



## INTERIOR BOARD OF INDIAN APPEALS

Heather L. McMillan Nakai v. Eastern Regional Director, Bureau of Indian Affairs

60 IBIA 64 (02/27/2015)

Judicial review of this case:

Complaint filed, *Nakai v. Jewell*, No. 1:16-cv-01500-TSC



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
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|----------------------------|---|--------------------------|
| HEATHER L. MCMILLAN NAKAI, | ) | Order Affirming Decision |
| Appellant,                 | ) |                          |
|                            | ) |                          |
| v.                         | ) |                          |
|                            | ) | Docket No. IBIA 12-136   |
| EASTERN REGIONAL DIRECTOR, | ) |                          |
| BUREAU OF INDIAN AFFAIRS,  | ) |                          |
| Appellee.                  | ) | February 27, 2015        |

Heather L. McMillan Nakai (Appellant) appealed to the Board of Indian Appeals (Board) from a June 4, 2012, decision (Decision) of the Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director denied Appellant’s request for a verification of Indian preference for employment in BIA and the Indian Health Service. *See* 25 C.F.R. Part 5. Appellant sought verification of Indian preference as a person who is “of one-half or more Indian blood of tribes indigenous to the United States.” *Id.* § 5.1(c); *see* Indian Reorganization Act (IRA) § 19, 48 Stat. 984, 988, codified at 25 U.S.C. § 479 (“Indian” includes “persons of one-half or more Indian blood”). Appellant contends that she is 31/32 Indian blood derived from the Cherokee, Croatan, and Cheraw tribes. Descendants of those and other tribes who were living in Robeson and adjoining counties in North Carolina, and who were historically referred to as the Siouan Indians of Robeson County, were designated by Congress in the 1956 Lumbee Act as the “Lumbee Indians of North Carolina.”<sup>1</sup>

Appellant is a Lumbee Indian, and the Regional Director concluded that the Lumbee Act precludes Appellant from claiming Indian preference based on ancestry from tribes whose descendants are Lumbee Indians because the Act states that “none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians.” Lumbee Act § 1, 70 Stat. at 255. Appellant contends that her status as a Lumbee is irrelevant to the determination of her qualification for Indian preference because her claim is separately and independently based on descent from the

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<sup>1</sup> *An Act Relating to the Lumbee Indians of North Carolina*, Pub. L. No. 84-570, 70 Stat. 254 (1956) (“Lumbee Act” or “Act”).

Siouan Indians of Robeson County, who after enactment of the IRA were recognized as eligible for benefits as Indians if they could establish one-half or more Indian blood.

We affirm the Regional Director. We accept, for purposes of our decision, that Appellant meets the requirements of 25 C.F.R. § 5.1(c) by having one-half or more Indian blood collectively derived from tribes indigenous to the United States. But we disagree with Appellant about the effect of the Lumbee Act. The fact that Appellant does not rely on her membership in the Lumbee Tribe does not mean that her status as a Lumbee Indian, which is derived from her ancestry, is irrelevant. When Congress precluded the applicability to Lumbee Indians of Federal statutes affecting Indians because of their status as Indians, it prevented Appellant from obtaining rights that she might otherwise have obtained as an “Indian” under Federal law, including “Indian” status for purposes of Indian preference.

## Background

### I. Appellant’s Ancestry

Appellant was born in Robeson County, North Carolina, as were her father and mother, who were born in 1946 and 1949, respectively. Notice of Appeal, May 17, 2012, Ex. A, at 1 (unnumbered) (Index to Vital Statistics – Births – Robeson County, N.C. (Appellant)); Ex. B, at 1 (unnumbered) (Index to Vital Statistics – Births – Robeson County, N.C. (Appellant’s mother)); and Ex. C, at 1 (unnumbered) (Index to Vital Statistics – Births – Robeson County, N.C. (Appellant’s father)) (Administrative Record (AR) Tab 5). Appellant contends that her mother was 4/4 degree Indian blood, and that her father was at least 1/2 degree Indian blood, based on information contained in U.S. Census records for Robeson County. *See* Census Records (various) (AR Tab 5). Thus, according to Appellant, she is at least 3/4 Indian blood, and she contends that the correct figure is 31/32. Appellant claims all of her Indian blood quantum from her parents and ancestors who lived in Robeson County, North Carolina, and claims that her blood quantum is derived from the Cheraw, Croatan, and Cherokee tribes.

### II. The Lumbee Indians

The term “Lumbee Indian” collectively refers to the descendants of several Indian tribes, mainly the historic Cheraw and related Siouan-speaking tribes, who settled near the Lumbee River in Robeson County in southeastern North Carolina. *See* S. Rep. No. 112-200, at 4 (2012); S. Rep. No. 108-213, at 3 (2003). The Lumbee also claim descent from remnants of early colonists. Lumbee Act § 1; *see* S. Rep. No. 112-200, at 4 (believed to be descendants of the lost Raleigh colony); *Relating to the Lumbee Indians of North Carolina: Hearing on H.R. 4656 Before the Subcomm. on Indian Affairs*, 84th Cong. 12-13 (1955) (“*Hearing on H.R. 4656*”) (testimony of Rev. D.F. Lowery) (admixture of seven tribes and

intermarried with the first colonists). Over the years, the Indians of Robeson County have been called Croatan, Siouan, Cherokee, and Cheraw Indians. S. Rep. No. 112-200, at 4. According to a 2012 U.S. Senate Report recommending legislation to extend Federal recognition to the Lumbee Tribe of North Carolina, the “complex origins” of the Lumbee prompted past administrations to oppose such recognition. *Id.* at 5.

In a 1951 referendum, the name “Lumbee Indians of North Carolina” was adopted by the Indians of Robeson County, and in 1953 the State of North Carolina recognized them as “Lumbee Indians.”<sup>2</sup> *Id.* The Lumbee Indians then petitioned Congress for Federal recognition of the name “Lumbee” as the official designation of the Indians of Robeson County. *Id.*

At hearings held in 1955 on proposed legislation to confer the designation, the sponsor explained that the purpose of the act was to give the Lumbee Indians “a name that would have . . . some significance,” and noted that they did not seek Federal recognition or benefits at that time. *Hearing on H.R. 4656* at 7 (remarks of Rep. F. Ertel Carlyle). The Department of the Interior (Department) nevertheless opposed the legislation on the grounds that the proposed bill would lead to an “obligation to furnish . . . services that are furnished to the citizens of this country who are recognized by the Congress as Indians.” H.R. Rep. No. 84-1654, at 2 (1956) (Statement of the Department). The Department objected to the “imposition of additional obligations on the Federal Government or in placing additional persons of Indian blood under the jurisdiction of [the] Department.” *Id.*<sup>3</sup> The Department argued that if the bill were to pass, “it should be amended to indicate clearly that it does not make [Lumbee Indians] eligible for services provided through the Bureau of Indian Affairs to other Indians.” *Id.*

The Lumbee Act was enacted on June 7, 1956. Lumbee Act, 70 Stat. 254 (1956). Congress recognized that the Indians of Robeson County “are descendants of that once large and prosperous tribe which occupied lands along the Lumbee River” during the early periods of European settlement. *Id.* at 254-55. The Act provided that “[t]he Indians now residing in Robeson and adjoining counties . . . and claiming joint descent from remnants of early American colonists and certain tribes of Indians originally inhabiting the coastal

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<sup>2</sup> Between 1913 and 1953, the State recognized them as the “Cherokee Indians of Robeson County.” The Cherokee are among the seven different tribes from which the Lumbees claim descent, but the tribes living in eastern North Carolina apparently did not associate with the Cherokee living in the mountains of western North Carolina. *Hearing on H.R. 4656* at 12-13 (testimony of Rev. D.F. Lowery); S. Rep. No. 112-200, at 4.

<sup>3</sup> The 1950s marked an era of Federal “termination” policies toward Indian tribes.

regions of North Carolina, shall . . . be known and designated as Lumbee Indians of North Carolina.” *Id.* at 255.

To address the Department’s objections, language was inserted stating that “[n]othing 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.” *Id.*

### III. Indian Preference

Several Federal statutes, including the IRA, include a preference for hiring Indians for certain Federal employment. *See* 25 U.S.C. § 472. The implementing regulations provide that “preference will be extended to persons of Indian descent” who fall within one of five categories, including, as relevant here, individuals “of one-half or more Indian blood of tribes indigenous to the United States.”<sup>4</sup> 25 C.F.R. § 5.1(c). Appellant applied for verification of Indian preference from the BIA Eastern Regional Office based on being one-half degree or more Indian blood descended from the tribes historically identified as “the Cheraw, Croatan, the Indians of Robeson County and the misnomer of the Cherokee Indians of Robeson County.”<sup>5</sup> Letter from Appellant to BIA, Mar. 21, 2012, at 2 (AR Tab 7). In support of her application, Appellant attached copies of U.S. Census records and state vital records, which identify her ancestors as Indian. *Id.* at 1-2; *see* Attachments to AR Tab 5.

A Tribal Government Specialist in BIA’s Eastern Regional Office responded to Appellant’s application, noting first that the Lumbee Indians are not a Federally recognized tribe, and stating that therefore BIA does not have records regarding the Lumbee to verify the degree of blood quantum claimed by Appellant. Letter from Joseph to Appellant, Apr. 19, 2012 (AR Tab 6).<sup>6</sup> The Tribal Government Specialist noted that the Indians of

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<sup>4</sup> The other categories are members of Federally recognized Indian tribes; descendants of such members who were, on June 1, 1934, residing within the present boundaries of an Indian reservation; Eskimos and other aboriginal people of Alaska; and certain Osage Indians. 25 C.F.R. § 5.1(a)-(b), (d)-(e).

<sup>5</sup> The application form filled out by Appellant identifies the tribes from which she claims descent as Cheraw, Croatan, and Tuscorora. Verification of Indian Preference for Employment, Form BIA – 4432 (AR Tab 8).

<sup>6</sup> The census records submitted by Appellant are barely legible, but do not appear to indicate blood quantum.

Robeson and adjoining counties in North Carolina were designated as Lumbee Indians by the Lumbee Act, and stated that the Lumbee Act precluded BIA from extending benefits to Lumbee Indians, including Indian preference under the IRA. *Id.*

Appellant appealed that determination to the Regional Director, arguing that the Tribal Government Specialist had misinterpreted her application for Indian preference by focusing on her status and enrollment as a Lumbee Indian, which Appellant contended were irrelevant to the basis upon which she sought Indian preference—her one-half or more Indian blood derived from the Cheraw, Croatan and Cherokee Tribes. Notice of Appeal, May 17, 2012, at 1 (AR Tab 5). Appellant argued that the Tribal Government Specialist had failed to address the documentation she provided in support of her claim of blood quantum eligibility for Indian preference, and suggested that BIA bias against members of the Lumbee Tribe may have led to the arbitrary and capricious denial of her application. *Id.* at 1-2.

The Regional Director affirmed the Tribal Government Specialist's determination that Appellant is ineligible for Indian preference. Letter from Regional Director to Appellant, June 4, 2012, at 1 (unnumbered) (Decision) (AR Tab 4). The Regional Director also interpreted the Lumbee Act as prohibiting BIA from extending Federal benefits to Lumbee Indians, finding that Indian preference is “not available to persons who base their Indian blood quantum on descent from Lumbee Indians.” *Id.*

The Regional Director acknowledged that a Federal court decision, *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975) (“*Maynor I*”), had restored Federal benefits to the 22 Lumbee plaintiffs in that case. *Id.* at 2 (unnumbered). But the Regional Director construed *Maynor I* as limited in applicability to those 22 plaintiffs, who had been certified as “Indian” under the IRA prior to enactment of the Lumbee Act, and whom the court held had not been divested of their status and rights by the Lumbee Act. *Id.* The Regional Director concluded that Appellant is not entitled to verification of Indian preference “by virtue of your membership in the Lumbee Tribe or your descent from Lumbee Indians.” *Id.*

Appellant appealed to the Board. Notice of Appeal, July 5, 2012 (AR Tab 3). Appellant argues that BIA mistakenly considered her enrollment and status as a Lumbee Indian, which she contends are irrelevant to satisfying § 5.1(c) and establishing eligibility for IRA benefits. Opening Brief (Br.), Nov. 15, 2012, at 5-8, 11. Appellant contends that the Lumbee Act does not preclude her eligibility for employment preference based on criteria other than her Lumbee enrollment, because the purpose of the Lumbee Act was only to give a collective name to the various Indian tribes of Robeson County, and it did not affect the benefits available to such Indians through prior legislation. *Id.* at 17; Reply Br., Jan. 14, 2013, at 11. According to Appellant, the last clause of the Lumbee Act—

“none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians”—was only meant to make clear that the Lumbee Act itself did not make Lumbee Indians eligible for Federal services or entitle them to Federal benefits. Opening Br. at 16. Appellant contends that her blood quantum as derived from the historical Cheraw, Croatan, and Cherokee tribes in Robeson County is “undisputed,” and that because she claims eligibility for Indian preference based on her blood quantum pursuant to 25 C.F.R. § 5.1(c), not based on her membership in the Lumbee Tribe, she qualifies for Indian preference. *Id.* at 1, 3-4.

The Regional Director filed an answer brief, and Appellant filed a reply brief.

### Discussion

We affirm the Decision because Appellant’s status as a Lumbee Indian cannot be distinguished from her descent from the Indian tribes of Robeson County, whom Congress designated as Lumbee Indians. The fact that Appellant does not claim Indian preference based upon her membership in the Lumbee Tribe does not mean that her status as a Lumbee Indian—conferred by Congress—is irrelevant to determining her eligibility for Indian preference.<sup>7</sup>

The Lumbee Act declared that:

the Indians now residing in Robeson and adjoining counties of North Carolina, . . . claiming joint descent from remnants of early American colonists and certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after the ratification of this Act, be known and designated as Lumbee Indians of North Carolina.

70 Stat. at 255. The Act expressly provided that the Indians designated as Lumbee Indians “shall continue to enjoy all rights, privileges, and immunities enjoyed” as citizens of North Carolina and the United States “as they enjoyed before the enactment of this Act.” *Id.* The Act also made clear that it did not “make such Indians eligible for any services performed by the United States for Indians because of their status as Indians.” *Id.*

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<sup>7</sup> We assume, for purposes of our decision, that Appellant can satisfy the language of 25 C.F.R. § 5.1(c) of having more than one-half Indian blood of tribes indigenous to the United States. We note, however, that Appellant apparently interprets census records identifying her ancestors as “Indian” as evidence that they were full-blood Indian.

Had Congress stopped there, Appellant might well fare differently, or at least this case apparently would rest on the evidentiary issue we need not address—the sufficiency of Appellant’s proof of her Indian blood quantum. But Congress continued, in the Lumbee Act, by providing that “none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians.” *Id.*

We conclude that this language is dispositive. Appellant, by virtue of her descent from the Indians of Robeson and adjoining counties in North Carolina, is a Lumbee Indian, and she is enrolled in the Lumbee Tribe. The language of the Lumbee Act states that none of the Federal statutes that affect Indians because of their status as Indians—here, the IRA and Indian preference statutes—shall be applicable to Lumbee Indians. For Appellant to claim more than one-half Indian blood from the historical tribes whose descendants were later collectively designated Lumbee Indians does not allow her to escape the effect of the Act.

Appellant contends that *Maynor I* was not limited to the 22 plaintiffs, and that it 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. Opening Br. at 16-17. According to Appellant, *Maynor I* held that the Lumbee Act did not repeal the IRA, and her half-blood status derived from the historical predecessor tribes of the Lumbee allows us to ignore her status as a Lumbee and find that she can independently obtain rights under the IRA as a half-blood Indian. *Id.* at 17.

Appellant reads *Maynor I* too broadly. In *Maynor I*, the plaintiffs were Lumbee Indians who, following enactment of the IRA, had petitioned the Secretary for recognition as persons of one-half degree or more Indian blood, and who were certified in 1938 by BIA as being Indians “entitled to benefits established by the [IRA].” 510 F.2d at 1256. After the Lumbee Act was enacted in 1956, however, the Department took the position that those individuals were no longer eligible for benefits under the IRA. *Id.* at 1257. They sued, arguing that the Lumbee Act could not take away rights previously conferred on them prior to its passage. The Court found that “Congress was very careful [in the Lumbee Act] not to confer *by this legislation* any special benefits on these people so designated as Lumbee Indians.” *Id.* at 1258. But the Court also found “nothing in the background of the Lumbee Act . . . which would indicate that Congress had any desire to take away any rights from persons . . . who may have been granted such rights by prior legislation.” *Id.* The Court concluded that “whatever rights were acquired by [the plaintiffs] who were certified by the Department . . . in 1938 as ‘Indians’ under the IRA . . . were not abrogated” by the passage of the Lumbee Act. *Id.* at 1259.

Arguably, as the Regional Director concluded, *Maynor I* was limited in applicability to the 22 plaintiffs involved in that case, as suggested by a subsequent court decision. *See*

*Roy Maynor v. United States*, 2005 U.S. Dist. LEXIS 16873, at \*5-6 (D.D.C. July 11, 2005) (*Maynor I* “merely declared” that the Lumbee Act “did not . . . preclude the 22 recognized individuals from receiving benefits under the IRA as previously determined. . . . It merely affirmed the 22 individuals’ status as Indians entitled to benefits conferred by the IRA.”), *aff’d*, 2006 U.S. App. LEXIS 3276 (D.C. Cir. Feb. 9, 2006). Whether or not *Maynor I* might have some relevance beyond the 22 plaintiffs, the facts in that case are distinguishable from Appellant’s case, and we are not convinced that *Maynor I* can aid Appellant.

In our view, to accept Appellant’s arguments would effectively negate the prohibitory language of the Act. The IRA is a statute that “affect[s] Indians because of their status as Indians,” and thus, by the language of the Lumbee Act, the IRA is inapplicable to Lumbee Indians. As *Maynor I* recognized, the Act did not intend to divest individuals who had been certified as “Indians” under the IRA before they became Lumbee Indians of their pre-existing status. Appellant was born well after the Act, as a Lumbee Indian. 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 Siouan Indians of Robeson County, did not attach to Appellant. The prohibition in the Lumbee Act has always applied to her, and serves as a threshold barrier to obtaining IRA benefits, regardless of whether, in the absence of the Act, she would qualify under 25 C.F.R. § 5.1(c) based on Indian blood quantum.<sup>8</sup> Thus, she is ineligible for Indian preference under the IRA, regardless of whether her blood quantum exceeds one-half Indian blood of the predecessor tribes of the Lumbee Indians.

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<sup>8</sup> As noted, in her application, Appellant claimed that her Indian blood quantum is derived from the Cheraw, Croatan, and Cherokee (or Tuscorora) tribes. *Compare* Mar. 21, 2012, Letter at 2 (AR Tab 7) *with* Application (AR Tab 8). In her reply brief, Appellant appears to single out descent from the “Cherokee Tribe” as sufficient to constitute her one-half degree Indian blood, Reply Br. at 4-5, but she does not explain how that would alter the applicability of the Lumbee Act to her. During the hearings on the Lumbee Act, it was clear that the Cherokee tribe was among the several tribes from whom the Indians of Robeson County claimed descent. Appellant does not claim Indian status based on membership in one of the Federally recognized Cherokee tribes, and thus we need not address whether such affiliation would make a difference.

## Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Decision of the Regional Director.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge