

# Committee on Natural Resources

Rob Bishop Chairman  
Mark-Up Memorandum

September 3, 2016

To: All Natural Resources Committee Members

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

Mark-Up: **H.R. 3764 (Rep. Rob Bishop)**, To provide that an Indian group may receive Federal acknowledgment as an Indian tribe only by an Act of Congress, and for other purposes.  
**September 7-8, 2016; 2167 Rayburn HOB**

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## **H.R. 3764 (Rep. Rob Bishop), “Tribal Recognition Act of 2015”**

### **Summary of the bill**

Invoking Article I, Section 8, Clause 3 of the Constitution, H.R. 3764 clarifies and reasserts the plenary power of Congress over the federal recognition of Indian tribes. 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. 3764 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 shall submit the findings to Congress. Under the bill, the Secretary has 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 Act shall be unaffected.

The Subcommittee on Indian, Insular and Alaska Native Affairs (subcommittee) first received testimony on H.R. 3764 on October 28, 2015<sup>1</sup> during which the Assistant Secretary - Indian Affairs, Kevin Washburn, provided the Administration’s testimony in opposition to Congress’s role in the recognition of Indian tribes as provided under the bill. A second legislative hearing<sup>2</sup> provided the committee with testimony from non-federal witnesses, including Indian tribes, a state attorney general, and a local government leader.

### **Cosponsors:**

Reps. Paul Gosar (R-AZ), Robert Goodlatte (R-VA)

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<sup>1</sup> <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=399511>

<sup>2</sup> <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=399656>

## **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 power<sup>3</sup> in the Constitution, the so-called Indian Commerce Clause delegates to Congress what the Supreme Court has said is “plenary” power over Indian affairs.<sup>4</sup> Inherent in this delegation of authority to Congress is the power to recognize a tribe, as well as the prerogative *not* to extend recognition.

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.

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 even as Congress discussed, but did not enact, a bill to establish standards and conditions for when federal recognition may be extended to a tribe.

### ***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.<sup>5</sup> At an April 22, 2015 Subcommittee hearing<sup>6</sup>, the then-proposed rule was the focus of criticism from bipartisan Members of the House and Senate, and from several federally recognized tribes. Though the Government Accountability Office (GAO), Members of Congress, federally recognized tribes, and other interest holders (states and local governments) for years have criticized the Part 83 process for being inefficient, inconsistent, and lacking transparency, there has been virtually no requests for the Administration to relax the criteria or lower the evidentiary standards a petitioner must meet to be acknowledged as a tribe.

During the Subcommittee’s April hearing, the proposed revisions were sharply criticized by several tribal witnesses. 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.”<sup>7</sup> 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 ...”<sup>8</sup>

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<sup>3</sup> 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])

<sup>4</sup> 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.

<sup>5</sup> <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-031255.pdf>

<sup>6</sup> <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=398320>

<sup>7</sup> [Testimony of Fawn Sharp, President, Quinault Indian Nation](#)

<sup>8</sup> [Testimony of Robert Martin, Chairman, Morongo Band of Mission Indians](#)

The proposed revisions were endorsed by the National Congress of American Indians,<sup>9</sup> even though a number of recognized tribal governments have entered opposition to the revisions into the public record.<sup>10</sup>

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 standards and criteria have been relaxed.

The Summary of the Final Rule 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. This statement, however, is misleading. The final rule makes several substantive changes that relax the acknowledgment criteria. For example, petitioners will not have to 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 in the proposed rule, the final rule eliminates the important 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**

Should the standards and criteria for the recognition of a tribe be wholly within the discretion of the BIA, which is unelected and therefore unaccountable to those whose interests and rights are at stake?

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. This makes recognition a question for the political – or legislative – branch. 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 divests 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 increase funding for Indian programs lest the share of

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<sup>9</sup> [Testimony of the National Congress of American Indians](#)

<sup>10</sup> 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)

funds for other tribes is reduced by the addition of individuals eligible for benefits from the government.

The balancing of interests and the weighing of arguments for and against the need to extend recognition to a tribe should not be left to an unelected, unaccountable bureaucracy, but to the elected, publicly accountable branch of government. This point is reinforced by testimony presented in the second legislative 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.”<sup>11</sup>

H.R. 3764 reasserts Congress’ constitutionally superior role over federal Indian policy. It establishes a basis for the Secretary to examine the evidence submitted by groups seeking recognition as tribes, reserving to Congress the prerogative to render a final decision.

The criteria contained in H.R. 3764 reflect the major parts of the “old” Part 83 criteria as they existed before the 2015 revisions. Under the bill, the Secretary shall not have any power to recognize a tribe (except as expressly authorized by Act of Congress), and the Part 83 rule shall have no force or effect.

## **Major Provisions of the Bill**

### **Section 1: Short Title**

“Tribal Recognition Act of 2015”

### **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. 3764, 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).

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<sup>11</sup> [http://naturalresources.house.gov/uploadedfiles/martin\\_testimony\\_12\\_8\\_15.pdf](http://naturalresources.house.gov/uploadedfiles/martin_testimony_12_8_15.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 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. 3764.*

## **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 may include.

## **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.

## **Section 12: Force and Effect of Regulations**

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

### **Cost**

While no official CBO score has been received the committee does not anticipate the bill having an effect of the federal budget.

### **Administration Position**

At the October 28, 2015 legislative hearing on H.R. 3764, Assistant Secretary—Indian Affairs Kevin Washburn testified that while it had not done a complete analysis, the Administration opposes the bill based on overarching concerns.<sup>12</sup>

### **Anticipated Amendment**

The chairman will be offering an amendment in the nature of a substitute (ANS). The ANS will add two new titles to the end of the bill, consisting of the text of H.R. 286 (Rep. Ryan Zinke, MT-At Large), "*Little Shell Tribe of Chippewa Indians Restoration Act of 2015*", and H.R. 872 (Rep. Rob Wittman, VA-01), To extend Federal recognition to the Chickahominy Indian Tribe, the Chickahominy Indian Tribe-Eastern Division, the Upper Mattaponi Tribe, the Rappahannock Tribe, Inc., the Monacan Indian Nation, and the Nansemond Indian Tribe. The link to the hearing memo and testimony for the hearing on these two bills is available here: <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=399335>

The ANS also amends Sec. 104 to add a category of groups ineligible to file a petition for recognition with the Assistant Secretary under this title. The new category consists of groups that do not file a documented petition before five years after the date of enactment of the title.

### **Effect on Current Law (Ramsever)**

None.

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<sup>12</sup> [http://naturalresources.house.gov/uploadedfiles/washburn\\_testimony\\_10\\_28\\_15.pdf](http://naturalresources.house.gov/uploadedfiles/washburn_testimony_10_28_15.pdf)