IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

(1) ALABAMA-QUASSARTE TRIBAL TOWN, Plaintiff, v. (1) THE UNITED STATES OF AMERICA, (2) SALLY JEWELL, Secretary of the United States Department of the Interior, (3) KEVIN K. WASHBURN, Associate Deputy of the Department of the Interior, (4) JACK LEW, Secretary of the Treasury, (5) MUSCOGEE (CREEK) NATION, Defendants.	)	No. 06-cv-558-RAW Judge Ronald A. White

THE ALABAMA-QUASSARTE TRIBAL TOWN'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

The Alabama-Quassarte Tribal Town ("AQTT") respectfully requests this Court grant it summary judgment on the remaining claim in this case for ownership of AC# xxx7067 (the "Surface Lease Income Trust"). The account has always been treated as a AQTT account. The United States of America, *et al.* ("Defendants") cannot now simply ignore the history of the account and a resolution by the Muscogee (Creek) Nation directing its transfer. The decision of the Interior Board of Indian Appeals ("IBIA") is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The IBIA cannot hand AQTT property over to the Muscogee (Creek) Nation unilaterally. In support of this motion, the AQTT would show as follows:

I. STATEMENT OF THE CASE

This case was filed by AQTT's former counsel on December 29, 2006 seeking a declaratory judgment determining that the United States owes the AQTT a fiduciary obligation to provide it with a full and complete accounting of its assets and an injunction ordering the Defendants to perform the required accounting. [Dkt. #2.] In the parties' initial joint status report, the AQTT further refined claims as follows:

> Plaintiff seeks a declaratory judgment that: (1) Defendants are in violation of the Oklahoma Indian Welfare Act, 25 U.S.C. § 501, *et seq*. and have failed in their trust obligation to the Plaintiff by failing to assign lands to Plaintiff that were acquired for the Plaintiff by the United States through the OIWA, and; (2) Defendants have failed in their fiduciary obligation to Plaintiff by failing to provide the Plaintiff with an accounting of the funds held in trust for the Plaintiff by the Defendants so that Plaintiff may ascertain whether any mismanagement of said trust funds have occurred. Plaintiff also seek injunctive relief compelling Defendants to carry out the congressional mandate of the OIWA by assigning to the Plaintiff trust lands under the OIWA and to provide the Plaintiff with a full and complete accounting of all the Plaintiff's trust assets.

[Dkt. 23.]

The Defendants answered on March 30, 2007 and shortly thereafter, on April 23, 2007, this Court granted a stay in the case for the parties to complete certain tasks with the aim of settlement or alternative dispute resolution. [Dkt. #26 and Dkt. #28.] Pursuant to the parties' request, the case was administratively closed on June 4, 2007. [Dkt. #30.] The case was reopened on February 4, 2008. [Dkt. 38.] Thereafter, on March 3, 2008, the Defendants sought a partial judgment on the pleadings. [Dkt. #41.]

On November 17, 2008, this Court entered partial judgment and dismissed all of the AQTT's claims with respect to the Wetumka Project lands. [Dkt. #50.] The Court held that "[n]o trust was ever created for [AQTT's] benefit that included the Wetumka Project[1] lands or any other lands; thus, [the AQTT] has no such claim." [*Id.* at p. 14.] The Court did not dismiss the accounting claims holding that it had insufficient information to rule on those claims. [*Id.*] After attempts at a judicial settlement conference, the Court then entered a scheduling order and the case proceeded. [Dkt. #70.]

On January 11, 2010, the parties filed competing motions for summary judgment and the Defendants files a motion to dismiss. [Dkt. #89, #90 and # 92.] On September 21, 2010, this Court issued its Order and Opinion. [Dkt. #135.] In the opinion, this Court denied the AQTT's motion for summary judgment and denied the Defendants motion to dismiss. [*Id.* at 22-23.] The Court generally held that the Defendants claim that it did not hold any assets in trust for the AQTT was arbitrary and capricious because there was insufficient evidence with regard to the ownership of a Surface Lease Income Trust, which, excluding the land claims that had been dismissed by the Court, was the only asset held by the United States. [*Id.*] Thusly, the matter was remanded to the Defendants for "additional investigation and explanation." [*Id.* at 23.] Specifically, this Court ordered as follows:

> Defendants are to assemble a full administrative record to include all of the evidence they possess with regard to the

[1] The Wetumka Project lands consist of 878.25 acres of land in Hughes County, Oklahoma, which were purchased in 1941. [AR-003638.] As an additional note, the deed was produced in the record seven separate times. [AR-003638, AR-003640, AR-003641, AR-003642, AR-003643, AR-003644, AR-003645.] Moreover, those deeds were produced in random sections of the record as opposed to date order as the documents were produced to this Court. *cf.* AR-003638 with a label of T901-010-BIA-ALX-000084-0025-0001 to T901-010-BIA-ALX-000084-0025-0002 and AR-003640 with a label of T901-010-BIA-ALX-000173-0065-0001 to T901-010-BIA-ALX-00173-0065-0002.

> Surface Lease Income Trust and reconsider their decision on the matter of ownership of the Surface Lease Income Trust….

[*Id.*]

After the Order and Opinion, the AQTT appealed the decision to the United States Court of Appeals for the 10th Circuit. [Dkt. #137.] Since the case was remanded to the Defendants, the parties and the appellate court recognized that it had yet to have jurisdiction. Thus, the appeal was dismissed. [Dkt. #168.]

On March 30, 2012, the AQTT's former counsel was granted leave to withdraw from the case. [Dkt. #149.] In and around June 2012, the AQTT's current counsel was retained and entered an appearance.

In the remand to the Defendants, on March 22, 2011, the case was assigned to the Interior Board of Indian Appeals. [AR-000079.] The initial record was compiled and submitted on April 22, 2011. [AR-000001.] Thereafter, the parties worked to get a complete record, however, the records appear to be incomplete. [AR-000001.] The record contained several thousand documents and comprised of over 7,000 pages, many of which were not related to the claims in the case. It appears that the Defendants simply produced any document that involved the land and the AQTT. On July 30, 2012, the IBIA certified the final administrative record and set a briefing schedule. [AR-001775.] The parties briefed the issues and the IBIA rendered a decision on October 23, 2014. [AR-002312.] Of note, the Defendants never provided any explanation or argument as to why the Surface Lease Income Trust did not belong to the AQTT. Instead, the IBIA seemed to require the

AQTT to prove it owned the trust, which flipped the Trial Court's order on its head. Nonetheless, in some sense, the Defendants have now made a decision.

In its decision, the IBIA generally outlined the history of the Surface Lease Income Trust. [*Id.*] The AQTT does dispute some of those findings as contrary to the record on appeal. However, those issues will be dealt with later in the brief. After basically identifying that historically the Surface Lease Income Trust has always been used for the benefit of the AQTT, the IBIA, without identifying any law, awarded the Surface Lease Income Trust to the Muscogee (Creek) Nation based solely on the fact that this Court has held that the Muscogee (Creek) Nation are the beneficial owners of the Wetumka Project Lands and that it could not find a document that transferred the interest to the AQTT.

After the decision, the case returned to this Court and based on the discovered resolution, the AQTT moved to amend the complaint to add the Muscogee (Creek) Nation and add two claims. [Dkt. #174.] One claim was to the land based on the Muscogee (Creek) Nation's resolution and the other was for an "appeal" of the IBIA decision.[2] [*Id.*] The Muscogee (Creek) Nation moved to dismiss its addition to the suit on sovereign immunity grounds, which this Court granted on January 7, 2016. [Dkts. #181 and #194.]

Thereafter, this Court ordered the parties to submit a joint status report. [Dkt. #194.] The parties informed this Court of the status of the case and outlined a proposed briefing schedule. [Dkt. #195.] This Court, thereafter, adopted the schedule. [Dkt. #198.]

[2] It is not clear as to whether an appeal is necessary from the IBIA decision since the case originated in this Court and was simply remanded to Defendants for preparation of the underlying records and a reconsideration of its decision. Nonetheless, out of an abundance of caution, the claim was added to this suit.

II. STANDARD OF REVIEW

As previously held by this Court, the review of the Defendants' determination in this case falls under 5 U.S.C. § 706(2)(A). [Dkt. #135, p. 21.] Specifically, this Court held that it is empowered to review the Defendants' actions, findings and conclusions to determine if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* "If an agency takes action not based on neutral and rational principles, the APA grants federal courts power to set aside the agency's action as 'arbitrary' or 'capricious.' For these reasons, agencies under the APA are subject to a 'searching and careful' review by the courts." *Id.* (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 537, 129 S.Ct. 1800, 1823-24 (2009) (Justice Kennedy's concurring opinion)(citations omitted)). Based on that, this Court held that "an agency action is arbitrary and capricious 'if the agency 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* (citing *United Keetoowah Band of Cherokee Indians of Oklahoma v. United States Dept. of Housing and Urban Dev.*, 567 F.3d 1235, 1239 (10th Cir. 2009).

In light of that, this Court cautioned that it could "not substitute its judgment for that of government agencies." *Id.* (citing *United Keetoowah Band of Cherokee Indians*) "While the arbitrary and capricious standard is narrow, however, the court must 'engage in a substantial inquiry' and conduct a 'thorough, probing, in-depth review.'" *Id*. (citing *United Keetoowah Band of Cherokee Indians*).

Thus, in remanding the case to the Defendants, this Court held that

> The court delineated above the scant evidence upon which Defendants came to their final conclusion that they do not hold any assets in trust for Plaintiff. Defendants simply argue that because the Wetumka Project lands were held in trust for the Creek Nation and because at least sometimes they required the Creek Nation's approval before disbursing assets from the Surface Lease Income Trust to Plaintiff, then that trust belongs to the Creek Nation, not Plaintiff. Defendants seem to entirely ignore substantial evidence that tends to demonstrate that the Surface Lease Income Trust was created for the benefit of Plaintiff. This court will not substitute its judgment for that of Defendants. The court does believe, however, that Defendants failed to consider important aspects in making its decision on ownership of the Surface Lease Income Trust. The court finds Defendants conclusion on the ownership of the Surface Lease Income Trust to be arbitrary and capricious. The Defendants' failure to produce or provide any more than a *de minimus* administrative record requires this result. Accordingly, the court remands this matter to Defendants for further investigation and explanation.

Id. Despite this Court's admonishment that the Defendants could not "ignore the substantial evidence that demonstrate the Surface Lease Income Trust was created for the benefit of the AQTT," the IBIA held that the Muscogee (Creek) Nation owned the Surface Lease Income Trust solely on the fact that the Muscogee (Creek) Nation owns the property. *Id.* Thus, this Court must reverse the IBIA as its decision is contrary to the findings of the IBIA.

II. SUMMARY OF THE FACTS

Under the law, as explained above, this Court is to give great deference to the findings of the Defendants. Thus, given the amount of information, there is no need to

recite the entire fact summary here that is exhaustively laid out in the IBIA Opinion. [AR-002312, pp. AR-002315 (59 IBIA 176) to AR-002336 (59 IBIA 197).]

Nonetheless, the IBIA has appeared to ignore a significant document. In discussing the events in 1980, the IBIA failed to discuss that on October 4, 1980, the Muscogee (Creek) Nation passed a resolution that directed the United States to "[p]lace title to all lands and minerals in the name of the respective chartered tribal towns as was intended under the Oklahoma Indian Welfare Act …" and further "[r]elease tribal funds in a proper manner to the tribal towns as directed and approved by the respective tribal councils." [AR-00714, AR-007018, AR-007095, AR-007096.] It would appear that, if the Muscogee (Creek) Nation held any interest in the monies as of October 4, 1980, any such claim was relinquished at that time.

III. ARGUMENT AND AUTHORITY

A. The Muscogee (Creek) Nation Relinquished Any Claim to the Monies in 1980

As explained above, on October 4, 1980, the Muscogee (Creek) Nation passed a resolution that directed the United States to "[p]lace title to all lands and minerals in the name of the respective chartered tribal towns as was intended under the Oklahoma Indian Welfare Act …" and further "[r]elease tribal funds in a proper manner to the tribal towns as directed and approved by the respective tribal councils." [AR-00714, AR-007018, AR-007095, AR-007096.] It would appear that, if the Muscogee (Creek) Nation held any interest in the monies as of October 4, 1980, any such claim was relinquished at that time.

The United States Supreme Court has recognized Indian tribes as distinct, independent political communities, qualified to exercise many of the powers and prerogatives of self-government. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327, 128 S.Ct. 2709, 2718 (2008). "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030 (2014)(quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)). The individual Tribes retain their sovereign authority until **Congress** provides otherwise. *Id.* (emphasis added.) Each Tribe has regulatory, taxing and other inherent power that "centers on the land held by the tribe and on tribal members within the reservation." *Id.* Thus, no one Tribe can be declared greater than another as each are sovereigns in their own right and, once the Muscogee (Creek) Nation completed the transfer of any interest it may have held to the AQTT, as a separate and distinct sovereign, the Defendants could not simply ignore the transfer. There is simply no law or fact that makes the AQTT a "state" of the Muscogee (Creek) Nation. Moreover, historically, the Muscogee (Creek) Nation was a confederacy and the Tribal Towns had dominance over the larger Nation.

B. The History of the Surface Lease Income Trust Shows That the Account is For the AQTT

Further, as this Court held, the substantial history of the trust shows that it is owned by the AQTT. The United States Supreme Court has recognized that the United States has

> the distinctive obligation of trust incumbent upon [it] in its dealings with these dependent and sometimes exploited

> people. . . . In carrying out its treaty obligations with the Indian tribes, [it] is something more than a mere contracting party . . . . [I]t has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-297. In this manner, the United States has entered into a fiduciary relationship with the AQTT for safe keeping of its assets. Because of this fiduciary obligation, the United States cannot simply take property from the AQTT and redistribute it to another tribe. Consistent with this duty is the basic premise that a fiduciary must provide an accounting that shows he has faithfully carried out his trust responsibilities. *Cobell v. Norton*, 240 F.3d 1081, 1103 (*quoting White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446, 449 (Cl. Ct. 1992)).

Thus, in the case of the Surface Lease Income Trust, as this court recognized, it is a fundamental construct that the intention of a settlor of a trust should control. *See, eg, In re Dimick's Will*, 531 P.2d 1027, 1030 (Okla. 1975). The evidence shows that it was the intent of the United States, at the time the lands were purchased, to assign the Wetumka Project lands to the AQTT. Moreover, it was the intent of the trustee, the Defendants, that the monies and economic benefits realized from the Wetumka Project lands be used for the benefit of the AQTT. That is no more evident by the fact that the AQTT have always been in physical control of the land.

As the long history outlines, the monies were always used for the benefit of the AQTT. They were never used for the benefit of another Indian Tribe, or even for the benefit of the Muscogee (Creek) Nation. Moreover, the evidence demonstrates that the

Defendants, up until this lawsuit, considered the account the property of the AQTT. The Defendants cannot simply ignore that history and the general law regarding trusts to give AQTT property to the Muscogee (Creek) Nation. As this Court previously noted, "Defendants seem to entirely ignore substantial evidence that tends to demonstrate that the Surface Lease Income Trust was created for the benefit of [the AQTT]." In fact, there is not one instance that the Surface Lease Income Trust was used for the benefit of the Muscogee (Creek) Nation. It has always been used for the benefit and at the behest of the AQTT. Therefore, the IBIA's decision is arbitrary, capricious and contrary to law.

IV. CONCLUSION

The Surface Lease Income Trust has always been used for the benefit of the AQTT. Moreover, the Muscogee (Creek) Nation disclaimed any interest it may have to the account in the October 1980 resolution, and requested that BIA complete the transfer intended when the Wetumpka Project Lands were originally purchased. Thus, the Surface Lease Income Trust is the property of the AQTT and the Defendants' decision is arbitrary, capricious and contrary to law.

Respectfully submitted this
22nd day of July, 2016,

/s/Eugene K. Bertman

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CERTIFICATE OF SERVICE

I hereby certify that, on July 22, 2016, I caused the attached document to be electronically filed with the Clerk of Court using the CM/ECF system and electronically served on the following:

Jody H. Schwarz
Attorney for the United States, Sally Jewell, Kevin Washburn, and Jack Lew

/s/Eugene K. Bertman
Eugene K. Bertman