

Federal Acknowledgment and Indian Gaming Issues in California's 5th Congressional District

By
Michael L. Lawson, Ph.D.
Of Counsel



Public Policy & Historical Consultants
Washington, D.C.

MARCH 17, 2014

This report provides a summary of issues involving the Federal acknowledgment or recognition of unrecognized or terminated tribal entities and the potential expansion of Indian gaming facilities in the northern California region encompassed within the 5th Congressional District. In many ways, this recently renumbered and redistricted political precinct, represented by Congressman Mike Thompson, is a microcosm of the broader political and economic concerns over additional tribes, reservations, and casinos that have become tumultuous throughout California. The 5th District contains several federally recognized tribes, half of which already have casinos and half of which are “reservation shopping” for prime sites on which to develop gaming. It also contains an Indian group that is petitioning for Federal Acknowledgment and a terminated tribe that is seeking restoration of its Federal status. On the other side of these tribal entities in the 5th District is a very vocal community of State and local politicians, municipal governing bodies, citizen-action groups, and others who want to maintain the political and economic status quo. These constituents are opposed to any measures that would give unrecognized and terminated tribal groups a faster track to Federal recognition. They are also opposed to additional tribal land-into-trust acquisitions for gaming that are far distant from the existing residential communities of the tribal entities involved. They are likewise concerned about the negative impacts of expanded Indian gaming, such as the need it creates for increased local government services and

the potential threat to the area's premier agricultural industry, the famed vineyards of Napa and Sonoma.

This report provides a profile of Representative Thompson and his Congressional District. It identifies the recognized and unrecognized tribal entities in and around the District, the existing Indian gaming facilities, and the key controversies that have grown around the potential recognition of additional tribal entities and further expansion of Indian casinos. Where Rep. Thompson has taken a position on these issues, the report describes his position. Even though he has not made any statement regarding the proposed revision of the Federal Acknowledgment regulations and the single Acknowledgment petitioner in his District poses no real threat to the status quo, the report concludes that Congressman Thompson should care deeply about the proposed revisions because of the concern he has demonstrated about the expansion of Indian gaming and the great potential they have to create new federally recognized tribes, reservations, and gaming facilities throughout California.

At present, the 5th District, which was numbered as the 1st District prior to 2013, includes much of California's best wine country. It encompasses Napa County plus portions of Contra Costa, Lake, Solano, and Sonoma counties. Cities within the District include Citati, Rohnert Park, Santa Rosa, Sonoma, Napa, American Canyon, Vallejo, Benicia, Hercules, and part of Martinez. Prior to redistricting in 2011, the 5th District encompassed Sacramento and some of its surrounding area.

Mike Thompson (D), who was elected in 1998, represents the 5th District. An Army veteran of the Viet Nam War, he was formerly a vineyard owner, a public administration professor, and member of the California Senate. Rep. Thompson is considered to be a moderate “Blue Dog” Democrat, who votes with his Party 91 percent of the time.

There is only one Indian group in the 5th District that has petitioned the Department of the Interior (DOI) for Federal Acknowledgment in accordance with the procedures established in Part 83 of Title 25 of the *Code of Federal Regulations* (25 CFR 83). This group is the Displaced Elem Lineage Emancipated Members Alliance (also known as DELEMA) based in Santa Rosa in Sonoma County. This group submitted a letter of intent to petition to the DOI in 1998. There is also a petitioner in Contra Costa County, the Xolon Salinan Tribe, based in Bay Point, which submitted a letter of intent in 2001. However, that portion of Contra Costa County falls within the 11th Congressional District, which is represented by Rep George Miller (elected in 1974). No evidence could be found that either of these petitioners is still actively pursuing Federal Acknowledgment. Neither group has a tribal website and the DOI does not have their current addresses.

DELEMA members are a splinter group of the Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, a federally recognized tribe based on a reservation near Clearlake Oaks in Lake County. This reservation lies within the 3rd Congressional District represented by Representative John

Garamendi (D). Elected in 2009, Rep. Garamendi formerly served as the Deputy Secretary of the DOI during the Clinton Administration (1995-98).

A factional dispute within the Elem Colony in the mid-1990s centered on the operation of the casino that the tribe ran at that time. This led to a civil war between 80 members of the tribe. In October 1995, the factions fought a five-day gun battle over the casino. In the aftermath of this armed uprising, nine tribal members suffered gunshot wounds, seven homes were set on fire, and half the tribe took refuge at the Oak Knoll Naval Hospital in Oakland. The National Indian Gaming Commission then stepped in to shut down the casino.

The divisions grew deeper after the DELEMA petitioned for separate acknowledgment in 1998. DELEMA members allegedly dis-enrolled from the Elem Colony, but reservation members complained in 2011 that some of the people who allegedly broke away were trying to take control of the Colony. In April of that year, State and local law enforcement officers were called in to monitor a court-ordered transfer of access to tribal records to the Colony's newly elected secretary-treasurer.

In February 2012, the Environmental Protection Agency (EPA) finalized a multi-party agreement to settle cleanup costs for seven mining sites, including one formerly operated by the Bradley Mining Company on the Elem Indian Colony's reservation. As a part of this settlement, 380 acres of land will be added to the Colony's existing holdings of 50 acres. This development will no doubt raise the stakes between the contentious factions. The addition of new

lands also increases the potential for the redevelopment of gaming at the Elem Colony.

The Mishewal Wappo Tribe of Alexander Valley is another unrecognized Indian group that is also based in Santa Rosa (Sonoma County), within the 5th District. This group claims to be the successors in interest to the Alexander Valley Indian Rancheria, whose Federal status was terminated by Congress by virtue of the California Rancheria Termination Act of 1958. The area of use and occupation of the historical Wappo Tribe also included the Napa Valley in what is now Napa County.

In 2010, the Mishewal Wappo Tribe filed suit in U.S. District Court requesting the restoration of their Federal status and the right to establish gaming under provisions of the Indian Gaming Regulatory Act of 1988 (IGRA). The counties of Sonoma, Lake, and Napa joined this suit, arguing that land should not be taken out of their jurisdiction without consultation and that gaming would create excessive new obligations on county services. Four Napa County cities also took a public position opposing a potential Wappo casino.

Rep. Thompson and other California politicians, including Senator Diane Feinstein and Representative Lynn Woolsey (D), who represented the 6th District until her retirement in 2013, announced that they were opposed to recognition of the group through the Federal court system, stating that a casino would have a negative impact on the region's world-class vineyards.

The object of the litigation was to compel the DOI to reach a settlement with the group and, to this end, the DOI entered negotiations with Wappo representatives. In February 2012, Rep. Thompson stated that:

before Federal recognition of the Wappo tribe moves ahead, the proper process must be followed every step of the way. In Napa and Sonoma counties, developments such as a casino would hurt our agricultural industry. This is too important not to have all local stakeholders at the table.

Rep. Woolsey and Rep. Don Young (D, Alaska), chairman of the House Subcommittee on Indian and Alaska Native joined Rep. Thompson in reminding Ken Salazar, who was then the Secretary of the Interior, that only Congress has the authority to restore a terminated tribe and that they thought it inappropriate for the DOI to execute any settlement agreement with the Wappo. In February 2012, Senator Dianne Feinstein also advised Secretary Salazar that the DOI should not recognize the Wappos without placing restrictions on future tribal development. "Such a restriction," she stated, "is the only way to ensure that the character of the region is maintained."

In June 2012, Rep. Thompson released the following statement after testifying at a hearing of the House Subcommittee of Indian and Alaska Native Affairs on issues that included Federal recognition of the Mishewal Wappo:

The correct process for federal recognition of a congressionally derecognized tribe rests with Congress. The Wappo tribe is attempting to circumvent Congress and the Department of Interior by going through the courts. This is not in the best interest of the American people, and it's not in the best interests of Napa and Sonoma Counties.

By the tribal chair's own admission, if the Wappos receive federal recognition, they will attempt to build a gaming facility in Napa or Sonoma Counties. In Napa and Sonoma Counties, developments such as a casino would damage our agricultural

preserves and put our local economy at risk. This is the absolute wrong region to build a casino.

As Rep. Thompson noted, the only “correct process” that is an alternative to a judicial or administrative settlement in this case is legislative recognition by Congress. The Mishewal Wappo Tribe is not eligible to petition through the DOI’s administrative process for Federal Acknowledgment because Congress terminated its Federal relationship in 1958. Given the strong opposition to the group’s recognition, getting a member of Congress to sponsor a restoration bill might be a difficult challenge. It is very likely that any legislation that might be introduced would specifically prohibit gaming, as have other recent restoration bills such as those for the Lumbee Indian Tribe of North Carolina. As has also been discussed in the Lumbee case, Congress also has the alternative of authorizing the group to proceed through the Federal Acknowledgment process rather than restoring the Federal relationship itself.

If the Mishewal Wappo did get approval to go through the DOI’s administrative Acknowledge process, it would likely be eligible for a fast track evaluation under either the present or proposed regulations. Section 83.8 of the current regulations provides for a reduced burden of evidence for petitioners that can demonstrate that they have had “unambiguous previous Federal acknowledgment.” If a petitioner can evince that it was previously federally recognized as a tribal entity, it needs only to show that it meets criterion (a) since the last date of previous acknowledgment, criteria (b) at present, criterion (c) at present and since the last date of previous acknowledgment, and criteria (d) governing document, (e) descent from a historical tribe, (f) members not

principally part of a recognized tribe, and (g) never terminated. If the group cannot demonstrate that it meets criterion (a) and (c) since the last date of recognition, it can alternatively show that it meets criteria (a), (b), and (c) since the last date of previous acknowledgment. The proposed revisions of the Acknowledgment regulations change these provisions by eliminating the need to show evidence for criterion (a) and moving the starting dates for criteria (b) and (c) up to 1934, which is likely to be a later date than most groups would have had previous recognition.

It seems very likely that the Mishewal Wappo should be able to demonstrate that they were federally recognized prior to 1958, when the Alexander Valley Rancheria was terminated. Thus, if the revised regulations are implemented as proposed before Congress authorized the Wappo to go through the Acknowledgment process, the terminated tribal entity would only have to provide evidence that it meets criterion (b) at present, criterion (c) at present and since 1958, and criteria (d) through (f). It is assumed here that the DOI would waive criterion (g), never terminated, if Congress authorized the tribe to go through the process.

Being found eligible for a fast track based on “unambiguous previous acknowledgment” would be a bigger advantage for the Mishewal Wappo than would be the general revisions now being proposed for the Acknowledgment regulations. If somehow the group cannot evince its social and political connections to the previously recognized Alexander Valley entity and therefore qualify for a fast track evaluation, the proposed revisions if enacted would, by

eliminating criterion (a) and moving the starting date for criteria (b) and (c) up from 1789 to 1934, still provide the Mishewal Wappo with a much lesser burden of proof than has previously been available to any California tribal group that has come through the Acknowledgment process.

The Mishewal Wappo Tribe reportedly has financial backers that are supporting its restoration efforts in the hope of eventually establishing a gaming facility for the group. Both sides are working with historical consultants to collect and interpret evidence supporting their positions. Interestingly, the counties have retained Stephen Dow Beckham, a professor at Lewis and Clark College in Oregon, who was the primary researcher for the successful Federal Acknowledgment petition of the Cowlitz Indian Tribe of Washington. Dr. Beckham maintains that the group has no connection to either the Alexander Valley Rancheria or the historical Wappo tribe. Edward Castillo, director of the Native American Studies at Sonoma State University, is working with the Mishewal Wappo. He holds that Dr. Beckham “cherry-picked” his historical documentation.

There are six (6) federally recognized tribal entities based in the 5th District. These are (1) the Kashia Band of Pomo Indians of the Stewarts Point Rancheria in Santa Rosa (Sonoma County), (2) the Koi Nation of Northern California in Santa Rosa (Sonoma County), (3) the Federated Indians of the Graton Rancheria in Rohnert Park (Sonoma County), (4) the Big Valley Band of Pomo Indians of the Big Valley Rancheria based in Lakeport (Lake County), (5) the Middletown Rancheria of Pomo Indians based in Middletown (Lake County),

and (6) the Scotts Valley Band of Pomo Indians based in Kelseyville and Lakeport.

Three of these tribal entities operate gaming facilities. The Indians of the Graton Rancheria maintain the Graton Resort and Casino in Rohnert Park, the Indians of Big Valley own the Konocti Vista Casino in Lakeport and the Indians of the Middletown Rancheria run the Twin Pine Casino in Middletown. All of these casinos are classified as Class III gaming facilities under the IGRA.

Rep. Thompson has never received any significant campaign contributions from Indian gaming interests.

The Kashia Band, the Koi Nation, and the Scotts Valley Band do not have gaming facilities. The latter tribe purchased 28 acres of land in North Richmond (in Contra Costa County, approximately 20 miles northeast of San Francisco) on which it proposed to develop the Sugar Bowl Casino. This site lies within Rep. George Miller's 11th Congressional District. Many public officials opposed this development, including Senator Dianne Feinstein, former Governor Arnold Schwarzenegger, and the Richmond City Council. However, the plan suffered a major blow in May 2012 when the Bureau of Indian Affairs (BIA) rejected the Band's application to bring the land into Federal trust status. The BIA claimed that the application failed to demonstrate that the Scotts Valley Band had any historical connection to the subject land.

In March 2013, the Kashia Band purchased 510 acres of hilly timberland near the Sonoma coast in Sonoma County and is actively seeking investment partners for the development of gaming on this site. Although the Band's

headquarters are in Santa Rosa, within the 5th District, both this new property and the Stewarts Point Rancheria are within the 2nd Congressional District of Rep. John Huffman.

In 2005, the landless Koi Nation planned to develop a 35-acre gaming site near the Oakland International Airport in Alameda County. The Nation offered to pay the City of Oakland \$600 million over 20 years for the right to develop a casino, hotel, and spa complex. Governor Schwarzenegger announced that he was opposed to this plan and any other tribal land acquisitions in urban areas for the purpose of developing casinos. The proposal ultimately failed when the Oakland City Council rejected it in the face of strong opposition from many quarters, including the nearby cities of Alameda, San Leandro, and Berkeley.

There are six (6) other federally recognized tribal entities in Sonoma and Lake counties that are in other Congressional Districts. In Sonoma County, these include (1) the Lytton Rancheria of California in Healdsburg, (2) the Dry Creek Rancheria of Pomo Indians in Geyserville, and (3) the Cloverdale Rancheria of Pomo Indians in Cloverdale. These three entities are all within the 2nd Congressional District that is represented by Rep. Jared Huffman (D), elected in 2012. The other federally recognized tribal entities in Lake County include (4) the Robinson Rancheria Band of Pomo Indians in Nice, (5) the Habermatolet Pomo of Upper Lake at Upper Lake, and (6) the aforementioned Elem Indian Colony in Clearlake Oaks. The reserved lands of these three entities are within the 3rd Congressional District that is represented by Rep. John Garamendi (D), elected in 2009.

Three of these entities (Dry Creek, Upper Lake, and Robinson) presently operate Class III casinos and Cloverdale is developing such a facility. The Lytton Band runs a Class II facility in San Pablo (Contra Costa County), which lies within Rep. George Miller's 11th Congressional District.

In sum, there are twelve federally recognized tribes that are licensed to run eight gaming facilities within three of the counties (Sonoma, Lake, and Contra Costa) that lie in part within the 5th Congressional District. There are two Federal Acknowledgment petitioners in those counties (DELEMA and the Xolon Salinan Tribe) and one terminated tribe that is seeking administrative restoration of its Federal status (the Mishewal Wappo Tribe).

Section 83.10(r) of the proposed revisions of the Acknowledgment regulations would allow previously denied petitioners to re-petition the DOI. This provision does not pose any specific threat to the 5th District, because none of the five previously denied California petitioners are based in the counties that are a part of the District. Neither do these denied petitioners pose a general threat to tribal status quo in California because none of them came close to meeting the existing seven mandatory for Federal Acknowledgment. Even if criterion 83.7 (external identification since 1900) is eliminated and the starting date for the evaluation of criteria 83.7(b), community, and 83.7(c), political influence or authority is moved up from 1789 to 1934, as is proposed for the revised regulations, these denied petitioners would be overwhelmingly challenged to meet even these revised criteria.

The denied California petitioners include (1) the United Lumbee Nation of North Carolina and America, based in Exeter, Tulare County (Final Determination 1985), (2) the Muwekma Ohlone Tribe of San Francisco Bay, based in San Jose, Santa Clara County (Final Determination 2002), (3) the Juaneno Band of Mission Indians based in San Juan Capistrano, Orange County (Final Determination 2011), (4) the Juaneno Band of Mission Indians, Acjachemen Nation, also based in San Juan Capistrano (Final Determination 2011, Referred to the Secretary of the Interior for Reconsideration 2013), and (5) the Tolowa Nation based in Fort Dick, Del Norte County (Negative Proposed Finding 2010, Final Determination pending).

The United Lumbee Nation could not demonstrate any connection to an antecedent tribal entity in California. Most of its members had Cherokee or Choctaw ancestry if they had any Indian ancestry at all. The Nation could never meet any Acknowledgment criteria because there has never been an historical Lumbee tribe in California.

Even though the Muwekma Ohlone were determined to have unambiguous previous Federal Acknowledgment up to 1927, under the provisions of Section 83.8 of the existing regulations, it was found not to meet criterion 83.7(a), external identification since 1900, between 1927 and 1965 and between 1972 and 1981. Although having unambiguous previous acknowledgment gave it a fast track that meant that it had only to demonstrate that it met criteria 83.7(b), community and 83.7(c), political influence or authority, at present, it failed to do so. Even if criterion 83.7(a) is eliminated and the

starting date for 83.7(b) and (c) is moved up to 1934, not being able to evince a modern community and political structure will always be a fatal flaw. Even some of the petitioners found most lacking in evidence have been found to have a modern community and political structure.

The two Juaneno Band petitioners are splinter groups that claimed to be the successors of the same historical tribe that was based at the San Juan Capistrano mission up to 1862. Both groups failed to meet criterion 83.7(a), criterion 83.7(b) any time after 1862, criterion 83.7(c), any time after 1835, and criterion 83.7(e), descent from a historical tribe. Revising criteria 83.7(b) and (c) will be of little help to these groups (even if they combined) when they could not previously prove that they meet these criteria from 1934 to the present.

In accordance with special guidelines for Federal Acknowledgment procedures issued by the DOI in 2008, the Tolowa Nation was only evaluated on criterion 83.7(b). These guidelines provided that if the DOI determined that it was likely that a petitioner could not meet any one of the seven mandatory criteria, it could initiate an evaluation of the criterion that seemed to lack sufficient evidence. Accordingly, the Tolowa Nation was only evaluated on criterion 83.7(b). The DOI's 2010 Proposed Finding determined that the group did not meet criterion 83.7(b) from 1853 to the present. A Final Determination of this case is pending and the Nation has indicated that it wants to continue to be evaluated under the current regulations. If the group ever decides to re-petition in the future, if it has that option, it will be hard pressed to prove that it has had a viable community since 1934, when it could not demonstrate that it had one for

81 years prior to that date. It would also be challenged to show that it meets all the other criteria that may then be mandatory.

As has been noted, there is considerable opposition to the expansion of Indian gaming in this region of northern California. Much of this opposition has been spearheaded by citizen-action organizations, such as Stand Up for California. This statewide organization is intensely focused on Indian gaming issues in California, including potential gaming development by unrecognized tribes that have petitioned for Federal Acknowledgment. For example, Stand Up for California was an interested party that submitted comments to the DOI in opposition to the Juaneno Band of Mission Indians, which was denied acknowledgment in 2011. In 2013, the organization reportedly spent \$2 million to collect more than 500,000 signatures to compel California to hold a statewide referendum on the State legislature's ratification of a Class III gaming compact for the North Fork Rancheria of Mono Indians. Although their 80-acre rancheria is in a rural part of Madera County, the North Fork Mono purchased 305 acres along Highway 99 four miles north of the city of Madera, which is 35 miles from the rancheria. The DOI approved this land-into-trust acquisition in October 2013. Stand Up for California has also filed lawsuits against Governor Jerry Brown and the DOI over the proposed North Fork casino.

There are many smaller citizen-action groups associated with the Stand Up for California organization. Within the 5th District, for example, these include the Alexander Valley Association and the Concerned Citizens of Rohnert Park.

Congressman Thompson has made no public statement about the proposed revision of the Federal Acknowledgment regulations. The DELEMA is the only petitioner in the 5th District and it appears to not have a viable case because it is a splinter group of a federally recognized tribe. Even though there is no Acknowledgment petitioner that poses a threat to the political and economic status quo in his District, Rep. Thompson shares care about the proposed Acknowledgment revisions because he has demonstrated that he is concerned about the expansion of Indian gaming. The disputes involving the potential gaming development by the Mishewal Wappo Tribe, the Kashia Band, the Koi Nation, and the Scotts Valley Band, which are all based in the 5th District, vividly illustrate that California is rife with opposition to the further recognition of tribal entities, additional tribal land-into-trust acquisitions, especially in off-reservation urban areas, and the general expansion of Indian gaming in a state where many feel the market is already oversaturated. The proposed revisions of the Acknowledgment regulations have the potential of standing all these conflicts on their head, because the reduced criteria could create more federally recognized tribes in California than in any other state. This is a constituent issue about which Congressman Thompson should care deeply.

.