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TO EXTEND THE FEDERAL RECOGNITION TO THE LITTLE SHELL TRIBE OF CHIPPEWA INDIANS OF MONTANA, AND FOR OTHER PURPOSES

MAY 22, 2017.—Ordered to be printed

Mr. HOEVEN, from the Committee on Indian Affairs, submitted the following

R E P O R T

[To accompany S. 39]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 39) to extend the Federal recognition to the Little Shell Tribe of Chippewa Indians of Montana, and for other purposes, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purposes of S. 39 are (1) to extend Federal recognition to the Little Shell Tribe of Chippewa Indians of Montana (Little Shell), making its members eligible for all services and benefits provided by the United States to other federally recognized Indian tribes; and (2) to effect the transfer of 200 acres of land, which the Secretary of the Interior (Secretary) shall acquire and place in trust for the benefit of Little Shell.

BACKGROUND

History of federally recognizing Indian tribes

The act of federally recognizing an Indian tribe is highly significant. It is an affirmation by the United States of the existence of a formal government-to-government relationship between the United States and the tribe. Once federally recognized, a tribe and its members have access to Federal benefits and programs, and the

tribal government incurs a formal responsibility to its members as the primary governing body of the community.

Before Congress ended the practice of treaty-making with Indian tribes in 1871, treaties were the usual manner of recognizing a government-to-government relationship between the United States and an Indian tribe. Since the conclusion of this practice, the United States has recognized Indian tribes by legislation, executive orders, and administrative decisions. Additionally, Federal courts may clarify the status of an Indian group.

In order to provide a uniform and consistent process by which an Indian tribe may be federally recognized, the Department of the Interior (Department) developed an administrative process in 1978 to allow Indian groups to petition for formal acknowledgment of a government-to-government relationship with the United States. Standards and procedures for this process were set forth in Part 83 of Title 25 of the Code of Federal Regulations (Part 83 or the Federal acknowledgement process). These regulations, as amended in 1994, required a petitioner to satisfy seven mandatory requirements, including:

(1) The petitioner "has been identified as an American Indian entity on a substantially continuous basis since 1900";

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

(3) The petitioner has "maintained political influence or authority over its members as an autonomous entity from historical times to the present";

(4) The group must "provide a copy of its present governing documents and membership criteria";

(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";

(6) The "membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe" and do not maintain a bilateral political relationship with the acknowledge tribe; and

(7) "Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship".[1]

The Department issued new Part 83 regulations on July 1, 2015.[2]

History of changes made to the Department's Part 83 regulations

The Federal acknowledgement process has been criticized as "broken" for decades.[3] Nonetheless, until the Department's recent effort to reform Part 83 (discussed below), there have been only a handful of changes made to the Federal acknowledgement process since its inception.[4]

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[1] *See* 59 Fed. Reg. 94–3934. (February 25, 1994).
[2] 80 Fed. Reg. 37861 (July 1, 2015).
[3] *See* 80 Fed. Reg. 37862.
[4] Examples of changes made to the process prior to recent reform efforts include regulations clarifying the evidence needed to support a recognition petition, 59 Fed. Reg. 94–3934 (February 25, 1994); a notice regarding internal BIA processing of federal acknowledgment petitions, 65

Complaints about the Department's Federal acknowledgement process have centered primarily on the high cost of gathering documentary evidence to meet the seven mandatory criteria, the length of time it takes the Department to review a petition, and the Department's inconsistent application of the listed criteria.[5] Of the 567 tribes that have been federally recognized, only 18 have been acknowledged through the Part 83 process.

Since 1970, Congress has passed legislation to federally recognize or reaffirm 17 Indian tribes.[6] To date, the Department has issued 50 decisions under the Part 83 process, including one decision issued after new Part 83 regulations were published in July 2015.[7]

Recent developments

On June 21, 2013, the Assistant Secretary—Indian Affairs (AS–IA) released a Discussion Draft proposing changes to Part 83. The related comment period closed on September 30, 2013. On May 29, 2014, the AS–IA published a Proposed Rule in the Federal Register. The Department received substantial input from tribes, state and local governments, and the public, during the associated comment period, which closed on September 30, 2014.[8]

Ultimately, the Department published a Final Rule on July 1, 2015, which took effect on July 31, 2015.[9] Assistant Secretary Washburn also issued a policy statement indicating that the Department will rely on the new Part 83 process as the "sole administrative avenue" for Federal acknowledgement for tribes.[10]

According to the Department, the Final Rule preserves the existing standard of proof and seven mandatory criteria to "maintain[] the substantive rigor and integrity of the [Part 83] process."[11] In order to promote timeliness and efficiency, the Final Rule provides for a two-phased review of petitions that establishes certain threshold criteria and may result in the earlier issuance of final decisions, as well as a uniform evaluation period (1900 to present) to satisfy the tribal identification, community and political authority criteria.[12] The Final Rule is intended to promote efficiency by pro-

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Fed. Reg. 7052–53 (February 11, 2000); and a notice providing guidance and direction to streamline the process, 73 Fed. Reg. 30146 (May 23, 2008).

[5] *See* 80 Fed. Reg. 37861 (July 1, 2015).

[6] *See* Tonto Apache Tribe of Arizona, Pub. L. 92–470 (1972); Modoc Tribe of Oklahoma, Pub. L. 95–281 (1978); Pasqua Yaqui Tribe of Arizona, Pub. L. 95–375 (1978); Houlton Band of Maliseet Indians of Maine, Pub. L. 96–420 (1980); Cow Creek Band of Umpqua Indians of Oregon, Pub. L. 97–391; Kickapoo Traditional Tribe of Texas, Pub. L. 97–429 (1983); Mashantucket Pequot Tribe of Connecticut, Pub. L. 98–134 (1983); Ysleta Del Sur Pueblo of Texas, Pub. L. 100–89 (1987); Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan, Pub. L. 100–420 (1988); Coquille Tribe of Oregon, Pub. L. 101–42 (1989); Aroostook Band of Micmac Indians of Maine, Pub. L. 102–171 (1991); Pokagon Band of Potawatomi Indians of Michigan, Pub. L. 103–323 (1994); Little River Band of Ottawa Indians of Michigan, Pub. L. 103–324 (1994); Little Traverse Band of Odawa Indians of Michigan, Pub. L. 103–324 (1994); Central Council of the Tlingit & Haida Indian Tribes of Alaska, Pub. L. 103–454 (1994); Graton Rancheria of California, Pub. L. 106–568 (2000); and Loyal Shawnee Tribe of Oklahoma, Pub. L. 106–568 (2000).

[7] The Department of the Interior issued a final determination recognizing the Pamunkey Indian Tribe. *See* 80 Fed. Reg. 39144 (July 8, 2015).

[8] *See* U.S. Department of the Interior, News Release, *Department of the Interior Announces Final Federal Recognition Process to Acknowledge Indian Tribes* (June 29, 2015) (stating that more than 2,800 commenters provided input on the Discussion Draft, and that there were over 330 unique comments on the Proposed Rule). The Department also received feedback from tribes during consultations and public meetings. *Id.*

[9] 80 Fed. Reg. 37861 (July 1, 2015).

[10] 80 Fed. Reg. 37538–39 (July 1, 2015).

[11] 80 Fed. Reg. 37861 (July 1, 2015).

[12] *Id.*

viding for limited reconsideration of final agency determinations.[13] The Department states that the Final Rule promotes fairness and consistency by providing that prior decisions finding evidence or methodology sufficient to satisfy any particular criterion will also be sufficient for a petitioner under the new Part 83 process.[14] It also states that the Final Rule promotes transparency by providing for increased public access to petitions for Federal acknowledgement and associated public materials and, in the case of a negative proposed finding, providing petitioners the opportunity for a hearing.[15]

Indian tribes that applied for federal acknowledgment prior to publication of the Final Rule on July 1, 2015, are allowed to choose to have the Department evaluate their application under the previous application process or the new application process.[16]

Since the Final Rule was published, one Indian tribe has been federally recognized.[17]

History of Little Shell

The Little Shell has used historical ties to the Pembina Band of Chippewa Indians in North Dakota for the Department to consider to satisfy criteria five.[18] The Pembina Band was included in the Chippewa—Red Lake and Pembina Bands treaty with the United States in an 1863 treaty that was ratified by the Senate.[19] Many of the members of the Pembina Band settled on reservations in Minnesota, but the ancestors of the Little Shell moved westward, following the buffalo herds. By the late 1800s, the Little Shell had settled in Montana and in the Turtle Mountains of North Dakota.[20]

The Little Shell Band has had numerous dealings with the United States. In 1892, a United States Commission was formed to negotiate cession of land from the Turtle Mountain Chippewa and provide for their removal. Chief Little Shell and his followers refused to accept the terms of the agreement and walked out on the negotiations. He was followed by a group of supporters who would become known as the "Little Shell Band".[21]

Chief Little Shell and the Little Shell Band's refusal to cede additional lands to the United States left them without a reservation.[22] Congress appropriated funds in 1908, and from 1914 through 1925, to establish a land base for the "homeless Indians in the State of Montana."[23]

In 1935, following the enactment of the Indian Reorganization Act (IRA),[24] the BIA attempted to help the Little Shell Tribe form

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] The Department of the Interior issued a final determination recognizing the Pamunkey Indian Tribe on July 2, 2015. *See* 80 Fed. Reg. 39144 (July 8, 2015).
[18] *See* Little Shell Tribe of Chippewa Indians Restoration Act of 2011, S. 546, 112th Cong. § 2 (7) (2011).
[19] Treaty with the Chippewa—Red Lake and Pembina Bands, U.S.-Chippewa—Red Lake and Pembina Bands, October 2, 1863, 13 Stat. 667.
[20] *Fixing the Federal Acknowledgement Process: Hearing Before the S. Comm. on Indian Affairs,* 111th Cong. 2, 2–3 (2009) (written testimony of John Sinclair, President of the Little Shell Tribe of Chippewa Indians of Montana).
[21] *Id.*
[22] *Id.*
[23] *Little Shell Tribe of Chippewa Indians Restoration Act of 2007: Hearing on S. 724 Before the S. Comm. on Indian Affairs,* 110th Cong. 2, 13 (2008) (statement of the Hon. John Sinclair, Little Shell Tribe of Chippewa Indians of Montana, President); 41 Stat. 1225 (March 3, 1925).
[24] Indian Reorganization Act, 25 U.S.C. §§ 5101–5144 (2017).

a government and reestablish a relationship with the United States. The Little Shell was ultimately unable to formally organize under the IRA because they lacked a land base.[25]

The Little Shell continued its effort to obtain Federal recognition through the Department's Federal acknowledgment process. In 1978, the year this process was created, Little Shell filed a letter of intent to petition for Federal acknowledgment. Little Shell spent approximately 14 years documenting their petition for acknowledgment, and ultimately submitted a petition in 1992.[26]

In 1995, the BIA declared the Little Shell's petition was complete.[27] In 2000, the BIA issued a positive proposed finding on the petition, stating that Little Shell had met all seven mandatory criteria for Federal acknowledgment.[28] However, the BIA Office of Federal Acknowledgement requested additional information from the Tribe. In response, Little Shell provided nearly 1,000 pages of additional material.

In 2009, the Department issued a final determination against federally acknowledging Little Shell.[29] The Department's final determination stated that Little Shell met only four of the seven mandatory criteria for Federal acknowledgment.[30] Little Shell appealed the negative final determination to the Interior Board of Indian Appeals.[31]

In 2013, the Secretary referred Little Shell's petition to the AS–IA for reconsideration. The Little Shell petition was placed on hold.

LEGISLATIVE HISTORY

Montana Senators Jon Tester [D–MT] and Max Baucus [D–MT] introduced legislation to federally recognize Little Shell in the 110th Congress (S. 724), the 111th Congress (S. 1936), the 112th Congress (S. 546), and the 113th Congress (S. 161). During the 110th Congress, and again in the 112th and 113th Congresses, the Committee on Indian Affairs held hearings on the legislation. At that time, Little Shell's petition for recognition was on active consideration, and the Administration testified in support of the Part 83 process.[32] Montana Senators Jon Tester and Steve Daines introduced legislation to federally recognize Little Shell in the 114th Congress (S. 35). The Committee favorably reported out bills to recognize Little Shell in the 112th, 113th, and 114th Congresses.

In the 115th Congress, on January 5, 2017, Senators Jon Tester [D–MT] and Steve Daines [R–MT] introduced S. 39 to federally recognize Little Shell. The bill was referred to the Committee on Indian Affairs, which considered the bill at a February 8, 2017 busi-

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[25] *See* Little Shell Tribe of Chippewa Indians Restoration Act of 2011, S. 546, 112th Cong. § 2 (7) (2011).

[26] *Id.*

[27] *Little Shell Tribe of Chippewa Indians Restoration Act of 2013: Hearing on S. 161 Before the S. Comm. on Indian Affairs,* 113th Cong. 1, 4 (2013) (written testimony of the Assistant Secretary for Indian Affairs, U.S. Department of the Interior).

[28] 65 Fed. Reg. 45394 (July 21, 2000).

[29] 74 Fed Reg. 56861 (November 3, 2009); *Little Shell Band of Chippewa Indians Restoration Act of 2011: Hearing on S. 546 Before the S. Comm. on Indian Affairs,* 112th Cong. 1, 30 (2011) (statement of Hon. John Sinclair, Little Shell Tribe of Chippewa Indians of Montana, President).

[30] *Little Shell Tribe of Chippewa Indians Restoration Act of 2013: Hearing on S. 161 Before the S. Comm. on Indian Affairs,* 113th Cong. 1, 20 (2013) (statement of the Assistant Secretary for Indian Affairs, U.S. Department of the Interior).

[31] *Id.*

[32] *Little Shell Tribe of Chippewa Indians Restoration Act of 2007: Hearing on S. 724 Before the S. Comm. on Indian Affairs,* 110th Cong. 2, 1 (2008) (written testimony of Director, R. Lee Fleming, Office of Federal Acknowledgment, US Department of the Interior).

ness meeting. During this business meeting, the Committee favorably reported S. 39 to the full Senate by voice vote, without amendment.

Although there have been companion bills introduced in the House during past Congresses (including the 114th Congress), there is currently no companion bill. Additionally, Montana's at-large congressional seat is presently vacant.

SECTION-BY-SECTION ANALYSIS

Section 1—Short title

This section states that the short title of the bill is the "Little Shell Tribe of Chippewa Indians Restoration Act of 2017".

Section 2—Findings

This section lists Congressional findings.

Section 3—Definitions

This section defines terms used throughout the Act.

Section 4—Federal recognition

This section formally extends Federal recognition to Little Shell, making all federal laws and regulations of general applicability to Indians and Indian tribes, including the IRA, applicable to Little Shell and its members.

Section 5—Federal services and benefits

This section states that, beginning on the date of enactment of this Act, the Little Shell and each member shall be eligible for all services and benefits provided by the United States to Indians and federally recognized Indian tribes, without regard to either the existence of a reservation for the tribe or the location of the residence of any member on or near an Indian reservation. This section also establishes Little Shell's service area for service delivery and benefits purposes as Blaine, Cascade, Glacier, and Hill Counties in the State of Montana.

Section 6—Reaffirmation of rights

This section makes clear that nothing in this Act diminishes any right or privilege of Little Shell, or members of Little Shell, that existed prior to the date of enactment. The section further states that any legal or equitable claims to enforce rights or privileges reserved by or granted to Little Shell that were wrongfully denied or taken before enactment of this Act are preserved.

Section 7—Membership roll

This section mandates, as a condition of receiving recognition, services, and benefits pursuant to this Act, that Little Shell submit to the Secretary a membership roll within 18 months of enactment of this Act, and maintain such roll. This section also requires that tribal membership be determined in accordance with Little Shell's constitution dated September 10, 1977.

Section 8—Transfer of land

This section directs the Secretary to acquire trust title to 200 acres of land within the service area of the Tribe. This section also states that the Secretary may acquire additional land for the benefit of the Tribe, in accordance with the IRA.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated February 21, 2017.

Summary: S. 39 would provide federal recognition to the Little Shell Tribe of Chippewa Indians of Montana. Federal recognition would make the tribe eligible to receive benefits from various federal programs.

CBO estimates that implementing this legislation would cost $35 million over the 2018–2022 period, assuming appropriation of the necessary amounts. Enacting S. 39 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 39 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 39 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) by exempting some lands from taxation by state and local governments, but CBO estimates the cost of the mandate would be small and well below the threshold established in that act ($78 million in 2017, adjusted annually for inflation).

S. 39 contains no private-sector mandates as defined in UMRA.

Estimated cost to the Federal Government: The estimated budgetary effect of S. 39 is shown in the following table. The costs of this legislation fall within budget functions 450 (community and regional development) and 550 (health).

	By fiscal year, in millions of dollars—					
	2018	2019	2020	2021	2022	2018–2022
INCREASES IN SPENDING SUBJECT TO APPROPRIATION						
Department of the Interior:						
Estimated Authorization Level	3	3	3	3	3	16
Estimated Outlays	2	3	3	3	3	15
Indian Health Service:						
Estimated Authorization Level	4	4	4	4	5	20
Estimated Outlays	4	4	4	4	5	20
Total Changes:						
Estimated Authorization Level	7	7	7	7	8	36
Estimated Outlays	6	7	7	7	8	35

Note: Components may not sum to totals because of rounding.

Basis of estimate: For this estimate, CBO assumes that S. 39 will be enacted near the end of 2017 and that the amounts necessary to implement the bill will be appropriated each year.

Providing federal recognition to the Little Shell Tribe of Chippewa Indians of Montana would allow the tribe and about 2,600 tribal members to receive benefits from various programs administered by the Department of the Interior (DOI) and the Indian Health Service (IHS). Based on the average per capita expenditures by those agencies for other Indian tribes, CBO estimates that implementing S. 39 would cost $35 million over the 2018–2022 period.

Department of the Interior

DOI, primarily through the Bureau of Indian Affairs (BIA), provides funding to federally recognized tribes for various purposes, including child welfare services, adult care, community development, and general assistance. Based on current per capita expenditures of around $1,200 for other federally recognized tribes located in the central states and accounting for anticipated inflation, CBO estimates that providing those services to the tribe would cost $15 million over the 2018–2022 period.

Indian Health Service

S. 39 also would make members of the tribe eligible to receive health benefits. Based on an analysis of information from the IHS, CBO estimates that about 55 percent of tribal members—or about 1,400 people—would receive benefits each year. CBO expects that the per capita cost to serve those people would be similar to the costs for current IHS beneficiaries—about $2,650 in 2017. Accounting for anticipated inflation, CBO estimates that providing benefits for tribal members through the IHS would cost $20 million over the 2018–2022 period.

Other Federal Agencies

In addition to DOI and IHS funding, certain Indian tribes also receive support from other federal programs within the Departments of Education, Housing and Urban Development, Labor, and Agriculture. Based on their status as a tribe recognized by the state of Montana, the tribe is already eligible to receive funding from those departments. Thus, CBO estimates that enacting S. 39 would not increase costs for that support.

Pay-As-You-Go considerations: None.

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 39 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

Estimated impact on state, local, and tribal governments: S. 39 contains an intergovernmental mandate as defined in UMRA because it would authorize the Secretary of Interior to acquire and take into trust 200 acres of land for the Little Shell Tribe. Because that land would be exempt from state and local taxes, the provision would impose an intergovernmental mandate. Given the small amount of land to be taken into trust, CBO estimates that the forgone tax revenue to state and local governments would be small and well below the threshold established for intergovernmental mandates ($78 million in 2017, adjusted annually for inflation).

Estimated impact on the private sector: S. 39 contains no private-sector mandates as defined in UMRA.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 39 will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 39.

CHANGES IN EXISTING LAW

In accordance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 39 will not make any changes in existing law.

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