

Subcommittee on Indian, Insular and Alaska Native Affairs
Doug LaMalfa, Chairman
Hearing Memorandum

September 22, 2017

To: All Subcommittee on Indian, Insular and Alaska Native Affairs Members

From: Majority Committee Staff,
Subcommittee Indian, Insular and Alaska Native Affairs (x6-9725)

Hearing: Legislative hearing on **H.R. 3744 (Rep. Rob Bishop)**, To provide that an Indian group may receive Federal acknowledgement as an Indian tribe only by an Act of Congress, and for other purposes.
September 26, 2017, 2:00 pm 1334 Longworth HOB

H.R. 3744 (Rep. Rob Bishop), the “*Tribal Recognition Act of 2017*”

Summary of the bill

H.R. 3744 reclaims Congress’s Constitutional Article I role over recognizing tribes from the Executive Branch, which has appropriated this power. The bill establishes a statutory process for examining the evidence submitted by groups seeking recognition as tribes and for reserving to Congress the prerogative to render a final determination.

Under the bill, an Indian group may receive federal recognition (also called “acknowledgment”) as a tribe, but only by an Act of Congress. To assure Congress makes an informed decision when a group seeks federal recognition, H.R. 3744 establishes procedures for any group to petition for federal recognition as a tribe, and requires the Secretary (acting through the Assistant Secretary—Indian Affairs) to examine the evidence in support of the petition using criteria and standards set forth in the bill, after which the Secretary of the Interior (Secretary) shall submit the findings to Congress. Under the bill, the Secretary shall have no authority to recognize a tribe, and the existing acknowledgment regulations created by the Department shall have no force or effect. The status of a tribe federally recognized prior to the date of enactment of the bill shall be unaffected.

H.R. 3744 is the same as Title I of H.R. 3764 of the 114th Congress, reported by the Committee on December 7, 2016.¹

Witnesses

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¹ [H. Rept. 114-847](#).

Background

Article I, Section 8, Clause 3 of the Constitution grants Congress power to “regulate commerce ... with the Indian tribes.” Supplemented by the Treaty making power² in the Constitution, the so-called “Indian Commerce Clause” delegates to Congress what the Supreme Court has said is “plenary” power over Indian affairs.³ Inherent in this delegation of authority to Congress is the power to recognize a tribe, as well as the prerogative not to extend recognition.

The U.S. Supreme Court has held that the Indian Commerce Clause does not grant Congress completely unfettered authority to designate groups of individuals as “Indian tribes” or individuals as “Indians” in that Congress may not exercise such authority arbitrarily. The Court, however, also has not determined the minimum qualifications an individual must have in order to be an “Indian” for the purpose of federal statutes. As a consequence, Congress has codified different qualifications in different statutes. For example, section 3(b) of the Alaska Native Claims Settlement Act⁴ defines “Alaska Native” as an individual of “one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof.” But section 19 of the Indian Reorganization Act⁵ defines “Indian” as including an individual “of one-half or more Indian blood.”

Similarly, most, although not all, federally recognized tribes have membership criteria that include a minimum blood quantum requirement. However, in recent years Congress has generally not included a minimum blood quantum requirement in statutes pertaining to Indian tribes and Indians. And in the same vein, in the tribal acknowledgment regulations the Secretary of the Interior has required in 25 CFR 83.11(e) that a group that petitions for acknowledgment only be composed of “individuals who descend from a historical Indian tribe.”

In certain eras, congressional policy favored the termination of the special status of tribes as political entities. These policies were repudiated beginning with the Nixon Administration, and Congress has used its power over recognition to “restore” several terminated tribes, and it has also extended recognition to groups that had not ever been officially recognized as tribes by the United States.

In 1978, the Bureau of Indian Affairs (BIA) crafted regulations – now contained in 25 CFR Part 83 – to recognize any group that can meet seven mandatory criteria to establish a continuous existence as an autonomous Indian tribe throughout history to the present. The BIA developed these regulations notwithstanding Congress’s failure to enact then-pending legislation to establish standards and conditions for the recognition of tribes.

In hearings on the prior version of this bill in the 114th Congress, there was discussion of the source of BIA’s authority to develop the “Part 83” regulations. In the original 1978

² Treaty making with the Indian tribes was abolished by Congress in 1871 (“...*Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty ...” [U.S. Statutes at Large, 16:566])

³ According to the Supreme Court, Congress’s power regarding Indian tribes “has always been deemed a political one, not subject to be controlled by the judicial department of the government.” *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) at 565.

⁴ (43 USC 1602(b))

⁵ 25 USC 5129 (formerly classified as 25 USC 479)

regulations (then codified in Part 54), the following sources of authority were cited for the BIA to recognize tribes: “5 U.S.C. §301; and sections 463 and 465 of the revised statutes 25 U.S.C. §2 and §9; and 230 DM 1 and 2.” (“DM” in the citation of BIA authority stands for Departmental Manual, which is not a source of law). Today, the Part 83 regulations cite the following as the sources of authority for the BIA to recognize tribes: “5 U.S.C. §301; 25 U.S.C. §2, §9, §479a-1; Pub. L. 103-454 Sec. 103 (Nov. 2, 1994); and 43 U.S.C. §1457.”

None of these sources on their face authorize the Executive Branch, let alone an obscure office within a Bureau of the Department of the Interior, to promulgate the Part 83 regulations or otherwise extend recognition without express direction from Congress. Further detailed analysis of these statutes may be found on pages 25-28 of H. Rept. 114-847.

Controversial Revision of Recognition Standards

On July 1, 2015, the Bureau of Indian Affairs finalized a controversial rule to revise the “Part 83” recognition regulations.⁶ At an April 22, 2015 Subcommittee hearing,⁷ the then-proposed rule was the focus of criticism from bipartisan Members of the House and Senate, and from several federally recognized tribes. Criticism focused on the proposed rule’s relaxation of the criteria, and a lowering of the burden of proof, a petitioner must meet to be acknowledged as a tribe. For example, one tribal leader testified that “the proposed revisions fail to uphold or establish safeguards to protect the federal government’s treaty and trust obligations to existing federally recognized tribes.”⁸ Another tribal witness asked that the Department “withdraw the proposed rule in its entirety” because the changes to recognition standards “threaten the fabric which currently binds all tribal nations ...”⁹

The proposed revisions were endorsed by the National Congress of American Indians,¹⁰ even though a number of recognized tribal governments have entered opposition to the revisions into the public record.¹¹

The final rule published in the Federal Register on July 1, 2015, addressed some of the concerns raised by tribes, non-tribal stakeholders, and certain Members of Congress, but the rule remains flawed in two major respects: (1) the standards and criteria, finalized by administrative fiat, are not authorized by Congress; and (2) the criteria and the burden of proof a petitioner must meet were lowered.

The Obama Administration’s summary of the final rule misleadingly states that “the rule does not substantively change the Part 83 criteria, except in two instances:” (1) allowing internal as well as external evidence for ... identity as an American Indian entity, and (2) changing the way marriages are counted as evidence for ... community. In fact, the final rule makes several substantive changes to the acknowledgment criteria. For example, petitioners will not have to

⁶ <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-031255.pdf>.

⁷ <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=398320>.

⁸ [Testimony of Fawn Sharp, President, Quinault Indian Nation.](#)

⁹ [Testimony of Robert Martin, Chairman, Morongo Band of Mission Indians.](#)

¹⁰ [Testimony of the National Congress of American Indians.](#)

¹¹ A number of tribes and tribal organizations submitted comments to the BIA raising concerns with the relaxation of criteria and standards in the proposed rule; other tribes passed formal resolutions opposing the proposed rule (e.g., see Resolution No. 15-13 of the Inter-Tribal Council of the Five Civilized Tribes).

provide evidence prior to 1900 in order to meet criteria relating to community, political influence or authority; this reduces the evidentiary requirement for these criteria by 111 years. The final rule also restricts the rights of third parties to participate in the Secretary's review of a petition, compared to the participants having an equal footing with the petitioner under the previous rules.

In addition, without providing an explanation of its grounds for doing so, the final rule eliminates the requirement for the Department to approve additions to a tribe's base roll so as to prevent a tribe from transforming itself into a different entity after it obtains recognition from the Secretary.

Need for Legislation

Recognition of a tribe is a solemn act of the United States Government, with long-term consequences not only to a tribe's members, but to other tribes, and to states and non-Indian citizens. A tribe is eligible for a variety of federal services and benefits, including operation of a casino on its lands, and absolute sovereign immunity against anyone except the federal government. It usually obtains federal protection in controversies where states, local governments, or private citizens are adverse parties. A tribe may exercise special political authority over its territory and its Indian members. Land acquired in trust for a tribe preempts state and local government jurisdiction over such property. A tribe is not deemed to be a party to the Constitution and as a result, an individual under a tribe's civil or criminal jurisdiction does not possess on that tribe's lands any of the rights guaranteed by the Constitution, except as provided by Congress. Recognizing a tribe incurs an obligation on Congress to administer lands held in trust for Indians, an obligation whose fulfillment depends on the availability of appropriations that only Congress can make.

These weighty matters should not be left to an unelected bureaucracy based in Washington, D.C., to resolve, particularly through regulatory standards and procedures that are not specified by Congress, that can be changed administratively from Administration to Administration, and whose implementation is and has been shown to be subject to political influences, as explained in a subcommittee hearing by a tribal witness who said that "the current process is inherently flawed and subject to influence by those who have the best relationships within the Executive Branch."¹² Most importantly, however, the Indian Commerce Clause specifically delegates this authority to Congress and not the Executive Branch.

Congress is not without certain shortcomings with respect to tribal recognition. The Committees of jurisdiction do not typically have the capacity to analyze large quantities of detailed and often complicated historical documents necessary to evaluate a petition from a group claiming continuous status as an Indian tribe dating to the 18th or 19th centuries. The Executive Branch bureaucracy, if given sufficient funds, does have the advantage of employing impartial experts who can review and analyze historical documents a petitioner must submit to demonstrate whether its members meet the minimum criteria necessary for a group to be eligible for recognition.

¹² http://naturalresources.house.gov/uploadedfiles/martin_testimony_12_8_15.pdf

H.R. 3744 ensures Congress exercises its plenary power over tribal recognition with the best historical information and analysis possible from the Department of the Interior. The criteria contained in H.R. 3744 reflect the major parts of the Part 83 criteria as they existed before the 2015 Obama Administration relaxed them and lowered the burden of proof for a group to meet to be recognized. Under the bill, the Secretary is prohibited from recognizing a tribe (except as expressly authorized by Act of Congress), and the Part 83 rules shall have no force or effect.

Previous Committee Action

In the 114th Congress, following an oversight hearing on the then-proposed revisions to the Part 83 recognition rules, Rep. Bishop introduced a substantially similar bill, H.R. 3764. H.R. 3764 was the subject of two hearings in the subcommittee, and it was then ordered reported (amended) by the full committee on September 8, 2016. No further action was taken on the bill before the end of the 114th Congress.

Major Provisions of the Bill

Section 1: Short Title

“Tribal Recognition Act of 2017”

Section 2: Findings

Clarifies and reassert Congress’s authority under Article I, Section 8, Clause 3 of the Constitution over the recognition of Indian tribes.

Section 3: Definitions

Sets forth definitions used in the bill. Definitions are similar to those used in the Part 83 regulations except that in H.R. 3744, the term “Historical, historically, or history” means dating from first sustained contact with non-Indians; the newly revised Part 83 regulations define “Historical” to mean before 1900.

Section 4: Groups Eligible to Submit Petitions

Allows any non-recognized group to have its petition examined by the Secretary of the Interior.

Groups *not* allowed to petition include: splinter groups or political factions of Indians tribes; tribes, bands or similar communities already lawfully recognized; groups previously denied recognition under Part 83 (including any reorganized or reconstituted group).

Section 5: Filing a Letter of Intent

Specifies how a group may submit a petition to the Assistant Secretary—Indian Affairs.

Section 6: Duties of the Assistant Secretary

Requires the Assistant Secretary to make guidelines for the preparation of documented petitions available, and to research the documented petitions. Prohibits the Assistant Secretary from performing research on behalf of petitioners.

Section 7: Criteria for Federal Acknowledgment

Provides the minimum criteria the Assistant Secretary shall apply in examining groups' petitions for recognition.

[See side-by-side comparison](#) of the new Part 83 recognition criteria and those contained in Section 7 of H.R. 3744.

Section 8: Previous Federal Acknowledgment

Provides that unambiguous federal acknowledgment (or recognition) of a group as an Indian tribe shall be acceptable evidence of the tribal character of a petition to the date of the last such recognition. Specifies what kind of evidence may constitute unambiguous federal acknowledgment.

Section 9: Notice of a Receipt of a Petition

Section 9 directs the Assistant Secretary to notify state governments, recognized tribes, and other interested parties when the Assistant Secretary has received a petition, and requires that within 60 days, such notice be published in the Federal Register and in major newspapers of general circulation in the town or city nearest to the petitioner.

Section 10: Processing of the Documented Petition

Sets forth how the Assistant Secretary shall process a petition, including making technical review assistance available to the petitioner.

Requires the Assistant Secretary to review documented petitions in the order in which they are ready for review, and that within one year after a petitioner is notified its petition is ready for review, the Assistant Secretary submit a report (including a summary of evidence, findings, petition, and supporting documentation) to the House Committee on Natural Resources and the Senate Committee on Indian Affairs. The petitioner and other interested parties shall also be notified of the submission of the report/findings to the congressional committees and provide copies upon request.

Section 11: Clarification of Federal Recognition Authority

Provides that recognition of a tribe may be granted only by Act of Congress and prohibits the Secretary of the Interior from recognizing any tribe. This Act shall not affect the status of any Indian tribe that was lawfully federally recognized before the date of enactment of this Act.

Additionally, this section clarifies that the bill will have no effect on the recognition status of any Indian tribe that was acknowledged before date of enactment.

Section 12: Force and Effect of Regulations

Part 83 of title 25, Code of Federal Regulations, shall have no force or effect.