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No. 17-7044 (consolidated with No. 17-7042)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CHEROKEE NATION,

Plaintiff-Appellee

v.

RYAN ZINKE, in his official capacity, *et al.*,

Defendants-Appellants,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, *et al.*,

Intervenors-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
Case No. 6:14-cv-428 (Hon. Ronald A. White)

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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GLOSSARY

BIA	Bureau of Indian Affairs
CNO	Cherokee Nation of Oklahoma
IRA	Indian Reorganization Act
OIWA	Oklahoma Indian Welfare Act
UKB	United Keetoowah Band of Cherokee Indians in Oklahoma

INTRODUCTION

In its answering brief, the Cherokee Nation of Oklahoma ("CNO") fails to demonstrate that the district court's holdings were correct. First, rather than dispute the interpretation adopted by the Bureau of Indian Affairs ("BIA") of the term "rights or privileges" in Section 3 of the Oklahoma Indian Welfare Act ("OIWA"), the CNO makes several points that are irrelevant to the BIA's challenge to the district court's reading of Section 3.

Second, the CNO is incorrect that it must consent for the BIA to acquire the parcel. A rider in the 1999 Appropriations Act supersedes a 1980 regulation requiring the consent of certain tribes, and the CNO's arguments to the contrary lack textual support. With respect to Article 26 of the 1866 treaty between the Cherokees and the United States, the CNO does not dispute that the district court's interpretation of the "domestic feuds and insurrections" clause was wrong. Further, the CNO fails to demonstrate that the "hostilities of other tribes" clause applies here because having fee land taken into trust is not a "hostility," and the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") is not an "other tribe" within the meaning of Article 26.

Third, the CNO fails to demonstrate that the trust-acquisition analysis undertaken by the Assistant Secretary – Indian Affairs was arbitrary and capricious. The Assistant Secretary rationally explained why the jurisdictional-problems factor and the administrative-burden factor weigh in favor of the acquisition. Further, under

the arbitrary-and-capricious standard of review, the courts may not overturn agency action merely because the deciding official's conclusion is different from that of a subordinate office. Even if that were not the case, the Assistant Secretary provided a reasonable explanation for reaching a conclusion different from that of the BIA's Eastern Oklahoma Region.

ARGUMENT

I. The CNO is incorrect that the district court's order was a non-final administrative remand, and this Court has jurisdiction over the appeal in any event

As the BIA's opening brief demonstrates, the district court's order was "final" within the meaning of 28 U.S.C. § 1291. Opening Br. 21–23.[1] Although the order contains the phrase "remands this action to the Region," Aplt. App. 53, it resolved all issues in the case and granted full relief to the CNO, and the district court entered judgment in favor of the CNO. *See* Opening Br. 22 (citing *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009)). The CNO's answering brief does not engage with that reasoning. Rather, the CNO argues that the order was non-final because the district court (1) "state[d]" that it was remanding the action to the BIA, and (2) "directed" the BIA to consider *Carcieri v. Salazar,* 555 U.S. 379 (2009), "before taking any land into trust for the UKB." Br. 21.

[1] All citations to "Opening Br." are to the BIA's opening brief.

The first argument, which relies entirely on the district court's characterization of its order, is particularly weak because "a district court's label for its own action carries little weight in determining the nature of that action on appeal." *New Mexico*, 565 F.3d at 698 n.15. Although framed as a "remand," the order bears no resemblance to such an action: it left no issues unresolved, granted relief to the CNO, and did not instruct the BIA to undertake additional proceedings. The CNO's second argument—that the order "directed" the BIA to consider the IRA's separate definition of "Indian" before acquiring trust land under Section 3 of the OIWA—fails because *all* district court orders, whether final or non-final, require compliance by the targeted parties. The directive in the order's concluding sentence instructing the BIA to comply with the court's holding, Aplt. App. 53, in no way indicates that the court contemplated a continuation of the case.

Even if the order were an administrative remand, this appeal fits squarely within the practical-finality rule because, the CNO's assertion notwithstanding, Br. 23, if the BIA accords the mandated relief on remand, it will be unable to appeal the district court's decision. As this Court has stated, the practical-finality rule is a prudential limitation on the administrative-remand rule because "agencies may be barred from seeking district court (and thus circuit court) review of their own administrative decisions." *Rekstad v. First Bank Sys., Inc.*, 238 F.3d 1259, 1262 (10th Cir. 2001); *see also Baca-Prieto v. Guigni*, 95 F.3d 1006, 1008 (10th Cir. 1996) ("danger of injustice" in following administrative-remand rule is "especially significant" when the

agency "may well be foreclosed from again appealing the district court's determination"); *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) (district court's order was "final judgment" under 42 U.S.C. § 405(g) due to "grave doubt" as to whether the agency could appeal its own order on remand). The same rule applies in other circuits as in this Court: the administrative-remand rule yields to practical finality for purposes of an agency's appeal when the agency would otherwise be foreclosed from obtaining review of a district-court decision. *See* 15B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3914.32 n.19 (Supp. 2017) (collecting cases).

The practical-finality rule applies here because the BIA has no avenue to obtain judicial review of its own administrative decisions on future UKB trust applications. In accordance with the district court's order, those decisions must evaluate "the effect of *Carcieri*" and must seek the CNO's "written consent," Aplt. App. 53—judicially imposed requirements challenged in this appeal. Applying the practical-finality rule here is not at odds with *Trout Unlimited v. USDA*, 441 F.3d 1214 (10th Cir. 2006), on which the answering brief relies. Br. 22. In *Trout Unlimited*, 441 F.3d at 1219, this Court agreed with the Forest Service that "urgent or immediate judicial consideration" of an administrative-remand order was unnecessary because the intervenor could obtain "delayed review" after the agency issued a new decision. By contrast, the BIA cannot obtain "delayed review" of the district court's holdings because it must abide

by those holdings in future administrative decisions. As far as the BIA is concerned, the order is effectively unreviewable.

Therefore, this Court has jurisdiction over this appeal.

II. The CNO does not dispute the BIA's interpretation of "rights or privileges" in Section 3 of the Oklahoma Indian Welfare Act

As the opening brief demonstrates, Opening Br. 24–27, neither the text of the OIWA nor Congress's understanding of the statute supports the district court's conclusion that the term "Indian" under the Indian Reorganization Act of 1934 ("IRA") circumscribes the IRA's "rights or privileges." To the contrary, Section 3 of the OIWA unequivocally extended those rights and privileges to the "incorporated group" of "[a]ny recognized tribe or band of Indians residing in Oklahoma," 25 U.S.C. § 5203—a category that includes the UKB. *See* Act of Aug. 10, 1946, ch. 947, 60 Stat. 976. The answering brief simply fails to respond to that argument. Rather, the CNO makes several points that are irrelevant to the BIA's challenge of the district court's holding.

The CNO first focuses on whether the UKB "was under federal jurisdiction in 1934." Br. 25–26. That issue goes to determining whether the UKB fits within the IRA's definition of "Indian." *See Carcieri*, 555 U.S. at 395. But the BIA's point is that whether the UKB fits within the IRA's definition of "Indian" is legally irrelevant because the UKB fits within the OIWA's extension of the IRA's rights and privileges to recognized Oklahoma tribes like the UKB. Consequently, whether the UKB fits

within the IRA's definition of "Indian" is a sideshow that has no bearing on whether the BIA may take land into trust for the UKB, and it was error for the district court to hold otherwise. For the CNO merely to repeat its arguments about the IRA's definition of "Indian" does not join the issue; rather, it simply assumes the conclusion.

Next, the CNO argues that the BIA's acquisition of the UKB parcel pursuant to Section 3 of the OIWA was "a sham perpetrated to circumvent the *Carcieri* decision." Br. 26–28. The CNO's characterization of the acquisition is both inaccurate and immaterial. The Assistant Secretary was clear regarding the BIA's decision to acquire the UKB parcel pursuant to its OIWA Section 3 authority (as opposed to its IRA Section 5 authority) in order to avoid the difficult, unsettled question of whether the UKB was under federal jurisdiction in 1934. *See, e.g.*, Aplt. App. 270–73, 289–90. With two separate statutes at the BIA's disposal that permit the acquisition of trust land, the Assistant Secretary acted within his authority to acquire the UKB parcel pursuant to one of those statutes instead of the other. Regardless, the Assistant Secretary's motives for invoking the BIA's OIWA Section 3 authority to acquire the parcel have no bearing on the issue appealed, namely, the district court's interpretation of the phrase "rights or privileges" under that statute.

Finally, the CNO seemingly contends that the Assistant Secretary may not acquire trust land for the UKB Corporation, which "did not exist in 1934," because Section 3 of the OIWA "simply carries over . . . the same powers that the Secretary

has under Section 5 of the IRA for purposes of taking land into trust for Oklahoma tribal corporations." Br. 29–30. That argument conflates rights that Congress granted under separate statutes subject to different sets of conditions. Whereas the IRA limits Interior to acquiring land on behalf of "Indians" as defined in the IRA, 25 U.S.C. §§ 5108, 5129, Section 3 of the OIWA limits Interior to acquiring land on behalf of the "incorporated group" of "[a]ny recognized tribe or band of Indians residing in Oklahoma," 25 U.S.C. § 5203. Congress has formally "recognized" the UKB "as a band of Indians residing in Oklahoma within the meaning of" Section 3 of the OIWA, 60 Stat. 976, and so the BIA acted within its authority to acquire the parcel. Congress's grant of certain rights or privileges to one group of tribes through the IRA in no way diminished its power to extend those same rights or privileges to "particular Indian tribes not necessarily encompassed within the definitions of 'Indian' set forth" in the IRA, *Carcieri*, 555 U.S. at 392—precisely what it accomplished for Oklahoma tribes through Section 3 of the OIWA.

For these reasons, the district court's interpretation of "rights or privileges" is wrong.

III. The CNO is incorrect that its consent is necessary for the BIA to acquire the UKB parcel

The answering brief makes two inaccurate arguments in support of its point that CNO consent is required for trust acquisitions within the former Cherokee reservation. First, the CNO incorrectly asserts that the 1999 Appropriations Act rider

did not supersede 25 C.F.R. § 151.8. Br. 32–35. Second, although it does not defend the district court's erroneous holding on the "domestic feuds and insurrections" clause of Article 26 of the 1866 treaty, the CNO is incorrect that the "hostilities of other tribes" clause of Article 26 pertains to, much less requires CNO consent for, trust acquisitions. Br. 35–44

A. The CNO's constructions of the 1999 Appropriations Act rider lack textual support

The text and legislative history of the 1999 Appropriations Act rider support the interpretation that the BIA must "consult" with the CNO before acquiring trust land for the UKB within the original Cherokee territory. *See* Opening Br. 28–31 (discussing Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-246 (1998)). Therefore, within the original Cherokee territory and as applied to the CNO, the statutory "consultation" requirement supersedes a 1980 Interior regulation, 25 C.F.R. § 151.8, that conditions certain tribal trust acquisitions on the consent of other tribes. As the CNO notes, the district court held that the rider "applies to funding" only. Br. 31. Yet as the opening brief demonstrates and as the answering brief does not challenge, there is no practical difference between "acquir[ing] land in trust status" within the meaning of 25 C.F.R. § 151.8 and "us[ing funds] to take land into trust," 112 Stat. at 2681-246, because all trust acquisitions require the expenditure of BIA funds. Contrary to the CNO's

assertion, Br. 31, the rider carries no less "weight" than any other act of Congress merely because it uses appropriations terminology.

The CNO also offers two alternative constructions of the rider, both of which are at odds with the text. The CNO first argues, contrary to the plain language of the rider, that the requirement for "consultation" cannot apply to "funds spent *by* the BIA while processing the land into trust application" because that would "open" the former Cherokee reservation to "every other Tribe in the United States." Br. 33 (emphasis in original). That is incorrect. The BIA must still consider eight criteria in evaluating on-reservation land-into-trust applications, including the "statutory authority for the acquisition and any limitations contained in such authority," the tribe's "need . . . for additional land," the "purpose 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. The CNO also warns that any conclusion besides its own "would be an absolute diminishment of" its "Treaty Territory." Br. 33. Yet the UKB already owns the parcel at issue. Acquiring it into trust without CNO consent will not "diminish" the CNO's territory. *See infra* pp. 13–14.

The CNO also argues that even if the rider did replace the "consent" requirement with a "consultation" requirement, such a change applies only to "lands purchased with federal funds appropriated for 'Operation of Indian Programs.'" Br. 33–34. The text of the rider contains no such limitation. Rather, it instructs the BIA that, without first consulting the CNO on acquisitions within the former Cherokee

reservation, "no funds shall be used to take land into trust." 112 Stat. at 2681-246. The CNO's interpretation—that "land" in the rider actually means "land purchased with federal funds appropriated for 'Operation of Indian Programs'"—manufactures a qualification lacking any textual support. The rider conditions the expenditure of BIA funds for taking "land into trust" only on CNO consultation and makes no distinction based on the source of the funds used to purchase the land. This Court should not countenance inserting a modifier that Congress chose to omit.

The answering brief mischaracterizes the 1999 Appropriations Act in other ways as well. Contrary to the CNO's assertions that the Act "does not state or imply that it affects or changes any other existing law," Br. 32, the rider expressly repealed an existing law. The Act "amend[ed]" a 1992 Appropriations Act "consent" rider and replaced it with the "consultation" rider. 112 Stat. at 2681-246; *see also Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992) ("Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly.").

The answering brief also defends the district court's nonsensical application of the rule disfavoring implied repeal. Br. 34–35. In support of its holding that the 1999 Appropriations Act did not supersede the BIA's tribal-consent regulation, 25 C.F.R. § 151.8, the district court noted that "repeals by implication are not favored." Aplt. App. 50 (quoting *United States v. Will*, 449 U.S. 200, 221 (1980)). That disregards the basic principle of administrative law that agency regulations yield to statutory commands. *See Enfield v. Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977). Recognizing

the district court's error, the CNO reframes the court's argument, suggesting that the court was actually referring not to the regulation, but instead to Section 5 of IRA. Br. 35. The court expressly stated that the rider "does not override the *land acquisitions regulations*." Aplt. App. 50 (emphasis added). Even putting that aside, Section 5 of IRA, which broadly authorizes trust acquisitions "for the purpose of providing land for Indians," 25 U.S.C. § 5108, does not impose an express "consent" or "consultation" requirement. Simply put, the text of Section 5 does not conflict with the 1999 Appropriations Act rider. Only the BIA's land-acquisition regulation regarding tribal consent conflicts with the rider, and that conflict "renders the regulation . . . void and unenforceable" as applied to CNO consent within the former Cherokee reservation. *Enfield*, 566 F.2d at 1142. Therefore, the 1999 Appropriations Act rider supersedes BIA's tribal-consent regulation, and only CNO *consultation* is required before acquiring trust land within the former Cherokee reservation.

B. The CNO is incorrect that the "hostilities of other tribes" clause of Article 26 of the 1866 treaty applies to trust acquisitions

As the BIA's opening brief demonstrates, the "domestic feuds and insurrections" and the "hostilities of other tribes" clauses in Article 26 of the Treaty with the Cherokees, July 19, 1866, 14 Stat. 799, 803, do not pertain to trust acquisitions. Opening Br. 31–38. The answering brief does not dispute that the district court's holding regarding the "domestic feuds and insurrections" clause was wrong. Instead, the CNO focuses solely on the "hostilities of other tribes" clause.

For two reasons, the CNO is incorrect that the "hostilities" clause applies here: (1) acquiring into trust a parcel owned in fee does not implicate the treaty's guarantee to protect against "hostilities," and (2) the UKB is not an "other tribe" within the meaning of the treaty.

1. Applying to have fee land taken into trust is not a "hostility" within the meaning of the treaty

In its answering brief, the CNO makes a single argument as to why the BIA's approval of the UKB land-into-trust application violates the guarantee to protect against "hostilities": the "relationship" between the UKB and the CNO is "a 'hostile' one." Br. 42. In support, the CNO claims that the UKB "separated" from the CNO, "seeks to usurp" the CNO's "territorial jurisdiction," "sought to divert the distribution of federal funds from" the CNO, and "claim[s]" the CNO's "historical sovereignty." Br. 42–43. Yet the CNO nowhere explains why the 1866 treaty's guarantee of United States protection from "hostilities" encompasses the administrative action at issue *here*—acquiring into trust a parcel that the UKB owns in fee. As the opening brief demonstrates, the meaning of "hostilities" at the time of the treaty's ratification, the contemporary usages of the term, and the history and purpose of Article 26 all support the interpretation that the "hostilities" clause does not encompass BIA trust acquisitions. Opening Br. 33–36. Rather, the clause was aimed only at assuaging Cherokee concerns about the resettlement of Kansas tribes within

Cherokee territory after the Civil War and about potential acts of armed warfare (i.e., "hostilities") carried out by those resettled tribes. *Id.*

Furthermore, insofar as the answering brief focuses on Cherokee "common property," Br. 37–42, it overlooks the past 120 years of federal Indian policy and the substantial body of federal law made applicable to the tribes. The CNO is correct that "country" as used in Article 26 describes the tribal property of the historical Cherokee Nation. *See generally Cohen's Handbook of Federal Indian Law* § 15.04[3][a] (Nell Jessup Newton et al. eds., 2012). But this case does not concern tribal property. In 1898, thirty years after the treaty was ratified, Congress enacted the Curtis Act, ch. 517, 30 Stat. 495, to accomplish the allotment of Cherokee lands. In 1902, the Cherokees "agreed to the allotment of" tribal property for individual Indians and to "the termination of tribal affairs." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627 (1970) (discussing Act of July 1, 1902, ch. 1375, 32 Stat. 716). When the historical Cherokee Nation's tribal lands were allotted, the United States Commission to the Five Civilized Tribes was responsible for assigning unselected allotments to individual tribal members, thereby eliminating any continuing tribal property interest in the land. § 16, 32 Stat. at 717.[2]

[2] The answering brief cites this Court's recent opinion in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), in asserting that Congress "never expressly terminated" the former Cherokee reservation. Br. 12. *Murphy* held that Congress did not disestablish the *Creek* reservation. 875 F. 3d at 937. It did not confront the question of the former *Cherokee* reservation's status. In any event, the status of the former Cherokee

Cont.

Thus, even if the parcel that the UKB now owns in unrestricted fee was once the tribal property of the historical Cherokee Nation, Congress altered its tribal-ownership status more than a century ago by authorizing allotment. Hence, the cases that the answering brief cites regarding tribal property designated through various nineteenth-century treaties, Br. 37–39, are relevant in the context of tribal treaty land but are inapplicable to the UKB parcel. Likewise, even if the relationship of UKB members to the CNO were germane in determining UKB members' "rights in" the CNO's "tribal property," Br. 40–42, that has no bearing on the unrestricted fee land at issue here. The "hostilities" clause therefore provides no support for the CNO's claimed authority to block the trust acquisitions of fee land.

2. The UKB is not an "other tribe" within the meaning of the treaty

Even if the "hostilities" clause were to require that the BIA obtain CNO consent before acquiring trust land for "other tribes" within the former Cherokee reservation, that requirement would not apply to UKB land-into-trust applications because the UKB is not an "other tribe" within the meaning of the 1866 treaty. As noted above, *supra* pp. 12–13, "other tribes" was intended to address the post-Civil War resettlement of Kansas tribes within Cherokee territory. Both the UKB and the

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reservation is not at issue here, the CNO has forfeited that newly presented argument by failing to make it in the district court, *see Ave. Capital Mgmt. II, L.P. v. Schaden*, 843 F.3d 876, 884 (10th Cir. 2016), and the answering brief does not otherwise develop the argument.

CNO trace their roots to the same historical Cherokee Nation that entered into the 1866 treaty. Opening Br. 10–11. Indeed, in a letter supporting congressional recognition of the UKB, the Secretary of the Interior informed the Senate Committee on Indian Affairs that the UKB was "interested in maintaining" its Cherokee "identity" and that the UKB then comprised "nearly one half of the Cherokees possessing one-half or more degree of Indian blood" within the former Cherokee reservation. S. Rep. No. 79-978, at 3 (1946). (The district court recognized the tribes' common Cherokee ancestry, Aplt. App. 5, but gave that no weight in analyzing the "hostilities" clause.)

The point that the UKB is not one of the "other tribes" within the meaning of Article 26 is not at odds with the recent decision in *Cherokee Nation v. Nash*, 267 F. Supp. 3d 87 (D.D.C. 2017), which interpreted "all the rights of native Cherokees" in Article 9 of the 1866 treaty to extend to qualifying freedmen such that their descendants are entitled to the rights of CNO citizens. *Id.* at 117, 140. The answering brief quotes a dictum in which *Nash* stated that the CNO's 1976 constitution "supersede[d]" the 1839 constitution of the historical Cherokee Nation. Br 38 n.11 (quoting *Nash*, 267 F. Supp. 3d at 111). But *Nash* had no occasion to consider whether the CNO is the *only* successor to the historical Cherokee Nation or whether the UKB's 1950 constitution *also* did not "supersede" the 1839 constitution. Furthermore, the CNO's suggestion of an uninterrupted political line from the historical Cherokee Nation to the CNO, Br. 40, ignores the interregnum in tribal

government wrought by the allotment era. *See* Act of Apr. 26, 1906, ch. 1876, §§ 6, 11, 27, 28, 34 Stat. 137, 139, 141, 148; *accord Cohen's Handbook* 216 (1942) (discussing how allotment caused the Indians to become "disorganized as groups"). Therefore, even if the "hostilities" clause requires CNO consent for some trust acquisitions, that would not apply to the UKB, which is not an "other tribe" within the meaning of Article 26.

For the reasons discussed, CNO consent is not required for the acquisition. The "consultation" rider in the 1999 Appropriations Act supersedes the BIA's tribal-consent regulation, 25 C.F.R. § 151.8, and the "hostilities" clause of Article 26 of the 1866 treaty does not apply.

IV. The CNO fails to demonstrate that the Assistant Secretary's analysis of the trust-acquisition criteria was arbitrary and capricious

In evaluating the UKB's trust application, the Assistant Secretary considered several regulatory criteria, including "[j]urisdictional 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." 25 C.F.R. § 151.10(f), (g). Although the CNO takes issue with the Assistant Secretary's conclusion that those factors weigh in favor of the acquisition, the answering brief does not meet the burden of demonstrating that the Assistant Secretary "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence." *WildEarth Guardians v. EPA*, 770 F.3d 919, 927 (10th Cir.

2014) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

A. The CNO is incorrect that the Assistant Secretary's jurisdictional-problems analysis misconstrued legal authorities

In considering jurisdictional problems and potential conflicts of land use, Aplt. App. 219–21 (discussing 25 C.F.R. § 151.10(f)), the Assistant Secretary concluded, based on reasoned analysis of the relevant legal authorities, that the factor does not weigh against acquiring the UKB parcel. The CNO's arbitrary-and-capricious argument mainly takes issue with the Assistant Secretary's discussion of those legal authorities. Br. 45–48. First, after conceding that the UKB Corporation's charter "authorizes" the acquisition of trust property and that Section 3 of the OIWA gives the UKB Corporation the right "to petition" the BIA to acquire trust land, the CNO argues nonetheless that "[i]f the UKB cannot have land taken into trust because of *Carcieri*," then Section 3 of the OIWA "neither grants nor creates such a right for the UKB Corporation." Br. 45–46.

The CNO is correct that if this Court were to hold that the IRA's separate definition of "Indian" circumscribes "rights or privileges" under Section 3 of the OIWA, then the BIA would first need to determine whether the UKB meets the IRA's definition of "Indian" before acquiring the parcel pursuant to its Section 3 authority. But that truism does not pertain to, much less undercut, the Assistant Secretary's jurisdictional-problems analysis: the statute recognizing the UKB does not

restrict the tribe's authority; the UKB Corporation's charter, which Interior approved, "weighs heavily in favor of finding" that the UKB may have land taken into trust because it authorizes the UKB Corporation to "hold land for tribal purposes"; and Congress, through the 1999 Appropriations Act, affirmatively contemplated that the UKB would assert jurisdiction over tribal lands. Aplt. App. 219–20.

The answering brief's charge that the Assistant Secretary's jurisdictional-problems analysis "improperly relied on the theory that trust acquisitions are 'rights or privileges,'" Br. 45 (quoting Aplt. App. 272), cites a different Assistant Secretary decision that is unrelated to the jurisdictional-problems analysis. That separate decision pertained only to the BIA's statutory authority for acquiring the UKB parcel. It did not discuss the trust-acquisition criteria. In any event, even if (contrary to fact, *see* Aplt. App. 273) that separate decision conflated the right to have trust land with the right to petition to have trust land, that is irrelevant to the question underlying jurisdictional-problems analysis: whether the tribe would have jurisdiction "over land that the United States holds in trust for" it. *Id.* at 220.

The CNO also argues that the Assistant Secretary "misread[]" the 1994 IRA amendment, Br. 46, which includes a provision that prohibits federal agencies from "mak[ing] any decision or determination pursuant to" statute "with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 5123(f). However, the

CNO misconstrues the purpose for which the Assistant Secretary cited the 1994 IRA amendment. The Assistant Secretary did not "interpret[]" the amendment "as authorizing a tribe to *acquire* trust lands within the territory of another tribe," or as "mandat[ing]" that the Assistant Secretary "grant the requested application." Br. 47 (emphasis in original). Rather, the Assistant Secretary read the IRA amendment as "prohibit[ing]" Interior "from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction." Aplt. App. 219. The Assistant Secretary reasonably concluded that the IRA amendment prevents Interior from finding that only certain federally recognized tribes possess the "privilege" to assert territorial jurisdiction—a decision in keeping with the Assistant Secretary's reading of the statute recognizing the UKB, the UKB Corporation's charter, and the 1999 Appropriations Act.

The legislative history of the 1994 amendment to the IRA is not to the contrary. As the CNO notes, Br. 47, the district-court decision in *Stand Up for California! v. DOI*, 204 F. Supp. 3d 212, 301 (D.D.C. 2016), *aff'd*, No. 16-5327, 2018 WL 385220 (D.C. Cir. Jan. 12, 2018), did consider part of the legislative history of the IRA amendment that reflected Congress's unease with de-recognition of federal tribes. But nowhere did the *Stand Up* court imply that such unease was the *only* concern animating passage of the IRA amendment. Indeed, according to the Senator who introduced the specific provision that the Assistant Secretary interpreted here, the provision was intended to ensure that "Indian tribes recognized by the Federal

Government stand on an equal footing to each other." 140 Cong. Rec. S11,232, S11,235 (May 19, 1994).

The CNO's remaining arguments are equally unpersuasive. The Assistant Secretary's analysis was not, as the answering brief claims, a "directive" to the Region "that it was not to consider evidence bearing on the issue before it." Br. 50. Rather, the Assistant Secretary issued the decision in the exercise of express regulatory authority, *see* 25 C.F.R. § 2.20(c), on administrative appeal from a decision of the Region. To be sure, the Assistant Secretary disagreed with the Region's weighing of the jurisdictional-problems factor. But the Assistant Secretary reasonably explained why he reached a different conclusion regarding the evidence on which the Region relied: internal agency documents finding exclusive CNO jurisdiction either predate the 1994 IRA amendment or do not reveal their basis, and several unpublished district-court orders predate the 1994 IRA amendment and do not decide the issue of CNO jurisdiction. Aplt. App. 219–20; *see also* Opening Br. 40–41. The unremarkable fact that there was an intra-agency "difference in view" during the deliberative process does not demonstrate lack of adequate foundation for the Assistant Secretary's decision. *State Farm*, 463 U.S. at 43.

Finally, the CNO is correct that there are differences between the situation here and the examples of shared jurisdiction that the Assistant Secrecy cited. Br. 50–51. But that does not detract from the Assistant Secretary's point, much less render the jurisdictional-problems analysis arbitrary. The Assistant Secretary concluded that the

UKB "would have exclusive jurisdiction over land that the United States holds in trust" for the tribe, but he further concluded that "even if the UKB had to share jurisdiction with the CNO, such shared jurisdiction would not preclude" him "from taking the land into trust." Aplt. App. 220. Although most instances of shared jurisdiction in the Region cited by the Assistant Secretary involve shared property ownership, the Assistant Secretary did not posit that those situations were identical to the conditions in this case. Rather, those examples were intended to support the Assistant Secretary's preceding statements that shared jurisdiction "is not unheard of" and does not "preclude" the trust acquisition. *Id.* Thus, even if it were true that shared ownership creates "economic and political incentives to cooperate" and that the Creek Nation is in "constant conflict" with the Thlopthlocco Tribal Town, Br. 50, that is immaterial to the point for which the Assistant Secretary cited the examples of shared jurisdiction. The CNO therefore fails to demonstrate that the Assistant Secretary's analysis of potential jurisdictional problems and conflicts of land use was arbitrary.

B. The CNO erroneously faults the Assistant Secretary for not "explaining the reasons" that his administrative-burden analysis diverged from that of a subordinate office

The CNO correctly observes that the Region "had no choice but to acquiesce" in the Assistant Secretary's controlling analysis of the administrative-burden factor, 25 C.F.R. § 151.10(g). Br. 52. But the CNO then contends (without elaboration) that the Assistant Secretary failed to "explain the reasons for ignoring" the Region's

concerns. *Id.* Under "narrow and highly deferential" arbitrary-and-capricious review, *Compass Envtl., Inc. v. OSHRC*, 663 F.3d 1164, 1167 (10th Cir. 2011), this Court will not overturn agency action merely because the deciding official reached a decision contrary to the finding of a subordinate office. *Cf. State Farm*, 463 U.S. at 43.

Even if that were not the case, the Assistant Secretary provided a rational explanation for reaching a conclusion different from that of the Region. The Region initially found that it "ha[d] limited resources to allow close supervision" of the UKB parcel. Aplt. App. 163. On administrative appeal, the Assistant Secretary questioned that finding because the UKB parcel is "a small parcel of land with community program buildings and a dance ground," which does not necessitate "extensive" supervision, and the UKB, Cherokee County, and the CNO "already provide law enforcement services within the proposed acquisition area." *Id.* at 172. The Assistant Secretary asked the Region for "additional evidence to substantiate the need for additional supervision." *Id.* On remand, however, the Region denied the application on the same grounds without providing additional evidence. *See id.* at 310–20. Because the Region provided no additional evidence, "fail[ed] to identify specific duties that the BIA will incur," and did not explain why it could not fulfill duties that do arise or contract those duties to the UKB, the Assistant Secretary reaffirmed his earlier finding. *Id.* at 221. Far from "ignoring" the Region's concerns, much less failing to "explain the reasons for ignoring" those concerns, the Assistant Secretary reasonably found that there was no evidence that issues related to trust administration

would arise on the UKB's small community-services parcel. The Assistant Secretary also found that if such issues did arise, the Region or the UKB could effectively administer the corresponding duties.

Therefore, the Assistant Secretary's conclusion that the administrative-burden factor weighs in favor of the trust acquisition was not arbitrary or capricious.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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I hereby certify that on February 1, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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