

Committee on Natural Resources

Rob Bishop Chairman
Markup Memorandum

June 8, 2018

To: All Natural Resources Committee Members

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

Mark-Up: **H.R. 3744 (Bishop of Utah)**, To provide that an Indian group may receive Federal acknowledgement as an Indian tribe only by an Act of Congress, and for other purposes.
June 13, 2018, 10:15 a.m., 1324 Longworth HOB

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

Summary of the Bill

H.R. 3744 reclaims the Article I authority of Congress over recognizing tribes from the Executive Branch, which has appropriated this power. The bill establishes a statutory process for the Department of the Interior to examine evidence submitted by groups seeking recognition as tribes within the meaning of federal law, and for Congress to make a final determination on extending recognition. 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

Cosponsors

Rep. Paul Gosar

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.

¹ [H. Rept. 114-847](#).

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.

The U.S. Supreme Court has held that the Indian Commerce Clause does not grant Congress 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, has not determined the minimum qualifications an individual must meet to be an “Indian” within the meaning of federal law.

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. Considerable funds are required from Congress to administer lands held in trust for Indians, and to provide other services and benefits, including free health care from the Indian Health Service.

Establishing federal relations with tribes is a political question and is therefore reserved to the political branch: Congress. In the 1970’s Congress considered but failed to enact legislation to establish a statutory framework for the recognition of tribes. In 1978 the Bureau of Indian Affairs unilaterally crafted regulations (today 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.

Far from creating uniform standards for the recognition of tribes, the Bureau of Indian Affairs (BIA) has modified and occasionally wholly waived its Part 83 procedures, with the most recent revisions finalized under the Obama Administration. Ostensibly designed to increase transparency and efficiency in the BIA recognition process,⁴ at an April 22, 2015, Subcommittee hearing⁵ 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.

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.

In addition to these problems is the BIA’s failure to implement its regulations in a consistent, impartial, and transparent manner. In several cases the BIA has sidestepped or formally waived the Part 83 procedures to create tribes. In one such case, the Inspector General of the Department of the Interior reported that it “could not find any discernible process used” by the BIA in extending recognition to a certain group.⁶ In 2002 the Inspector General investigated

⁴ <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-031255.pdf>.

⁵ <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=398320>.

⁶ https://www.doi.gov/sites/doi.gov/files/Tejon_ROI_FINAL_PUBLIC.pdf

allegations of misconduct in the recognition process in which “six tribal recognition decisions by Clinton Administration BIA appointees ... were contrary to the recommendations made by the career staff ...”⁷ Gaming was at the heart of the alleged misconduct.

Congress is not without its own shortcomings in 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. A group of individuals could be recognized legislatively as an Indian tribe even if Congress has not comprehensively evaluated, if it even possesses, evidence that documents the group as a distinct Indian community. Establishing a process by which experts in the field of Indian law and policy, history, and genealogy could examine petitions of groups seeking federal recognition would benefit Congress in its determinations whether to extend recognition.

H.R. 3744 creates a consistent and publicly transparent process of evaluating recognition petitions under statutorily establish criteria, and ensures Congress exercises its plenary power over tribal recognition with the best historical information and analysis possible from the Department of the Interior.

Major Provisions/Analysis of H.R. 3744

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).

⁷ <https://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-01-i-00329/pdf/GPO-DOI-IGREPORTS-01-i-00329.pdf>

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

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 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 shall 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 federally recognized before the date of enactment of this Act.

Section 12: Force and Effect of Regulations

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

Cost

In its score of the identical legislation (Title I of H.R. 3764 (114th Congress)), CBO reported that implementing the procedures required in the bill would not significantly change Interior's administrative costs. CBO further reported that the Department allocated about \$2 million in 2016 for administrative expenses related to Indian tribal recognition.

Administration Position

In a prepared written statement on H.R. 3744, a witness for the Department of the Interior testified that the Department does not oppose Congress's decision to set legislative criteria for recognition and it supports those provisions of H.R. 3744.

Anticipated Amendments

Chairman Bishop is anticipated to offer technical and clarifying changes, and to prohibit the Secretary from waiving recognition regulations established under H.R. 3744.

Effect on Current Law (Ramseyer)

No change made to current law.