

TRIBAL RECOGNITION ACT OF 2018

SEPTEMBER 20, 2018.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BISHOP of Utah, from the Committee on Natural Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3744]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3744) to provide that an Indian group may receive Federal acknowledgment as an Indian tribe only by an Act of Congress, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Tribal Recognition Act of 2018”.

SEC. 2. FINDINGS.

Congress finds as follows:

(1) Article I, section 8, clause 3 of the Constitution (commonly known as the Indian Commerce Clause) gives Congress authority over Indian affairs.

(2) Such authority is plenary and exclusive.

(3) Such authority may not be exercised by the judicial branch or by the executive branch (except to the extent that such authority has been expressly delegated to the executive branch by an Act of Congress).

SEC. 3. DEFINITIONS.

As used in this Act:

(1) **ASSISTANT SECRETARY.**—The term “Assistant Secretary” means the Assistant Secretary of Indian Affairs, or that officer’s authorized representative.

(2) **AUTONOMOUS.**—The term “autonomous” means the exercise of political influence or authority independent of the control of any other Indian governing

entity. Autonomous must be understood in the context of the history, geography, culture, and social organization of the petitioning group.

(3) **COMMUNITY.**—The term “Community” means any group of people who can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. Community must be understood in the context of the history, geography, culture, and social organization of the group.

(4) **CONTINENTAL UNITED STATES.**—The term “continental United States” means the contiguous 48 States and Alaska.

(5) **CONTINUOUSLY OR CONTINUOUS.**—The term “continuously or continuous” means extending from first sustained contact with non-Indians throughout the group’s history to the present substantially without interruption.

(6) **DOCUMENTED PETITION.**—The term “documented petition” means the detailed arguments made by a petitioner to substantiate its claim to continuous existence as an Indian tribe, together with the factual exposition and all documentary evidence necessary to demonstrate that these arguments address the mandatory criteria.

(7) **HISTORICALLY, HISTORICAL, OR HISTORY.**—The term “historically, historical, or history” means dating from first sustained contact with non-Indians.

(8) **INDIAN GROUP OR GROUP.**—The term “Indian group or group” means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe. Indian tribe, also referred to herein as tribe, means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior has lawfully acknowledged as an Indian tribe.

(9) **INDIGENOUS.**—The term “indigenous” means native to the continental United States in that at least part of the petitioner’s territory at the time of sustained contact extended into what is now the continental United States.

(10) **INFORMED PARTY.**—The term “informed party” means any person or organization, other than an interested party, who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner.

(11) **INTERESTED PARTY.**—The term “interested party” means any person, organization, or other entity who can establish a legal, factual, or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner. “Interested party” includes the Governor and attorney general of the State in which a petitioner is located, and may include, but is not limited to, local governmental units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination.

(12) **LETTER OF INTENT.**—The term “letter of intent” means an undocumented letter or resolution by which an Indian group requests Federal acknowledgment as an Indian tribe and expresses its intent to submit a documented petition.

(13) **PETITIONER.**—The term “petitioner” means any entity that has submitted a letter of intent to the Secretary requesting acknowledgment that it is an Indian tribe.

(14) **POLITICAL INFLUENCE OR AUTHORITY.**—The term “political influence or authority” means a tribal council, leadership, internal process, or other mechanism which the group has used as a means of influencing or controlling the behavior of its members in significant respects, and making decisions for the group which substantially affect its members, and representing the group in dealing with outsiders in matters of consequence. This process is to be understood in the context of the history, culture, and social organization of the group.

(15) **PREVIOUS FEDERAL ACKNOWLEDGMENT.**—The term “previous Federal acknowledgment” means action by the Federal Government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States.

(16) **SECRETARY.**—The term “Secretary” means the Secretary of the Interior or that officer’s authorized representative.

(17) **SUSTAINED CONTACT.**—The term “sustained contact” means the period of earliest sustained non-Indian settlement or governmental presence in the local area in which the historical tribe or tribes from which the petitioner descends was located historically.

SEC. 4. GROUPS ELIGIBLE TO SUBMIT PETITIONS.

(a) **ELIGIBLE GROUPS.**—Indian groups indigenous to the continental United States that are not federally recognized Indian tribes on the date of the enactment of this Act may submit a petition under this Act.

(b) **INELIGIBLE GROUPS.**—The following may not submit a petition under this Act:

(1) Splinter groups, political factions, communities, or groups of any character that separate from the main body of a federally recognized Indian tribe, unless they can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity, even if they have been regarded by some as part of or have been associated in some manner with a federally recognized Indian tribe.

(2) Indian tribes, organized bands, pueblos, Alaska native villages, or communities that have been lawfully acknowledged to be federally recognized Indian tribes and are receiving services from the Bureau of Indian Affairs.

(3) Groups that petitioned and were denied Federal acknowledgment under part 83 of title 25, Code of Federal Regulations, including reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

(4) Groups for which a documented petition has not been filed pursuant to section 9 by the date that is 5 years after the date of the enactment of this Act.

(c) **GROUPS WITH PETITIONS IN PROGRESS.**—This Act, including the criteria in section 7, shall apply to any Indian group whose documented petition was submitted and not denied on the date of the enactment of this Act.

SEC. 5. FILING A LETTER OF INTENT.

Any eligible Indian group in the continental United States that believes it should be acknowledged as an Indian tribe and that it can satisfy the criteria in this Act may submit a letter of intent requesting acknowledgment that an Indian group exists as an Indian tribe. The letter of intent submitted under this section—

(1) shall be filed with the Assistant Secretary;

(2) may be filed in advance of, or at the same time as, a group's documented petition; and

(3) shall be produced, dated, and signed by the governing body of an Indian group.

SEC. 6. DUTIES OF THE ASSISTANT SECRETARY.

(a) **GUIDELINES.**—The Assistant Secretary shall make available guidelines for the preparation of documented petitions. These guidelines—

(1) shall include an explanation of the criteria, a discussion of the types of evidence which may be used to demonstrate particular criteria, and general suggestions and guidelines on how and where to conduct research;

(2) shall include an example of a documented petition format which shall provide guidance, but not preclude the use of any other format; and

(3) may be supplemented or updated as necessary.

(b) **RESEARCH AND PREPARATION OF PETITION.**—The Assistant Secretary—

(1) shall provide petitioners with suggestions and advice regarding preparation of the documented petition; and

(2) shall not be responsible for the actual research on behalf of the petitioner.

SEC. 7. CRITERIA FOR FEDERAL ACKNOWLEDGMENT.

The criteria for consideration for Federal acknowledgment are, at a minimum, the following:

(1) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification by other than the petitioner itself or its members:

(A) Identification as an Indian entity by Federal authorities.

(B) Relationships with State governments based on identification of the group as Indian.

(C) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(D) Identification as an Indian entity by anthropologists, historians, or other scholars.

(E) Identification as an Indian entity in newspapers and books.

(F) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or State Indian organizations.

(2) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

(A) This criterion may be demonstrated by some combination of the following evidence and other evidence that the petitioner meets the definition of community:

- (i) Significant rates of marriage within the group, or, as may be culturally required, patterned out-marriages with other Indian populations.
 - (ii) Significant social relationships connecting individual members.
 - (iii) Significant rates of informal social interaction which exist broadly among the members of a group.
 - (iv) A significant degree of shared or cooperative labor or other economic activity among the membership.
 - (v) Evidence of strong patterns of discrimination or other social distinctions by nonmembers.
 - (vi) Shared sacred or secular ritual activity encompassing most of the group.
 - (vii) Cultural patterns shared among a significant portion of the group that are different from those of the non-Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization, or religious beliefs and practices.
 - (viii) The persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name.
 - (ix) A demonstration of historical political influence under the criterion in paragraph (3) shall be evidence for demonstrating historical community.
- (B) A petitioner shall be considered to have provided sufficient evidence of community at a given point in time if evidence is provided to demonstrate any one of the following:
- (i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community.
 - (ii) At least 50 percent of the marriages in the group are between members of the group.
 - (iii) At least 50 percent of the group members maintain distinct cultural patterns such as, but not limited to, language, kinship organization, or religious beliefs and practices.
 - (iv) There are distinct community social institutions encompassing most of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations.
 - (v) The group has met the criterion in paragraph (3) using evidence described in paragraph (3)(B).
- (3) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.
- (A) This criterion may be demonstrated by some combination of the evidence listed below and by other evidence that the petitioner meets the definition of political influence or authority:
- (i) The group is able to mobilize significant numbers of members and significant resources from its members for group purposes.
 - (ii) Most of the membership considers issues acted upon or actions taken by group leaders or governing bodies to be of importance.
 - (iii) There is widespread knowledge, communication, and involvement in political processes by most of the group's members.
 - (iv) The group meets the criterion in paragraph (2) at more than a minimal level.
 - (v) There are internal conflicts which show controversy over valued group goals, properties, policies, processes, and decisions.
- (B) A petitioning group shall be considered to have provided sufficient evidence to demonstrate the exercise of political influence or authority at a given point in time by demonstrating that group leaders and other mechanisms exist or existed which—
- (i) allocate group resources such as land, residence rights, and the like on a consistent basis;
 - (ii) settle disputes between members or subgroups by mediation or other means on a regular basis;
 - (iii) exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior; and
 - (iv) organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(C) A group that has met the requirements in paragraph (2)(B) at a given point in time shall be considered to have provided sufficient evidence to meet this criterion at that point in time.

(4) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

(5) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

(A) Some types of evidence that can be used for this purpose include the following:

(i) Rolls prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, or other purposes.

(ii) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iii) Church, school, and other similar enrollment records identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(v) Other records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(B) The petitioner must provide an official membership list, separately certified by the group's governing body, of all known current members of the group. This list must include each member's full name (including maiden name), date of birth, and current residential address. The petitioner must also provide a copy of each available former list of members based on the group's own defined criteria, as well as a statement describing the circumstances surrounding the preparation of the current list and, insofar as possible, the circumstances surrounding the preparation of former lists.

(6) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. However, under certain conditions a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe. The conditions are that the group must establish that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group.

(7) Neither the petitioner nor its members are the subject of an Act of Congress that has expressly terminated or forbidden the Federal relationship.

SEC. 8. PREVIOUS FEDERAL ACKNOWLEDGMENT.

(a) **IN GENERAL.**—Unambiguous previous Federal acknowledgment shall be acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment. If a petitioner provides substantial evidence of unambiguous Federal acknowledgment, the petitioner shall only be required to demonstrate that it meets the requirements of section 7 to the extent required by this section. A determination of the adequacy of the evidence of previous Federal action acknowledging tribal status shall be made during the technical assistance review of the documented petition conducted pursuant to section 10(b).

(b) **EVIDENCE.**—Evidence to demonstrate previous Federal acknowledgment includes evidence that the group—

(1) has had treaty relations with the United States;

(2) has been denominated a tribe by an Act of Congress or Executive order; and

(3) has been treated by the Federal Government as having collective rights in tribal lands or funds.

SEC. 9. NOTICE OF RECEIPT OF A PETITION.

(a) **IN GENERAL.**—Not later than 30 days after receiving a letter of intent, or a documented petition if a letter of intent has not previously been received and noticed, the Assistant Secretary shall acknowledge to the sender such receipt in writing. Notice under this subsection shall—

(1) include the name, location, and mailing address of the petitioner and such other information to identify the entity submitting the letter of intent or documented petition and the date it was received;

(2) serve to announce the opportunity for interested parties and informed parties to submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgment or to request to be kept informed of all general actions affecting the petition; and

(3) indicate where a copy of the letter of intent and the documented petition may be examined.

(b) **NOTICE TO STATE GOVERNMENTS.**—The Assistant Secretary shall notify, in writing—

(1) the Governor and attorney general of the State or States in which a petitioner is located; and

(2) any recognized tribe and any other petitioner that—

(A) appears to have a historical or present relationship with the petitioner; or

(B) may otherwise be considered to have a potential interest in the acknowledgment determination.

(c) **PUBLICATION.**—Not later than 60 days after receiving a letter of intent, or a documented petition if a letter of intent has not previously been received and noticed, the Assistant Secretary shall have the notice required under this section published—

(1) in the Federal Register; and

(2) in a major newspaper or newspapers of general circulation in the town or city nearest to the petitioner.

SEC. 10. PROCESSING OF THE DOCUMENTED PETITION.

(a) **REVIEW.**—Upon receipt of a documented petition, the Assistant Secretary—

(1) shall cause a review to be conducted to determine the extent to which the petitioner has met the criteria set forth in section 7;

(2) shall include consideration of the documented petition and the factual statements contained therein;

(3) may initiate other research for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner's status; and

(4) may consider any evidence which may be submitted by interested parties or informed parties.

(b) **TECHNICAL ASSISTANCE.**—

(1) Prior to review of the documented petition under subsection (a), the Assistant Secretary shall conduct a preliminary review of the petition in order to provide technical assistance to the petitioner.

(2) The review under paragraph (1) shall be a preliminary review for the purpose of providing the petitioner an opportunity to supplement or revise the documented petition prior to the review under subsection (a). Insofar as possible, technical assistance reviews under this paragraph will be conducted in the order of receipt of documented petitions. However, technical assistance reviews will not have priority over active consideration of documented petitions.

(3) After the technical assistance review, the Assistant Secretary shall notify the petitioner by letter of any obvious deficiencies or significant omissions apparent in the documented petition and provide the petitioner with an opportunity to withdraw the documented petition for further work or to submit additional information.

(4) If a petitioner's documented petition claims previous Federal acknowledgment or includes evidence of previous Federal acknowledgment, the technical assistance review shall also include a review to determine whether that evidence is sufficient to meet the requirements of previous Federal acknowledgment.

(c) **RESPONSE TO TECHNICAL ASSISTANCE REVIEW.**—

(1) Petitioners may respond in part or in full to the technical assistance review letter or request, in writing, that the Assistant Secretary proceed with the active consideration of the documented petition using the materials already submitted.

(2) If the petitioner requests that the materials submitted in response to the technical assistance review letter be again reviewed for adequacy, the Assistant Secretary shall provide the additional review.

(3) If the assertion of previous Federal acknowledgment under section 8 cannot be substantiated during the technical assistance review, the petitioner may respond by providing additional evidence. A petitioner that claims previous Federal acknowledgment and fails to respond to a technical assistance review letter under this subsection, or whose response fails to establish the claim, shall have its documented petition considered on the same basis as documented petitions submitted by groups not claiming previous Federal acknowledgment. Petitioners that fail to demonstrate previous Federal acknowledgment after a review of materials submitted in response to the technical assistance review shall be so notified. Such petitioners may submit additional materials concerning previous acknowledgment during the course of active consideration.

(d) CONSIDERATION OF DOCUMENTED PETITIONS.—The Assistant Secretary shall—

(1) review documented petitions in the order that they are determined ready for review;

(2) establish and maintain a numbered register of documented petitions which have been determined ready for active consideration;

(3) maintain a numbered register of letters of intent or incomplete petitions based on the original date the item was received by the Department of the Interior; and

(4) use the register of letters of intent or incomplete petitions to determine the order of review by the Assistant Secretary if two or more documented petitions are determined ready for review on the same date.

(e) REPORT.—Not later than 1 year after notifying the petitioner that review of the documented petition has begun, the Assistant Secretary shall—

(1) submit a report including a summary of the evidence, findings, petition, and supporting documentation, to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate;

(2) notify the petitioner and interested parties that the review is complete and the report required under paragraph (1) has been submitted;

(3) provide copies of the report to the petitioner and interested parties; and

(4) provide copies of the report to informed parties and others upon written request.

SEC. 11. CLARIFICATION OF FEDERAL RECOGNITION AUTHORITY.

(a) ACT OF CONGRESS REQUIRED.—An Indian group may receive Federal acknowledgment (or reacknowledgment) as an Indian tribe only by an Act of Congress. The Secretary may not grant Federal acknowledgment (or reacknowledgment) to any Indian group.

(b) PREVIOUS ACKNOWLEDGMENT.—This Act shall not affect the status of any Indian tribe that was federally acknowledged before the date of the enactment of this Act.

SEC. 12. FORCE AND EFFECT OF REGULATIONS.

Part 83 of title 25, Code of Federal Regulations, shall have no force or effect, and section 1.2 of title 25, Code of Federal Regulations, with respect to any regulation promulgated by the Secretary pursuant to this Act, shall have no force or effect.

SEC. 13. TRUST LAND REAFFIRMATION.

All land taken into trust by the United States under or pursuant to the Act of June 18, 1934 (25 U.S.C. 5101 et seq.), before February 24, 2009, for the benefit of an Indian tribe that was federally recognized on the date that the land was taken into trust is hereby reaffirmed as trust land.

PURPOSE OF THE BILL

The purpose of H.R. 3744 is to provide that an Indian group may receive Federal acknowledgment as an Indian tribe only by an Act of Congress.

BACKGROUND AND NEED FOR LEGISLATION

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.

Article I, Section 8, Clause 3 of the Constitution grants to Congress power to “regulate commerce . . . with the Indian tribes.” Supplemented by the treaty-making power¹ in the Constitution, the so-called “Indian Commerce Clause” delegates to Congress what the Supreme Court has said is “plenary” power over Indian affairs.² 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 unfettered authority to designate groups of individuals as “Indian tribes” or individuals as “Indians” in that Congress may not exercise such authority arbitrarily.³ 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, 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 1970s Congress considered but failed to enact legislation to establish a statutory framework for the recognition of tribes. In 1978 the Bureau of Indian Affairs (BIA) 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 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 on Indian, Insular and Alaska Native Af-

¹Treaty 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])

²According 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.

³See *United States v. Sandoval*, 231 U.S. 28, at 46 (1913).

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

fairs hearing,⁵ 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, 2015,⁶ 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.⁷ In 2002 the Inspector General investigated 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 . . ."⁸ 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 copious 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 century. 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 fields 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.

H.R. 3744 is identical to Title I of H.R. 3764 of the 114th Congress, favorably reported by the Committee on Natural Resources on December 7, 2016.⁹

During the markup of H.R. 3744, the Committee adopted an amendment filed by the Ranking Minority Member to ratify the trust status of lands acquired for tribes by the Secretary of the Interior prior to the date of the Supreme Court's judgment in *Carciere v. Salazar* (555 U.S. 379 (2009)), or February 25, 2009. In *Carciere*,

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

⁶ 80 Federal Register 37861 (July 1, 2015).

⁷ https://www.doi.gov/sites/doi.gov/files/Tejon_ROI_FINAL_PUBLIC.pdf.

⁸ <https://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-01-i-00329/pdf/GPO-DOI-IGREPORTS-01-i-00329.pdf>.

⁹ H. Rept. 114-847.

the Court resolved a dispute over the Secretary's use of Section 5 of the Indian Reorganization Act of 1934 (IRA)¹⁰ as general authority (typically exercised through the BIA) to acquire land in trust for any tribe. The Court held Section 5 of the IRA applies to tribes recognized and under federal jurisdiction on the date of enactment of that act, or 1934, not to tribes under federal jurisdiction after that date. To date, the Department of the Interior has refused to disclose to the Committee a list of tribes and trust lands affected by *Carcieri*.

The Ranking Member's amendment would remove any doubt as to the trust status of lands acquired for tribes prior to the Court's issuance of *Carcieri*. However, the amendment fails to resolve serious concerns stemming from the absence of any identifiable standards or guidelines (besides the one limit identified in *Carcieri*) governing the Secretary's power under the IRA to acquire land in trust, including lands for off-reservation casinos. Concerns with Section 5 of the IRA are broad and bipartisan. For example, 21 States filed a brief in support of Governor Carcieri of Rhode Island in the IRA controversy before the Supreme Court.¹¹ Seventeen State Attorneys General (of both parties and ranging from so-called deep Blue to deep Red States) have written the Committee to complain that the "current process [for taking land into trust] does not provide for meaningful analysis or weighing of input of states and local units of government and is void of binding limits on the discretion of the secretary [sic]."¹² The current Democratic Leader of the Senate has previously written the Obama Administration to warn the Secretary of the Interior not to "undercut" the Supreme Court's *Carcieri* decision or the authority of Congress with respect to the trust land process.¹³

With these concerns in mind, the Chairman of the Committee, in the interest of compromising to advance the larger policy reforms contained in H.R. 3744, offered to accept the *Carcieri* amendment in exchange for the Ranking Minority Member's support of the bill as amended. The Ranking Minority Member rejected the offer, thereby leaving tribes whose lands may be in legal jeopardy hanging. The Chairman decided to accept the Ranking Member's *Carcieri* amendment, keeping open his offer to Members willing to set aside partisanship to forge a compromise on federal Indian policies relating to recognition and trust lands.

SECTION-BY-SECTION ANALYSIS OF H.R. 3744 AS ORDERED REPORTED

Section 1. Short title

Provides that this Act may be cited as the "Tribal Recognition Act of 2018".

¹⁰25 U.S.C. 5108 (formerly classified as 25 U.S.C. 465)

¹¹The State of Rhode Island's position in *Carcieri* was further supported by an amicus brief signed by the Council of State Governments, National League of Cities, U.S. Conference of Mayors, National Association of Counties, and the International City/County Management Association.

¹²"A Communication from the Chief Legal Officers" of Alaska, Colorado, Connecticut, Florida, Hawaii, Iowa, Kansas, Massachusetts, Michigan, Mississippi, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Utah, sent to the Chairmen and Ranking Members of the Committees on Natural Resources of the House of Representatives and on Indian Affairs of the Senate, dated April 24, 2009.

¹³Letter from Senator Charles E. Schumer to Secretary Ken Salazar, dated March 8, 2010.

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; and 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 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

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 be provided 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, and section 1.2 of title 25, Code of Federal Regulations (with respect to any regulation promulgated by the Secretary of the Interior pursuant to this Act) shall have no force or effect.

Section 13. Trust land affirmation

Provides that all land taken into trust by the United States under or pursuant to the Act of June 18, 1934 (25 U.S.C. 5101 et seq.) before February 24, 2009, for the benefit of an Indian tribe that was federally recognized on the date that the land was taken into trust is hereby reaffirmed as trust land.

COMMITTEE ACTION

H.R. 3744 was introduced on September 12, 2017, by Congressman Rob Bishop (R-UT). The bill was referred to the Committee on Natural Resources and within the Committee to the Subcommittee on Indian, Insular and Alaska Native Affairs. The Subcommittee held a hearing on the bill on September 26, 2017. On June 13, 2018, the Committee on Natural Resources met to consider the bill. Congressman Rob Bishop offered an amendment designated #1; it was adopted by voice vote. Congressman Raúl M. Grijalva (D-AZ) offered an amendment designated 001; it was adopted by voice vote. No further amendments were offered, and the bill, as amended, was ordered favorably reported to the House of Representatives by a bipartisan roll call vote of 20 ayes to 14 noes, as follows:

Committee on Natural Resources

U.S. House of Representatives

115th Congress

Date: 06.13.18

Recorded Vote #:1

Meeting on / Amendment on: FC Markup Favorably Report HR 3744 (Rep.Rob Bishop of UT)

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Bishop, UT, Chairman	X			Mr. Cook, CA	X		
<i>Mr. Grijalva, AZ, Ranking Member</i>		X		<i>Mr. McEachin, VA</i>		X	
Mr. Young, AK, Chairman Emeritus	X			Mr. Westerman, AR	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Mr. Brown, MD</i>		X	
Mr. Gohmert, TX, Vice Chairman	X			Mr. Graves, LA	X		
<i>Ms. Bordallo, Guam</i>		X		<i>Mr. Clay, MO</i>			
Mr. Lamborn, CO	X			Mr. Hice, GA	X		
<i>Mr. Costa, CA</i>		X		<i>Mr. Gomez, CA</i>		X	
Mr. Wittman, VA	X			Mrs. Radewagen, AS			
<i>Mr. Sablan, CNMI</i>	X			<i>Ms. Velázquez, NY</i>			
Mr. McClintock, CA	X			Mr. Webster, FL	X		
<i>Ms. Tsongas, MA</i>				Mr. Bergman, MI			
Mr. Pearce, NM				Ms. Cheney, WY	X		
<i>Mr. Huffman, CA</i>		X		Mr. Johnson, LA			
Mr. Thompson, PA	X			Ms. González-Colón, PR	X		
<i>Mr. Lowenthal, CA</i>		X		Mr. Gianforte, MT	X		
Mr. Gosar, AZ	X			Mr. Curtis, UT	X		
<i>Mr. Beyer, VA</i>		X					
Mr. Labrador, ID							
<i>Mr. Gallego, AZ</i>		X					
Mr. Tipton, CO	X						
<i>Ms. Hanabusa, HI</i>		X					
Mr. LaMalfa, CA	X						
<i>Ms. Barragán, CA</i>		X					
Mr. Denham, CA							
<i>Mr. Soto, FL</i>		X		TOTAL:	20	14	

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII AND CONGRESSIONAL BUDGET ACT

1. Cost of Legislation and the Congressional Budget Act. With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 6, 2018.

Hon. ROB BISHOP,
*Chairman, Committee on Natural Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3744, the Tribal Recognition Act of 2018.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Robert Reese.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 3744—Tribal Recognition Act of 2018

H.R. 3744 would repeal the current process used by the Department of the Interior (DOI), to determine if Indian groups can be recognized as Indian tribes. The current process has been in place since 2015. Under the bill an Indian group could become a federally recognized Indian tribe only through the enactment of legislation to that effect.

The bill also would outline new administrative procedures for Indian groups to petition DOI for federal recognition. Those procedures would be similar to the procedures that existed before 2015. Using information from DOI, CBO estimates that implementing the procedures required in H.R. 3744 would not significantly change DOI's administrative costs over the 2019–2023 period because personnel currently working to recognize Indian groups as Indian tribes would be shifted to process the tribal recognition petitions prior to submitting them to the Congress. In 2018, DOI allocated about \$2 million for administrative expenses related to Indian tribal recognition.

Enacting H.R. 3744 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 3744 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 3744 would impose no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Robert Reese. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

2. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to provide that an Indian group may receive Federal acknowledgment as an Indian tribe only by an Act of Congress.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

COMPLIANCE WITH H. RES. 5

Directed Rule Making. This bill does not contain any directed rule makings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes to existing law.

DISSENTING VIEWS

H.R. 3744 would make Congress the sole authority for recognizing or restoring Native American tribes. Aside from further delaying an already interminable process, the bill would consolidate the power of tribal recognition in the hands of a very few Members of Congress, including the Chairman of this Committee. The importance of federal recognition cannot be overstated, and that is why simply leaving an act of Congress as the only path forward for tribal recognition is dangerous and misguided.

There is no argument that congress has the authority to federally recognize Native American tribes, but the authority of the Department of the Interior is also well established.

The Secretary of the Interior's authority to acknowledge the existence of Indian tribes is deeply rooted in the laws passed by Congress and the structure of the Constitution. Congress rightly granted the Assistant Secretary of Indian Affairs the authority to "have management of all Indian affairs and of all matters arising out of Indian relations."¹ This includes the authority to administratively acknowledge Indian tribes. This authority is well established and has been upheld by the courts.²

The Congressional findings that supported the Federally Recognized Indian Tribe List Act of 1994 reiterated that Indian tribes could be recognized "by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe,'" and described the relationship the United States has with federally recognized tribes.³ In addition to the power delegated by Congress, the Executive Branch has independent constitutional authority to recognize Tribal Nations through the Constitution's Treaty Clause.⁴

H.R. 3744 seeks to upset this recognized authority by stipulating that only Congress has the authority to recognize Indian tribes. The bill obscures its true intent by setting forth its own process by which a tribe can petition the Department of the Interior for recognition. However, the only requirement at the end of that process would be for the Department to "submit a report including a summary of the evidence findings, petition, and supporting documentation, to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate." Therefore, the role of the Department of the Interior would be limited and would not include the ability to recognize tribes administratively.

¹25 U.S.C. § 2 and § 9, and 43 U.S.C. § 1457.

²See, e.g. *Miami Nation of Indians of Indiana, Inc. v. United States Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001); *James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).

³See Public Law 103-454 Sec. 103(2), (3), (8) (Nov. 2, 1994).

⁴U.S. Const, art. II, § 2, cl. 2.

Ranking Member Raúl Grijalva offered an amendment to ensure that all land taken into trust prior to the Carcieri decision in 2009 is reaffirmed as tribal trust land. The amendment was accepted by voice vote. While enactment of this provision would be a positive development to tribes that face frivolous lawsuits related to the Carcieri decision, its inclusion does not change our opposition to the Underlying legislation.

Many tribes have still not established or reaffirmed their relationship with the federal government. The Department of the Interior's process provides the only non-partisan, research-based approach to determining the validity of tribal claims—a rigorous, time-consuming process that is based on hard science and meticulous investigation. Taking that avenue away and leaving an act of Congress as the only option for recognition, will only result in further delays and difficulties for tribes. Most dangerous of all, it will leave tribal recognition decisions vulnerable to political whims and the influence of special interests.

For these reasons, we oppose H.R. 3744.

RAÚL M. GRIJALVA,
*Ranking Member, Committee
on Natural Resources.*

ALAN LOWENTHAL.

RUBEN GALLEGO.

COLLEEN HANABUSA.

NYDIA M. VELÁZQUEZ.

GRACE F. NAPOLITANO.

JIMMY GOMEZ.

DONALD S. BEYER, JR.

DARREN SOTO.

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