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United States Court of Appeals
Tenth Circuit

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Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THE CHEROKEE NATION,

Plaintiff - Appellee,

v.

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, U.S. Department of the Interior; TARA KATUK MAC LEAN SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior; EDDIE STREATER, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs,

Defendants,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA; UNITED KEETOOWAH BAND OF CHEROKEEE INDIANS IN OKLAHOMA CORPORATION,

Intervenors Defendants - Appellants.

No. 17-7042

THE CHEROKEE NATION,

Plaintiff - Appellee,

v.

17-7044

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, U.S. Department of the Interior; TARA KATUK MAC LEAN SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior; EDDIE STREATER, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs,

Defendants - Appellants,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA; UNITED KEETOOWAH BAND OF CHEROKEEE INDIANS IN OKLAHOMA CORPORATION,

Intervenors Defendants.

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:14-CV-00428-RAW)

Avi Kupfer, Attorney, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C. (Jeffrey H. Wood, Acting Assistant Attorney General, Eric Grant, Deputy Assistant Attorney General, William B. Lazarus, Thekla Hansen-Young, and Jody H. Schwarz, Attorneys, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C.; Scott Keep, Matthew Kelly, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C. with him on the briefs), for Federal Appellants.

Klint A. Cowan of Fellers, Snider, Blankenship, Bailey & Tippens, P.C., Oklahoma City, Oklahoma, for Intervenors-Defendants-Appellants.

David McCullough (S. Douglas Dodd with him on the brief), of Doerner, Saunders, Daniel & Anderson, L.L.P., Tulsa, Oklahoma, for Plaintiffs-Appellees.

Before **MATHESON**, **MCHUGH**, and **EID**, Circuit Judges.

EID, Circuit Judge.

Intervenor-Appellant the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) is a federally recognized Indian tribe located in eastern Oklahoma. The UKB are descended from the historical Cherokee Indian tribe. In 2000, the UKB purchased an undeveloped 76-acre parcel of land near Tahlequah, Oklahoma, with the intention of developing it into a tribal and cultural center (Subject Tract, or Subject Parcel). The Subject Parcel sits entirely within the boundaries of the former reservation of Appellees the Cherokee Nation of Oklahoma (Nation). In 2004, the UKB submitted an application to the Department of the Interior's Bureau of Indian Affairs (BIA), requesting the BIA take the Subject Parcel into trust, thereby formally establishing a UKB tribal land base. The Nation opposed the application. After seven years of review, the BIA approved the UKB's application.

The Nation sued Department of the Interior and BIA officials, with the UKB intervening as defendants, challenging the BIA's decision on several fronts. The district court found in favor of the Nation, determining that the BIA's decision to take the Subject Parcel into trust was "arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law." Op. at 19. Among other holdings, the district court concluded that: (1) the BIA must obtain Nation consent before taking the Subject Parcel into trust; (2) the BIA's analysis of two of its regulations as applied to the UKB

application was arbitrary and capricious; and (3) the BIA must consider whether the UKB meets the Indian Reorganization Act (IRA)'s definition of "Indian" in light of the Supreme Court case *Carcieri v. Salazar*, 555 U.S. 379 (2009). Op. at 19. Accordingly, the district court enjoined the Secretary of the Interior from accepting the Subject Parcel into trust.

Because the district court's order was a final decision, we have jurisdiction over this appeal, pursuant to 28 U.S.C. § 1291. We hold that the Secretary of the Interior has authority to take the Subject Parcel into trust under section 3 of the Oklahoma Indian Welfare Act of 1936 (OIWA), 25 U.S.C. § 5203.[1] The BIA was therefore not required to consider whether the UKB meets the IRA's definition of "Indian." Nor was the BIA required to obtain the Nation's consent before taking the land into trust. We also hold that the BIA's application of its regulations was not arbitrary and capricious. Accordingly, we reverse the district court and vacate the injunction preventing the Secretary from taking the Subject Parcel into trust.

I.

A.

The subject of this litigation is the UKB's 2004 application to the BIA, Eastern Oklahoma Region (Region) to acquire the Subject Tract into trust.[2] The application's

[1] This section was located at 25 U.S.C. § 503 during the BIA's consideration of the UKB Corporation's application. For clarity's sake, all references will be to the statute's current location.

[2] Acquiring land into trust "is one of the most important functions [the Department of the] Interior undertakes on behalf of the tribes," and "is essential to tribal self-determination." U.S. Department of the Interior, Indian Affairs, *Fee To Trust*,

road to eventual acceptance featured many twists and turns, which we outline here. First, the Region denied the application in April 2006. Aplt. App. 159. The UKB appealed that decision to the Interior Board of Indian Appeals (IBIA). On April 5, 2008 the Assistant Secretary for Indian Affairs (Assistant Secretary) directed the Region to request a remand from the IBIA to reconsider the application in light of findings made by the Assistant Secretary (2008 Directive). Aplt. App. 171. The Region requested the remand and the IBIA complied, vacating the Region's 2006 denial of the application.

After reconsideration, the Region denied the application a second time on August 6, 2008. Aplt. App. 310. Again, the UKB appealed the decision to the IBIA. At this juncture, the Assistant Secretary assumed jurisdiction over the appeal pursuant to 25 C.F.R. § 2.20(c). The Assistant Secretary issued three decisions, dated June 24, 2009 (June 2009 Decision), July 30, 2009 (July 2009 Decision), and September 10, 2010 (2010 Decision), explaining why he found the Region's reasoning to be flawed. Aplt. App. 214, 229, and 270. The effect of the three decisions was to vacate the Region's denial of the application and remand to the Region for reconsideration consistent with the Assistant Secretary's findings.

In the 2010 Decision, the Assistant Secretary determined that the UKB should be allowed to amend its application to invoke alternative authority for the acquisition of the

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https://www.bia.gov/bia/ots/fee-to-trust (last visited August 22, 2019). The UKB intends to turn the Subject Parcel into a tribal land base, and asserts that "it is essential for such a land base to be held in trust so that tribal governmental and self-determination activities can be guaranteed for future Keetoowah members." Aplt. App. 63 (UKB Land Into Trust Application).

Subject Parcel into trust. Aplt. App. 272. Accordingly, the UKB amended its application to request that the Subject Parcel be taken into trust: (1) for the UKB Corporation, rather than the UKB tribe; and (2) pursuant to section 3 of OIWA, 25 U.S.C. § 5203, rather than section 5 of the IRA, 25 U.S.C. § 5108.[3] Aplt. App. 291. The Assistant Secretary sent a letter dated January 21, 2011 to the UKB clarifying additional matters pertaining to the application (2011 Letter). Aplt. App. 289.

B.

On May 21, 2011, the Region issued its decision granting the UKB's amended application (2011 Decision). Aplt. App. 291. The 2011 Decision incorporated by reference the Assistant Secretary's 2008 Directive, June 2009 Decision, July 2009 Decision, 2010 Decision, and 2011 Letter. Aplt. App. 292. The BIA's relevant findings were as follows.[4]

The BIA found that statutory and regulatory authority permitted the Secretary to take land into trust for the UKB. 25 C.F.R. § 151.3(a) permits the Secretary to take land into trust if the application satisfies one of three listed criteria.[5] The BIA determined that

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[3] This section was previously located at 25 U.S.C. § 465. Again, we cite to the current location.

[4] Some clarification of the agency relationships may be in order before describing the 2011 Decision. The Regional offices (in this case, the Eastern Oklahoma Region) conduct the initial review and adjudication of land-into-trust applications in their jurisdictions. When, as here, the Assistant Secretary assumes jurisdiction over the appeal of the Region's decision, the Assistant Secretary is authorized to make findings that are binding on the Region on remand. *See* 25 C.F.R. § 2.20(c). In the 2011 Decision, the Region often expressed disagreement with the Assistant Secretary's findings, while acknowledging that it was bound by those findings. Therefore, we ascribe the holdings of the 2011 Decision to the BIA as a whole, not the Region.

[5] The regulation provides:

section 151.3(a)(2) applied because the UKB owned the Subject Tract in fee; and section 151.3(a)(3) applied because the Assistant Secretary found that the UKB had a need for the Subject Tract to be taken into trust so that the UKB may exercise jurisdiction over it, thus facilitating tribal self-determination. Aplt. App. 292. Additionally, the BIA found that "Section 3 of the OIWA . . . implicitly authorizes the Secretary to take land into trust for the UKB Corporation." *Id.* The BIA found this implicit authority in the following language of OIWA: "Such charter [of incorporation] may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right . . . *to enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA]*." 25 U.S.C. § 5203 (emphasis added). Because section 5 of the IRA authorizes the Secretary of the Interior to take land into trust "for the purpose of providing land for Indians," 25 U.S.C. § 5108, OIWA's

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> Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.
>
> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:
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> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
>
> (2) When the tribe already owns an interest in the land; or
>
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3.

reference to the IRA implicitly grants the Secretary authority to take land into trust for incorporated Oklahoma tribal groups (like the UKB).

Next, the BIA determined that consultation with, rather than the consent of, the Nation is required before the Secretary may take land into trust for the UKB Corporation. BIA regulations stipulate that an Indian tribe "may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation *consents in writing* to the acquisition . . . ." 25 C.F.R. § 151.8 (emphasis added). It is undisputed that the Subject Tract is entirely within the former reservation of the Nation. But the BIA concluded that Congress overrode the consent requirement of section 151.8 with respect to lands within the boundaries of the former Cherokee reservation when it passed the Interior and Related Agencies Appropriations Act of 1999[6] (1999 Appropriations Act). The 1999 Appropriations Act provides: "until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without *consultation with* the Cherokee Nation." 112 Stat. 2681-246 (emphasis added). The BIA determined that the 1999 Appropriations Act replaced the consent requirement with a consultation requirement in these circumstances, and the consultation requirement was satisfied when it solicited comments from the Nation in 2005 in connection with the UKB's initial application. Aplt. App. 293.

[6] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

The BIA next evaluated whether the application satisfied the criteria established by 25 C.F.R. § 151.10.[7] At issue in this appeal are the BIA's findings regarding subsections (f) and (g). Subsection (f) concerns whether jurisdictional problems may arise if the application were granted. The Region concluded that "it is clear that both the UKB and the [Nation] would assert jurisdiction over the subject property if it were taken in trust." Aplt. App. at 297. The Region noted that it had "twice previously concluded that the potential for jurisdictional problems between the Cherokee Nation and the UKB is of utmost concern and weighed heavily against approval of the acquisition." *Id.* In contrast, the Assistant Secretary had determined that: (1) the Nation did not have exclusive jurisdiction over the Subject Tract; (2) the UKB had a right to assert jurisdiction over its tribal lands; and (3) that "the perceived jurisdictional conflicts between the UKB and the

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[7] The Secretary considers the following criteria when deciding whether to take land into trust:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
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> (b) The need of the individual Indian or the tribe for additional land;
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> (c) The purposes for which the land will be used;
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> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise;
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
>
> 25 C.F.R. § 151.10.

Subsection (h) requires the applicant to provide information that allows the Secretary to comply with environmental standards. *Id.*

[Nation] are not so significant that I should deny the UKB's application." *Id.* at 297–98. The Region remained concerned, but acknowledged that the Assistant Secretary's decisions were binding. *Id.* at 298.

Subsection (g) concerns whether the BIA is equipped to discharge additional responsibilities resulting from a land-into-trust acquisition. The Region noted that the Nation currently administers programs for the Subject Parcel, such as real estate, tribal court, and law enforcement services. *Id.* The Region was concerned that if the Subject Tract were placed into trust for the UKB, the UKB would likely reject the authority of the Nation and insist that the Region provide direct services. *Id.* Despite the Region's worries that it did not have the funds necessary to provide those services, the Assistant Secretary "rejected this concern as unsubstantiated and insignificant." *Id.* Again, the Assistant Secretary's findings were binding on the Region.

Accordingly, the BIA approved the UKB's land-into-trust application. *Id.* at 300. The Nation appealed the 2011 Decision to the IBIA, which dismissed the appeal for lack of jurisdiction and on the grounds of abstention. *Cherokee Nation v. Acting E. Okla. Reg'l Dir.*, 58 IBIA 153, 2014 WL 264820 (2014).

C.

The Nation sued the BIA in federal district court challenging the 2011 Decision. The UKB and the UKB Corporation intervened as defendants. The Nation argued that the BIA could not acquire the Subject Parcel under section 3 of OIWA and, even if it could, the IRA's definition of the term "Indian" excludes the UKB. The Nation also contended that the BIA failed to comply with the regulatory requirement that it obtain

Nation consent for the land-into-trust acquisition. And the Nation argued that the BIA's analysis of the 25 C.F.R. § 151.10 regulatory criteria—specifically the administrative-burden and jurisdictional-conflicts criteria—was arbitrary and capricious. The Nation asked for injunctive and declaratory relief.

In 2017, the district court entered a decision enjoining the BIA from acquiring the Subject Tract. The court determined that the BIA may generally acquire the Subject Parcel under Section 3 of OIWA, but the BIA must consider how the Supreme Court's decision in *Carcieri* affects the BIA's right to acquire the parcel for the UKB in particular. Op. at 12, 14. In *Carcieri*, the Supreme Court held that the phrase "now under Federal jurisdiction" in the IRA's definition of "Indian" refers to "a tribe that was under federal jurisdiction at the time of the statute's enactment." 555 U.S. at 382. The Court reasoned that this definition "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* The UKB achieved federal recognition in 1946. *See* Act of August 10, 1946, ch. 947, 60 Stat. 976. The Assistant Secretary believed that *Carcieri* was not implicated in the 2011 Decision because the UKB amended its application to request land-into-trust pursuant to OIWA, not the IRA. Aplt. App. at 272. The district court disagreed that *Carcieri* was not implicated and held that before the BIA could take any land into trust for the UKB, the BIA must consider the IRA's definition of "Indian" in light of *Carcieri*. Op. at 19.

The district court also held that the Nation must consent to the acquisition for two reasons: (1) an 1866 treaty between the United States and the Nation guarantees

protection for the Nation against "domestic feuds and insurrections" and "hostilities of other tribes,"[8] which could describe the current dispute with the UKB; and (2) the 1999 Appropriations Act does not override the regulatory consent requirement of 25 C.F.R. § 151.8. Op. at 16–17. And the court held that the BIA's analysis of jurisdictional conflicts and the administrative burden under 25 C.F.R. § 151.10 was arbitrary and capricious. *Id.* at 18–19.

The court "remand[ed] this action to the Region." *Id.* at 19. It enjoined the BIA from taking the land into trust without: (1) obtaining the Nation's consent; (2) reconsidering the section 151.10 criteria; and (3) considering the effect of *Carcieri* on the acquisition. *Id.* Department of Interior officials and the UKB brought this appeal.

II.

As an initial matter, we must determine whether we have jurisdiction over this appeal. *See W. Energy All. v. Salazar*, 709 F.3d 1040, 1046 (10th Cir. 2013) ("'[J]urisdiction is a threshold question which an appellate court must resolve before addressing the merits of the matter before it.'" (quoting *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002))).

This court has jurisdiction "over all final decisions of federal district courts under 28 U.S.C. § 1291." *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129, 1137 (10th Cir. 2011). But "it is well settled law that the remand by a district court to an administrative agency for further proceedings is ordinarily not appealable because it is

[8] Treaty with the Cherokees, art. 26, July 19, 1866, 14 Stat. 799, 803 ("1866 Treaty" or "Treaty").

not a final decision." *W. Energy All.*, 709 F.3d at 1047 (quotation and brackets omitted). "This general principle has been called the 'administrative-remand rule.'" *Id.* "In determining whether the district court's order was a final decision," this court considers "'the nature of the agency action as well as the nature of the district court's order.'" *Id.* (quoting *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 697 (10th Cir. 2009)). "Generally, to be final and appealable, the district court's judgment must end the litigation and leave nothing to be done except execute the judgment." *Bender v. Clark*, 744 F.2d 1424, 1426 (10th Cir. 1984) (quotation and brackets omitted). A district court's order is more likely an administrative remand when it "square[s] with the traditional notion of a 'remand,' wherein the reviewing court returns an action to a lower court for further proceedings." *New Mexico*, 565 F.3d at 698. "[A] district court's label for its own action carries little weight in determining the nature of that action on appeal[.]" *Id.* n.15.

> The district court characterized its holding as a remand to the agency. It held:
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> > [T]he court finds in favor of the Cherokee Nation and remands this action to the Region. Furthermore, in accordance with the court's findings herein, the Secretary is enjoined from taking the Subject Tract into trust without the Cherokee Nation's written consent and full consideration of the jurisdictional conflicts and the resulting administrative burdens the acquisition would place on the Region. Before taking *any* land into trust for the UKB or the UKB Corporation, the Region shall consider the effect of Carcieri on such acquisition.

Op. at 19 (italics and underlining in original). The language of the court's order appears to call for an administrative remand because it instructs the Secretary to reconsider the

application in light of its holdings regarding Nation consent, the section 151.10 factors, and the applicability of *Carcieri*.

Viewing the district court's order "practically rather than technically," *Bender*, 744 F.2d at 1427, though, we conclude that the order was final, and therefore appealable. The district court's injunction preventing the Secretary from taking the Subject Parcel into trust without the Nation's consent essentially ends the proceedings in this case. No further action can be taken on the UKB's application without Nation consent, and the Nation has steadfastly withheld that consent throughout the fourteen years of the application's pendency. Accordingly, the district court's judgment "end[ed] the litigation" and "leave[s] nothing to be done except execute the judgment." *Id.* at 1426.

Moreover, "the nature of the district court's order . . . does not square with the traditional notion of a 'remand,' wherein the reviewing court returns an action to a lower court for further proceedings." *New Mexico*, 565 F.3d at 698. In *New Mexico*, the district court enjoined the Bureau of Land Management from approving development leases without conducting more stringent environmental analyses. *Id.* We noted that "[t]he [district] court's order did not require BLM to recommence a proceeding, or indeed to take any action at all—it simply enjoined BLM from further [environmental] violations." *Id.* Similarly, the other holdings by the district court—that the BIA's analysis of the section 151.10 factors was arbitrary, and that its consideration of *Carcieri* was insufficient—do not mandate further proceedings. Because the UKB's application will not move forward until Nation consent is granted, there will be no occasion for the BIA to reconsider the application in light of the court's holdings.

Accordingly, we conclude that the district court's order was not an administrative remand, but rather a final order that we have jurisdiction to review under section 1291.[9]

III.

In reaching its decision, the district court interpreted federal statutes—the IRA, the OIWA, and the 1999 Appropriations Act—and the 1866 Treaty. This court reviews those interpretations de novo. *Par. Oil Co. v. Dillon Cos., Inc.*, 523 F.3d 1244, 1248 (10th Cir. 2008) (statutes); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 988 (10th Cir. 2004) (treaties).

Agency action shall be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (quotation omitted). An action is arbitrary and capricious if

> the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.

Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers, 702 F.3d 1156, 1165 (10th Cir. 2012) (quoting *New Mexico*, 565 F.3d at 704).

[9] Incidentally, we note that, while we cannot assume jurisdiction over a case simply because the parties consent to it, *see Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951), counsel for the Nation agreed at oral argument that the district court's order was a final decision. *See* Oral Argument at 27:46.

This court will "uphold the agency's action if it has articulated a rational basis for the decision and has considered relevant factors." *Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir. 2006) (quotation omitted).

IV.

A.

Our analysis starts with the district court's holding that the BIA inadequately considered the effects of *Carcieri* when it authorized taking land into trust for the UKB Corporation.

Land may only be taken into trust for an Indian tribe when the acquisition is authorized by an act of Congress. 25 C.F.R. § 151.3. The UKB's 2004 application pointed to section 5 of the IRA as providing such Congressional authority.[10] Aplt. App. 65. In 2009, however, the Supreme Court issued *Carcieri*, which construed section 5129 of the IRA.[11] Section 5129 provides the following definition of "Indian":

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal

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[10] Section 5 of the IRA provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
> . . .
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5108.

[11] At the time *Carcieri* was decided, this provision was codified at 25 U.S.C. § 479.

> jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 5129. The Supreme Court held that "the term 'now under Federal jurisdiction' in § [5129] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri*, 555 U.S. at 395. The UKB was not federally recognized until 1946.

The Assistant Secretary grappled with the implications of *Carcieri* in his June 2009, July 2009, and July 2010 decisions. Aplt. App. 215, 229, 270. The Assistant Secretary ultimately concluded that the UKB should be allowed to amend its application to invoke different statutory authority: section 3 of OIWA.[12] Aplt. App. 270. Section 3 of OIWA provides that a properly chartered Oklahoma Indian group "enjoy[s] any other rights or privileges secured to an organized Indian tribe under the [IRA.]" 25 U.S.C. § 5203. Because one of the rights or privileges in the IRA is to have land taken into trust,

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[12] Section 3 of OIWA provides:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the [Indian Reorganization] Act of June 18, 1934 (48 Stat. 984)[.]
>
> 25 U.S.C. § 5203 (emphasis in original).

the Assistant Secretary reasoned, OIWA extends that right to properly incorporated Oklahoma Indian groups, like the UKB. Accordingly, the Assistant Secretary was satisfied that, by allowing the UKB to amend the application to invoke OIWA and not the IRA, the *Carcieri* holding did not apply.[13]

The district court agreed that using OIWA and the IRA in tandem provided authority for land-into-trust acquisitions for Oklahoma Indian corporations. Op. at 12. But it disagreed that this statutory formulation rendered the definition of "Indian" in the IRA inapplicable. The court reasoned that "[t]o allow a corporation formed under the OIWA to enjoy a portion of the IRA's provisions without regard to its other provisions and definitions would be to provide it more rights and privileges than the IRA provides." *Id.* The district court therefore concluded that the UKB Corporation must still satisfy the IRA's definition of "Indian," as construed by the Supreme Court in *Carcieri*. *Id.* at 13. Accordingly, the court enjoined the acquisition until the BIA "reach[es] the question of how any acquisition for the UKB or the UKB Corporation is affected by *Carcieri*." *Id.* at 14.

Appellants do not argue on appeal that the UKB Corporation meets the definition of "Indian" under the IRA; rather, they assert that the IRA's definition does not apply under these circumstances. We agree.

As the Supreme Court noted in *Carcieri*, Congress may choose "to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the

[13] The UKB also amended the application to take the Subject Tract into trust for the UKB Corporation, not the UKB tribe.

definitions of 'Indian' set forth in § [5129]." *Carcieri*, 555 U.S. at 392 (footnote omitted). That is precisely what Congress did when it enacted OIWA. By its terms, OIWA extends to properly incorporated Oklahoma Indian groups "the right . . . to enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA]." 25 U.S.C. § 5203. OIWA contemplated that "recognized tribe[s] or band[s] of Indians residing in Oklahoma" would take advantage of the right to incorporate and therefore have access to the "rights or privileges" provided by the IRA. *Id.* It would be strange for Congress to purport to extend the benefits of the IRA to new groups only to have that extension immediately nullified if the group does not satisfy the IRA's definition of "Indian." We therefore conclude that section 3 of OIWA was not meant to be constrained by the definition of "Indian" in the IRA.

Accordingly, it was not necessary for the BIA to consider whether the UKB Corporation met the IRA's definition of "Indian," and the *Carcieri* ruling was not implicated. We reverse the district court's contrary holding. Because it is undisputed that the UKB is a "recognized tribe or band of Indians residing in Oklahoma," *id.*, that has incorporated pursuant to OIWA, *see* Aplt. App. 79, the BIA properly concluded that statutory authority exists for the Secretary to take the Subject Parcel into trust for the UKB Corporation.

B.

We turn now to the district court's holding that Nation consent is required before the BIA may take the Subject Parcel into trust for the UKB. The court found two independent bases for the consent requirement: BIA regulations and the 1866 Treaty. We

conclude that neither the regulations nor the 1866 Treaty applies in these circumstances, and therefore reverse.

1.

BIA regulations provide: "An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition[.]" 25 C.F.R. § 151.8. Because the Subject Tract is entirely within the former Nation reservation, section 151.8 seemingly mandates Nation consent before the UKB application may be granted. Congress also weighed in on the issue, including the following proviso in the "Interior and Related Agencies Appropriations Act of 1992"[14] (1992 Appropriations Act): "until such time as legislation is enacted to the contrary . . . [no] funds [shall] be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without the *consent* of the Cherokee Nation." 105 Stat. 990 (emphasis added).

But the BIA concluded that Congress overrode the 1992 Appropriations Act and section 151.8 when Congress passed the 1999 Appropriations Act. Aplt. App. 293. The Act provides:

> [T]he sixth proviso under [the 1992 Appropriations Act] is hereby amended to read as follows: "*Provided further*, That until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without *consultation* with the Cherokee Nation."

[14] Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 Stat. 990 (1991).

112 Stat. 2681-246 (second italics added).

Because the only substantive change to the proviso was to change the word "consent" to "consultation," the BIA construed the 1999 Appropriations Act proviso as replacing the "consent requirement" with a "consultation requirement."[15]

The district court held that while the 1999 Appropriations Act may have amended the 1992 Appropriations Act, it did not abrogate the consent requirement of section 151.8. The court concluded that the Act applies only to *funding* land-into-trust acquisition (noting the "no funds shall be used" language), while not overriding section 151.8, which applies to the *general process* of land-into-trust acquisitions (regardless of funding source). Op. at 16. The district court found further support for its position in the fact that Congress "revisited" the BIA regulations in 2001 (i.e. after the 1999 Appropriations Act) and did not alter the consent requirement. *Id.*

We interpret the 1999 Appropriations Act as overriding the consent requirement of section 151.8 with respect to lands within the original Cherokee territory in Oklahoma. The 1999 Appropriations Act provides explicitly that it amends the 1992 Appropriations Act, *see* 112 Stat. 2681-246, and the substance of the amendment is to require Nation consultation, instead of consent, when using funds to take lands into trust within the boundaries of the original Cherokee territory in Oklahoma. *Id*. While the 1999 Appropriations Act does not specifically state that it overrides section 151.8, when a

[15] The BIA determined that it satisfied the consultation requirement when it solicited comments from the Nation in connection with the UKB's initial application. Aplt. App. 293.

statute and a regulation are in conflict, the statute "renders the regulation which is in conflict with it void and unenforceable."[16] *Enfield v. Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977).

Nor do we share the district court's concern that the 1999 Appropriations Act amounts to a "repeal by implication," a generally disfavored practice. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("The intention of the legislature to repeal must be clear and manifest."). Rather, the 1999 Appropriations Act carves out an exception to section 151.8. Section 151.8 deals with trust acquisitions in general; the 1999 Appropriations Act singles out land located on the original Cherokee territory in Oklahoma. Accordingly, there is not an "irreconcilable conflict" between the enactments; "the more

[16] The Nation argues that "[c]ourts will not construe an appropriations act to amend substantive law unless it is clear that Congress intended to change the substantive law." Aple. Br. at 35 (citing *United States v. Will*, 449 U.S. 200, 221 (1980)). Although appropriations acts "have the limited and specific purpose of providing funds for authorized programs," "both substantive enactments and appropriations measures are 'Acts of Congress[.]'" *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). We have recognized that "if Congress so intends, it can amend the provisions of a statute through the use of an appropriations act." *United States v. Burton*, 888 F.2d 682, 685 (10th Cir. 1989); *see also Will*, 449 U.S. at 222 ("[W]hen Congress desires to suspend or repeal a statute in force, there can be no doubt that it could accomplish its purpose by an amendment to an appropriations bill, or otherwise." (quotation marks, brackets, and ellipsis omitted)). "The whole question depends on the intention of Congress as expressed in the statutes." *Will*, 449 U.S. at 222 (quoting *United States v. Mitchell*, 109 U.S. 146, 150 (1883)).

In this case, Congress's intent to modify the law is clear. As noted above, the 1999 Appropriations Act explicitly provides that it amends the 1992 Appropriations Act. 112 Stat. 2681-246. The 1999 Act replaced the consent requirement contained in the 1992 Act with a consultation requirement when taking lands into trust within the boundaries of the original Cherokee territory in Oklahoma. Congress clearly intended the 1999 Appropriations Act to enact a substantive change in the requirements for taking lands within the original boundaries of the Cherokee territory into trust.

recent and specific statute will be determined to modify or super[s]ede an earlier, more general statute only to the extent necessary to avoid the irreconcilable conflict or inconsistency." *Oldenkamp v. United Am. Ins. Co.*, 619 F.3d 1243, 1247 (10th Cir. 2010) (quoting *Duncan v. Oklahoma Dept. of Corr.*, 95 P.3d 1076, 1079 (Okla. 2004)).[17]

We are also unconvinced by the district court's reasoning that the 1999 Appropriations Act is confined only to funding, and not land-into-trust acquisitions in general. There is no practical difference between "acquir[ing] land in trust" (section 151.8's language) and "us[ing funds] to take land into trust" (the Act's language). The operative action is taking lands into trust. All land-into-trust acquisitions require the expenditure of BIA funds, regardless of whether the BIA purchases the land or, as here, acquires the land from a tribe that already owns it in fee.

The Nation argues that the 1999 Appropriations Act is not tribe-specific to the UKB, and overriding the consent requirement would "open [the Nation's territory] to every other Tribe in the United States." Aple. Br. at 33. The Nation asserts that Congress could not have intended such an absurd result. We think these concerns unfounded. As this case has demonstrated, the application process for taking land into trust is exacting. The BIA must still consider other regulatory criteria, like the "existence of statutory authority for the acquisition and any limitations contained in such authority,"

[17] The 1999 Appropriations Act's specificity perhaps also explains why Congress chose not to alter section 151.8 when it "revisited" the regulations in 2001. *See* Op. at 15–16. Congress was not purporting to alter section 151.8 generally; it was merely codifying a narrow exception to the general rule.

the tribe's "need . . . for additional land," the "purposes for which the land will be used," and "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10 *et seq*. A tribe seeking trust lands on Nation territory must convince the BIA that it satisfies the regulatory criteria. And federal court review is available should the BIA abuse its discretion.

For these reasons, we conclude that the 1999 Appropriations Act overrides the consent requirement of section 151.8.

2.

Apart from the BIA regulations, the district court found a consent requirement in the 1866 Treaty as well. Article 26 of the Treaty provides: "The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes." 1866 Treaty, art. 26, July 19, 1866, 14 Stat. 799, 803. The district court concluded that

> [t]he members of the UKB are also Cherokee; thus, this could be considered a 'domestic feud or insurrection.' The UKB is also an independent tribe; thus, this could be considered 'hostility of another tribe,' as the UKB has announced its intention to assert exclusive jurisdiction over the Subject Tract. In either event, the 1866 Treaty guaranteed the Cherokee Nation protection against it.

Op. at 17.

The court determined that even if it was wrong about the 1999 Appropriations Act overriding section 151.8, Congress did not intend to override the Treaty, and Nation consent was still required. *Id.*

The district court's analysis was sparse. In fact, it did not render a true ruling, noting only that the UKB's application "*could* be considered a 'domestic feud or insurrection,'" or "*could* be considered 'hostility of another tribe[.]'" *Id.* (emphasis added). We do not read the Treaty's terms as prohibiting the UKB's application without Nation consent.

When analyzing the meaning of a treaty's language, courts "look beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). But "[t]reaty analysis begins with the text." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019). "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (quoting *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979)) (citation omitted). Treaties are "construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington*, 443 U.S. at 676.

The "plain language" of article 26 of the 1866 Treaty does not support the Nation's claim that it may veto the UKB's land-into-trust application. *See Klamath Indian Tribe*, 473 U.S. at 774. We note that the Nation seems to reject the district court's finding that the UKB's application "could be considered a 'domestic feud or

insurrection.'" Op. at 17. The Nation asserts that "[t]he UKB is another tribe" and argues solely that the application constitutes a "hostility of another tribe." Aple. Br. at 42–43. We agree that the "domestic feud or insurrection" clause does not apply. "Domestic" was understood in the 1860s to mean "of, or pertaining to, one's country; not foreign[.]" *Worcester's Dictionary* 436 (1860). A "feud" meant at the time of the Treaty's signing a "quarrel; a contention; . . . particularly a deadly quarrel between families or clans, or a quarrel not to be satisfied but with blood." *Id.* at 550. We doubt that the current litigation between the Nation and the UKB constitutes a "feud" within the meaning of article 26 because this dispute is not a "deadly quarrel" to be satisfied only "with blood." Regardless, because the UKB achieved federal recognition as a separate tribe from the Cherokee Nation in 1946, *see* 60 Stat. 976, any feud between the UKB and the Nation would not be "domestic."[18]

The "hostilities of other tribes" clause does not pertain to the UKB application either. "Hostility," in 1860s usage, meant "the practice of an open enemy; opposition in war; war; warfare." *Worcester's Dictionary* 697; *see also Burrill's Law Dictionary* 31 (1867) (defining "hostility" as "[a] state of open war . . . . An act of open war."). The context of the "hostilities" clause confirms that the treaty contemplated warlike hostilities, not mere civil disagreements. Under the Treaty, the United States promised the Nation "quiet and peaceable possession of their country and protection against

[18] Nor can the UKB's application be categorized as an "insurrection," which was defined as "[a] seditious rising against government; a rebellion; a revolt; a sedition." *Worcester's Dictionary* 764.

domestic feuds and insurrections, and against hostilities of other tribes." 1866 Treaty, art. 26, July 19, 1866, 14 Stat. 799, 803. Placing "hostilities" in a group with other words suggesting violent conflict—"feuds" and "insurrections"—and contrasting those events to "peaceable possession" demonstrates that the Treaty would have been understood to protect the Nation from warlike aggression.

While the relationship of the UKB and the Nation does not appear friendly, they are neither open enemies nor engaged in warfare. The Nation asserts that the relationship is "hostile" because the UKB has "separated from the Nation, prohibits its members from also maintaining citizenship in the Nation, and seeks to usurp the territorial jurisdiction of the government of the Nation[.]" Aple. Br. at 42. We disagree with the Nation's argument that the UKB establishing a separate identity, an action which was ratified by act of Congress, constitutes hostility. Neither does maintaining strict membership standards. In any event, those actions precede and are unrelated to the controversy at issue; that is, the UKB's application for the BIA to take land into trust. And while there may be jurisdictional disputes resulting from taking the land into trust, *see infra*, those potential conflicts would be of an administrative character. In short, no "hostilities," as contemplated in the 1866 Treaty, attach to the UKB's land-into-trust application.

The 1866 Treaty does not grant the Nation the power to veto the UKB's land-into-trust application. And, as regards land on the original Cherokee territory in Oklahoma, Congress overrode the consent requirement of section 151.8 when it passed the 1999 Appropriations Act. Accordingly, Nation consent is not required for the BIA to take the Subject Parcel into trust for the UKB.

C.

Finally, we review the district court's ruling that the BIA abused its discretion when it considered the regulatory criteria for land-into-trust acquisitions. BIA regulations provide that the agency will "consider" several "criteria in evaluating requests for the acquisition of land in trust status." 25 C.F.R. § 151.10. Specifically, the district court held that the BIA's analysis of two of the criteria—"jurisdictional problems and potential conflicts of land use which may arise," and whether the BIA is "equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," *id.* at (f) and (g)—was arbitrary and capricious. Op. at 18–19. We conclude that the BIA's analysis of the regulatory criteria was adequate, so we reverse the district court.

We review the BIA's consideration of the regulatory factors "to determine whether the agency acted in a manner that was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *McAlpine v. United States*, 112 F.3d 1429, 1436 (10th Cir. 1997) (citing 5 U.S.C. § 706(2)(A)). "The critical question in answering this inquiry is 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (quoting *Overton Park*, 401 U.S. at 416). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* This court's "task is to assess whether the agency considered all of the relevant factors contained at 25 C.F.R. § 151.10 in evaluating" the BIA's consideration of a land-into-trust application. *Id.*

1.

We start with the district court's holding that the BIA's consideration of the jurisdictional-conflicts criterion, 25 C.F.R. § 151.10(f), was arbitrary and capricious. The court noted the disagreements between the Region and the Assistant Secretary about the significance of potential jurisdictional conflicts. The Region twice denied the UKB application—in 2006 and 2008—in large part because it was convinced that both the Nation and the UKB would assert jurisdiction over the Subject Parcel if it were taken into trust. *See* Aplt. App. 162–63; 314–17. In his June 2009 Decision, the Assistant Secretary responded to the Region's concerns by finding that (1) the UKB would exercise exclusive jurisdiction over the Subject Parcel, and (2) even if both the Nation and the UKB asserted jurisdiction, shared-jurisdiction trust lands have been approved in the past. *Id.* at 219–21. The Region reiterated in the 2011 Decision that its concerns were not assuaged, but it acknowledged that the Assistant Secretary's findings were binding on it, preventing it from denying the application on jurisdictional grounds. *Id.* at 296–98.

The district court credited the Region's arguments while giving short shrift to those of the Assistant Secretary. We note the intra-agency difference of opinion, but our task is not to decide which side has the better argument. Instead, we must review the agency's ultimate disposition of the issue (in this case, the Assistant Secretary's findings that jurisdictional problems are not insurmountable) for an abuse of discretion. *See Overton Park*, 401 U.S. at 416 (reviewing courts must discern "whether *the decision* was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (emphasis added)). We conclude that the BIA "consider[ed] . . . the

relevant factors" and did not make a "clear error of judgment" in its jurisdictional-conflicts analysis. *Id.*

The Assistant Secretary explained his reasoning in the June 2009 Decision, which was incorporated by reference into the 2011 Decision. First, the Assistant Secretary responded to the Region's finding that the Nation possessed exclusive jurisdiction over the former historic Cherokee reservation. The Assistant Secretary pointed to the 1946 Congressional Act recognizing the UKB "as a band of Indians residing in Oklahoma within the meaning of section 3 of the [OIWA]." *See* 60 Stat. 976 (1946 Act). The Assistant Secretary reasoned that the 1946 Act "imposes no limitations on the [UKB]'s authority," and "[t]here is no reason, on the face of the Act, that the Keetoowah Band would have less authority than any other band or tribe." Aplt. App. 219. To further support this conclusion, the Assistant Secretary referenced section 476(f),[19] an amendment to the IRA enacted in 1994, which provides that the government shall not "classif[y], enhance[], or diminish[] the privileges and immunities available to [an] Indian tribe relative to other federally recognized tribes[.]" *Id.* (quoting 25 U.S.C. § 5123(f) (IRA Amendment)). The Assistant Secretary reasoned that this provision prohibited the BIA from finding the UKB lacks territorial jurisdiction while other tribes possess it, and justified a departure from BIA precedent holding that the Nation exercised exclusive jurisdiction within the former Cherokee reservation.[20] *Id.* And the Assistant

[19] Now located at 25 U.S.C. § 5123(f).

[20] The precedents the Region cited consist of unpublished orders from the Northern District of Oklahoma. *See United Keetoowah Band v. Secretary*, No. 90-C-608-B (N.D. Okla. Order May 31, 1991) ("[T]he Secretary of the Interior, or his designee, has

Secretary cited the 1999 Appropriations Act, discussed *supra*, as further indication of Congressional intent that trust lands may be established on the former Cherokee reservation for tribes other than the Nation. *Id.* at 220.

Second, the Assistant Secretary concluded that "even if the UKB had to share jurisdiction with the [Nation], such shared jurisdiction would not preclude me from taking the land into trust." *Id.* The Assistant Secretary then referenced other instances of tribes sharing jurisdiction over trust lands. *Id.* at 220–221. "The UKB and the [Nation] should be able, as these other tribes have done, to find a workable solution to shared jurisdiction." *Id.* at 221.

We find the Assistant Secretary's analysis sufficient to withstand the "narrow" standard of arbitrary and capricious review. *McAlpine*, 112 F.3d at 1436. The Assistant Secretary was justified in relying on the 1994 IRA Amendment and the 1999 Appropriations Act as bases for changing the BIA's stance on the exclusivity of Nation jurisdiction over former Cherokee reservation land.[21] "[T]he fact that an agency had a

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determined that the subject lands of the old Cherokee Reservation are under the jurisdiction of the new Cherokee Nation, not the UKB."); *Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B (N.D. Okla. Order Feb. 24, 1992); *United Keetoowah Band v. Mankiller*, No. 92-C-585-B (N.D. Okla. Order Jan. 27, 1993) ("This court has previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation." (citing *UKB v. Secretary*). The Assistant Secretary justified departing from those court pronouncements because (1) they predated the 1994 IRA Amendment and the 1999 Appropriations Act, and (2) they were "based on the Department [of the Interior's] position at that time," which has since been disavowed. Aplt. App. 219.

[21] The Nation appears to argue that the Assistant Secretary misconstrued the IRA Amendment as "mandat[ing] that the Secretary grant [a land-into-trust] application." Aple. Br. at 47–48. This is a mischaracterization of the Assistant Secretary's position. The Assistant Secretary relied on the IRA Amendment to support the proposition that the

prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009). And neither the district court nor the Region confronted the Assistant Secretary's alternative theory that a shared-jurisdiction arrangement could be implemented.[22] Accordingly, we reverse the district court's holding that the BIA abused its discretion in its consideration of the jurisdictional-conflicts criterion.

2.

The district court held that the BIA's consideration of 25 C.F.R. § 151.10(g)—which requires the Secretary to consider "whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status"—was arbitrary and capricious. Op. at 19. As with the jurisdictional-conflicts criterion, the Region and the Assistant Secretary disputed whether the administrative-burden criterion should defeat the UKB application. The district court sided with the Region. Again, we reverse.

UKB share the "privileges and immunities available" to other Indian tribes; in this case, the right to assert jurisdiction over its tribal lands. *See* Aplt. App. 219. The Assistant Secretary never claimed he was mandated to approve a land-into-trust application, only that he cannot privilege or diminish one tribe over another.

[22] The Nation argues that the "examples of shared jurisdiction given by the Secretary are not on point." Aple. Br. at 50. The Nation asserts that in every case but one, "the tribes involved share ownership of the land and thus have economic and political incentives to cooperate." *Id.* No such supposed incentives exist here because the UKB owns the Subject Tract in fee. In the remaining example, the Nation claims that the tribes sharing jurisdiction "are in constant conflict." *Id.* (referencing disputes between the Creek Nation and Thlopthlocco Tribal Town). We find the Nation's arguments speculative in nature and insufficient to demonstrate that the BIA abused its discretion.

In response to the Region's initial denial of the UKB application in 2006, the Assistant Secretary requested the Region to reconsider the application and more fully explain its reasoning regarding the administrative-burden criterion. Aplt. App. 172 (2008 Directive). The Assistant Secretary noted that the "proposed trust land is a small parcel of land" and that "[i]t would not appear that supervision needs to be extensive[.]" *Id.* In its 2008 denial of the UKB application, the Region explained that the local Bureau agency responsible for providing services in the area had closed, and those services were contracted to the Nation.[23] Aplt. App. 318. The Region was concerned that the UKB would reject the provision of services by the Nation and insist that the Region provide the services instead. *Id.* The Region concluded that it lacked the resources to provide the services. *Id.*

The Assistant Secretary was unpersuaded. In his June 2009 Decision, he stated that the Region "failed to substantiate [its] decision" and "fail[ed] to identify specific duties that the BIA will incur." Aplt. App. 221. The Assistant Secretary found that the Region failed to demonstrate which services the BIA would be required to provide for the Subject Parcel, and did not explain why the services could not be administered by the Region or contracted to the UKB. *Id.* Accordingly, the Assistant Secretary reiterated his stance from the 2008 Directive: the burden of providing administrative services would be negligible. *Id.* As with the jurisdictional-conflicts criterion, the Region was bound by the Assistant Secretary's findings.

[23] Such services include realty, tribal court, and law enforcement. Aplt. App. 318.

Again, we conclude that the BIA considered the relevant factors and did not make a clear error of judgment. *Overton Park*, 401 U.S. at 416. The relatively small size of the Subject Parcel and the fact that BIA services have been provided in the past suggest that any additional administrative burden will not be unreasonable. We have considered the Region's counterarguments, but we conclude that the Assistant Secretary's position is not "so implausible that it could not be ascribed to a difference in view[.]" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Therefore, the BIA's consideration of the administrative-burden criterion was not arbitrary and capricious.

V.

We reverse the district court's order holding that the 2011 Decision approving the UKB's land-into-trust application was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. We hold that (1) the BIA need not consider the definition of "Indian" under the IRA when taking land into trust pursuant to OIWA; (2) Nation consent is not required for the BIA to take the Subject Parcel into trust; and (3) the BIA's consideration of the section 151.10 regulatory factors was not arbitrary and capricious. Consequently, we vacate the district court's injunction preventing the Secretary from taking the Subject Parcel into trust.