INTERIOR BOARD OF INDIAN APPEALS

Cherokee Nation v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs

58 IBIA 153 (01/06/2014)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

CHEROKEE NATION, Appellant,	)	Order Dismissing Appeal
v.	)	
	)	Docket No. IBIA 11-122
ACTING EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	January 6, 2014

The Cherokee Nation (Appellant) seeks review by the Board of Indian Appeals (Board) of a May 24, 2011, decision (Decision) of the Acting Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director approved an application by the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB Tribe or Tribe) for the United States to accept title to land, now owned in fee by the UKB Tribe, in trust for the United Keetoowah Band of Cherokee Indians in Oklahoma Corporation (UKB Tribal Corporation), pursuant to Section 3 of the Oklahoma Indian Welfare Act of 1936 (OIWA), 25 U.S.C. § 503. The land, known as the "Community Services Parcel" (Parcel), comprises approximately 76 acres located in Cherokee County, Oklahoma, on the former Cherokee reservation.[1]

As a threshold issue relevant to the Board's consideration of this appeal, all parties agree that the Regional Director's decision was limited in scope by a series of decisions of the Assistant Secretary - Indian Affairs (Assistant Secretary) favorable to the UKB Tribe regarding the trust acquisition of the Parcel. The parties agree that the Board does not have jurisdiction to review decisions of the Assistant Secretary, but they disagree whether all issues raised by Appellant in this appeal are subsumed in the Assistant Secretary's decisions so as to preclude our review. The Regional Director and the UKB Tribe argue that every question presented in Appellant's notice of appeal was decided by the Assistant Secretary—

[1] The Parcel is located within the last treaty boundaries of the historic Cherokee Nation as defined by the terms of the Treaty of New Echota, 7 Stat. 478 (Dec. 29, 1835), and an 1866 treaty with the Cherokees (1866 Treaty), 14 Stat. 799 (July 19, 1866). A legal description of the Parcel is contained in the Administrative Record (AR) at Tab 1 at 1 (application) and Tab 5 (deeds).

rendering the Regional Director's decision a ministerial act—and that we therefore lack jurisdiction to review the Decision, except at most to affirm it as complying with the Assistant Secretary's directives.

Appellant contends that certain substantive issues were left undecided by the Assistant Secretary, that the Regional Director also failed to consider these issues but in effect decided them against Appellant by approving the acquisition, and that we have jurisdiction to review those issues and must vacate or reverse the Decision.

We conclude that most, if not all, of the issues raised in this appeal were either decided by, encompassed within, or clearly implicate decisions issued by the Assistant Secretary for this trust acquisition, thus warranting dismissal in part or in whole for lack of jurisdiction. And even assuming that we may have *jurisdiction* to consider some issues, another factor has presented itself during the pendency of this appeal: The Assistant Secretary issued a final Departmental decision to accept another parcel in trust for the UKB Tribal Corporation, and Appellant has challenged that decision in Federal court, raising precisely the same issues for which it seeks Board review in this appeal. Because the Assistant Secretary decided the same issues, and the Department is now defending the Assistant Secretary's decision in litigation, the Board will abstain from exercising whatever residual jurisdiction it may have.

Therefore, we dismiss the appeal for lack of jurisdiction and upon the ground of abstention.

Background

I. UKB Tribe's Fee-to-Trust Application for the Parcel

In 2004, the UKB Tribe requested that BIA acquire the Parcel in trust for the Tribe pursuant to Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 465. UKB Tribe's First Application, June 9, 2004, at 6 (AR Tab 1). The Regional Director[2] evaluated the application under BIA's trust acquisition regulations, 25 C.F.R. Part 151, and denied the application in 2006 based on concerns that jurisdictional disputes would arise between Appellant and the UKB Tribe, that BIA would be unable to discharge additional responsibilities resulting from acquiring the land in trust status, and that a categorical exclusion did not apply under the National Environmental Policy Act (NEPA) and

[2] Determinations were made regarding the UKB Tribe's application over time by different persons having the delegated authority of the Regional Director. We will refer to each of them as the Regional Director.

therefore additional environmental review was required. Regional Director's First Decision, Apr. 7, 2006, at 4-6 (unnumbered) (AR Tab 45). The UKB Tribe appealed the decision to the Board. While the appeal was pending, the Assistant Secretary instructed the Regional Director to request a remand of the matter, and the Board granted the remand and vacated the decision. *United Keetoowah Band of Cherokee Indians in Oklahoma v. Eastern Oklahoma Regional Director*, 47 IBIA 87, 90 (2008); Memorandum from Assistant Secretary to Regional Director, Apr. 5, 2008, at 1 (AR Tab 57).

On remand in 2008, the Regional Director again denied the application, on principally the same grounds as before. Regional Director's Second Decision, Aug. 6, 2008, at 5-11 (AR Tab 78). When the UKB Tribe again appealed to the Board, the Assistant Secretary—through the Acting Deputy Assistant Secretary - Policy and Economic Development—assumed jurisdiction of the appeal pursuant to 25 C.F.R. § 2.20(c). Letter from Acting Deputy Assistant Secretary to Board, Sept. 4, 2008 (AR Tab 81). In his first, June 24, 2009, decision (June 2009 Decision) on the application, Assistant Secretary Larry Echo Hawk reviewed "*de novo*" the Regional Director's decision and "reversed" the findings as to the potential for jurisdictional conflicts, the inability of BIA to administer the land, and the inapplicability of a categorical exclusion. June 2009 Decision at 2 (AR Tab 100). The Assistant Secretary made several other findings favorable to the acquisition. He concluded that Appellant's consent to the proposed acquisition would be required pursuant to 25 C.F.R. § 151.8, except that in the Interior and Related Agencies Appropriations Act of 1999,[3] "Congress overrode this regulatory requirement with respect to lands within the boundaries of the former Cherokee reservation," and therefore Appellant "does not need to consent to the acquisition in trust of the UKB's land. It is only necessary that the Department consult with [Appellant]." June 2009 Decision at 4-5. He also concluded that the Department had satisfied the consultation requirement when it solicited comments from Appellant on the application in 2005. *Id.* at 5. In addition, the Assistant Secretary found, pursuant to 25 C.F.R. § 151.10(b), that because "[t]he UKB has no land held in trust . . . the UKB has a need for this land to be taken into trust." June 2009 Decision at 5.

The Assistant Secretary "remand[ed]" the application to the Regional Director for the sole purpose of applying a categorical exclusion checklist and, if the checklist was satisfied, to "hold the application pending resolution of my authority to take the land into trust," a reference to the Department's authority under Section 5 of the IRA. *Id.* at 2; *see id.* at 11. A month later, on July 30, 2009, the Assistant Secretary issued a second decision

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[3] The act provides in part 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." Pub. L. No. 105-277, 112 Stat. 2681-232, -246 (1998) (emphasis added).

(July 2009 Decision) in which he "clarif[ied] the effect of" his June 2009 Decision by stating it "was a partial ruling" that "did not . . . render a final ruling on my authority to take the land into trust generally." July 2009 Decision at 2 (AR Tab 106). The Assistant Secretary requested additional briefing from Appellant and the UKB Tribe "on the import, if any," of the Supreme Court's then-recent *Carcieri v. Salazar* decision. *Id.*[4]

On September 10, 2010, the Assistant Secretary issued his third decision (September 2010 Decision) on the matter, which "reaffirm[ed his] June 2009 decision regarding NEPA and conflicting jurisdiction," and "direct[ed] the Regional Director to reconsider an amended application consistent with this decision." September 2010 Decision at 4 (unnumbered) (AR Tab 114). The Assistant Secretary set out three options for the UKB Tribe to submit an amended application. Relevant to the subsequent proceedings and this appeal, the Assistant Secretary "conclude[d] that the Regional Director should allow the UKB to amend its application . . . [to] invoke my authority under Section 3 of [OIWA] and seek to have the land held in trust for the UKB Corporation." *Id.* at 1 (unnumbered).[5]

The Assistant Secretary stated that "Section 3 does not explicitly authorize me to take land in trust. But that authority is implicit." *Id.* at 3 (unnumbered). In a footnote, the Assistant Secretary stated that "[w]ithin the UKB tribal structure are the tribal government and the tribal corporation. They are separate entities." *Id.* at 3 n.1 (citing Solicitor's Opinion, 65 I.D. 483 (1958); 2 *Op. Sol. on Indian Affairs* 1846, (U.S.D.I. 1979)). However, he said, "[t]he UKB Corporation is merely the tribe organized as a corporation. Its property, therefore, is tribal property." *Id.*

The UKB Tribe then elected to amend its application in order to have the Parcel taken into trust for the UKB Tribal Corporation under authority of Section 3 of OIWA. *See* UKB Tribal Resolution No. 10-UKB-47, Sept. 29, 2010, at 2-3 (AR Tab 115). But a meeting with BIA's Eastern Oklahoma Regional Office apparently prompted some

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[4] *Carcieri,* 555 U.S. 379 (2009), held that the phrase "now under Federal jurisdiction" limited the Secretary of the Interior's (Secretary) authority to acquire land in trust under Section 5 of the IRA to only those tribes under Federal jurisdiction when the IRA was enacted in 1934. Congress recognized the UKB Tribe in an Act of August 10, 1946, 60 Stat. 976, for the purpose of allowing it to organize under Section 3 of OIWA.

[5] In 1950, the UKB Tribe organized under Section 3 of OIWA pursuant to a constitution and bylaws, and incorporated under a corporate charter approved by the Secretary. Section 3 of OIWA provides that the Secretary may "issue to any such organized group a charter of incorporation, which . . . may convey to the incorporated group . . . any other rights or privileges secured to an Indian tribe under [the IRA]." 25 U.S.C. § 503.

questions concerning the Assistant Secretary's remand to the Regional Director. The UKB Tribe sent a letter to the Assistant Secretary on October 5, 2010, requesting "confirm[ation]" that he previously decided two issues: (1) that the September 2010 Decision "removes any question of your legal authority under three provisions of federal law, including Section 3 of [OIWA]," and "no further analysis on that issue is needed from the Regional Director"; and (2) that "the requirement for notice to and opportunity to comment from state and local governments has been satisfied for this trust application." Letter from UKB Tribe to Assistant Secretary, Oct. 5, 2010, at 2 (AR Tab 116) (emphasis omitted). Appellant also wrote to the Assistant Secretary, requesting a copy of the UKB Tribe's letter, an opportunity to comment, and a copy of any response by the Assistant Secretary. Letter from Appellant to Assistant Secretary, Oct. 13, 2010.[6] Appellant again wrote to the Assistant Secretary on October 21, contending that because the Assistant Secretary had recognized that the UKB Tribe and the UKB Tribal Corporation are "separate entities," the UKB Tribe's application on behalf of the UKB Tribal Corporation was a new application that required full review by the Regional Director under applicable regulations, and a further response from Appellant. Letter from counsel for Appellant to Assistant Secretary, Oct. 21, 2010, at 1 (AR Tab 120). Appellant also argued that "the question of whether section 3 of the OIWA provides authority for approving a UKB *corporate* fee-to-trust application was not briefed by the parties, and is stated primarily as a conclusory assertion in your September 10 decision." *Id.* (emphasis added). Appellant contended that the Secretary lacked legal authority to accept land into trust for the UKB Tribal Corporation under Section 3 of OIWA. *Id.* at 2. Appellant reiterated these objections in an October 28 letter to the Regional Director. Letter from counsel for Appellant to Regional Director, Oct. 28, 2010 (AR Tab 121).

In a letter dated January 21, 2011 (January 2011 Letter), the Assistant Secretary replied to the UKB Tribe's October 5, 2010, letter, providing the confirmation and clarification sought by the UKB Tribe. *See* Letter from Assistant Secretary to UKB Tribe, Jan. 21, 2011 (AR Tab 135). The Assistant Secretary stated that "[t]here is . . . no reason for the Regional Director to question his authority to take the 76-acre parcel in trust for the Tribe's corporation. He has that authority under Section 3 of the OIWA. *Carcieri* does not apply to this acquisition." *Id.* at 1. The Assistant Secretary also confirmed that, "[a]ssuming no change in land use is planned . . . there is no need to seek additional comments from the local jurisdictions. . . . The Regional Director is to consider the application based on the comments submitted in connection with your first application." *Id.*

[6] Appellant's October 13 letter does not appear in the administrative record but Appellant submitted a copy to the Board and we have included it in the appeal record.

On March 21, Appellant wrote to the Assistant Secretary, objecting to statements made in his January 2011 Letter concerning his authority to take land into trust for the UKB Tribal Corporation under Section 3 of OIWA, and his "assum[ption]" that the UKB Tribe submitted an amended application rather than a new application to which Appellant is entitled to comment. Letter from counsel for Appellant to Assistant Secretary, Mar. 21, 2011, at 1-2 (AR Tab 143). Also on March 21, Appellant wrote to the Regional Director and requested clarification "whether you have been given authority to make a final decision on the pending fee-to-trust application, or whether that decision instead rests with the Assistant Secretary." Letter from Appellant to Regional Director, Mar. 21, 2011 (AR Tab 144). The Regional Director responded that "the authority to make the decision whether to approve the UKB application resides with me. . . . [T]he UKB application is being processed in compliance with the policies and regulations which generally govern trust acquisitions, as well as decisions and guidance of the Assistant Secretary - Indian Affairs concerning this particular acquisition." Letter from Regional Director to Appellant, Mar. 22, 2011 (AR Tab 145).

II. Regional Director's May 24, 2011, Decision

On May 24, 2011, the Regional Director issued the Decision that gave rise to Appellant's appeal to the Board. The Regional Director prefaced his Decision by stating that it was "made in the exercise of discretionary authority . . . delegated to this office" and that the "request was evaluated in accordance with the regulations contained in [25 C.F.R. Part 151] and in accordance with the Assistant Secretary's June 24, 2009, July 30, 2009, and September 10, 2010 Decisions, as well as his January 21, 2011 Letter." Decision at 2.

The Regional Director addressed several of the regulatory criteria for acquiring land in trust in 25 C.F.R. Part 151. After noting that the Assistant Secretary had determined in his June 2009 Decision that the UKB Tribe's original application satisfied § 151.9 ("Requests for approval of acquisitions"), the Regional Director found that the amended request by the UKB Tribe on behalf of its tribal corporation also satisfied that requirement. Decision at 4. Concerning § 151.3 ("Land acquisition policy"), which requires that there be statutory authority in order to take land in trust for a tribe, and § 151.10(a) (existence of statutory authority and any limitations contained in such authority), the Regional Director stated that the Assistant Secretary's September 2010 Decision, "as clarified by" his January 2011 Letter, concluded that Section 3 of OIWA provides implicit statutory authority for the Secretary to take land into trust for the UKB Tribal Corporation, and that both the September 2010 Decision and the January 2011 Letter "are binding on the Region and preclude further consideration of this issue by the Region." Decision at 2; *see id.* at 4. The Regional Director concluded, after summarizing the Assistant Secretary's decisions, that "there is statutory and regulatory authority to take the Community Services Parcel into trust for the UKB Corporation." *Id.* at 2.

Addressing § 151.8 ("Tribal consent for nonmember acquisitions"), the Regional Director found that the Assistant Secretary's June 2009 Decision determined that Appellant's consent to the acquisition was not required, and that the Department only needed to consult with Appellant pursuant to the 1999 Appropriations Act. Decision at 3. The Regional Director further found that the Assistant Secretary's June 2009 Decision and January 2011 Letter conclusively determined that the requirement for consultation was met when the Regional Director solicited comments from Appellant in 2005 on the UKB Tribe's initial application. *Id.* Nonetheless, the Regional Director "review[ed]" Appellant's October 2010 and March 2011 letters to the Assistant Secretary and the Regional Director, concluded that Appellant sought to comment on "the determination that Section 3 of the OIWA authorizes the Secretary to take land into trust for a tribal corporation chartered under the OIWA," and found that "that issue was decided by the Assistant Secretary in his [September] 2010 Decision, and the Region is precluded from revisiting it here." *Id.* at 4.

As to § 151.10(b) (the need of the tribe for additional land), the Regional Director found that the Assistant Secretary's June 2009 Decision, which concluded that the UKB Tribe has no land in trust and that the UKB Tribe has a need for the Parcel to be taken into trust, "is binding on the Region." Decision at 5.

The Regional Director once again expressed concern, pursuant to §§ 151.10(f) and 151.10(g), that jurisdictional conflicts would arise between Appellant and the UKB Tribe, and that the Regional Office would not have the necessary funds to discharge the duties that would arise as a result of the acquisition. Decision at 7-8. However, he concluded that, pursuant to the Assistant Secretary's "binding" June 2009 Decision, these concerns provided insufficient basis to deny the application. *Id.* at 8.

In addressing NEPA compliance, the Regional Director confirmed that no change in land use is planned and therefore a categorical exclusion checklist had been completed in accordance with the Assistant Secretary's June 2009 Decision. *Id.* at 9.

The Regional Director concluded by reiterating that "[i]n accordance with" the Assistant Secretary's decisions and letter, "the Region's review and evaluation . . . reveal that regulatory and statutory authority for the acquisition of the property in trust for a tribal corporation exists in [§ 151.3 and Section 3 of OIWA]." *Id.*

Appellant filed a timely notice of appeal and an opening brief. The UKB Tribe filed a motion to dismiss and request for expedited consideration, which the Board took under

advisement. The UKB Tribe and the Regional Director each filed an answer brief, and Appellant filed a reply.[7]

Prior to Appellant's reply, the UKB Tribe notified the Board that on July 30, 2012, the Assistant Secretary[8] had issued a decision to accept another property—known as the "Keetoowah Casino Property"—in trust for the UKB Tribal Corporation pursuant to Section 3 of OIWA (2012 Casino Decision). The UKB Tribe asserted that the 2012 Casino Decision "includes analysis of each of the relevant Part 151 factors. Moreover, the Decision contains the Assistant Secretary's determination that the historic Cherokee reservation . . . is the former reservation of both the CNO and the Keetoowah Cherokee." Letter from counsel for the UKB Tribe to Board, Aug. 20, 2012.

As relevant here, in the 2012 Casino Decision, the Assistant Secretary applied the Part 151 regulations to the UKB Tribe's application to accept the Keetoowah Casino Property in trust for the UKB Tribal Corporation. The Assistant Secretary approved the acquisition.

Appellant responded to the UKB Tribe's notice by informing the Board that it has challenged the 2012 Casino Decision in Federal district court on the basis, *inter alia*, that it is unsupported by statutory or regulatory authority and that it also violates Appellant's treaty rights under the 1866 Treaty. Letter from counsel for Appellant to Board, Sept. 10, 2012 (enclosing copy of complaint in *Cherokee Nation v. S.M.R. Jewell*, No. 12-CV-493-GKF-TLW (N.D. Okla.)). Appellant subsequently notified the Board that on August 12, 2013, the Court granted Appellant's motion for a preliminary injunction against taking the Keetoowah Casino Property into trust. According to the hearing transcript supplied by Appellant, the Court made a determination, for purposes of granting the preliminary injunction, that Appellant is likely to succeed on the merits in asserting that the law and implementing regulations do not permit the Assistant Secretary to take land into trust for the UKB Tribal Corporation. Tr. at 12-13 (Appellant's Notice of Additional Authority, Aug. 21, 2013, Attach.). Both the Cherokee Nation's complaint and the transcript indicate that among the issues in the litigation is whether a trust acquisition for the UKB Tribal Corporation is authorized under the trust acquisition regulations, and specifically whether the UKB Tribal Corporation is a "tribe" within the meaning of 25 C.F.R. § 151.2(b).[9]

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[7] The Board granted a motion by the Regional Director for a protective order for the privileged information or documents identified in part B of the table of contents for the record. The documents have not been considered by the Board in reaching this decision.

[8] The Assistant Secretary at that time was Acting Assistant Secretary Michael Black.

[9] The parties have not supplied the Board with a copy of their briefs filed in that case.

Jurisdiction and Abstention

As a general rule, the Board has jurisdiction to review a decision of a BIA regional director. *California Valley Miwok Tribe v. Pacific Regional Director*, 51 IBIA 103, 118 (2010); 25 C.F.R. § 2.4(e); 43 C.F.R. § 4.330(a). But, with exceptions not relevant here, the Board does not have jurisdiction to review a decision of the Assistant Secretary. *California Valley Miwok Tribe*, 51 IBIA at 118, and cases cited therein; *Yakama Nation v. Northwest Regional Director*, 52 IBIA 94, 96, 104 (2010); *Edwards v. Portland Area Director*, 34 IBIA 215, 219 (2000); 25 C.F.R. § 2.6(c) (decisions of the Assistant Secretary are final for the Department); 43 C.F.R. § 4.331(b) ("Any interested party affected by a final administrative action or decision of an official of [BIA] . . . may appeal to the Board of Indian Appeals, except . . . [w]here the decision has been approved in writing by the Assistant Secretary - Indian Affairs prior to promulgation."). Where a regional director's decision is connected to a decision of the Assistant Secretary, the Board's jurisdiction depends on a careful examination of the relationship between the Assistant Secretary's action and the regional director's decision. To the extent that a regional director's decision "goes beyond what was decided or confirmed by the Assistant Secretary," our review is not necessarily precluded by the Assistant Secretary's action. *California Valley Miwok Tribe*, 51 IBIA at 105. The Board may consider a challenge to a regional director's implementation of a decision by the Assistant Secretary if in doing so the Board's review does not implicate the Assistant Secretary's decision. *Yakama Nation*, 52 IBIA at 96-97, 104, 106.

Where the Board has jurisdiction to review a BIA decision, it may nevertheless decline to do so on the ground of abstention. For Federal courts, there are several bases for abstention, one of which is to avoid duplicative litigation where a parallel lawsuit is pending in another court. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-20 (1976). For the Board, abstention has been based on the Board's recognition of the differing roles and responsibilities within the Department of the Interior and within the Executive Branch of the Federal Government. *Quantum Entertainment, Limited v. Acting Southwest Regional Director*, 44 IBIA 178, 200 (2007), *remanded*, *Quantum Entertainment Ltd. v Department of the Interior*, 597 F. Supp. 2d 146 (D.D.C. 2009). In *Quantum*, the Board abstained from reviewing an issue where the Department was taking a position in Federal district court that arguably constrained the ability of the Board, as delegee of the Secretary of the Interior, to independently review the same issue. For the Board to have proceeded would have allowed the administrative appeal to serve as a collateral attack on the Assistant Secretary's final agency decision in the parallel Federal court suit. *Id.* Rather than proceed, the Board chose to abstain, to avoid the possibility of

arriving at a merits determination that was contrary to the Secretary's—and the Department of Justice's—legal position in the parallel suit. *Id.*[10]

Standard of Review

A decision by a BIA regional director on a trust acquisition request is a discretionary decision, for which the Board does not substitute its judgment in place of BIA's judgment. *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 65 (2012), and cases cited therein. The appellant bears the burden of proving that BIA did not properly exercise its discretion. *Id.* at 66. In contrast to the Board's review of BIA's discretionary decisions, the Board has full authority to review legal questions and the sufficiency of the evidence. *Id.* However, the appellant has the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Id.*

Discussion

On appeal, the Regional Director asserts that his own Decision "is in reality a decision of the Assistant Secretary that is beyond the jurisdiction of this Board. The Assistant Secretary dictated every substantive decision that was a basis for the final decision of the . . . Regional Director." Regional Director's Answer Br. at 11-12. The Regional Director contends that he was only permitted to carry out the "very limited ministerial functions" of (a) completing the categorical exclusion checklist, (b) updating the environmental review, and (c) confirming that there had been no change in the land use plan, and argues that Appellant has not challenged any of those actions in this appeal. *Id.* at 15. The UKB Tribe similarly contends that the Board lacks jurisdiction to consider any of Appellant's arguments raised on appeal. Alternatively, the Regional Director and the UKB Tribe argue that Appellant has not met its burden to establish that the Regional Director's decision failed to address relevant criteria in 25 C.F.R. Part 151, was an abuse of discretion, or was legally erroneous.

Appellant concedes that the Assistant Secretary made several final decisions for the Department, including, *inter alia*: Section 3 of OIWA provides implicit authority to acquire land in trust; the Secretary may acquire land in trust under Section 3 of OIWA for tribal corporations chartered under Section 3 as a general proposition; the UKB Tribe has a need for the Parcel in trust pursuant to § 151.10(b); Appellant's consent to the proposed

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[10] The Court remanded for the Board to further explain the rationale for its decision, without ruling that it was error to abstain from the issue *per se*. *See Quantum*, 597 F. Supp. 2d at 153-55. Of course, if a court, or the Secretary or Assistant Secretary, were to direct the Board to decide a matter, we would do so exercising our independent judgment.

acquisition is not required under § 151.8; the acquisition would not result in jurisdictional problems or conflicts of land use meriting denial of the application pursuant to § 151.10(f); and Appellant would not have exclusive jurisdiction over Indian country on the former Cherokee reservation. *See* Opening Br. at 13 n.7, 26, 33-34; Reply Br. at 1-2, 11 n.11.

Appellant contends, however, that the Assistant Secretary did not decide the following issues and that we have jurisdiction to review them: (1) Whether Section 3 and BIA's regulations allow the submission of a land-into-trust application *by an Indian tribe* for a tribal corporation; (2) whether Appellant was properly consulted on the application pursuant to the 1999 Appropriations Act; (3) whether *Carcieri* bars reliance on Section 3 as authority to acquire land in trust for the UKB Tribal Corporation; (4) whether the UKB Tribal *Corporation* (not the UKB Tribe) is a "tribe" within the meaning of § 151.2(b) and therefore an eligible beneficiary of trust land; (5) whether the UKB Tribal *Corporation* has a need for the land in trust under § 151.10(b); and (6) whether the acquisition would violate the 1866 Treaty. For reasons we discuss *infra*, we dismiss this appeal because these issues were decided by the Assistant Secretary or are implicated by and encompassed within his decisions, so as to preclude Board review, *or*—to the extent the Board may have jurisdiction to review some issues—because the Board abstains from addressing them in light of the Federal court litigation in which the Secretary is defending the Department against the very same arguments. Dismissal of this appeal on abstention grounds is supported by the fact that in challenging the Assistant Secretary's 2012 Casino Decision in Federal court, Appellant has raised precisely the same statutory, regulatory, and treaty arguments it has raised in this appeal. And the cases cannot be distinguished on factual grounds with regard to the issues raised in this appeal. Thus, to proceed with this appeal would effectively place the Board in the position of reviewing final agency determinations made by the Assistant Secretary—either in this case or in the Keetoowah Casino Property case. Even assuming that we have jurisdiction to review discrete issues, we conclude that the overlap is sufficiently complete to warrant abstention.

I. Procedural Issues

A. Do Section 3 of OIWA and BIA's Regulations Permit the UKB Tribe to Submit an Application to Place Land into Trust for the UKB Tribal Corporation?

Appellant argues that Section 3 of OIWA does not authorize an application *by the UKB Tribe* to acquire land in trust for the UKB Tribal Corporation. *See* Opening Br. at 17-22. We do not reach the merits of Appellant's argument, because the Assistant Secretary decided that the UKB Tribe could apply to place land, owned by the Tribe in fee, in trust for its tribal corporation pursuant to Section 3. In his September 2010 Decision, the Assistant Secretary stated in material part: "The UKB may *amend its* application to invoke

my authority under Section 3 of the OIWA and to have the land held in trust for the UKB *Corporation*." September 2010 Decision at 3 (unnumbered) (emphases added); *see id.* at 1 ("[T]he Regional Director should allow the UKB to amend its application . . . [to] invoke my authority under Section 3 of [OIWA] and seek to have the land held in trust for the UKB Corporation."). Thus, rather than instruct the UKB Tribal Corporation to submit a new application on its own behalf, the Assistant Secretary expressly allowed the UKB Tribe to amend its original application.

For the same reason, the Assistant Secretary's decisions preclude our review of Appellant's argument that the UKB Tribe's application is defective because, as Appellant interprets 25 C.F.R. § 151.9, "the applicant for a trust acquisition and the proposed trust beneficiary must be one and the same." Opening Br. at 36 n.23. The Assistant Secretary's decision in this case necessarily concluded otherwise, or at least precluded the Regional Director from independently considering this issue. For the Board to review the issue would directly implicate the Assistant Secretary's decision to allow the UKB Tribe to amend its application to ask that the Parcel be acquired in trust for the UKB Tribal Corporation, and his instructions for the Regional Director to consider such an application.

B. Did BIA Adequately Consult with Appellant?

Appellant recognizes that the Board lacks jurisdiction to review the Assistant Secretary's decision that Appellant's consent to the acquisition is not required, and instead argues that the Assistant Secretary did not make a binding decision that Appellant's right of consultation pursuant to the 1999 Appropriations Act was satisfied. *See* Opening Br. at 37-40. Appellant contends that it was denied that right. We conclude that the Board lacks jurisdiction to decide whether Appellant's right of consultation was satisfied.

The Assistant Secretary's June 2009 Decision expressly concluded that Appellant's consent was not required, and that the Department had already satisfied the consultation requirement. June 2009 Decision at 4-5. The Assistant Secretary's January 2011 Letter "confirm[ed]" that the UKB Tribe's understanding of his September 2010 Decision was correct. January 2011 Letter at 1. The UKB Tribe's understanding is set forth in its letter of October 5, 2010, in which the UKB Tribe stated to the Assistant Secretary: "As you definitively found in your June 2009 Decision, no further consultation with the Cherokee Nation of Oklahoma is needed, as 'the Department satisfied this requirement when it solicited comments from the CNO.'" AR Tab 116 at 2 (quoting June 2009 Decision at 4-

5). Thus, the consultation issue is necessarily encompassed within the decisions of the Assistant Secretary.[11]

II. Legal Authority to Accept Land into Trust for the UKB Tribal Corporation

A. Does *Carcieri* Preclude the Trust Acquisition?

Appellant, although acknowledging that the Board cannot review the Assistant Secretary's decisions, and that the Assistant Secretary concluded that "*Carcieri* does not apply to this acquisition," January 2011 Letter at 1, nevertheless seeks to have us review whether *Carcieri* precludes the trust acquisition. But the Assistant Secretary undoubtedly found that *Carcieri* was not a barrier to this trust acquisition.

In his September 2010 Decision, the Assistant Secretary concluded: "I can . . . acquire land in trust for the [UKB] corporation under Section 3 of the OIWA." September 2010 Decision at 3 (unnumbered). Following the September 2010 Decision, both the UKB Tribe and Appellant corresponded with the Assistant Secretary concerning the scope of his authority under Section 3. In its October 5 letter, the UKB Tribe requested confirmation—due to "some apparent confusion regarding whether the Regional Director still has to address any issues that it would have to address were this acquisition to proceed under Section 5 of the [IRA]"—that the Regional Director would not analyze the authority issue further. AR Tab 116 at 2. In its October 21 letter, Appellant directly challenged the Assistant Secretary's conclusion that he had authority to acquire land in trust for the UKB Tribal Corporation post-*Carcieri*. AR Tab 120 at 2. In his January 2011 Letter, the Assistant Secretary stated that "[t]here is . . . no reason for the Regional Director to question his authority to take the 76-acre parcel in trust for the Tribe's corporation. He has that authority under Section 3 of the OIWA. *Carcieri* does not apply to this acquisition." January 2011 Letter at 1.[12]

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[11] Nor do we have authority to consider Appellant's contention that the January 2011 Letter was "*ultra vires*." *See* Opening Br. at 39 n.28.

[12] We reject Appellant's argument that the January 2011 Letter is not a formal "decision," and thus is not binding on the Regional Director and (apparently) is reviewable by the Board. *See* Opening Br. at 26 n.18, 39-40; Reply Br. at 6 n.6. The Assistant Secretary's January 2011 Letter constitutes action taken by the Assistant Secretary and it undoubtedly constitutes a directive to the Regional Director. Moreover, it specifically supplements the Assistant Secretary's prior decision. At least under the facts of this case the distinction argued by Appellant puts form over substance.

Appellant argues that the Assistant Secretary's conclusion that *Carcieri* does not apply is a "*non sequitur* that is both literally true and irrelevant" because *Carcieri* involved an application submitted under Section 5 of the IRA. Opening Br. at 26 n.18. Appellant misses the point: The Assistant Secretary specifically addressed the potential relevance of *Carcieri* to this case. Our review of the *Carcieri* arguments raised by Appellant would necessarily implicate the Assistant Secretary's determination that "*Carcieri* does not apply to this acquisition." January 2011 Letter at 1. Therefore, we lack jurisdiction to review any *Carcieri* issues in this case.[13]

B. Is the UKB Tribal Corporation a "Tribe" for Purposes of 25 C.F.R. Part 151?

Appellant argues that the Assistant Secretary did not consider whether the UKB Tribal Corporation is an entity that is eligible to hold trust land pursuant to 25 C.F.R. § 151.2(b), and thus the Board may review this issue in reviewing the Regional Director's decision (which also did not discuss the issue). *See* Opening Br. at 29-33. But because the Assistant Secretary specifically concluded that one option available to the UKB Tribe was to have the land accepted into trust for the UKB Tribal Corporation, our review of the issue would directly implicate the Assistant Secretary's decision; the issue is necessarily encompassed within it.

In addition, it is now clear that the issue has squarely been raised in the litigation challenging the Assistant Secretary's 2012 Casino Decision. *See supra* at 160. For the Board to entertain the issue would effectively constitute Board review of another decision by the Assistant Secretary on the same issue, and the Board will not consider what amounts to a collateral attack on the Assistant Secretary's decision. Thus, even assuming that the Board has jurisdiction to review the issue, the Board would abstain from doing so to avoid interfering with the Assistant Secretary's authority and discretion regarding the position taken by the Department in litigation.

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[13] The Board's decision in *Yakama Nation* is not to the contrary. In *Yakama Nation*, the Assistant Secretary made a determination regarding his authority to bill Indian owners of idle trust lands for Operation and Maintenance fees. The Board held that it lacked jurisdiction to review the Assistant Secretary's determination, but that it had jurisdiction to review the appellant's claim to be entitled to an exemption from such fees—a wholly distinct issue that did not implicate the Assistant Secretary's determination. 52 IBIA at 104-06.

III. Discretionary Factors: Need of the Tribe for the Land versus Need of the UKB Tribal Corporation

Appellant argues that the Assistant Secretary only determined that the UKB *Tribe* has a need to place the Parcel in trust, and that the Regional Director was required to separately address whether the UKB Tribal *Corporation* needs the Parcel in trust. *See* Opening Br. at 33-36. We are not convinced that the Assistant Secretary's decisions were intended to leave room for the Regional Director to address this issue. The Assistant Secretary concluded that the Tribe needed the land, under § 151.10(b). June 2009 Decision at 5. And the Assistant Secretary also stated that "[t]he UKB Corporation is merely the tribe organized as a corporation. Its property, therefore, is tribal property." September 2010 Decision at 3 n.1 (unnumbered). Moreover, the Assistant Secretary determined that the UKB *Tribe* could amend *its* application in order to have the land taken into trust for the UKB Tribal *Corporation*. *See supra* at 163-64. Thus, we are not convinced that in making the "need" determination under § 151.10(b), the Assistant Secretary intended to have the Regional Director re-examine § 151.10(b) and distinguish between the Tribe and the Tribe's corporate instrumentality.[14]

IV. Treaty Rights: Whether the Proposed Acquisition Would Violate the 1866 Treaty

Appellant's final argument is that the Assistant Secretary and the Regional Director did not consider that acquisition of the Parcel in trust would violate the 1866 Treaty in two ways: First, Appellant argues that the Decision authorizes the creation of trust land for the UKB Tribal Corporation within the borders of the former Cherokee reservation without Appellant's consent. Appellant cites Article XV of the Treaty, which provides:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied

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[14] Had we not concluded that the Assistant Secretary's decisions precluded the Regional Director from independently considering whether the UKB Tribal Corporation needs the land, we would abstain from the issue. The Assistant Secretary's 2012 Casino Decision makes it even more apparent that the Assistant Secretary has decided that the UKB Tribe and the UKB Tribal Corporation should be treated interchangeably for purposes of trust acquisitions under Section 3 of OIWA, and the Department is now defending that decision in parallel Federal court litigation. *See* 2012 Casino Decision at 6, 10 (stating that Section 3 authorizes the acquisition for the UKB Tribal Corporation and also stating that the property will be acquired in trust for the UKB Tribe); 77 Fed. Reg. 47089, 47089 (Aug. 7, 2012) (the notice of decision states both that the land will be acquired in trust for the UKB Tribe and for the UKB Tribal Corporation).

> lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States . . . .

14 Stat. 799, 803, art. XV. Appellant contends that, regardless of whether the 1999 Appropriations Act canceled the consent requirement in 25 C.F.R. § 151.8, it did not cancel the consent requirement in the 1866 Treaty. Opening Br. at 41-42.

Second, Appellant argues that, because the Assistant Secretary concluded that the UKB Tribe would exercise jurisdiction over the Parcel, the acquisition would violate Article XXVI of the 1866 Treaty. In the Treaty, "[t]he United States guarantee to the people of the Cherokee nation the quiet and peaceful possession of their country and protection . . . against hostilities of other tribes." 14 Stat. 799, 806, art. XXVI. Appellant contends that the UKB Tribe is "a hostile tribe and a likely disturber of the Cherokee Nation's peaceful possession of its country." Opening Br. at 43.

Although over the course of this matter Appellant raised treaty concerns, it is not apparent that these particular arguments were presented to or considered by the Assistant Secretary, or that they were necessarily subsumed within his decisions and directives to the Regional Director in this case. We therefore do not dismiss this part of the appeal for lack of jurisdiction. However, it is clear that Appellant is challenging the Assistant Secretary's decision to acquire the Keetoowah Casino Property in trust on the same treaty grounds that Appellant presents in this appeal. Because the treaty issue is part of the parallel litigation before the Federal district court in the appeal of the Assistant Secretary's 2012 Casino Decision, we abstain from considering the issue.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal of the Regional Director's May 24, 2011, decision to acquire the Community Services Parcel in trust.

I concur:

// original signed	//original signed
Thomas A. Blaser	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge