register every time such notices were issued between 1992 and  
19 2002. (Lytton's Mot. to Dism. at 4.)

20 Since gaming is inconsistent with the Sonoma County general  
21 plan, the Lyttons could not find land for a casino in Alexander  
22 Valley, where the original Rancheria was located. (Mejia Decl. ¶  
23 5.) With the assistance of outside investors, Lytton began to  
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25 <sup>2</sup> See 102 Stat. 2467, 25 U.S.C. § 2701 et seq.

26 <sup>3</sup> Whether the stipulation required Lytton to organize under  
the IRA before federal recognition is a disputed issue.

1 search for property that could be taken into trust and used for  
2 gaming. (Lytton's Mot. to Dism. at 2; Pls.' Mot. for Prelim.  
3 Inj. at 10.) Eventually, the San Pablo property, which is the  
4 focus of this dispute, was identified as a suitable gaming  
5 property by Lytton and its investors. The property is within the  
6 San Francisco Bay Area and would be the first, or one of the  
7 first, Indian gaming casinos in a major urban area in California.  
8 The San Pablo property already had a card room operating on it,  
9 owned by Ladbrooke's, a major gambling concern, and Lytton's  
10 investors purchased the property in anticipation of transferring  
11 ownership to Lytton.

12 In 2000, Lytton obtained a Lytton land trust provision in §  
13 819 of the Omnibus Indian Advancement Act of 2000 ("Omnibus Act")  
14 that instructed the Secretary to take the San Pablo property into  
15 trust:

16 Notwithstanding any other provision of law, the  
17 Secretary of the Interior shall accept for the benefit  
18 of the Lytton Rancheria of California the [San Pablo]  
19 land . . . . The Secretary shall declare that such  
20 land is held in trust by the United States for the  
21 benefit of the Rancheria and that such land is part of  
the reservation of such Rancheria under sections 5 and  
7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C.  
467). Such land shall be deemed to have been held in  
trust and part of the reservation of the Rancheria  
prior to October 17, 1988.

22 Pub. L. 106-568 § 819, 114 Stat 2868. The last portion of § 819  
23 apparently exempts the property from § 20 of IGRA, which subjects  
24 gaming on lands acquired by the Secretary of the Interior after  
25 October 17, 1988 to additional requirements, chief among them the  
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1 approval of the Governor of the State.<sup>4</sup> 25 U.S.C. § 2719.  
2 Because of this and related litigation, the Secretary has not yet  
3 taken the land into trust for Lytton. (Pls.' Mot. at 10, 12.)  
4 See Artichoke Joe's v. Norton, 216 F.Supp.2d 1084 (E.D.Cal. 2002)  
5 [hereinafter Artichoke Joe's I].

6 In 2001, Congress revisited the San Pablo land grant to the  
7 Lytton Rancheria by enacting Public Law 107-63 § 128, providing  
8 that: "The Lytton Rancheria of California shall not conduct class  
9 III gaming as defined [by IGRA] on land taken into trust for the  
10 tribe pursuant to [§ 819 of Omnibus Act] except in compliance  
11 with all required compact provisions . . . or any relevant class  
12 III gaming procedures."<sup>5</sup> Although the import of this statutory

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14 <sup>4</sup> 25 U.S.C. § 2719(a)&(b)(1)(A) provides:

15 [G]aming regulated by this chapter shall not be  
16 conducted on lands acquired by the Secretary in trust  
17 for the benefit of an Indian tribe after October 17,  
18 1988, unless . . . the Secretary, after consultation  
19 with the Indian tribe and appropriate State and local  
20 officials, including officials of other nearby Indian  
21 tribes, determines that a gaming establishment on newly  
22 acquired lands would be in the best interest of the  
23 Indian tribe and its members, and would not be  
24 detrimental to the surrounding community, but only if  
25 the Governor of the State in which the gaming activity  
26 is to be conducted concurs in the Secretary's  
determination . . . .

22 <sup>5</sup> IGRA divides tribal gaming into three categories. Indian  
23 tribes exclusively regulate class I gaming consisting largely of  
24 social games with small prizes. 25 U.S.C. §§ 2703(6), 2710(d).  
25 Class II gaming includes certain types of bingo, as well as card  
26 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. . . ." Id. §  
2703(7)(A). Both tribal governments and the federal government  
regulate class II gaming. Id. § 2710(d). Class III gaming is  
defined as all forms of gaming that "are not class I gaming or

1 language is unclear and disputed, it appears that at the least  
2 Congress wished to allay fears that § 819 could be understood to  
3 permit unregulated class III gaming on the San Pablo property.

4 Under IGRA, to conduct class III gaming, an Indian tribe  
5 must negotiate a compact with the state. The Governor of  
6 California has informed Lytton that he will not negotiate with  
7 Lytton about a gaming compact until Lytton has land in trust that  
8 can be used for gaming. (Hamerling Decl. Ex. G.) The Governor  
9 has also communicated to Lytton some concern about urban gaming:  
10 "it is our understanding that the Tribe intends to acquire land  
11 in a metropolitan area for the purpose of conducting class III  
12 gaming. Accordingly, there are numerous issues implicated by the  
13 Tribe's intended acquisition." (Id.) Since it is not certain  
14 that there will be a class III gaming compact in the immediate  
15 future, plaintiffs allege that even so they face imminent  
16 hardship from class II gaming, which Lytton could begin, without  
17 a compact, as soon as the land is taken into trust. Plaintiffs  
18 allege that they are prohibited from conducting certain forms of  
19 class II gaming, and hence would be placed at a competitive  
20 disadvantage. (First Amended Complaint ("FAC") ¶ 67.)

21 The Lytton Rancheria currently has 253 enrolled members, 122  
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23 class II gaming." Id. § 2703(8). While class II regulations  
24 prohibit "electronic or electromechanical facsimiles of any game  
25 of chance or slot machines of any kind," such machines are  
26 permitted under class III gaming, as are house-banking, "Las  
Vegas" style games. Tribes cannot conduct class III gaming on  
Indian land without first negotiating a gaming compact with the  
state and gaining approval from the National Indian Gaming  
Commission ("NIGC"). Id. § 2710(d)(1).

1 adults and 131 minors. (Meija Decl. ¶ 6.) Most of Lytton's  
2 members live near Healdsburg, close to the site of the old  
3 Rancheria land. (Id.) Many of Lytton's members live in  
4 economically depressed conditions; 15 percent are homeless, 90  
5 percent do not have health insurance, 40 to 50 percent of the  
6 adults are unemployed, and many members experience persistent  
7 problems with alcohol abuse, chronic depression, and lack of  
8 education. (Id. ¶¶ 6-7.) Lytton's members do not plan to live  
9 on the San Pablo land parcel. (Pls.' Mot. at 11.) If the San  
10 Pablo land is taken into trust and the Lyttons are allowed to  
11 take control of the San Pablo Casino, the Lyttons plan to develop  
12 a fifty acre parcel in Windsor, California, in Sonoma County,  
13 which the Lyttons' financial backers now own for the Lyttons'  
14 benefit. (Meija Decl. ¶ 15.)

15 Plaintiffs filed this suit on August 7, 2001. They allege  
16 that (1) the Secretary violated the APA by listing Lytton as a  
17 federally recognized Indian tribe; (2) the § 819 Lytton land  
18 trust directive violates federal law because Lytton is not an  
19 "Indian tribe" under IGRA, the San Pablo site does not constitute  
20 "Indian land," and the municipal services agreement ("MSA") with  
21 San Pablo violates IGRA; and (3) if Lytton were allowed to  
22 conduct Indian gaming under IGRA at the San Pablo site, the  
23 plaintiff card rooms would be denied equal protection under the  
24 Fourteenth and Fifth Amendments of the Constitution. (FAC ¶¶ 70-  
25 83.) Plaintiffs request a preliminary injunction prohibiting the  
26 Secretary from taking the San Pablo land into trust. Defendants

1 move to dismiss the action as nonjusticiable.

2 II. Motion to Dismiss

3 Many of plaintiffs' claims turn on their contention that  
4 Lytton is not a validly recognized Indian tribe. Defendants move  
5 to dismiss all such claims on the basis that the validity of  
6 federal tribal recognition is a nonjusticiable political  
7 question. Defendants also move to dismiss the remaining claims  
8 as follows: the Tenth Amendment and Enclaves Clause claims for  
9 lack of standing; the statutory IGRA claims on the basis of  
10 standing and ripeness; the challenge to the Scotts Valley  
11 stipulation as time-barred; and the claim that § 128 of P.L. 107-  
12 63 supersedes § 819 of the Omnibus Act for failure to state a  
13 claim upon which relief can be granted.

14 A. Judicial Review of Federal Recognition

15 The Supreme Court has consistently treated tribal  
16 recognition decisions by Congress or the executive as entitled to  
17 a large degree of deference. Indeed, the Court's first  
18 pronouncement on the reviewability of tribal recognition  
19 decisions might suggest that such decisions are unreviewable and  
20 that the courts lack jurisdiction to entertain any challenges to  
21 tribal recognition: "In reference to all matters of this kind,  
22 it is the rule of this court to follow the action of the  
23 executive and other political departments of the government,  
24 whose more special duty is to determine such affairs. If by them  
25 those Indians are recognized as a tribe, this court must do the  
26 same." United States v. Holliday, 70 U.S. (3 Wall.) 407, 419

1 (1866). Later decisions, however, have clarified that the  
2 discussion in Holliday does not foreclose all review but rather  
3 sets a high standard of judicial deference. In Baker v. Carr,  
4 369 U.S. 186, 215-216, 82 S.Ct. 691, 709-710 (1962), the court  
5 gave the status of Indian tribes as an example of a political  
6 question, but then noted that "courts will strike down any  
7 heedless extension of th[e] ['distinctly Indian'] label. They  
8 will not stand impotent before an obvious instance of a  
9 manifestly unauthorized exercise of power."

10 Thus, while according great deference to executive decisions  
11 on tribal status, courts have found such decisions reviewable at  
12 least when the Secretary recognizes an Indian tribe under  
13 specific Congressional mandates or agency regulations. See,  
14 e.g., Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489, 1496  
15 (D.C.Cir. 1997) ("Although the principle of deference does not  
16 require a court to avoid the question of sovereignty, a 'proper  
17 respect for both tribal sovereignty itself and for the plenary  
18 authority of Congress in this area cautions that we tread lightly  
19 in the absence of clear indications of legislative intent.'")  
20 (citation omitted). Courts apply the "arbitrary and capricious"  
21 standard for review of agency action to recognition decisions  
22 where the "executive branch has . . . sought to canalize the  
23 discretion of its subordinate officials by means of regulations  
24 that require them to base recognition of Indian tribes on the  
25 kinds of determination, legal or factual, that courts routinely  
26 make." Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of

1 the Interior, 255 F.3d 342, 348 (7th Cir. 2001) (citing Hein v.  
2 Capitan Grande Band of Diequeno Mission Indians, 201 F.3d 1256,  
3 1261 (9th Cir. 2000)).

4       Accordingly, initial review is appropriate at least to  
5 determine whether Lytton has been recognized as a tribe according  
6 to cognizable standards or wholly outside of any regulations or  
7 judicially manageable standards. See James v. Dept. of Health  
8 and Human Services, 824 F.2d 1132, 1137-39 (D.C.Cir. 1987)  
9 (reviewing the tribal status of the Gay Head Indians only to  
10 decide that the acknowledgment regulations were applicable  
11 standards, then deferring to the Department of the Interior,  
12 which had not yet been given a chance to apply those  
13 regulations).

14       Plaintiffs challenge the Secretary's decision to settle the  
15 Scotts Valley case and to list Lytton as a tribe. (See, e.g.,  
16 Pls.' Consolidated Reply at 20.) They assert that the Secretary  
17 did not follow the applicable regulations in determining Lytton's  
18 status.<sup>6</sup> (Id.) The Secretary's response is not entirely clear.  
19 In her initial briefing she asserted that Lytton was recognized  
20 under the Indian Reorganization Act ("IRA"). (Fed. Defs.' Opp'n  
21 at 10-11.) However, in supplemental briefing, the Secretary  
22 maintained that Lytton was recognized on the date the Scotts  
23 Valley stipulation was signed, independent of any IRA

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26       <sup>6</sup> Plaintiffs argue that the Secretary should have followed  
the recognition regulations at 25 C.F.R. § 83 et seq. (Pls.' Consolidated Reply at 20.)

1 organization.<sup>7</sup> (Fed. Defs.' Suppl. Brief. at 2-3.) If the  
2 latter characterization were correct, it might follow that the  
3 Secretary's decision to recognize Lytton was not the result of a  
4 considered application of independent standards and would not be  
5 reviewable, assuming that it was not a "manifestly unauthorized  
6 exercise of power." Baker, 369 U.S. at 215-216.

7 At this stage of the litigation, the court does not have  
8 enough information to determine whether the Secretary recognized  
9 Lytton under the IRA or whether the Secretary made a recognition  
10 decision that was political in the sense that it was independent  
11 of any regulation or standard. Defendants' motion to dismiss  
12 plaintiffs' tribal status claim as a political question is denied  
13 without prejudice to its renewal on a clearer record.

#### 14 B. Standing for Tenth Amendment and Enclaves Clause Claims

15 Defendants move to dismiss plaintiffs' Tenth Amendment and  
16 Enclaves Clause claims for lack of standing.

##### 17 1. Tenth Amendment Claim

18 The complaint asserts that the removal of the San Pablo  
19 property from state regulatory control into a federal trust,  
20 without the IGRA procedures applicable to lands taken into trust  
21 after 1988, would violate the Tenth Amendment. In Tennessee  
22 Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 143-44, 59  
23 S.Ct. 366, 372-73 (1939) [hereinafter "TVA"], the Supreme Court  
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25 <sup>7</sup> The Secretary notified the court that Lytton "has not  
26 completed the final procedures for approval of [a tribal  
constitution] pursuant to the IRA." (Fed. Defs.' Suppl. Brief  
Regarding Lytton's Tribal Status at 1.)

1 held that a private power company did not have standing to make a  
2 Tenth Amendment challenge "absent the states or their officers. .  
3 . ." See also Nance v. EPA, 645 F.2d 701, 716 (9th Cir. 1981).

4 The State of California is not a party to this case; indeed,  
5 it specifically declined to intervene. (Notice by State of  
6 California of Intent Not to Intervene, 12/27/2002). The Supreme  
7 Court has not overruled its holding in TVA. See City of  
8 Roseville v. Norton, 219 F.Supp.2d 130, 147-49 (D.D.C. 2002)  
9 (noting Seventh and Eleventh Circuit case law allowing private  
10 party standing, but holding that courts must continue to follow  
11 TVA until overruled). Because the plaintiffs do not act with the  
12 authority of the State of California or its officers, they do not  
13 have standing to assert a Tenth Amendment claim. Defendants'  
14 motion to dismiss plaintiffs' Tenth Amendment claim is granted.

## 15 2. Enclaves Clause Claims

16 The complaint also asserts a claim under the Enclaves Clause  
17 similar to the Tenth Amendment claim. "The Enclaves Clause  
18 requires the consent of a State before the federal government may  
19 establish an enclave within a State's territory that is  
20 exclusively subject to federal legislative authority."  
21 Roseville, 219 F.Supp.2d at 149 (citing U.S. Const., Art. I, § 8,  
22 cl. 17). As with the Tenth Amendment claim, plaintiffs attempt  
23 to don the mantle of the State to protect its interest in  
24 jurisdiction over land within its borders. They lack standing to  
25 do so for the same reasons that they lack standing to assert the  
26 Tenth Amendment claim. Id. at 145-46 (prohibition on third party

1 standing bars private party from bringing claims under the  
2 Enclaves Clause). Defendants' motion to dismiss the Enclaves  
3 Clause claim is granted.

4 C. The Primary Beneficiary Claim

5 One of plaintiffs' claims under IGRA is that "[t]he Lyttons  
6 will not be the 'primary beneficiaries' of the San Pablo gaming  
7 operation, in violation of . . . [s]ections 2702(2) and 2711 of  
8 IGRA." (FAC ¶ 75(c).) Plaintiffs allege that Lytton will not be  
9 the "primary beneficiary" of San Pablo gaming profits because of  
10 the deal made by Lytton with its outside investors and Ladbroke,  
11 the previous owner of the San Pablo Casino. (Compl. ¶¶ 48-49.)  
12 The Secretary argues that this claim should be dismissed because  
13 (1) IGRA does not impose an enforceable requirement that the  
14 compacting tribe be the "primary beneficiaries" of gaming, (2)  
15 plaintiffs lack standing to challenge the Lyttons' share of  
16 gaming profits, and (3) the claim is not ripe, because the  
17 National Indian Gaming Commission ("NIGC") has not yet approved  
18 the San Pablo management contract, as required under 25 U.S.C. §  
19 2711. (Fed. Defs.' Opp'n at 24.)

20 Section 3 of IGRA is a "declaration of policy" that states  
21 that one purpose of IGRA is to "provide a statutory basis for the  
22 regulation of gaming by an Indian tribe . . . to ensure that the  
23 Indian tribe is the primary beneficiary of the gaming operation.  
24 . . ." 25 U.S.C. § 2702. Although the "primary beneficiary"  
25 provision is simply a declaration of policy, not a statutory  
26 provision with a private right of action, plaintiffs rely on §

1 2711(b)(5) and § 2711(c), which include specific protections for  
2 tribal interests in gaming. (Pls.' Reply at 44 n.52.) Section  
3 2711(b)(5) provides that the NIGC Chairman may only approve a  
4 casino management contract if the contract term does not exceed  
5 five years, unless other (specified) circumstances justify a  
6 longer term. Section 2711(c) requires the Chairman to disapprove  
7 management contracts where the non-tribal management entity  
8 receives more than thirty percent of net gaming revenues.<sup>8</sup>  
9 Plaintiffs have alleged, without further explanation, "that the  
10 Lyttons' financial arrangements with the City of San Pablo and  
11 with their other non-Indian investors violate these rules."  
12 (Pls.' Reply at 44 n.52; FAC ¶¶ 75(d), 84(h).)

13 There is no IGRA provision that explicitly gives non-tribes  
14 private rights of action under § 2711(b)(5) and (c), and it seems  
15 doubtful that plaintiffs could have standing under the APA to  
16 challenge a decision by the NIGC Chairman that would have no  
17 effect on them. But even if standing could be shown, there is no  
18 decision by the NGIC to challenge under the APA. Accordingly,  
19 plaintiffs' statutory IGRA claims are not ripe. See  
20 Hodgers-Durqin v. De La Vina, 199 F.3d 1037, 1044 (9th Cir.1999).  
21 Defendants' motion to dismiss plaintiffs' claims under 25 U.S.C.  
22 § 2711(b)(5) and (c) is granted.<sup>9</sup>

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24 <sup>8</sup> In certain circumstances, the fee may be up to forty  
percent of net revenues. 25 U.S.C. § 2711(c)(2).

25 <sup>9</sup> Plaintiffs request that "the court stay rather than  
26 dismiss this aspect of plaintiffs' action so that it can be  
adjudicated as soon as the Lyttons seek approval from the NIGC  
for their management contracts." (Pls.' Reply at 14 n.16.) The

1           D. Tribal Status Claim and the Statute of Limitations

2           Defendants assert that plaintiffs' challenge to Lytton's  
3 tribal status is barred by the six year statute of limitations  
4 for claims against the United States. See 28 U.S.C. § 2401(a)  
5 ("[E]very civil action commenced against the United States shall  
6 be barred unless the complaint is filed within six years after  
7 the right of action first accrues."). Defendants argue that  
8 because it has been more than six years since the Scotts Valley  
9 stipulation was reached and Lytton was first listed in the  
10 Federal Register as a recognized tribe, plaintiffs' claim is time  
11 barred.<sup>10</sup> Plaintiffs agree that § 2401 applies, but argue that  
12 under Wind River Mining Corp. v. U.S., 946 F.2d 710 (9th Cir.  
13 1991), their claim is not barred.

14           The rule in Wind River provides that notwithstanding the six  
15 year statute of limitations, substantive challenges to agency  
16 action can be made up to six years from the date the action was  
17 applied to the challenger. Id. at 715-16. The rationale of the  
18 Wind River decision is equally applicable to this action: "The  
19 government should not be permitted to avoid . . . challenges to  
20 its actions, even if *ultra vires*, simply because the agency took  
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22 court declines to stay the claim given that it is clearly  
23 premature and that plaintiffs' claim to standing is so tenuous.

24           <sup>10</sup> As part of the substance of their tribal status claim,  
25 plaintiffs assert that Lytton can only obtain federal recognition  
26 through IRA reorganization, and that Lytton has not completed IRA  
reorganization. Of course, if it turns out that Lytton has not  
actually finished the tribal recognition process under the IRA  
and that the stipulation requires that Lytton do so, plaintiffs'  
tribal status challenge could not be untimely.

1 the action long before anyone discovered the true state of  
2 affairs." Id. at 715.

3 Plaintiffs' claim concerning recognition of Lytton as a  
4 tribe is a substantive challenge to the Secretary's recognition  
5 decision. Further, when the Secretary made the decision to  
6 settle the Scotts Valley case and grant Lytton federal  
7 recognition in 1991, plaintiffs could have had no idea that  
8 Lytton's tribal status would affect them. (Pls.' Reply at 11.)  
9 Lytton's previous home land was in Sonoma County, and there was  
10 no indication in the Scotts Valley settlement that Lytton would  
11 seek to conduct tribal gaming in San Pablo. Even if they had  
12 known of the Scotts Valley stipulation and wanted to challenge it  
13 at the time, plaintiffs would not have had standing to do so.  
14 The only group with an interest in challenging the Secretary's  
15 recognition decision was the intervenor Alexander Valley  
16 landowners and the stipulation effectively removed any interest  
17 or incentive the landowners had in challenging the Secretary's  
18 decision by forbidding gaming by the Lyttons in Sonoma County.  
19 Thus, there was no one with standing to challenge the recognition  
20 decision at the time it was made. For these reasons, the statute  
21 of limitations did not start running on plaintiffs' tribal status  
22 claim until IGRA gaming in San Pablo by the Lyttons became  
23 probable. It follows that plaintiffs' claim is not barred by the  
24 six year statute of limitations.

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1 E. Inter-relation of § 128 and § 819: Failure to State a  
2 Claim

3 In the second claim of the First Amended Complaint,  
4 plaintiffs contend that Public Law 107-63 § 128 ("§ 128"),  
5 enacted in 2001, repealed the backdating provision in § 819 of  
6 the Omnibus Act. (FAC ¶ 75(g).) Section 819 provides that

7 Notwithstanding any other provision of law, the  
8 Secretary of the Interior shall accept for the benefit  
9 of the Lytton Rancheria of California the [San Pablo  
10 Casino] land. . . . The Secretary shall declare that  
11 such land is held in trust by the United States for the  
12 benefit of the Rancheria and that such land is part of  
13 the reservation of such Rancheria. . . . Such land  
14 shall be deemed to have been held in trust and part of  
15 the reservation of the Rancheria prior to October 17,  
16 1988.

17 Pub. L. 106-568 § 819, 114 Stat 2868 (emphasis added). Section  
18 128 states: "The Lytton Rancheria of California shall not  
19 conduct class III gaming as defined [by IGRA] on land taken into  
20 trust for the tribe pursuant to [§ 819 of Omnibus Act] except in  
21 compliance with all required compact provisions . . . or any  
22 relevant class III gaming procedures." P.L. 107-63 § 128.

23 Plaintiffs contend that the § 128 language requiring Lytton  
24 to meet "all required compact provisions or any relevant class  
25 III gaming procedures" must refer to 25 U.S.C. § 2719, which  
26 imposes additional requirements for gaming on lands acquired in  
trust after October 17, 1988.<sup>11</sup> (Pls. Reply at 50-51.) For that

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24 <sup>11</sup> 25 U.S.C. § 2719(a)&(b)(1)(A) provides:

25 [G]aming regulated by this chapter shall not be  
26 conducted on lands acquired by the Secretary in trust  
for the benefit of an Indian tribe after October 17,  
1988, unless . . . the Secretary, after consultation

1 reason, they argue that the § 819 provision backdating the San  
2 Pablo land acquisition was repealed when § 128 was passed.

3 Plaintiffs' claim presents a difficult question of statutory  
4 interpretation. The relationship between the two sections is not  
5 clear. At the point in time that the Governor either enters into  
6 a compact for class III gaming with Lytton or declines to do so  
7 because of § 128, this statutory interpretation question must be  
8 addressed. Until that time, however, the statutory issue is not  
9 ripe and may never arise.

10 Even if § 128 overrules § 819, and the San Pablo land  
11 acquisition is not backdated, it does not follow that Lytton  
12 cannot conduct class III gaming at San Pablo. Section 2719 does  
13 not forbid class III gaming on trust lands acquired after 1988  
14 but permits the Governor to refuse to negotiate a class III  
15 compact if he finds gaming would be detrimental to the  
16 surrounding community. Id.

17 At this time, Governor Davis has not begun, and may not  
18 begin negotiations with Lytton about a class III gaming compact.  
19 Or the Governor and the Secretary might make a determination that  
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21  
22 with the Indian tribe and appropriate State and local  
23 officials, including officials of other nearby Indian  
24 tribes, determines that a gaming establishment on newly  
25 acquired lands would be in the best interest of the  
26 Indian tribe and its members, and would not be  
detrimental to the surrounding community, but only if  
the Governor of the State in which the gaming activity  
is to be conducted concurs in the Secretary's  
determination . . . .

1 gaming is in the best interests of the Lyttons and the local  
2 community. Under both plaintiffs' and defendants'  
3 interpretation, § 128 only addresses requisite procedures and  
4 findings for entering into class III gaming compacts and it is  
5 unclear from this vantage what compact procedures would be  
6 followed and what determinations might be made by the Secretary  
7 and Governor were a class III compact negotiation to occur. P.L.  
8 107-63 § 128; 25 U.S.C. § 2719(a)&(b)(1)(A). At least at this  
9 juncture, the court declines to address the merits of the § 128/§  
10 819 claim when no class III gaming compact is imminent.  
11 Defendants' motion to dismiss is therefore denied.

### 12 III. Preliminary Injunction

13 To grant a preliminary injunction, the court must find  
14 either (1) a combination of probable success on the merits and a  
15 possibility of irreparable harm; or (2) the existence of serious  
16 questions going to the merits where the balance of hardships tips  
17 sharply in the moving party's favor. Sammartano v. First  
18 Judicial Dist. Court, 303 F.3d 959, 965 (9th Cir. 2002). Harm  
19 and probable success on the merits are considered on a sliding  
20 scale such that a stronger showing on one factor may balance a  
21 weaker showing on the other. Immigrant Assistance Project of Los  
22 Angeles County Fed'n of Labor (AFL-CIO) v. I.N.S., 306 F.3d 842,  
23 873 (9th Cir. 2002).

#### 24 A. Balance of Hardship

25 At oral argument, plaintiffs argued that they will suffer  
26 immediate, irreparable harm if the Secretary takes the San Pablo

1 land into trust. They assert that if the land is taken into  
2 trust: (1) the Quiet Title Act will prevent them from challenging  
3 the land trust in the future; (2) the Lyttons will commence class  
4 II gaming that will draw business away from plaintiffs; (3) such  
5 class II gaming will not be subject to state criminal  
6 jurisdiction; and (4) the Lyttons may lease the San Pablo land to  
7 another tribe with a class III gaming compact. (Hr'g Tr. at  
8 11:22-15:10; 75:11-76:12.)

9 1. Quiet Title Act

10 Plaintiffs contend that once the San Pablo land is taken  
11 into trust, they cannot challenge the Lyttons' possession of it  
12 under the Quiet Title Act. See 28 U.S.C. 2409a(a) ("The United  
13 States may be named as a party defendant in a civil action under  
14 this section to adjudicate a disputed title to real property in  
15 which the United States claims an interest. . . . This section  
16 does not apply to trust or restricted Indian lands. . . .").  
17 However, even if the Quiet Title Act would not allow plaintiffs  
18 to challenge the San Pablo land trust, it is not tribal ownership  
19 or possession of land in San Pablo that may harm plaintiffs; it  
20 is tribal gaming. The federal government has authority to take  
21 land into trust for individual Indians and groups of Indians.  
22 See United States v. McGowan, 302 U.S. 535, 539, 58 S.Ct. 286,  
23 288 (1938) (holding that the federal government validly held land  
24 in trust for the Reno Indian Colony, a group of homeless Indians  
25 of several different tribes); United States v. Pelican, 232 U.S.  
26 442, 448, 34 S.Ct. 396, 398 (1914) (holding that where federal

1 government held land in trust for individual Indians, "its power  
2 to make rules and regulations respecting such territory was  
3 ample."). Lytton's possession of the land under federal trust  
4 will not preclude review of plaintiffs' substantive claims  
5 concerning possible gaming at the site. Since Lytton's  
6 possession of the land does not itself harm plaintiffs, the Quiet  
7 Title Act will not prevent plaintiffs from redressing any future  
8 harm.

## 9 2. Class II Gaming

10 Plaintiffs assert that they will be harmed because Lytton  
11 will be able to commence class II gaming as soon as the land is  
12 taken into trust. In particular, plaintiffs assert that Lytton  
13 will be permitted to offer electronic bingo as class II gaming  
14 whereas under state law non-Indian card rooms are prohibited from  
15 offering any form of bingo while charitable organizations are  
16 limited to non-electronic bingo with jackpots no greater than  
17 \$250.<sup>12</sup>

18 The IGRA definition of class II gaming includes "the game of  
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20 <sup>12</sup> California "prohibits bingo games that are not operated  
21 by members of designated charitable organizations or which offer  
22 prizes in excess of \$250 per game." California v. Cabazon Band  
23 of Mission Indians, 480 U.S. 202, 222, 107 S.Ct. 1083, 1095  
24 (1987); Cal. Penal Code § 326.5. Those entities that are allowed  
25 to conduct bingo games under Cal. Penal Code § 326.5 are not  
26 permitted to use electronic aids that eliminate the use of actual  
bingo cards. 67 Ops. Cal. Att'y Gen. 528 (1984) (prohibiting use  
of electronic bingo game played on facsimile of bingo card on the  
screen); 70 Ops. Cal. Att'y. Gen. 304, 308 (1987) (advising that  
any electronic bingo device replacing actual bingo cards is  
prohibited); 81 Ops. Cal. Att'y Gen. 415 (stating that card rooms  
could use an electronic aid in conjunction with bingo cards to  
notify a player when a game is won).

1 chance commonly known as bingo (whether or not electronic,  
2 computer, or other technologic aids are used in connection  
3 therewith)," 25 U.S.C. § 2703(7)(A)(i), but excludes "electronic  
4 or electromechanical facsimiles of any game of chance or slot  
5 machines of any kind." Id. § 2703(7)(A)(ii). Class II gaming  
6 additionally excludes house banking games.<sup>13</sup> United States v.  
7 103 Electronic Gambling Devices, 223 F.3d 1091, 1099 (9th Cir.  
8 2000). As class II gaming, a tribe can offer bingo on electronic  
9 cards where the players compete against other players, who may be  
10 at different locations, for jackpots that could become sizeable  
11 depending on the number of players and whether the tribe  
12 subsidizes the jackpot. See U.S. v. 162 MegaMania Gambling  
13 Devices, 231 F.3d 713, 721 (10th Cir. 2000). But a tribe without  
14 a class III compact cannot offer electronic bingo that is played  
15 against a machine (the house) much like a slot machine. Id. at  
16 1093, 1103. And, of course, a tribe without a compact cannot  
17 offer slot machine gambling; indeed, the ability to offer slot  
18 machines is the principal benefit of class III gaming. Artichoke  
19 Joe's I, 216 F.Supp.2d at 1098.

20 Plaintiffs claim that class II gaming in San Pablo would  
21 decrease patronage of their businesses because Lytton would be  
22 able to offer "unlimited jackpots," while plaintiff charities  
23 would have to abide by the statutory \$250 jackpot cap. See,  
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25 <sup>13</sup> A house banking game is "any game of chance that is  
26 played with the house as a participant in the game, where the  
house takes on all players, collects from all losers, and pays  
all winners, and the house can win." 25 C.F.R. § 502.11.

1 e.g., Wilkinson Decl. ¶ 4. But it is speculative as to how big  
2 the bingo jackpots may be at the Lytton facility and how powerful  
3 an incentive a large bingo jackpot would be to card-playing  
4 patrons of the card rooms or to players accustomed to charity  
5 bingo events.

6 Moreover, plaintiffs do not make a convincing case that  
7 electronic bingo games are "virtually indistinguishable" from  
8 slot machines. (Eadington Decl. ¶ 7.) There is little dispute  
9 that slot machines are a big draw. Plaintiffs' expert, William  
10 Eadington, asserts that class II electronic bingo slot machines  
11 look just like Las Vegas style class III slot machines. (Id.  
12 Exh. B.) But the machines he points to have not yet been  
13 classified as class II by the NIGC. At oral argument, counsel  
14 for Lytton characterized the pictured machines as "marginal  
15 machines," machines that look and play like class III devices,  
16 but are marketed as class II devices. (Hr'g Tr. at 60:10-15.)  
17 Plaintiffs' counsel represented that Lytton would not use such  
18 machines. (Id. at 60:16-21.)

19 The court relies in part on Lytton's counsel's  
20 representation that Lytton will not use "marginal" electronic  
21 bingo devices. With that understanding, the differences in the  
22 type of bingo that some of plaintiffs currently conduct and that  
23 Lytton may conduct does not constitute great hardship to  
24 plaintiffs.<sup>14</sup> Of course, there may be an increase in competition  
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26 <sup>14</sup> This conclusion is supported by the declaration of  
plaintiffs' expert. Exhibit A to the Eadington declaration is  
Eadington's opinion submitted to the court in the predecessor to

1 from an infusion of funds into the San Pablo site. But this could  
2 occur if non-tribal owners purchased and revamped the San Pablo  
3 Casino. The advantages that Lytton would have from offering  
4 class II gaming and electronic bingo cards are sufficiently minor  
5 and speculative that they do not constitute substantial hardship.

6 3. State Enforcement

7 Plaintiffs assert that because the State will not have  
8 criminal jurisdiction over Lytton's casino once the San Pablo  
9 land is held in trust, plaintiffs will experience hardship from a  
10 lack of law enforcement. However, there is no indication that  
11 federal enforcement of federal gaming regulations will be less  
12 stringent than state enforcement of state regulations. Under  
13 IGRA, the federal government and the tribe have concurrent  
14 regulatory jurisdiction over class II gaming. 25 U.S.C. §  
15 2710(d). Under the Municipal Services Agreement between San  
16 Pablo and Lytton, the City also has concurrent regulatory  
17 jurisdiction. (Krathwohl Decl. ¶ 9.) The San Pablo police chief  
18 asserts that as a member of the Gaming Commission that would  
19 regulate gaming at the San Pablo site, he will have "unfettered  
20 access" to non-public areas and surveillance tapes at the casino.  
21 Id. ¶ 10. Thus, there should not be a gap in oversight if Lytton

22 \_\_\_\_\_  
23 this case, Artichoke Joe's I, 216 F.Supp.2d at 1084. In that  
24 case, plaintiffs challenged class III tribal gaming. Eadington's  
25 opinion was that such gaming would harm plaintiff card rooms and  
26 charities because of the differences he described between class  
III and class II gaming. (Eadington Decl. Exh. A ¶ 17-20.)  
Eadington's first declaration cites house-banking gaming and slot  
machines as salient differences between class II and class III  
gaming, and it is clear that Lytton will not be able to employ  
either without a compact.

1 begins conducting class II gaming in San Pablo, and plaintiffs  
2 have not provided any evidence that only state criminal  
3 jurisdiction would be effective in enforcing class II gaming  
4 regulations.

5 4. Lease to Another Tribe

6 Plaintiffs assert that Lytton may lease the San Pablo land  
7 to a tribe with a class III compact and that this new tribe will  
8 then begin class III gaming. There is no basis in fact for this  
9 speculation.

10 In short, none of plaintiffs' arguments establishes that  
11 plaintiffs will experience significant hardship if the Secretary  
12 takes the land into trust. Their claim for injunctive relief  
13 preventing such a transfer is weak partly because merely taking  
14 the land into trust is not the source of plaintiffs' alleged  
15 injury. Rather, it is the prospect of class III gaming at the  
16 site which plaintiffs fear. For that reason, the harm plaintiffs  
17 allege here is not irreparable. Lytton cannot conduct class III  
18 gaming under IGRA unless it is a federally recognized tribe. 25  
19 U.S.C. § 2700 et seq. Plaintiffs' ability to redress any injury  
20 they may suffer when and if Lytton begins class III gaming is not  
21 hindered by the court's order, which does not address the merits  
22 of plaintiffs' attack on Lytton's tribal status or plaintiffs'  
23 constitutional or statutory claims.

24 Finally, the danger of more substantial injury to plaintiffs  
25 is not imminent, because class II gaming is not significantly  
26 different from the gaming that plaintiffs can conduct, and Lytton

1 does not have a class III gaming compact. For all of these  
2 reasons, the balance of hardships does not tip sharply in  
3 plaintiffs' favor.

4 B. Likelihood of Plaintiffs' Success on the Merits

5 In light of the above discussion, for the court to enter a  
6 preliminary injunction prohibiting the Secretary from taking the  
7 San Pablo land into trust, plaintiffs must show that they have a  
8 probability of success on their claim for injunctive relief.

9 Congress has explicitly ordered the Secretary to take the  
10 San Pablo land into trust for Lytton.<sup>15</sup> Omnibus Act § 819, Pub.  
11 L. 106-568 § 819, 114 Stat 2868. The Secretary has recognized  
12 Lytton as an Indian tribe, a decision that is at least entitled  
13 to great deference, assuming it is reviewable at all. See supra  
14 § II.A. Neither the parties nor the court has found a single  
15 case where a court overturned the federal government's  
16 recognition of an Indian tribe. Here, the Secretary is preparing  
17 to take land into trust for a group of Indians the Secretary has  
18 recognized as a tribe, under a specific Congressional mandate to  
19 take the land into trust. The court does not foreclose  
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21 <sup>15</sup> Plaintiffs argue that the court should not allow the  
22 Secretary to take the land into trust because § 819 only allows  
23 the Secretary to take land into trust for Lytton if Lytton is a  
24 tribe, and plaintiffs argue that Lytton is not a tribe. Section  
25 819 directs the Secretary to take land into trust "for the Lytton  
26 Rancheria of California." Pub. L. 106-568 § 819, 114 Stat 2868.  
It does not condition the land grant on a determination of  
Lytton's tribal status. In passing § 819, Congress may have  
assumed that Lytton was a tribe -- a reasonable assumption since  
Lytton was listed as a federally recognized tribe -- but Congress  
did not condition its direction to the Secretary on Lytton's  
tribal status.

1 plaintiffs' challenge to Lytton's tribal status or plaintiffs'  
2 constitutional claims relating to gaming. But the immediate  
3 issue is not gaming, certainly not class III gaming, but a  
4 transfer of land pursuant to specific Congressional direction.  
5 Plaintiffs' arguments on the merits are not so strong as to  
6 outweigh the discretionary action of the Secretary backed by  
7 express Congressional authority and direction.

8 In sum, the harm that plaintiffs may face as a result of the  
9 taking of the San Pablo land into trust itself is not irreparable  
10 or substantial. Nor have plaintiffs shown probable success on  
11 the merits of their claims limited to the land transfer. For  
12 these reasons, plaintiffs' motion for a preliminary injunction is  
13 denied.

#### 14 IV. Conclusion

15 For the reasons stated above, defendants' motion to dismiss  
16 is DENIED as to plaintiffs' tribal status claim and claim that  
17 Congress overruled § 819 of the Omnibus Act. Defendants' motion  
18 to dismiss is GRANTED as to plaintiffs' Enclaves Clause claims,  
19 Tenth Amendment claims, and statutory IGRA claims. Plaintiffs'  
20 motion for a preliminary injunction is DENIED.

21 IT IS SO ORDERED.

22 Dated: \_\_\_\_\_.

23  
24 \_\_\_\_\_  
25 DAVID F. LEVI  
26 United States District Judge