

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

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DEC 22 2016

Memorandum

To: Secretary

From: Solicitor

Subject: Reconsideration of the Lumbee Act of 1956

Since the 1970s, the Department of the Interior ("Department") has vacillated over whether *An Act Relating to the Lumbee Indians of North Carolina* ("Lumbee Act" or "Act")¹ precludes the Department from considering a petition from the Lumbee Indians as an Indian tribe under the Department's *Procedures for Federal Acknowledgment of Indian Tribes*, set forth in 25 C.F.R. Part 83 ("Part 83").² Since 1989, however, the position of the Department has been that the Act is "legislation terminating or forbidding the Federal relationship"³ and, therefore, prohibits the Department from considering such a petition from the Lumbee Indians.⁴

Upon further review of the Act's text, its legislative history, the case law concerning the Act, the Department's varying interpretations of the Act, and decisions made pursuant to the relevant provisions of Part 83, I conclude that the Lumbee Act does not terminate or forbid the Federal relationship and, therefore, does not bar the Department from recognizing the Lumbee Indians by application of the Part 83 acknowledgment process. Accordingly, I withdraw and reverse

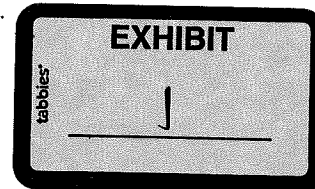
¹ 70 Stat. 254 (1956).

² The procedures for federal acknowledgment of an Indian tribe were first published in 1978 at 25 C.F.R. Part 54. 43 Fed. Reg. 39361 (Sept. 5, 1978). These procedures were revised and recodified at 25 C.F.R. Part 83 in 1994, 59 Fed. Reg. 9280 (Feb. 25, 1994), and were revised again in 2015. 80 Fed. Reg. 37862 (July 1, 2015).

³ Memorandum from William G. Lavell, Associate Solicitor, Indian Affairs, to the Deputy to the Assistant Secretary - Indian Affairs (Tribal Services), at 5 (Oct. 23, 1989) ("1989 Assoc. Solic. Mem."). The version of Part 83 that was in effect in 1989 addresses "legislation terminating or forbidding the Federal relationship" in two places: first, in the context of the Department's authority in Section 83.3, which defines the scope of the regulations, 25 C.F.R. § 83.3(e) (1989) ("this part does not apply to groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship"); and second, in the context of criteria for acknowledgment in Section 83.7, which sets forth the criteria a group must meet in order for tribal existence to be acknowledged, 25 C.F.R. § 83.7(g) (1989) ("The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship."). Unless otherwise indicated, all citations in this Memorandum are to the regulations as they existed in 1989.

The most recent revision of Part 83 maintains those two provisions in, respectively, 25 C.F.R. § 83.4(c) (2016) ("The Department will not acknowledge: . . . (c) Any entity that is, or any entity whose members are, subject to congressional legislation terminating or forbidding the government-to-government relationship."); and 25 C.F.R. § 83.11(g) (2016) ("*Congressional termination*. Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.").

⁴ Letter from Manuel Lujan, Jr., Secretary of the Interior, to Representative Morris K. Udall, Chairman, U.S. House Committee on Interior and Insular Affairs (Dec. 1, 1989) ("1989 Sec'y Letter").



contrary memoranda prepared by the Office of the Solicitor in 1989.⁵ In doing so, however, I do not opine on whether any petition for federal acknowledgment by the Lumbee Indians, if filed, would succeed;⁶ I merely conclude that the Lumbee Act does not preclude evaluating such a petition.

I. Statutory Interpretation

“The question whether federal law authorize[s] certain federal agency action is one of congressional intent.”⁷ Agency interpretation of a statute follows the same two-step analysis that courts follow when reviewing an agency’s interpretation. At the first step, the agency must answer “whether Congress has spoken directly to the precise question at issue.”⁸ If the language of the statute is clear, the court and the agency must give effect to “the unambiguously expressed intent of Congress.”⁹ If, however, the statute is “silent or ambiguous,” pursuant to the second step, the agency must base its interpretation on a “reasonable construction” of the statute.¹⁰

II. The Lumbee Act

The Lumbee Act provides that certain Indians then residing in and around Robeson County, North Carolina, “be known and designated as Lumbee Indians of North Carolina.”¹¹ The final sentence of Section 1 of the Act provides:

Nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians.¹²

⁵ 1989 Assoc. Solic. Mem.; Memorandum from Martin L. Allday, Solicitor, to Secretary Manuel Lujan, Jr. (Nov. 20, 1989) (“1989 Solic. Mem.”).

⁶ Similarly, nothing in this Opinion would preclude the Lumbee Indians from seeking recognition by Congress.

⁷ *Wyoming v. United States*, 279 F.3d 1214, 1230 (10th Cir. 2002).

⁸ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

⁹ *Id.* at 843.

¹⁰ *Id.* at 840.

¹¹ 70 Stat. at 255. In its operative paragraph, the Lumbee Act designates the name for those individuals who were, at that time,

residing in Robeson and adjoining counties of North Carolina, originally found by the first white settlers on the Lumbee River in Robeson County, and claiming joint descent from the remnants of early American colonists and certain tribes of Indians originally inhabiting the coastal regions of North Carolina.

Id. The Lumbee Indians have asserted that they are descended from several different tribes, including Cherokee, Tuscarora, Hatteras, Pamlico, and Croatan. *H.R. 4656: Relating to the Lumbee Indians of North Carolina: Hearing Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 84th Cong. 12-13 (1955) (“1955 Hearing Report”) (statement of Rev. D.F. Lowery). Legislation introduced between 1910 and the 1930s, but never enacted, referred to these Indians as “Cherokee,” “Cheraw,” or “Siouan” Indians. *To Provide Federal Recognition for the Lumbee Tribe of North Carolina: Hearing Before the House Committee on Interior and Insular Affairs on H.R. 2335*, 101st Cong. 25-27 (1989) (“1989 Hearing Report”) (statement of Patrick A. Hayes, Acting Deputy to the Assistant Secretary – Indian Affairs).

¹² 70 Stat. at 255.

The question for the Department is whether this language prohibits the application of the Part 83 acknowledgement process to the Lumbee Indians.

A. Step 1: Congress has not spoken directly to this question

The text of the Lumbee Act does not definitively answer this question. The first clause of the final sentence of Section 1 of the Act provides that the Act does not make the Lumbee Indians eligible for services provided by the United States to Indians.¹³ The second clause of that sentence provides that federal statutes “which affect Indians because of their status as Indians” do not apply to the Lumbee Indians.¹⁴ However, the Act is ambiguous as to the scope of these provisions: the final sentence of Section 1 can be reasonably interpreted as merely providing that the Act, itself, did not confer benefits on Lumbee Indians who were not otherwise eligible for such benefits,¹⁵ or as foreclosing any future provision of federal services to Lumbee Indians. Therefore, I must proceed to the second step of the interpretive analysis and determine which reasonable interpretation of the Lumbee Act is consistent with Congress’s intent.

B. Step 2: A “reasonable construction” of the Lumbee Act

1. The legislative history

The legislative history makes clear that the final sentence of Section 1 of the Lumbee Act was intended merely to provide that the Act, itself, did not confer upon the Lumbee Indians eligibility for federal benefits or services for which they were not otherwise eligible, or extend to the Lumbee Indians federal statutes that did not already reach them. As originally introduced, the Act merely served to name the Lumbee Indians and to specify that such Indians would continue “to enjoy all rights, privileges, and immunities,” and “to be subject to all of the same obligations and duties,” as any other citizen of the State of North Carolina and of the United States, as they had “before the enactment of this Act.”¹⁶ When asked by Representative Wayne N. Aspinall

¹³ *Id.*

¹⁴ *Id.*

¹⁵ When the Lumbee Act was enacted, the Department provided services to as many as 22 Indians of North Carolina who had been certified as half or more Indian blood under the Indian Reorganization Act of 1934 (“IRA”). 25 U.S.C. § 5129 (recently redesignated from 25 U.S.C. § 479). In a 1935 memorandum, Assistant Solicitor Felix Cohen advised the Commissioner of Indian Affairs that the Siouan Indians of North Carolina, a landless group seeking to organize as a tribe under the IRA, would need to qualify for benefits under Section 19 of the IRA as persons of half or more Indian blood. Memorandum from Felix Cohen, Assistant Solicitor, to the Commissioner of Indian Affairs (Apr. 3, 1935). Under this definition, 209 persons applied for enrollment as half-blood Indians, and 22 were determined to be eligible for enrollment with the Bureau of Indian Affairs under the IRA’s half-blood provision. Letter from William Zimmerman, Assistant Commissioner, Indian Affairs, to Joseph Brooks (Dec. 12, 1939). Such enrollment, however, did not confer upon those 22 individuals “tribal status or any rights or privileges in any Indian tribe.” *Id.*; see also Letter from John Collier, Commissioner, Indian Affairs, to Lawrence Maynor (Jan. 28, 1939) (“This enrollment does not entitle you to membership in any Indian tribe, nor does it establish any tribal rights in your name. It entitles you solely to those benefits set forth in the [IRA] for which you may otherwise be eligible,” such as educational assistance and certain employment preferences). It is not clear how many of these 22 eligible Indians enrolled for or received IRA benefits, or how many were still receiving benefits in 1956, when the Lumbee Act was enacted. See *Maynor v. Morton*, 510 F.2d 1254, 1256 (D.C. Cir. 1975) (observing that, at the time the Lumbee Act was enacted, “[t]he Federal Government seems to have all but forgotten” the 22 individual Lumbee Indians eligible for IRA benefits as half-blood Indians).

¹⁶ 1955 Hearing Report at 2.

whether the bill might allow the Lumbee Indians to “come before Congress asking for the benefits that naturally go to recognized tribes,” the bill’s sponsor, Rep. F. Ertel Carlyle of North Carolina answered: “No one has ever mentioned to me any interest . . . in becoming a part of a reservation or asking the Federal Government for anything. Their purpose in this legislation is to have a name that they think is appropriate to their group.”¹⁷ When Representative Aspinall asked a similar question of the Rev. D.F. Lowery, who testified on behalf of the Lumbee Indians at the 1955 Hearing, Rev. Lowery answered that the Lumbee Indians had no interest in seeking services or benefits provided to Indians.¹⁸

Nonetheless the Department, in expressing its opposition to the bill, opined that “[i]f your committee should recommend the enactment of the bill, it should be amended to indicate clearly *that it does not make these persons eligible* for services provided through the Bureau of Indian Affairs to other Indians.”¹⁹ Adopting the Department’s suggestion, the House Committee on Interior and Insular Affairs amended the bill by adding the final sentence of Section 1.²⁰ Thus, the legislative history is clear that the Lumbee Act was amended, and the final sentence of Section 1 was added, in response to concerns raised by Reps. Aspinall and Ford and by the Department, merely to ensure that the Act did not confer upon the Lumbee Indians eligibility for services or benefits for which they were not otherwise eligible, and did not extend the reach of federal Indian statutes that did not already apply to the Lumbee Indians.

There is no evidence whatsoever in the legislative history that would suggest an intent by the 84th Congress to preclude the Lumbee Indians from *ever* receiving federal services and benefits or falling within the ambit of federal Indian statutes. Rather, the evidence points inexorably to the conclusion that the final sentence of Section 1 was added merely to ensure that the Act, itself, was not interpreted as making Lumbee Indians eligible for such services and benefits and did not, itself, bring the Lumbee Indians within the ambit of such statutes.

¹⁷ *Id.* at 7. See also *id.* at 8 (“As to any ulterior motive that might be suggested – that[is], that they would come in and ask for benefits now or later – that is not in this picture at all.”). A similar colloquy occurred between Representative Gerald Ford of Michigan and Representative Carlyle on the House floor:

Mr. FORD. Mr. Speaker, reserving the right to object, I should like to ask the author of the bill, the gentleman from North Carolina, whether or not this bill, if enacted, would in any way whatsoever commit the Federal Government in the future to the furnishing of services or monetary sums?

Mr. CARLYLE. Mr. Speaker, I am happy to say that the bill does not provide for that nor is it expected that it will cost the Government one penny.

Mr. FORD. There is no obligation involved, as far as the Federal Government is concerned, if this proposed legislation is approved?

Mr. CARLYLE. None whatsoever.

Mr. FORD. It simply provides for the change of the name?

Mr. CARLYLE. That is all.

Mr. FORD. Mr. Speaker, I withdraw my reservation of objection.

102 Cong. Rec. 2900 (Feb. 20, 1956).

¹⁸ 1955 Hearing Report at 16-18.

¹⁹ Letter from Orme Lewis, Assistant Secretary, to Representative Clair Engle, Chairman, House Committee on Interior and Insular Affairs (Aug. 3, 1955) (emphasis added), *printed in* H. Rep. No. 84-1654, at 2 (1956).

²⁰ S. Rep. No. 84-2012, at 2 (1956) (“The Committee has amended the bill to clearly indicate that the Lumbee Indians will not be eligible for any services provided through the Bureau of Indian Affairs to other Indians.”).

2. *Judicial and executive interpretations of the Lumbee Act*

This interpretation of the Lumbee Act is consistent with the only U.S. Circuit Court case interpreting the Act, *Maynor v. Morton*,²¹ and with a subsequent opinion of the U.S. Comptroller General.²²

In 1972, after certain individual Lumbee Indians sought to organize as an Indian tribe under the IRA, the Department concluded that the final clause of the Lumbee Act had extinguished any eligibility for federal services or benefits for the Lumbee Indians, including those 22 Lumbee Indians who were entitled to certain privileges as half-blood Indians under the IRA.²³ One of those 22 half-blood Indians, Lawrence Maynor, sued for declaratory judgment that he was still entitled to IRA benefits, notwithstanding the final sentence of Section 1 of the Lumbee Act.²⁴ The U.S. Circuit Court of Appeals for the District of Columbia, interpreting the final clause of Section 1 of the Act, rejected the Department's 1972 Memorandum. The court held that the final clause of Section 1 was not intended to divest Indians of benefits for which they were otherwise eligible under the IRA, but rather "to leave the rights of the 'Lumbee Indians' unchanged."²⁵ "The whole purpose of the clause," the court wrote, ". . . was simply to make sure that a simple statute granting the name 'Lumbee Indian' to a group of Indians, which hitherto had not had such designation legally, was not used in and of itself to acquire benefits from the United States Government."²⁶

Similarly, in 1979 the Comptroller General, relying in part on *Maynor*, opined that the purpose of the final clause of Section 1 of the Lumbee Act was "to assure that the Act was not used in and of itself to acquire Federal benefits," but it "does not deny to Lumbees benefits accorded Indians if they are otherwise entitled under the requirements of another Act."²⁷

The Interior Board of Indian Appeals ("IBIA") embraced a seemingly contrary interpretation of the Act last year in *Nakai v. Eastern Regional Director, Bureau of Indian Affairs*,²⁸ holding that the Act barred the plaintiff, a Lumbee Indian, from receiving Indian preference under the IRA and the Department's regulations.²⁹ For the reasons articulated below, I find the IBIA's rationale to be inconsistent both with *Maynor* and with the legislative history of the Act, and therefore I am not persuaded by the IBIA's decision.

²¹ 510 F.2d 1254 (D.C. Cir. 1975).

²² 58 Comp. Gen. 699 (1979) ("1979 Comp. Gen. Op.")

²³ Memorandum from William A. Gershuny, Associate Solicitor, Indian Affairs, to Commissioner, Indian Affairs (Nov. 28, 1972) ("1972 Memorandum") ("it is our conclusion that . . . the final clause reflects a clear congressional intent to terminate, from the date of its enactment, all Federal services that would normally be made available to the Lumbee Indians including the 22 individual Lumbees, because of their status as Indians.").

²⁴ *Maynor*, 510 F.2d at 1255.

²⁵ *Id.* at 1258.

²⁶ *Id.* at 1259; see also *id.* at 1258 ("Congress was very careful not to confer by this legislation any special benefits on these people so designated as Lumbee Indians" (emphasis in original)).

²⁷ 1979 Comp. Gen. Op. at 1.

²⁸ 60 IBIA 64 (2015).

²⁹ *Id.* at 71. Nakai claimed Indian preference under 25 C.F.R. § 5.1(c) as a person of one-half or more Indian blood of tribes indigenous to the United States, not as a tribal member.

3. Summary

The final sentence of Section 1 of the Lumbee Act is ambiguous as to whether it merely was intended to preserve the status quo *ante* concerning the eligibility of Lumbee Indians for federal services and the application of federal Indian statutes, or whether it was intended to affirmatively prohibit the Lumbee Indians from receiving such services or falling within the ambit of such statutes for all time. However, only the first interpretation is consistent with the evidence in the legislative history and with the subsequent interpretation of the Act by the Circuit Court in *Maynor*. Consequently, I interpret the final sentence of Section 1 of the Lumbee Act as merely providing that the Act did not, itself, confer upon the Lumbee Indians eligibility for services for which they were not otherwise eligible, and did not, itself, extend the reach of federal Indian statutes that did not already reach the Lumbee Indians. In light of that interpretation, I conclude that the Lumbee Act does not prohibit the Department from considering a petition from the Lumbee Indians under the federal acknowledgment process set forth in Part 83 and, if acknowledged, from availing themselves of the programs and services available to Indians because of their status as Indians.

III. The Department's Prior Interpretations of the Lumbee Act

In the years since the Lumbee Act was enacted, the Department has vacillated in its interpretation of the Act and, after the promulgation of the Part 83 regulations in 1978, whether the Act would serve as a bar to administrative acknowledgment of the Lumbee Indians as an Indian tribe.

A. 1956-1988

Before 1988, the question of the effect of the final sentence of Section 1 of the Lumbee Act appears to have received little attention in the Department. As previously noted, the Department opined in the 1972 Memorandum that the Act had extinguished eligibility for any services or benefits, including the right to organize as an Indian tribe, available to even those 22 individual Lumbee Indians who previously had been found to be eligible for IRA benefits as half-blood Indians.³⁰ The *Maynor* Court rejected this interpretation.³¹

From the mid-1970s into the 1980s, the Department's approach to the Lumbee Indians' requests was inconsistent. Beginning in the 1970s, several groups of Lumbee Indians sought various services and benefits available to Indian tribes.³² The Undersecretary advised the Hatteras Tuscaroras in 1976 that the Department could not recognize them as an Indian tribe unless the Lumbee Act was amended, although his letter provided no substantive legal analysis of the issue.³³ At this time, the Department was in the process of developing procedures for the

³⁰ *Maynor*, 510 F.2d at 1257; 1972 Memorandum.

³¹ *Maynor*, 510 F.2d at 1258-59.

³² See, e.g., Memorandum from Harry Rainbolt, Eastern Area Director, to the Commissioner of Indian Affairs (Sept. 26, 1975) (describing a meeting with the "Hatteras Tuscarora Indians of North Carolina," who were seeking federal recognition as an Indian tribe, as well as other services and benefits).

³³ Letter from Kent Frizzell, Undersecretary of the Interior, to Vernon Locklear (Jan. 20, 1978) (concluding that "Congress must modify the 1956 [Lumbee] Act before any federal recognition and services can be extended generally to a group such as the Hatteras Tuscaroras, as you request").

acknowledgment of Indian tribes, which were published as a final rule on September 5, 1978.³⁴ In a letter to Darlene Locklear of the Eastern Carolina Indian Organization, Inc., shortly before publication of the final rule, the Assistant Solicitor stated that the forthcoming Part 83 acknowledgment regulations “will not be applicable to groups which have been terminated or which are the subject of Congressional legislation similar to termination statutes,” and further stated that Lumbee Act, “while recognizing the Indians of Robeson County as Indians[,] clearly precluded the federal government from providing any services to them.”³⁵ This letter also contained no substantive legal analysis of the issue. Despite these statements, the United States provided the Lumbee Indians with grants and other assistance to support their petition for federal acknowledgment.³⁶ The Lumbee Indians submitted a petition in 1980.³⁷

In 1988, legislation was introduced in Congress that would have provided federal recognition to the Lumbee Indians.³⁸ At the time, the Department was concerned that deleting the final sentence of Section 1 of the Lumbee Act would, in and of itself, confer federal recognition upon the Lumbee Indians.³⁹ However, in a 1988 memorandum to the Assistant Secretary, Indian Affairs, the Associate Solicitor observed that deleting the final sentence of Section 1 of the Lumbee Act “would *remove any doubt* as to whether the Lumbee Indians may apply for recognition under the Department’s acknowledgment procedures.”⁴⁰ The Department advised Congress at that time that the *Maynor* opinion and the 1979 Comptroller General’s opinion “would seem to indicate that the 1956 [Lumbee] Act is not a bar to action as to” petitions for federal recognition made by Lumbee Indians under Part 83.⁴¹ Although the Department opposed the legislation on the grounds that “confirmation of tribal status on a group of people is something that should stand the test of the acknowledgment process and should continue to be a function of the administrative branch of Government,” the Department nonetheless acknowledged that an amendment to the Lumbee Act deleting the final sentence of Section 1 would “*make it clear* that [the Act] shall not be a bar for Lumbees coming into the system if they are acknowledged administratively.”⁴²

³⁴ 43 Fed. Reg. 39361.

³⁵ Letter from Scott Keep, Assistant Solicitor, Division of Indian Affairs, to Darlene Locklear, at 2-3 (Mar. 27, 1978) (“1978 Ass’t Solic. Letter”) (advising that the Department could not take land into trust for the benefit of the Eastern Carolina Indian Organization, Inc., because the organization “is not an Indian tribe within the meaning of the IRA and therefore the Secretary has no authority to take land into trust for that organization”).

³⁶ 1989 Sec’y Letter at 1 (“The Lumbee group has submitted a petition for Federal acknowledgment after many years of research funded by Federal grants.”); *see also* 1989 Solic. Mem. at 2 (Department staff provided “technical assistance to the Lumbees in the development of the documentation for their petition on the assumption that the Department would be able to consider the petition under our regulations”).

³⁷ *Federal Recognition of the Lumbee Indian Tribe of North Carolina: Hearing Before the Select Committee on Indian Affairs*, S. Hrg. 101-881, 100th Cong. 10-11 (Aug. 12, 1988) (“1988 Hearing Report”) (testimony of Hazel Elbert, Deputy to the Assistant Secretary, Indian Affairs). The Lumbee Indians submitted their undocumented petition on January 4, 1980; their documented petition on December 17, 1987; and supplements to their membership list on February 4, 1988, and February 22, 1988. *Id.*

³⁸ S. 2672 (100th Cong.).

³⁹ Memorandum from Dennis Daugherty, Associate Solicitor, Division of Indian Affairs, to the Assistant Secretary, Indian Affairs (Sept. 26, 1988) (“1988 Assoc. Solic. Mem.”).

⁴⁰ *Id.* at 4 (emphasis added).

⁴¹ S. Rep. No. 101-579, at 16 (1988) (“1988 Senate Report”) (statement of Ross O. Swimmer, Assistant Secretary, Indian Affairs).

⁴² 1988 Hearing Report at 8 (statement of Ross O. Swimmer, Assistant Secretary, Indian Affairs) (emphasis added).

B. 1989-present

In 1989, the Department concluded in two memoranda that the final clause of Section 1 prohibited the Department from recognizing the Lumbee Indians as a tribe through the Part 83 acknowledgment process.⁴³

1. The 1989 Associate Solicitor's Memorandum

In 1989, in response to requests from members of Congress for a statement concerning the eligibility of the Lumbee Indians to petition for federal acknowledgment through the Part 83 process, the Assistant Secretary, Indian Affairs, asked the Associate Solicitor, Indian Affairs, for an interpretation of the Lumbee Act.⁴⁴ The Associate Solicitor approached this question through the lens of the Part 83 regulations, and in particular the prohibition against using Part 83 to acknowledge any "groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship."⁴⁵ The Associate Solicitor ultimately concluded that the Lumbee Act was an example of such legislation and, therefore, that it barred the Department from acknowledging the Lumbee Indians through the Part 83 acknowledgment process.⁴⁶

The Associate Solicitor acknowledged that "the meaning of the Lumbee Act is, unfortunately, not clear," and that the Department had taken inconsistent positions on the question in the 1970s and 1980s.⁴⁷ He opined, however, that the Department previously "may have read too much into the narrow holding of" *Maynor*.⁴⁸ The Associate Solicitor read *Maynor* as holding merely that the Lumbee Act "did not take away rights which had previously vested in *individuals* under the

⁴³ The IBIA in *Nakai* reached the same conclusion, but did so without reference to the Department's memoranda.

⁴⁴ 1989 Assoc. Solic. Mem. at 1; *see also* 1989 Solic. Mem. at 4 ("several members of Congress wrote the Department wanting to know the Department's position on the effect of the 1956 [Lumbee] Act").

⁴⁵ 1989 Assoc. Solic. Mem. at 1 (citing 25 C.F.R. §§ 83.3(e), 83.7(g)).

Despite his citation to the Part 83 regulations, the Associate Solicitor also appears to have been heavily influenced by the risk of litigation that might result from an administrative recognition of the Lumbee Indians. *See, e.g.*, 1989 Assoc. Solic. Mem. at 2 ("the Department would be exposed to substantial risks of litigation if it provided services or acknowledge[d] a government-to-government relationship with the Lumbee Indians . . . based solely on an administrative determination"); *id.* at 4 (citing recent litigation concerning an Indian group in Vermont and writing: "[t]he risk of litigation is even greater in light of the substantial concentration of Lumbees in the townships around Pembroke. Absent clarifying legislation, an administrative determination that the Lumbees exist as a tribe will certainly result in substantial litigation over jurisdiction in those townships."). This concern prompted the Associate Solicitor to write:

I do not believe that you as a prudent trustee for those Indian tribes which have been acknowledged would be justified in committing the resources at your disposal to reviewing and making an administrative determination on the Lumbee petition knowing that there are unique circumstances surrounding the Lumbees as a result of the prior legislation which make a serious challenge to your determination inevitable.

Id. at 2. My office understands that recognition decisions often result in litigation, and that both the likelihood of litigation and the scale of the litigation increase when considering a petitioner as numerous and concentrated as the Lumbee. Such concerns, however, do not illuminate the question of whether the Lumbee Act bars the Department from recognizing the Lumbee Indians as an Indian tribe through the Part 83 acknowledgment process, and do not form a basis for this Memorandum.

⁴⁶ *Id.* at 5.

⁴⁷ *Id.* at 2-3.

⁴⁸ *Id.* at 4.

IRA.”⁴⁹ He concluded that interpreting the Act in any manner other than a prohibition on any future services or benefits to Lumbee Indians who were not already eligible for such services as half-blood Indians under the IRA would render the final sentence of Section 1 “a nullity.”⁵⁰

In addition, the Associate Solicitor compared the Lumbee Indians with two other groups, the Pascua Yaqui Indians of Arizona,⁵¹ and the Ysleta del Sur or Tiwa Indians of Texas.⁵² In each case, the Indian group at issue had been subject to earlier legislation containing substantially the same language as the final sentence of Section 1 of the Lumbee Act.⁵³ Both the Pascua Yaqui and the Tiwa ultimately were recognized not through the Part 83 acknowledgment process, but rather by an act of Congress.⁵⁴

Ultimately, the Associate Solicitor concluded that the Lumbee Act was “legislation terminating or forbidding the Federal relationship within the meaning of 25 C.F.R. §§ 83.3(e) and 83.7(g) and that, therefore, [the Assistant Secretary was] precluded from considering the application of the Lumbees for recognition.”⁵⁵

2. *The 1989 Solicitor's Memorandum*

Shortly after the Associate Solicitor conveyed his Memorandum to the Assistant Secretary, Indian Affairs, the Solicitor followed up with his own Memorandum to Secretary Lujan “to provide [the Secretary] with background on how the Department, and the Solicitor’s Office in particular, has interpreted” the Lumbee Act.⁵⁶ The Solicitor summarized the materials described above,⁵⁷ but did not contain a detailed legal analysis of the issue. Rather, it merely “explain[ed]

⁴⁹ *Id.* (emphasis added).

⁵⁰ *Id.*

⁵¹ *Id.* at 2-3 n.2 (the Department’s “informal position” that the Lumbee Act barred any federal relationship with the Lumbee Indians not already provided in the IRA “was similar to the position taken with regard to the 1964 Pascua Yaqui Act”).

⁵² *Id.* at 4 (“The position the Department took on the 1987 act to restore a Federal relationship with the Ysleta del Sur Pueblo (the Tiwas) is consistent with our present interpretation of the Lumbee Act.”).

⁵³ An Act to provide for the conveyance of certain land of the United States to the Pascua Yaqui Association, Inc., 78 Stat 1196, 1197 (Oct. 8, 1964) (“1964 Pascua Yaqui Act”) (“Nothing in this Act shall make such Yaqui Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Yaqui Indians.”); An Act Relating to the Tiwa Indians of Texas, 82 Stat 93 (Apr. 12, 1968) (“1968 Tiwa Act”) (“Nothing in this Act shall make such tribe or its members eligible for any services performed by the United States for Indians because of their status as Indians nor subject the United States to any responsibility, liability, claim, or demand of any nature to or by such tribe or its members arising out of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Tiwa Indians of Ysleta del Sur.”).

⁵⁴ An Act to provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes, 92 Stat 712 (Sept. 18, 1978) (“1978 Pascua Yaqui Recognition Act”); An Act to provide for the restoration of the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas, and for other purposes, 101 Stat. 666 (Aug. 18, 1987) (“1987 Restoration Act”).

⁵⁵ 1989 Assoc. Solic. Mem. at 5.

⁵⁶ 1989 Solic. Mem. at 1.

⁵⁷ The Solicitor’s Memorandum provided a recap of the 1972 Memorandum, and resulting *Maynor v. Morton* litigation; a petition for federal acknowledgment by Lumbee Indians, and Federal assistance provided to their petitions; the attempt to recognize the Lumbee Indian by an act of Congress in 1988, including Assistant Secretary

the course of the Department's and [the Solicitor's] office's consideration of the Lumbee legislation."⁵⁸

3. *The 1989 Secretary's Letter*

On December 1, 1989, Secretary Lujan advised Representative Morris K. Udall, the chairman of the House Committee on Interior and Insular Affairs, of the Department's opposition to legislative recognition of the Lumbee Indians, on the grounds that "we believe[] that the Lumbee group should go through the Federal acknowledgment process prescribed in 25 C.F.R. Part 83."⁵⁹ The Secretary conveyed to Chairman Udall copies of the 1989 Associate Solicitor's Memorandum and the 1989 Solicitor's Memorandum, and advised that further administrative review of the Lumbee Indians' acknowledgment petitions could be delayed in light of those opinions.⁶⁰ Citing the 1989 memoranda and the Department's preference for tribal acknowledgment through the administrative process, the Secretary urged the Chairman to push for "legislation that will provide the Lumbees an opportunity to receive the same thorough evaluation as all other groups petitioning for Federal acknowledgment."⁶¹

IV. *The Flawed Analysis in the 1989 Associate Solicitor's Memorandum*

Since 1989, the Department's position has been that the final sentence of Section 1 of the Lumbee Act bars the Department from considering a petition from the Lumbee Indians under the Part 83 acknowledgment process. That position, however, rests entirely on the 1989 Associate Solicitor's Memorandum, which does not withstand scrutiny.

A. *The Lumbee Act's text and legislative history*

The Associate Solicitor acknowledges that "[t]he meaning of the Lumbee act is, unfortunately, simply not clear."⁶² Nevertheless, he asserts that there is only one way to interpret the final sentence of Section 1 without rendering it "a nullity," and that the one acceptable interpretation is that the final sentence of Section 1 prohibits the Department from providing services or benefits to the Lumbee Indians.⁶³ However, the Associate Solicitor's analysis is too sweeping in its conclusion.

The legislative history discussed above demonstrates that, far from intending to permanently foreclose a trust relationship and all the attendant benefits and services for all time, Congress in the Lumbee Act sought to preserve the status quo, under which a small number of individual Lumbee Indians were eligible for benefits under the IRA, but the vast majority of Lumbee

Swimmer's statement to Congress that year that the Department did not believe the Lumbee Act prohibited the Department from recognizing the Lumbee Indians through Part 83; the 1988 Associate Solicitor's Memorandum that did not address whether the Lumbee Act barred the Department from recognizing the Lumbee Indians; and finally, the 1989 Associate Solicitor's Memorandum opining that the Act did, indeed, bar such administrative recognition.

⁵⁸ *Id.* at 4.

⁵⁹ 1989 Sec'y Letter at 1.

⁶⁰ *Id.*

⁶¹ *Id.* at 2.

⁶² 1989 Assoc. Solic. Mem. at 2.

⁶³ *Id.*

Indians did not receive federal Indian services and most federal Indian statutes did not reach the Lumbee Indians. This more plausible interpretation does not render the final sentence of Section 1 a nullity. On the contrary, it infuses that sentence with a specific meaning that is consistent with Congress's regular usage of the phrase "nothing in this act." Congress typically uses phrases such as "nothing in this act" or "nothing in this section" to preserve pre-legislation status quo.⁶⁴ Consistent with that approach, this Memorandum interprets the final sentence of Section 1 as an attempt to preserve the status quo *ante* by ensuring that the Act, itself, is not construed as making the Lumbee Indians eligible for federal services or benefits.

In addition, the interpretation of the Lumbee Act set forth in this Memorandum is the only interpretation that is consistent with the Act's legislative history. Despite his conclusion that the Lumbee Act was "legislation terminating or forbidding the Federal relationship within the meaning of 25 C.F.R. §§ 83.3(e) and 83.7(g),"⁶⁵ the Associate Solicitor offered no evidence whatsoever from the legislative history that Congress intended to foreclose the Lumbee Indians from ever having the opportunity to determine whether there exists a federal relationship – and certainly offered no evidence that Congress intended to foreclose the application of regulations that would not be promulgated until 22 years later. In fact, as demonstrated above, all of the evidence in the legislative history demonstrates that the 84th Congress was concerned that the Lumbee Act as originally introduced would be construed as recognition of the Lumbee Indians as an Indian tribe, and that the Act was amended and the final sentence of Section 1 added for the sole purpose of clarifying that the Act itself did not confer federal recognition of the Lumbee by virtue of a mere name designation.⁶⁶ If Congress had intended to take such a drastic measure of forever foreclosing a trust relationship with the Lumbee Indians, it could have expressly stated such intent.⁶⁷

B. *The Maynor v. Morton opinion*

Moreover, the Associate Solicitor's interpretation of the Lumbee Act is entirely inconsistent with the D.C. Circuit's opinion in *Maynor v. Morton*. The Associate Solicitor is correct that the *holding* in *Maynor* is narrow⁶⁸ – the Plaintiff sought declaratory judgment that the Lumbee Act had not extinguished his eligibility for IRA benefits as a half-blood Indian, and the Circuit Court reversed and remanded for just such an entry of judgment.⁶⁹ In reaching that holding, however, the *Maynor* court found that the sole purpose of the final sentence of Section 1 was to prevent the Act from being construed as recognizing the Lumbee Indians as an Indian tribe.⁷⁰ The Associate Solicitor's interpretation of the Lumbee Act embraces *Maynor*'s holding, but rejects *Maynor*'s reasoning without offering any analysis or reason for doing so.

⁶⁴ See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 69, 631-33 (1981) (holding that savings clause beginning with "[n]othing in this chapter" preserved the status quo concerning State and local authority to levy taxes on coal producers mining for coal on federal lands pursuant to the Mineral Lands Leasing Act of 1920); *Wyoming v. United States*, 279 F.3d at 1231 (evaluating savings clause beginning with "Nothing in this Act" as preserving the status quo except as it was in conflict with the clause or any other portion of the overall statute at issue).

⁶⁵ 1989 Assoc. Solic. Mem. at 5.

⁶⁶ See Part II.B.1, *supra*.

⁶⁷ See Part IV.B.2, *infra*.

⁶⁸ 1989 Assoc. Solic. Mem. at 4.

⁶⁹ 510 F.2d at 1255, 1259.

⁷⁰ See Part II.B.2, *supra*.

C. *The Pascua Yaqui and Tiwa analogies*

In addition, the Associate Solicitor's analogies to legislation involving the Pascua Yaqui and Tiwa Indians are inapt. The Associate Solicitor observed that both the 1964 Pascua Yaqui Land Act and the 1968 Tiwa Act contained language that was substantially similar to the final sentence of Section 1 of the Lumbee Act, and that the Pascua Yaqui and the Tiwa subsequently achieved federal recognition as Indian tribes by acts of Congress, not by the Part 83 acknowledgment process.⁷¹ This simple and surface-level comparison disregards significant differences in the circumstances surrounding these Indian groups and their legislation.

1. *Pascua Yaqui*

The 1978 Yaqui Recognition Act was necessary to effect federal recognition of the Pascua Yaqui Indians as an Indian tribe *not* because the language in the 1964 Pascua Yaqui Act mirrored the final sentence of Section 1 of the Lumbee Act, but because the Pascua Yaqui were not indigenous to the continental United States and, therefore, were ineligible for Part 83 acknowledgment.

The Pascua Yaqui Indians came to the United States as political refugees from Mexico in the late 1800s and early 1900s.⁷² By the 1960s, most of the Pascua Yaqui Indians were United States citizens, either having completed the naturalization process or having been born in the United States, and most were squatting on land near Tucson, Arizona.⁷³ The 1964 Pascua Yaqui Act was enacted to facilitate the removal of the Pascua Yaqui Indians from the land upon which they were squatting, and to relocate them to a separate parcel nearby.⁷⁴ As he did during consideration of the Lumbee Act, Representative Aspinall expressed concern that the 1964 Pascua Yaqui Act would ultimately lead to the provision of federal services and benefits to the Pascua Yaqui Indians.⁷⁵ Assistant Commissioner of Indian Affairs Graham E. Holmes testified that the Department did not intend to provide services to the Pascua Yaqui Indians, "and we do not anticipate that they will request any."⁷⁶ The 1964 Pascua Yaqui Act subsequently was amended to include language mirroring the final sentence of Section 1 of the Lumbee Act.⁷⁷

⁷¹ See fn. 51-52, *supra*, and accompanying text.

⁷² S. Rep. No. 95-719, at 3 (1978) ("1978 Senate Report"); Letter from Ferne Nevitt Lees, M.A., to House Committee on Interior and Insular Affairs 1 (Aug. 24, 1963) ("Lees Letter"), *pub'd in To Provide for the Conveyance of Certain Land of the United States to the Pascua Yaqui Association, Inc.: Hearing before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 90th Cong. (1964)* ("1964 Hearing").

⁷³ Lees Letter at 1; 1964 Hearing at 10 (statement of Graham E. Holmes, Assistant Commissioner for Legislation, Bureau of Indian Affairs).

⁷⁴ 1964 Hearing at 10 (statement of Graham E. Holmes, Assistant Commissioner for Legislation, Bureau of Indian Affairs).

⁷⁵ *Id.* at 14 (Representative Aspinall suggested that it would be "naïve" to believe that the Bureau of Indian Affairs would not eventually be asked to provide services to the Pascua Yaqui Indians).

⁷⁶ *Id.*

⁷⁷ See fn.53, *supra*.

The 1978 Pascua Yaqui Recognition Act was introduced at roughly the same time that the Department published the proposed regulations that would become Part 83.⁷⁸ At that time, the Department believed that the final sentence of Section 1 of the Lumbee Act would prevent the Department from recognizing the Lumbee Indians as an Indian tribe.⁷⁹ Consistent with that position, the Solicitor's Office advised Congress "in an informal opinion" that Section 4 of the 1964 Pascua Yaqui Act would prevent the Department from recognizing the Pascua Yaqui Indians as an Indian tribe through the Part 83 acknowledgment process.⁸⁰ Nevertheless, the Department opposed the 1978 Pascua Yaqui Recognition Act, and suggested instead that the 1964 Pascua Yaqui Act simply be amended to delete the Section 4 language that mirrored the last sentence of the Lumbee Act.⁸¹

However, the real impediment to administrative acknowledgment of the Pascua Yaqui was not the language in Section 4 of the 1964 Pascua Yaqui Act; rather, it was the fact that the Part 83 regulations limit their application to "those American Indian groups *indigenous to the continental United States*."⁸² Those same regulations define "indigenous" as "native to the continental United States in that at least part of the tribe's aboriginal range extended into what is now the continental United States."⁸³ The Pascua Yaqui Indians were indigenous to Mexico, not the United States,⁸⁴ which made them ineligible for Part 83 acknowledgment.⁸⁵ Thus, the Pascua Yaqui Indians needed Congressional recognition.

2. *Tiwa*

Similarly, the 1987 Restoration Act was necessary to effect federal recognition of the Tiwa Indians as an Indian tribe *not* because of the language in the 1968 Tiwa Act that mirrored the final sentence of Section 1 of the Lumbee Act, but because of other provisions of the 1968 Tiwa Act.

⁷⁸ 1978 Senate Report at 3 ("The introduction of S. 1633 coincided with the Secretary of the Interior's publication of proposed new federal regulations that would establish procedures for governing the determination that an Indian group is a federally recognized tribe" (citation to Fed. Reg. omitted)). Ultimately, the Part 83 regulations were promulgated on September 5, 1978. 43 Fed. Reg. 39362. The 1978 Pascua Yaqui Recognition Act was enacted on September 18, 1978, less than two weeks later. 92 Stat. 712.

⁷⁹ 1978 Ass't Solic. Letter at 3.

⁸⁰ 1978 Senate Report at 3; *see also id.* at 7 (statement of Forest J. Gerard, Assistant Secretary).

⁸¹ *Id.* at 7.

⁸² 25 C.F.R. § 83.3(a) (emphasis added).

⁸³ 25 C.F.R. § 83.1(n).

⁸⁴ 1978 Senate Report at 3; Lees Letter at 1.

⁸⁵ The 1978 Senate Report was published several months before the final Part 83 regulations were published, which might explain why the 1978 Senate Report does not contain a discussion of whether the Pascua Yaqui's origins outside the continental United States would bar them from administrative acknowledgment.

However, ten years later, when it was considering legislation that would have recognized the Lumbee Indians, Congress recognized that the Pascua Yaqui would not have been eligible for administrative acknowledgment because they were not indigenous to the continental United States. S. Rep. No. 100-579, at 5 (1988) (stating that Congress enacted the Pascua Yaqui Recognition Act because the Pascua Yaqui Indians, "having migrated from Mexico, [were] not indigenous to the United States and therefore [were] ineligible to file a petition" for Part 83 acknowledgment).

The Tiwa Indians were descendants of Indians who fled the Pueblo of Isleta during the Pueblo Revolt, eventually settling in what is now El Paso County, Texas.⁸⁶ The Tiwa Indians never entered a treaty or other agreement with the United States, and at the time of the 1968 Tiwa Act no land was held in trust for the Tiwa Indians.⁸⁷ In 1967, the Texas Legislature enacted legislation assuming a trust responsibility for the Tiwa Indians; however, there was a belief that in order for Texas to have the authority to exercise such a trust responsibility, an act of Congress was required.⁸⁸ By enactment of the 1968 Tiwa Act, “[r]esponsibility, if any, for the Tiwa Indians of Ysleta del Sur [was thereby] transferred [from the United States] to the State of Texas.”⁸⁹

The legislative history of the 1968 Tiwa Act demonstrates that it, like the Lumbee Act, was drafted so as to prevent it from being construed as an act recognizing the Tiwa Indians as an Indian tribe eligible for federal services and benefits. The Tiwa Act contained language that, in substance, mirrored the language of the Lumbee Act.⁹⁰ In fact, the Senate Report accompanying the Tiwa Act expressly states that the relevant language was “modeled after” the Lumbee Act.⁹¹ The Senate Report accompanying the Tiwa Act repeatedly states that the purpose of that language was to ensure that “its enactment will not *create* any trust responsibility” for the United States.⁹² By expressly stating that its purpose in adding the “nothing in this act” language to the 1968 Tiwa Act was to prevent that statute from being construed as creating a trust responsibility, and by expressly stating that this provision was “modeled after” the Lumbee Act, Congress implicitly acknowledged that the final sentence of Section 1 of the Lumbee Act merely ensured that that Act would not be read as creating a trust responsibility to the Lumbee Indians.

Moreover, the legislative history of the 1987 Restoration Act demonstrates that Congress rejected the idea that the 1968 Tiwa Act was the equivalent of a termination act. Congress made specific note of the language in the 1968 Tiwa Act that mirrored the final sentence of Section 1 of the Lumbee Act, and concluded “that the 1968 Tiwa Act *was not a ‘termination’ act.*”⁹³ Instead, Congress concluded that that language “did not, as a practical matter, alter the relationship between the United States and the Tiwa Tribe. The Tribe had not been subject to federal supervision and had received no federal Indian services before the 1968 Act, and that status continue[d] after its enactment.”⁹⁴ Because Congress expressly modeled the 1968 Tiwa Act after the Lumbee Act, and because Congress expressly found that the 1968 Tiwa Act was not a termination act, it follows that the Lumbee Act also was not a “termination act” for the Lumbee Indians.

⁸⁶ S. Rep. No. 90-1070, at 1 (1968) (“1968 Senate Report”).

⁸⁷ *Id.* at 5 (statement of Stanley S. Surrey, Assistant Secretary of the Treasury).

⁸⁸ *Id.* at 1.

⁸⁹ 82 Stat. 93.

⁹⁰ *Id.*; see also fn.53, *supra*.

⁹¹ 1968 Senate Report at 2.

⁹² *Id.* at 2 (emphasis added); *id.* at 3 (“The United States does not have any responsibility, and the bill clearly provides that its enactment will not create any responsibility” (emphasis added)).

⁹³ S. Rep. 100-90, at 7 (1987) (“1987 Senate Report”) (emphasis added). In contrast, the Alabama and Coushatta Tribes, which were also restored by the same Restoration Act, *were* expressly terminated by Congress. An Act to provide for the termination of federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof, and for other purposes, 68 Stat. 768 (1954).

⁹⁴ *Id.*

D. Contrasting the Lumbee Act with statutes terminating or forbidding the Federal relationship

The Associate Solicitor's conclusion that the Lumbee Act was "legislation terminating or forbidding the Federal relationship" was not specific as to whether the Lumbee Act "terminated" the Federal relationship, or "forbid" the Federal relationship, or both. A closer review demonstrates the substantial differences between the language of the Lumbee Act and the language Congress used when terminating tribes. In addition, the language of the Lumbee Act also differs from the language Congress has used to "forbid" a government-to-government relationship with a group of Indians.

1. Termination acts

Congress enacted the Lumbee Act during the Termination Era, which dominated federal Indian policy during the 1950s and 1960s.⁹⁵ Because the Lumbee Indians were not under federal supervision at the time of the Lumbee Act, that Act cannot technically be read as a termination act. Nonetheless, the Associate Solicitor concluded that the Act was "legislation terminating or forbidding the Federal relationship."⁹⁶ The stark contrast between the language Congress used in the Lumbee Act and the language it used in various termination statutes demonstrates that the Lumbee Act was not an act "terminating" a Federal relationship.

For example, in 1954, two years before enacting the Lumbee Act, Congress terminated the federal relationship with the Menominee Tribe of Wisconsin.⁹⁷ That act expressly ordered "termination of Federal supervision over the property and members" of the tribe, closed the tribal roll, and distributed all of the tribe's trust assets.⁹⁸ Later in 1954, Congress terminated the federal relationship with the Klamath Tribe of Indians.⁹⁹ That act, among other things, provided for "the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians . . . and of the individual members thereof," for "termination of Federal services furnished to such Indians because of their status as Indians," and for distribution of tribal property.¹⁰⁰ In addition, that act required the Secretary to publish in the Federal Register "a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated," and expressly terminated "[a]ny powers conferred upon the tribe" by the tribe's constitution.¹⁰¹ Other termination statutes enacted during this era contained similar

⁹⁵ See H. Con. Res. 108, 68 Stat. B122 (Aug. 1, 1953) (providing that "it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States," and stating "the declared sense of Congress that" Indian tribes in certain states and their members "should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians").

⁹⁶ 1989 Assoc. Solic. Mem. at 5 (citing 83 C.F.R. §§ 83.3(e), 83.7(g)).

⁹⁷ An Act to provide for per capita distribution of Menominee tribal funds and authorize the withdrawal of the Menominee Tribe from Federal jurisdiction, 68 Stat. 250 (1954).

⁹⁸ *Id.* at 250-51.

⁹⁹ An Act to provide for the termination of Federal supervision over the property of the Klamath Tribe of Indians located in the State of Oregon and the individual members thereof, and for other purposes, 68 Stat. 718 (1954).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 722.

language.¹⁰² However, no such language appears in the Lumbee Act. To the extent that the Associate Solicitor's opinion can be read as concluding that the Lumbee Act was legislation "terminating" a Federal relationship, I find that the differences between the Lumbee Act and contemporaneous termination acts undermines such a conclusion.

2. Statutes "forbidding" the Federal relationship

The Associate Solicitor engaged in no textual analysis to determine whether the Lumbee Act served to "forbid" any Federal relationship with the Lumbee Indians. When compared to other statutes found to include language "forbidding" the relationship, the Lumbee Act includes no such language.

For example, in 1839 Congress enacted An Act for the relief of the Brothertown Indians, in the Territory of Wisconsin ("1839 Brothertown Act"),¹⁰³ which, *inter alia*, provided for the partitioning of the reservation of the "Brotherton or Brothertown Indians"¹⁰⁴ and the division of those lands among the tribe's individual members.¹⁰⁵ The 1839 Brothertown Act further provided that, upon the division of the Tribe's lands and the completion of various administrative requirements, "the Brothertown Indians . . . shall then be deemed to be . . . citizens of the United States, . . . and their rights as a tribe or nation, and their power of making or executing their own laws, usages, or customs, as such tribe, *shall cease and determine*."¹⁰⁶

Following the publication of the Part 83 procedures, persons descended from the Brothertown Indians sought acknowledgment under Part 83.¹⁰⁷ In 2009, in its Proposed Finding Against Acknowledgment of the Brothertown Indian Nation ("Brothertown Proposed Finding"), the Department engaged in a lengthy analysis of the statutory language, finding that the word "determine" added a meaning beyond a mere cessation of activity. . . . The phrase 'cease and determine' thus stated that Federal recognition of tribal rights and powers not only would be discontinued, but also would be *brought to a permanent end*."¹⁰⁸ The Department concluded that "[b]y denying the Brothertown Indians of Wisconsin a federally recognized right to act in the future as a tribal political entity with powers of self-government, Congress *has forbidden a Federal relationship* with a Brothertown political tribal entity."¹⁰⁹

¹⁰² For two examples enacted the same year as the Lumbee Act, see An Act to provide for the termination of Federal supervision over the property of the Wyandotte Tribe of Oklahoma and the individual members thereof, and for other purposes, 70 Stat. 893 (1956); An Act to provide for the termination of Federal supervision over the property of the Peoria Tribe of Indians in the State of Oklahoma and the individual members thereof, and for other purposes, 70 Stat. 937 (1956).

¹⁰³ 5 Stat. 349 (Mar. 3, 1839).

¹⁰⁴ The statute recognized that both names were used. *Id.*

¹⁰⁵ *Id.* at 349-51.

¹⁰⁶ *Id.* at 351.

¹⁰⁷ Proposed Finding Against Acknowledgment of the Brothertown Indian Nation (Aug. 17, 2009), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001523.pdf>. The group, which initially used the name "Brotherton Indians of Wisconsin" before changing its name to "Brothertown Indian Nation," filed a letter of intent in 1980, and provided materials in support of its application as late as 2008. *Id.* at 2-3.

¹⁰⁸ *Id.* at 135-36 (emphasis added).

¹⁰⁹ *Id.* at 136 (emphasis added). This finding was upheld in the Department's Final Determination, at 2, available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-021391.pdf>.

The Associate Solicitor in 1989 did not have the benefit of this analysis of congressional legislation “forbidding” the Federal relationship. Nevertheless, in contrast to the 1839 Brothertown Act, the Lumbee Act contains no such forward-looking language. To the extent that the 1989 Associate Solicitor’s Memorandum can be read as concluding that the Lumbee Act was legislation “forbidding” a Federal relationship, I find that the lack of any such forward-looking language undermines that conclusion.

E. The Department’s § 83.7(g) decisions

Finally, with regard to statutes “terminating” the federal relationship, a close review of the Department’s one existing decision at the time under 25 C.F.C. § 83.7(g) demonstrates that that decision was based on evidence far more concrete than the evidence that led the Associate Solicitor to conclude that the final clause of Section 1 of the Lumbee Act was language “terminating or forbidding” a Federal relationship.

At the time of the Associate Solicitor’s Memorandum, the Department had published decisions granting seven acknowledgment petitions and denying eleven. Of those 18 published decisions, only one discussed § 83.7(g) in depth: the decision denying federal acknowledgment to the Tchinouk Indians of Oregon. In its Proposed Finding against Federal Acknowledgment, the Department concluded that, even though the Tchinouk Indians had not been specifically identified for termination in the Western Oregon Termination Act,¹¹⁰ they nonetheless fell within its purview:

Many of the petitioning group’s members were given termination services under Section 13 of the termination act, although many had not received services previously and many if not most do not appear on the available rolls of Southwestern Oregon Indians. . . . It is clear the act was viewed by the BIA as applying to these individuals even though they were not part of a distinct recognized tribe. . . .

Based on the inclusive language of the [Western Oregon Termination A]ct and BIA policies and legislative records concerning the act, we conclude that the Western Oregon Termination Act applies to the Tchinouk even though they were not previously recognized as a distinct tribe. The Tchinouk are the subject of legislation forbidding the Federal relationship and therefore do not meet the requirements of the criterion in 25 C.F.R. 83.7(g).¹¹¹

The evidence presented as to the Lumbee Indians contrasts with that concerning the Tchinouk, indicating that the Lumbee Act was not a termination act and that the Associate Solicitor’s conclusion that the Lumbee Act was “legislation terminating or forbidding the Federal relationship” should not be read as a conclusion as to “termination.” There is no evidence in the

¹¹⁰ 68 Stat. 724 (1954).

¹¹¹ Evidence for Proposed Finding against Federal Acknowledgment of the Tchinouk Indians of Oregon at 12 (May 30, 1985); after notice of the Proposed Finding was published, 50 Fed. Reg. 24709 (June 12, 1985), and comments received, the Final Determination That the Tchinouk Indians of Oregon Do Not Exist as an Indian Tribe was published on January 16, 1986. 51 Fed. Reg. 2437.

record that, after enactment of the Lumbee Act, the Department treated the Act as a termination act. There is no record of “termination services” having been provided to the 22 Lumbee Indians who were eligible for IRA benefits as half-blood Indians before the Lumbee Act, much less to any of the thousands of other Lumbee Indians. Instead, the Department allowed some 16 years to pass before concluding that the Lumbee Act extinguished the eligibility for benefits of those 22 half-blood Indians – a determination that the D.C. Circuit reversed.¹¹² In short, there is no evidence that the Department treated the Lumbee Act, at the time of its passage, as terminating or forbidding the federal relationship.

V. The Flawed Analysis in the IBIA’s Nakai Decision

Because the IBIA in *Nakai* construed the Lumbee Act in relation to the IRA, and not as it relates to the Part 83 acknowledgment process, I am not bound by the IBIA’s interpretation of the Act. Moreover, because the IBIA’s decision in *Nakai* rests upon a misreading of the Act, and is inconsistent with the D.C. Circuit’s holding in *Maynor*, I am not persuaded by the IBIA’s conclusion.

The plaintiff in *Nakai* was a Lumbee Indian who argued that, regardless of her affiliation with the Lumbee Indians, she also was 31/32 Indian blood and as such was eligible for the Indian employment preference provided in the IRA and the Department’s regulations.¹¹³ The Regional Director denied the plaintiff’s request for verification of Indian preference, finding that *Maynor* merely preserved the rights of those 22 Lumbee Indians who already had been certified to receive benefits under the IRA, and that the Lumbee Act precluded any other Lumbee Indians from services or benefits provided to Indians because of their status as Indians.¹¹⁴ On appeal, the plaintiff argued that *Maynor* “stands for the proposition that the Lumbee Act did not affect the eligibility of Lumbee Indians for Federal benefits under independent, prior legislation, such as the IRA.”¹¹⁵ The IBIA rejected this argument and affirmed the Regional Director, holding that “to accept [the plaintiff’s] arguments would effectively negate the prohibitory language of the Act. . . . Whatever rights may have attached under the IRA, before enactment of the Lumbee Act, to individuals with one-half or more Indian blood of the [Lumbee Indians], did not attach to [the plaintiff].”¹¹⁶

The Regional Director’s decision and the IBIA’s conclusion are inconsistent with both the text of the Act and the interpretation set forth in *Maynor*. First, as demonstrated above, there is no “prohibitory language” in the Act. Rather, the legislative history demonstrates that the language some have misinterpreted as prohibitory merely was intended to ensure that the Act, itself, was

¹¹² See 1972 Memorandum; *Maynor*, 510 F.2d at 1258.

¹¹³ *Nakai*, 60 IBIA at 64. The IRA provides that “qualified Indians shall hereafter have the preference to appointment in vacancies” in positions “in the administration of functions or services affecting any Indian tribe.” 25 U.S.C. § 5116 (recently redesignated from 25 U.S.C. § 472). The IRA defines “Indian” to include all persons who are “of one-half or more Indian blood.” 25 U.S.C. § 5129. The Department’s regulations further provide, in relevant part: “For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons of Indian descent who are: . . . of one-half or more Indian blood of tribes indigenous to the United States.” 25 C.F.R. § 5.1(c).

¹¹⁴ *Nakai*, 60 IBIA at 68.

¹¹⁵ *Id.* at 70.

¹¹⁶ *Id.* at 71.

not construed as extending to Lumbee Indians benefits for which they were not already eligible. In addition, the Regional Director's action and the IBIA's decision, both of which turn on the idea that the Lumbee Act altered the legal status of the Lumbee Indians, are inconsistent with *Maynor*, in which the D.C. Circuit stated: "The whole purpose of this final clause of the one paragraph operative portion of the Lumbee Act was simply *to leave the rights of the 'Lumbee Indians' unchanged.*"¹¹⁷

For these reasons, I am not persuaded by the IBIA's decision in *Nakai*, which did not concern Part 83 acknowledgment, and which is inconsistent both with the text and with judicial interpretations of the Lumbee Act.

VI. Conclusion

Over the past four decades, the Department has vacillated in its interpretations of the Lumbee Act. Solicitor's Office memoranda in 1989 concluded that the Act barred the Department from acknowledging the Lumbee Indians as an Indian tribe through the Part 83 process. Because I find that neither the text of the Lumbee Act nor its legislative history precludes the Lumbee Indians from petitioning for Federal acknowledgment under the Department's regulations, I conclude that they may avail themselves of the acknowledgment process in 25 C.F.R. Part 83. If their application is successful, they may then be eligible for the programs, services, and benefits available to Indians because of their status as Indians.

A handwritten signature in black ink, reading "Hilary C. Tompkins", enclosed within a large, loopy oval flourish.

Hilary C. Tompkins

¹¹⁷ *Maynor*, 510 F.2d at 1258 (emphasis added).