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

JULY 14, 2014.—Ordered to be printed

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

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 161]

The Committee on Indian Affairs, to which was referred the bill (S. 161) 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. 161 are to extend federal recognition to the Little Shell Tribe of Chippewa Indians of Montana, making its members eligible for all services and benefits provided by the United States to other federally recognized Indian tribes, and to effect a transfer of 200 acres of land which the Secretary of the Interior shall acquire and place in trust for the benefit of the Tribe.

BACKGROUND

History of recognizing Indian tribes

The recognition of an Indian group as a federally recognized Indian tribe is an important action. It is an affirmation by the United States of a tribe's right to self-government and the existence of a formal government-to-government relationship between the United

States and the tribe. Once a tribe is federally recognized, it 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 abolishment of treaty-making, the United States has recognized Indian tribes by executive order, legislation, and administrative decisions by the Executive Branch. Additionally, federal courts may clarify the status of an Indian group, though in many cases, the courts defer to the Bureau of Indian Affairs at the Department of the Interior.

In order to provide a uniform and consistent process in which to recognize an Indian group, the Department of the Interior developed an administrative process in 1978 through which Indian groups could petition for acknowledgment of a government-to-government relationship with the United States. The standards for this process are set forth in Title 25 of the Code of Federal Regulations, Part 83, "Procedures for Establishing That an American Indian Group Exists as an Indian Tribe."

The regulations establish seven mandatory criteria, each of which must be met before a group can achieve status as a federally recognized Indian tribe. The criteria are as follows:

(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 until 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 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

(7) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.

The regulations have remained essentially unchanged since 1978, with the exception of revisions clarifying the evidence needed to support a recognition petition (1994), updated guidelines on the process (1997), a notice regarding BIA's internal processing of federal acknowledgment petitions (2000), and a notice to provide guidance and direction to make the process more streamlined and efficient (2008).[1] The regulations are currently under review, and in June 2013, the Assistant Secretary of Indian Affairs release a Discussion Draft with proposed changes to the regulations that were developed by the Department of Interior Workgroup. [The comment

[1] 73 Fed. Reg. 30146–48 (May 23, 2008).

period on the Discussion Draft closed in August 2013, and the Assistant Secretary of Indian Affairs issued a proposed rule in the Federal Register on May 22, 2014.]

There have been numerous complaints about the process since 1978, but the primary complaints have been about the high cost of gathering documentary evidence to meet the seven criteria and the length of time it takes the Department to review a petition. Since the Federal Acknowledgment Process regulations were established in 1978, the Department has issued 49 decisions under the process. Of that number, 17 petitioners were acknowledged as Indian tribes, and 32 petitioners were denied acknowledgment.

Due to the problems associated with the Federal acknowledgment process, an increasing number of tribal groups have asked Congress to recognize or restore their status as federally-recognized Indian tribes. Congress retains the authority to recognize tribal groups, as Congress did with the Loyal Shawnee Tribe of Oklahoma and the Graton Rancheria of California in 2000 as a part of the Omnibus Indian Advancement Act.[2] Since 1982, Congress has restored or recognized 9 Indian tribes.[3]

History of the Little Shell Tribe

The Little Shell Tribe of Chippewa Indians descends from the Pembina Band of Chippewa Indians in North Dakota.[4] The Pembina Band was recognized by the United States in an 1863 treaty that was ratified by the Senate (Treaty of October 2, 1863, 13 Stat. 667).[5] Many of the members of the Pembina Band settled on reservations in Minnesota, but the ancestors of the Little Shell Tribe moved westward, following the buffalo herds. By the late 1800s, the Little Shell Tribe had settled in Montana and in the Turtle Mountains of North Dakota. 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".

The Little Shell Band has had numerous dealings with the United States government. In order to establish a land base for the "homeless Indians in the State of Montana," Congress appropriated funds in 1908 and then from 1914 through 1925. Unfortunately, a land base was never acquired for the Little Shell Band with the appropriated funds. In 1935, following the enactment of the Indian Reorganization Act (IRA), the Bureau of Indian Affairs (BIA) attempted to aid the Little Shell Tribe in forming a government and establishing a relationship with the federal government. However, the BIA required that tribes have a secured land base before reorganizing under the IRA. Still lacking a land base, the Little Shell Tribe was unable to gain federal recognition under the IRA.[6]

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[2] See Pub. L. 106–568 (2000).

[3] *http://www.bia.gov/idc/groups/xofa/documents/text/idc013624.pdf.*

[4] S. 546, Little Shell Tribe of Chippewa Indians Restoration Act of 2011, 112th Cong. §2(1) (2011).

[5] Id.

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

Little Shell Tribe and the Federal acknowledgment process

The Tribe continued their efforts to obtain federal recognition through the Department of Interior's Federal Acknowledgment Process (FAP). In 1978, the year FAP was created, the Tribe filed a letter of intent to petition for federal acknowledgment. After approximately 14 years of documenting their petition for acknowledgment, the Little Shell Tribe submitted their petition in 1992. In 1995, the BIA declared the Tribe's petition was ready for active consideration. In 2000, the BIA issued a positive proposed finding on the Tribe's petition, stating that the Tribe had met all seven mandatory criteria for federal acknowledgment. However, the decision was opened for a period of public comment and the OFA requested additional information from the Tribe. In response to this request, the Little Shell Tribe provided nearly 1000 pages of additional material and no letters or comments opposing the acknowledgement of the tribe were received.

After the Tribe had spent over thirty years in the process, the Department of Interior issued a final determination not to acknowledge the Little Shell Tribe in 2009.[7] This negative finding was a reversal in the Department's proposed positive determination.[8] Despite finding that 89 percent of their members descend from the Pembina Band of Chippewa Indians, the final determination stated that the Little Shell now met only four of the seven mandatory criteria for federal acknowledgment. The Little Shell Tribe appealed their negative final determination to the Interior Board of Indian Appeals.

In 2013, the Secretary of Interior directed the Assistant Secretary of Indian Affairs to reconsider the Little Shell's petition for federal acknowledgement. The Little Shell Tribe's petition is currently on hold, pending the upcoming rulemaking process for federal acknowledgement through the Department of Interior.

The State of Montana, local municipal governments, and all Montana tribes support the federal recognition of the Little Shell Tribe.

Senators Jon Tester (D–MT) and Max Baucus (D–MT) introduced legislation to recognize the Little Shell Tribe in the 110th Congress (S. 724), the 111th Congress (S. 1936), and the 112th Congress (S. 546). During the 110th Congress, and again in the 112th Congress, the Senate Committee on Indian Affairs held hearings on the Little Shell Tribe's legislation. At that time, the Little Shell Tribe's petition for recognition was on active consideration. The Administration testified in support of the federal acknowledgment process for tribes to obtain acknowledgment.

LEGISLATIVE HISTORY

S. 161 was introduced on January 28, 2013, by Senators Tester and Baucus. A companion bill, H.R. 2991, was also introduced in the House of Representatives. S. 161 was referred to the Committee on Indian Affairs. On October 30, 2013, the Committee held

[7] Legislative Hearing on S. 636, A bill to provide the Quileute Indian Tribe Tsunami and Flood Protection, and for other purposes; S. 703, the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2011; and S. 546, the Little Shell Band of Chippewa Indians Restoration Act of 2011, Before the S. Comm. On Indian Affairs, 112th Cong. 1 20–24 (2011) (statement of Hon. John Sinclair, Little Shell Tribe of Chippewa Indians of Montana, President).

[8] Id.

a hearing on the bill. On April 2, 2014, the Committee met to consider the bill. No amendments were offered, and the bill was ordered reported favorably to the full Senate by voice vote.

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 2013".

Section 2—Findings

This section provides the Congressional findings, including that the Little Shell Tribe of Chippewa Indians is a political successor to signatories of the Pembina Treaty of 1863; that the Tribe had petitioned the federal government for reorganization under the Indian Reorganization Act (25 U.S.C. 461 et seq.) throughout the 1930s and 1940s; and that in 1978 the Tribe submitted to the BIA a petition for federal recognition.

Section 3—Definitions

This section sets forth definitions of "member" as an individual enrolled in the Tribe pursuant to its membership roll; "Secretary" as the Secretary of the Interior; and "Tribe" as the Little Shell Tribe of Chippewa Indians of Montana.

Section 4—Federal recognition

This section formally extends federal recognition to the Tribe, making applicable to it all federal laws (including regulations) of general application to Indians and Indian tribes.

Section 5—Federal services and benefits

This section states that beginning on the date of enactment of this Act, the Tribe 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 the Tribe's service area 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 the Tribe or any member that existed before the date of enactment of this Act. The section further states that legal or equitable claims of the tribe to enforce any right or privilege reserved by, or granted to, the Tribe that was wrongfully denied to, or taken from the Tribe before the date of enactment of this Act is preserved.

Section 7—Membership roll

This section mandates, as a condition of receiving recognition, services, and benefits pursuant to this Act, that the Tribe submit, within 18 months of the Act's enactment, a membership roll and maintain such a roll, and that Tribal membership be determined

in accordance with sections 1 through 3 of article 5 of the Tribe's constitution.

Section 8—Transfer of land

This section directs the Secretary of the Interior to acquire trust title to 200 acres of land within the service area of the Tribe which will be used as a tribal land base. This section also states that the Secretary may also acquire additional land for the benefit of the Tribe pursuant to the Indian Reorganization Act.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated May 30, 2014, was prepared for S. 161.

S. 161—Little Shell Tribe of Chippewa Indians Restoration Act of 2013

Summary: S. 161 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 $38 million over the 2015–2019 period, assuming appropriation of the necessary funds. Enacting S. 161 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 161 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 expects the cost of that mandate would be small and well below the threshold established in that act ($76 million in 2014, adjusted annually for inflation).

S. 161 contains no private-sector mandates as defined in UMRA.

Estimated cost to the Federal Government: The estimated budgetary effect of S. 161 is shown in the following table. The costs of this legislation fall within budget functions 450 (community and regional development) and 550 (health).

Basis of estimate: For this estimate, CBO assumes that S. 161 will be enacted near the end of 2014 and that the amounts necessary to implement the bill will be appropriated for each year.

The bill would provide federal recognition to the Little Shell Tribe of Chippewa Indians of Montana. Such recognition would allow about 2,400 tribal members to receive benefits from various programs administered by the Bureau of Indian Affairs (BIA) 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. 161 would cost $36 million over the 2015–2019 period, assuming appropriation of the necessary funds.

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. In total, CBO estimates that providing those services to the tribe would cost $14 million over the 2015–2019 period, assuming appropriation of the necessary funds and adjusting for anticipated inflation. This estimate is based on

current per capita expenditures of around $1,200 for other federally recognized tribes located in the central states.

	By fiscal year, in millions of dollars—					
	2015	2016	2017	2018	2019	2015–2019
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Bureau of Indian Affairs:						
Estimated Authorization Level	3	3	3	3	3	15
Estimated Outlays:	2	3	3	3	3	14
Indian Health Service:						
Estimated Authorization Level	5	5	5	5	5	25
Estimated Outlays	4	5	5	5	5	24
Total Changes						
Estimated Authorization Level	8	8	8	8	8	40
Estimated Outlays	6	8	8	8	8	38

Indian Health Service

S. 161 also would make members of the tribe eligible to receive health benefits from the IHS. Based on information from the IHS, CBO estimates that about 55 percent of tribal members—or about 1,330 people—would receive benefits each year. CBO assumes that the cost to serve those individuals would be similar to funding for current IHS beneficiaries—about $3,050 per individual in 2013. Assuming appropriation of the necessary funds and adjusting for anticipated inflation, CBO estimates that IHS benefits for tribal members would cost $24 million over the 2015–2019 period.

Other Federal agencies

In addition to BIA 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 implementing S. 161 would not increase the costs of that support.

Pay-As-You-Go considerations: None.

Estimated impact on state, local, and tribal governments: S. 161 contains an intergovernmental mandate as defined in UMRA because it would authorize the Secretary of the Interior to acquire and take into trust 200 acres of land for the 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 ($76 million in 2014, adjusted annually for inflation).

Estimated impact on the private sector: S. 161 contains no private-sector mandates as defined in UMRA.

Estimate prepared by: Federal Costs: Martin von Gnechten—Bureau of Indian Affairs, Robert Stewart—Indian Health Service; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Marin Burnett.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

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. 161 will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 161.

ADDITIONAL VIEWS FROM VICE CHAIRMAN BARRASSO

I understand how important Federal recognition is for tribal groups and how difficult and challenging the administrative recognition process is for them. Nevertheless, it is my view that legislative recognition—legislation that deems a group or tribe to be federally recognized—is not the right way to decide which groups should be recognized and which groups should not be recognized. That is a function best performed by the Executive Branch of the Government following regulations that have been adopted for that purpose. Federal recognition of a group as an Indian tribe may have profound consequences for the group, its members, other Indian tribes, the general public, and the Federal Government.

In terms of impact on the Federal Treasury, the Congressional Budget Office estimates that implementing S. 161 will cost $36 million over a 5–year period, assuming appropriation of the necessary funds. Most of that cost would be in the form of programs and services available through the Bureau of Indian Affairs and Indian Health Service for which the tribe and its members will become eligible. Even if that additional money is never appropriated, recognition of the tribe will in and of itself place significant additional stress on the limited resources of these agencies, since tribal members will not be turned away from programs and services for which they are eligible. Tribal recognition is indeed a weighty decision, with real consequences.

Testifying about several recognition bills at a hearing before this Committee during the 110th Congress, the Director of the Office of Federal Acknowledgment at the Department of the Interior stated—

> Legislation such as S. 514, S. 724, S. 1058, and H.R. 1294 would allow these groups to bypass this [the Federal acknowledgement] process—allowing them to avoid the scrutiny to which other groups have been subjected. The Administration supports all groups going through the Federal acknowledgment process under 25 CFR Part 83.[9]

The Department's witness went on to point out that, in light of the importance and implications of recognition decisions, the Department adopted its Federal acknowledgment regulations at 25 CFR Part 83 in 1978 in recognition of "the need to end ad hoc decision making and adopt uniform regulations for Federal acknowledgment." [10]

This bill represents a step away from a process that applies uniform, established acknowledgment criteria to the history of the

[9] Hearing on S.514, S.724, S.1058, and H.R.1294 Before the S. Comm. on Indian Affairs, 110th Congress, 1, 35 (2008) (statement of R. Lee Fleming, Director, Office of Federal Acknowledgment, U.S. Department of the Interior).

[10] Id.

group and in the direction of 'ad hoc' recognition decisions. I do not think that Congress is in the best position to undertake the detailed historical, cultural, political and ethnographic analysis that should go into a recognition decision.

If a particular group has some unique historical or other barriers so that it cannot fairly access the administrative process, then perhaps it would be appropriate for Congress to consider whether those barriers should be removed or modified so that the group can have fair access to that process. I do not feel it is appropriate for Congress to simply deem a group to be a recognized Indian tribe.

JOHN BARRASSO.

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. 161 will not make any changes in existing law.

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