UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

ALABAMA-QUASSARTE TRIBAL TOWN,	)	
	)	
Plaintiff,	)	
	)	No. 06-cv-558-RAW
v.	)	
	)	Judge Ronald A. White
THE UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants.	)	
_____	)	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, CROSS-MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rules of Civil Procedure (Fed. R. Civ. P.) Rule 56 and LCvR 56.1, Defendants United States of America, S.M.R. Jewell, in her official capacity as the Secretary of the Department of the Interior, Lawrence Roberts, in his official capacity as the Acting Assistant Secretary – Indian Affairs, and Jacob Lew, in his official capacity as the Secretary of the Treasury (collectively "Defendants") oppose Plaintiff Alabama-Quassarte Tribal Town's ("AQTT") Motion for Summary Judgment. Also Defendants move for summary judgment on AQTT's last remaining claim in this case, *i.e.*, its challenge to the October 23, 2014, Interior Board of Indian Appeal's ("IBIA") final reconsidered decision on remand from this Court's opinion and order (ECF No. 135) and judgment (ECF No. 136) dated September 21, 2010. In its decision, the IBIA found that AQTT is not the legal beneficiary of an account containing income generated from leasing ("Surface Lease Income Trust") of certain lands ("Wetumka Project Lands").

As explained in greater detail in the attached papers, this Court should deny AQTT's motion and grant Defendant's motion because the IBIA's rendered its decision after careful consideration and review of the administrative record and the briefs submitted by AQTT, the Department of the Interior ("Interior Department" or "Interior"), and the Muscogee (Creek) Nation. As this Court has found, Defendants do not hold certain property in trust for AQTT's benefit but rather have always held it in trust for the Muscogee (Creek) Nation. Therefore, as the IBIA properly determined, Defendants do not hold lease income from this property in trust for AQTT. This Court, therefore, should uphold IBIA's decision and grant summary judgment to Defendants.

Respectfully submitted this 16th day of September, 2016

JOHN C. CRUDEN
Assistant Attorney General

/s/ Jody H. Schwarz
JODY H. SCHWARZ
ANTHONY HOANG
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, DC 20044
Phone: (202) 305-0245
(202) 305-0241
Fax: (202) 305-0506
E-mail: jody.schwarz@usdoj.gov
anthony.hoang@usdoj.gov
Attorneys for Defendant

OF COUNSEL:

SHANI WALKER
United States Department of the Interior
Office of the Solicitor

Division of Indian Affairs
Washington, DC 20044

THOMAS KEARNS
Office of the Chief Counsel
Bureau of the Fiscal Service

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I. INTRODUCTION

At issue in this case are the Wetumka Project Lands and trust funds generated by the leasing of those lands (Surface Lease Income Trust). The United States does not hold the Wetumka Project Lands or funds related to the Wetumka Project Lands in trust for the benefit of AQTT. As the Court has already found, the United States has always held the land in trust for the benefit of the Muscogee (Creek) Nation. Likewise, as the IBIA found on reconsideration, the United States has held, in trust for the benefit of the Muscogee (Creek) Nation, the funds generated by the Wetumka Project Lands Leasing Income. That fact that AQTT has benefited from the funds, while undisputed, is not relevant to or dispositive of the issue about whether AQTT is the legal beneficiary of the Wetumka Project Lands-related trust funds. As the IBIA found upon review of the full administrative record (ECF. No. 199), neither Interior nor the United States ever assigned a legal beneficial interest in the Surface Lease Income Trust funds to AQTT. Rather, beneficial title to the trust funds vested in the Muscogee (Creek) Nation when the Wetumka Project Lands were taken into trust for it. IBIA's decision was reasonable and well-grounded on the record before it. AQTT's reliance on a 1980 Muscogee (Creek) Nation tribal resolution does not impact the decision. Therefore, the Court should deny AQTT's motion and grant Defendants' cross-motion for summary judgment that Defendants do not hold the Surface Lease Income Trust funds in trust for AQTT's benefit.

II. RESPONSE TO AQTT'S STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

1. The IBIA failed to discuss that on October 4, 1980, the Muscogee (Creek) Nation

[1] AQTT did not set forth its material facts in numbered paragraphs. *Contra* LCvR 56.1(b), Therefore, Defendants assigned paragraph numbers to certain provisions of AQTT's Summary of the Facts for purposes of disputing or otherwise responding to those provisions herein.

passed a resolution ("TR 81-2") 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-007095-96].

Response: Admitted in part and disputed in part. Defendants admit that the Creek National Council passed TR 81-2 but further aver that subsequent Muscogee (Creek) Nation tribal resolutions effectively repealed TR 81-2 and all other resolutions expressing an opinion that the beneficial interest should belong to AQTT. AR-001273-74 (Oct. 27, 1993, Request for Response on Tribal Town Issues from Agency Superintendent to Area Director discussing TR 81-2 and subsequent Tribal Council resolution voiding it); AR-009794-95 (Muscogee (Creek) Nation Resolution TR 96-13, Oct. 14, 1996, "A Resolution of the Muscogee (Creek) Nation Opposing the Assignment of Certain Lands Known as the Wetumka or Dustin Projects Held in Trust by the United States for the Muscogee (Creek) Nation and Authorizing Principal Chief to Submit Comments on Same"). Ultimately, it is the United States or the Interior Department that determines whether a tribe, such as AQTT, has a beneficial interest in a trust property (such as trust funds or trust lands), not another tribe. Defendants aver that trust land cannot be transferred or alienated absent consent from Congress. 25 U.S.C. § 177.

2. 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.

Response: Disputed. Subsequent Tribal Resolutions repealed TR 81-2 and the Muscogee (Creek) Nation opposed AQTT taking the land into trust. *Id.* Further, the Interior Department

never took action to assign the Surface Lease Income Trust to AQTT but instead treated the Muscogee (Creek) Nation consistently as the beneficial owner. *In re Alabama-Quassarte Tribal Town v. United States*, 59 IBIA 173, 189-95 (2014).

3. 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.

Response: Defendants admit that the Interior Department, when it acquired the Wetumka Project Lands in trust, explored assignment of the lands to AQTT. *Id.* at 178-79. Neither Interior nor the United States ever assigned the Wetumka Project Lands in trust to AQTT, however. *Id.*

4. It was the intent of the trustees, 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.

Response: Disputed. Defendants aver that the Wetumka Project lands were purchased in trust for the Muscogee (Creek) Nation. *Id.* at 178. The Muscogee (Creek) Nation has handled the management of the lands. *Id.* at 181-83.

5. The monies in the Surface Lease Income Trust 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.

Response: Defendants admit that the Surface Lease Income Trust funds were disbursed to AQTT but further aver that such disbursements were at the request or direction of the Muscogee (Creek) Nation because the monies in the trust account derived from revenues on the Wetumka Project Lands, the legal title to which lay with the Muscogee (Creek) Nation, and therefore the Nation controlled the release and use of the funds. *Id.* at 189-93.

6. Defendants considered the Surface Lease Income Trust Account the property of AQTT.

Response: Disputed. Defendants aver that the Surface Lease Income Trust has always been and is the beneficial property of the Muscogee (Creek) Nation. *Id.* at 200-201.

III. DEFENDANTS' STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

A. Alabama-Quassarte Tribal Tow*n*

1. Historically, Creek towns were independent, self-governing tribes affiliated through a confederacy. 59 IBIA at 176 (citing *Oklahoma v. Hobia*, No. 12-CV-054-GKF-TLW, 2012 U.S. Dist. LEXIS 100793, * 10 (N.D. Okla. July 20, 2012).

2. In 1867, due to a litany of historical events, including the forced removal of the Creeks from their lands in the eastern United States to present-day Oklahoma, and the Federal government's insistence on dealing with a single Creek government, the Creeks adopted a constitution forming a national government, with executive, legislative, and judicial branches. 59 IBIA at 176; *see Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 970-71 (10th Cir. 1987); *Harjo v. Kleppe*, 420 F. Supp. 1110, 1120 (D.D.C. 1976).

3. In 1936 Congress passed the Oklahoma Indian Welfare Act of June 26, 1936 ("OIWA"), 49 Stat. 1967, 25 U.S.C. §§ 501-509. Nov. 17, 2008, Order and Opinion ("2008 Order") (ECF No. 50) at 3. The OIWA allowed "[a]ny recognized tribe or band[s] of Indians residing in Oklahoma" to organize and adopt a constitution under rules and regulations issued by the Secretary of the Interior, and authorized the Secretary to issue a charter of incorporation to "any such organized group." 49 Stat. 1967 at § 3.

4. The OIWA authorized the Secretary to purchase agricultural and grazing lands for

Oklahoma Indians, and provided "[t]itle to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired . . . ." *Id.* § 1.

5. AQTT received federal recognition for the purposes of organizing under to the OIWA. 2008 Order at 3; First Am. Compl. ¶ 1 (ECF No. 174).

6. A "trust account" is "a trust fund account for a federally recognized tribe that is maintained and held in trust by the Secretary." 25 C.F.R. § 115.002.

7. "Trust funds" are "money derived from the sale or use of trust lands, restricted fee lands, or trust resources and any other money that the Secretary must accept into trust." *Id.*

8. "Trust lands" are "any tract or interest therein, that the United States holds in trust status for the benefit of a tribe or an individual Indian." *Id.*

9. "Trust assets: are "trust lands, natural resources trust funds, or other assets held by the federal government in trust for Indian tribes and individual Indians." *Id.*

B. The Wetumka Project Lands and the Surface Lease Income Trust

10. Pursuant to its authority under OIWA, the United States purchased certain lands between 1938 and 1942, including 878.25 acres in Hughes County, Oklahoma, which are commonly known as the Wetumka Project Lands. 2008 Order at 4; Amend. Compl. ¶ 12.

11. The United States took title of the Wetumka Project Lands "in [t]rust for the Creek Tribe of Oklahoma until such time as the use of the land is assigned by the Secretary of the Interior to a tribe, Band, or Cooperative group organized under [OIWA], or to an individual Indian, then in trust for such tribe, band, group or individual." 2008 Order at 4-5. The lands have remained in trust for the Muscogee (Creek) Nation of Oklahoma. *Id.* at 4-5.

12. The Wetumka Project Lands were not assigned to AQTT. Nor are the Wetumka Project Lands held in trust for AQTT. 2008 Order at 8.

13. Because title to the Wetumka Project Lands is held in trust for the Muscogee (Creek) Nation, matters relating to its management and use must be handled through the Muscogee (Creek) Nation. 59 IBIA at 187, 190-93.

14. In 1953, the Interior Department held a meeting with AQTT to discuss the future operation of the lands. *Id.* at 181 (1953 Report of Meeting at 1). The meeting was attended by John Davis, Principal Chief of the Creek Nation, in relevant part. *Id.* The meeting minutes state that the BIA Area Director "stressed the importance of an effective plan for managing these lands, which will contribute to the real benefit of the members of the Creek Nation." *Id.*

15. In 1958, Interior Department correspondence refers to the "Wetumka Project" and leases covering "lands belonging to the Creek Tribe (Wetumka Project)." 59 IBIA 181 (Memo. from Realty Officer to Branch of Land Operations, Apr. 1, 1958). The memorandum refers to a lease for the "Creek Tribe, Wetumka Project," which was to be "executed by Roley Buck for the tribe." *Id.* Roley Buck was the Principal Chief of the Creek Nation from 1955-1957. *Id.* Vouchers in the record from 1958 refer to the lands as "Creek tribal property Wetumka Project." *Id.*

16. Leases executed for the Wetumka Project Lands between 1958 and 1976 identifies the tribe and land at various times as "Creek," "Alabama-Quassarte Reservation[,] Creek," "CREEK – WETUMKA PROJECT[,] Alabama-Quassarte Tribal Land," "Creek Tribe (Alabama-Quassarte Tribal Land), and "Alabama-Quassarte Tribal Land." 59 IBIA 181-82.

17. Other documents for the time period of 1958 through 1976 similarly refer to the

leases as being with or for the "'Alabama-Quassarte Reservation (Creek Tribe),'" for land "'located in the Creek Nation, Oklahoma,'" or "'on lands of the Creek Nation, Alabama-Quassarte Reservation.'" *Id.* at 182.

18. The leases and permits granted on the Wetumka Project Lands were conditional on the consent of the Principal Chief of the Creek Nation. *Id.* at 183.

19. Ten leases directed to IBIA's attention executed for the Wetumka Project Lands between 1958 and 1976 are signed by the Principal Chief of the Creek Nation for the "Lessor." *Id.* at 181-83.

20. "Beginning in the early 1960s, several of the leases are also signed, 'Approval Recommended,' by AQTT members who are identified as members of the 'Board of Trustees.'" *Id.* at 182. BIA appointed AQTT members as "Tribal Trustees" for the "Wetumka Project, Creek Tribe of Oklahoma." *Id.* at 182-83.

21. Although Interior understood that consultation with, or approval by, AQTT was either appropriate or required, for leases of Wetumka Project Lands, the Principal Chief of the Creek Nation had the authority to execute leases for the lands. *Id.* at 183.

22. In 1976, the Muscogee (Creek) Nation decided to discontinue leasing of the Wetumka Project Lands. 2008 Order at 8-10.

C. Administration of Income Derived from the Wetumka Project Lands

23. The Interior Department authorized establishment of an Individual Indian Monies ("IIM") account in 1943 to administer the fees collected from leasing the Wetumka Project Lands until such time as it was determined whether the revenue shall be credited to the Alabama-Quassarte Tribal Town or to the Muscogee (Creek) Nation. 59 IBIA at 184.

24. Vouchers from the 1950s refer to fees for "Creek tribal property Wetumka Project." *Id.* Although 1956 correspondence refers to a "revolving fund" into which rent was to be paid, apparently by lessees and members of AQTT who were living in houses on project lands, a 1958 Bureau of Indian Affairs ("BIA") memorandum refers to "special deposits" being held in connection with the "Wetumka Project" or for leases covering "Lands belonging to the Creek Tribe (Wetumka Project)." *Id.*

25. The Surface Lease Income Trust is limited to income (and accrued interest) deposited in the trust from surface leases of the Wetumka Project Lands between 1961 and 1976. 2008 Order at 8.

26. Between 1961 and 1976, even though the BIA officials, the Muscogee (Creek) Nation Principal Chief, and AQTT referred to the IIM account as AQTT's account, the BIA officials routinely viewed the Principal Chief of the Muscogee (Creek) Nation as their primary contact on matters concerning the IIM account into which income from the Wetumka Project Lands was deposited. 59 IBIA at 186.

27. Since the Wetumka Project Lands are held in trust for the Muscogee (Creek) Nation, the Muscogee (Creek) Nation had the right to the funds in the IIM account attributed to the Wetumka Project Lands. *Id.*

28. From time to time, entities other than the Muscogee (Creek) Nation – such as the advisory board appointed to make recommendations on the Wetumka Project Lands – requested disbursements from the account attributed to the Wetumka Project Lands. Any such disbursements required the approval of the Muscogee (Creek) Nation, however. *Id.* at 186-87.

29. Prior to 1980, AQTT did not object to the involvement of the Muscogee (Creek)

Nation's Principal Chief in the administration of the Wetumka Project Lands and the Surface Lease Income Trust. *Id.* at 189.

30. On May 1, 1980, after receiving a budget proposal from AQTT, the BIA explained that the "release and actual use of the monies credited to an account for the Alabama-Quassarte Tribal Town Wetumka Project—Creek Tribe, as a result of the provisions of farming and grazing leases, would be at the discretion of the Creek Nation." *Id.* at 190-91. The memorandum also noted that "revenue received therefrom [would be] credited to the Creek Nation." *Id.*

31. On September 24, 1980, AQTT stated in a letter to the Secretary that the BIA had informed it the Surface Lease Income Trust belonged to the Muscogee (Creek) Nation and that AQTT would need to work with the Nation. AR-007165-66. AQTT questioned this approach and also asked why AQTT would come under the Muscogee (Creek) Nation for certain purposes, such as funding, when the BIA recognized AQTT as a distinct legal entity. *Id.* at AR-007166.

32. On October, 4, 1980, the Creek National Council passed Tribal Resolution 81-2 (TR 81-2). AR-007097.

33. On November 10, 1980, the Muscogee (Creek) Nation passed a Tribal Resolution ("TR-81-02"), confirming executive actions proclaimed on September 29, 1980, declaring the validity of elections held on November 1, 1980, judging the returns and qualifications of members of the National Council, and declaring invalid and void certain actions taken by private citizens after their removal from tribal office. AR-001274. Included among the voided actions was TR 81-2. *Id.*

34. In September of 1981, AQTT again wrote to the Secretary of the Interior asserting

that the Wetumka Project Lands had been misused and never should have been taken in trust for the Muscogee (Creek) Nation. 59 IBIA at 191; AR-007166. AQTT disagreed with the BIA Superintendents' position that title to the Wetumka Project Lands was in the Creek Nation and the release and use of funds from the Surface Lease Income Trust would be at the discretion of the Creek Nation. 59 IBIA at 191. In its letter, AQTT requests that the monies and land be "returned" to AQTT. *Id.* at 192.

35. During a meeting held in October 1985, AQTT's Chief reported that the BIA's position that the agency would not act on AQTT's request to withdraw funds from the IIM account unless it went through the Muscogee (Creek) National Council. *Id.* The BIA explained that the Wetumka Project Lands were purchased for the use of AQTT's members but title was taken in trust for the Muscogee (Creek) Nation and the money in the IIM account came from the land leases. *Id.*

36. On December 23, 1985, the BIA approved AQTT's request to use funds from the IIM account only after receiving a tribal resolution from the Muscogee (Creek) Nation supporting the request. *Id.* (Creek Nation Tribal Resolution, 85-08).

37. The BIA interpreted TR 85-08 as not only providing support for AQTT's budget request but also allowing AQTT to expend monies from the IIM account without seeking further approval from the Muscogee (Creek) Nation. *Id.*

38. In September of 1987, AQTT formally petitioned the Secretary to assign the Wetumka Project Lands to AQTT, provide it with a full accounting of all monies earned from the lands, and recognize it as an independent tribe. *Id.* at 193. AQTT's petition noted that the Wetumka Project Lands were never assigned to it. *Id.* AQTT asserted that assignment of the

lands would "render it unnecessary for [AQTT] to receive the use and benefit of the land without obtaining the approval or consent of the Muscogee (Creek) Nation." *Id.*

39. On October 25, 1993, AQTT participated in a task force meeting relating to three Creek tribal towns. AR-001273. At that meeting, AQTT requested that the BIA review the validity of TR 80-02. *Id.* After the meeting, on October 27, 1993, the Agency Superintendent sent a Request for Response on Tribal Town Issue to the BIA Area Director. *Id.* The request included as attachments a June 4, 1992, letter from the Muscogee (Creek) Nation that enclosed both TR-81-02 and TR 81-2. AR001274. AQTT received copies of the Agency Superintendent's request, the June 4, 1992, letter, and both resolutions. AR-001275.

D. Transfer of Funds from the IIM Account to Proceeds of Labor (PL) Account

40. On October 1, 1987, the Assistant Secretary for Indian Affairs, Interior Department, issued a memorandum to all Area Directors stating that the BIA was ending its policy of allowing tribes to place funds into IIM accounts. 59 IBIA at 193.

41. Consistent with this directive, the IIM account attributed to the Wetumka Project Lands was closed as of December 18, 1987, and the funds were transferred to Proceeds of Labor (PL) account 7067. *Id.* at 193-94.

IV. RELEVANT LITIGATION BACKGOUND

On December 29, 2006 (ECF No. 2), AQTT filed this action alleging that the Interior Department purchased under the OIWA certain lands known as the Wetumka Project Lands for AQTT's benefit. AQTT sought a declaratory judgment that Defendants failed to fulfill their legal obligations and duties as trustees, as well as an order compelling Defendants to assign the Wetumka Project Lands to AQTT and to provide a full and complete accounting of AQTT's trust

funds and non-monetary assets. Compl., Demand for Relief ¶¶ (a) and (b).

The Court stayed or administratively closed the case between April 30, 2007, and February 4, 2008, to allow the parties an opportunity to conduct settlement discussions. ECF Nos. 28, 38. After discussions proved unsuccessful, Defendants moved for a partial judgment on the pleadings, requesting that the Court dismiss all of AQTT's claims related to the Wetumka Project Lands and the majority of AQTT's other claims. ECF No. 41. The Court granted Defendants' motion, dismissing all claims related to the Wetumka Project Lands based on its finding that Interior never placed the lands in trust for AQTT's benefit and its ruling that AQTT's claims, which accrued before April 29, 2914, were time-barred. 2008 Order. The Court further found that the Muscogee (Creek) Nation was a necessary party that could not be joined. *Id.* at 12-14. AQTT's accounting claim related to the Surface Lease Income Trust, *i.e.*, same as the one now subject to the parties' summary judgment briefing, remained.

In September, 2010, the Court ruled on AQTT's Surface Lease Income Trust-related claim. The Court found that, from 1961 to 1976, the Interior Department had deposited income from surface leases on the Wetumka Project Lands into an IIM account bearing AQTT's name and that, at a later point, Interior had moved the funds in that IIM account to a PL account. *See* Sept. 21. 2010 Order and Opinion ("2010 Order") (ECF No. 135 at 6). The Court found that a question remained as to the ownership of the Surface Lease Income Trust and remanded the action to Defendants for additional investigation and determination. *Id.* at 22.

The Interior Department referred action on the Court's remand to the IBIA. After a lengthy administrative process that involved not only Interior and AQTT but also the Muscogee (Creek) Nation and the promulgation of an administrative record (ECF No. 199), the IBIA issued

on October 23, 2104, its final reconsidered decision determining that the Surface Lease Income Trust was not held in trust for AQTT. 59 IBIA 173.

Upon reinstatement of active litigation in this case, AQTT amended its complaint, adding a claim for appeal of the IBIA's decision as arbitrary and capricious. *First Am. Compl.* ¶¶ 41-42. Also AQTT included the Muscogee (Creek) Nation as a defendant and a claim based on AQTT's discovery during the IBIA process that the Muscogee (Creek) Nation had passed a resolution (TR 81-2) requesting that the Wetumka Project Lands be assigned to AQTT. The Muscogee (Creek) Nation moved to dismiss on the grounds that it had not waived its sovereign immunity and that AQTT's claims regarding the Wetumka Project Lands were untimely and barred by the doctrines of estoppel and preclusion. *Mot. to Dismiss*, ECF No. 181 (June 8, 2015).

On January 7, 2016, the Court granted the Muscogee (Creek) Nation's motion, finding that the Nation had not waived its sovereign immunity for this suit. Jan. 7, 2016, Order and Opinion ("2016 Order") (ECF No. 193) at 4. The Court stated that it previously dismissed all claims related to the Wetumka Project Lands and found that the Wetumka Project Lands were never placed in trust for AQTT, that AQTT's claims related to the Wetumka Project Lands accrued on or before April 29, 1942, and thus those claims were time barred. *Id.* at 5. (citing 2008 Order at 9-14). Directly addressing AQTT's claims regarding TR 81-2, the Court noted that "[t]he resolution was drafted, signed, and filed with the United States in 1980" and that the resolution was a "public document." *Id.* (citing Dkt. No. 185, Exh. 2; Dkt. No. 185, Exh. 3 at 316). The Court held that, accordingly, "[a]ny possible claim here accrued in 1980," and that, because of the six year statute of limitations had passed, AQTT's Wetumka Project Lands-related claim was again dismissed. *Id.*

On July 22, 2016, AQTT moved for summary judgment on the merits of the IBIA decision. Defendants respond to AQTT's motion and also cross-move for summary judgment.

V. RELEVANT STATUTORY BACKGROUND

In determining whether agency action was arbitrary and capricious, the Court must apply the highly deferential standard of review applicable to agency action under the Administrative Procedure Act of 1946, 5 U.S.C. §§ 551-559, 701-706 ("APA"). The Court must sustain the IBIA's decision that the Surface Lease Income Trust was not held in trust for AQTT unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard is "narrow" and the reviewing court must not "substitute [its] judgment for that of the agency." *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) (citation omitted); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Rather, the Court reviews the decision to ensure that it was based on the relevant factors and was not a "clear error of judgment." *Id.* (citation omitted). "A presumption of validity attaches to the agency action and the burden of proof rests with the parties who challenge such action." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1165 (10th Cir. 2012) (citation omitted).

In making such a determination, "the court shall review the whole record or those parts of it cited by a party...." 5 U.S.C. § 706. "The complete administrative record consists of all documents and materials directly or indirectly considered by the agency." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). "[D]esignation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the administrative record absent

clear evidence to the contrary." *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Agric.*, 485 F.3d 1091, 1097 (10th Cir. 2007) (quoting *Bar MK Ranches*, 994 F.2d at 740).

VI. APPLICABLE STANDARD OF REVIEW

Summary judgment under Fed. R. Civ. P. 56 is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Kendall v. Watkins*, 998 F.2d 848, 850 (10th Cir. 1993), *cert. denied*, 510 U.S. 1120 (1994). Rule 56 permits the entry of summary judgment, upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 317. Defendants need not present their own evidence disproving AQTT's claims to meet its individual burden on summary judgment, and, instead, may challenge AQTT's lack of admissible evidence to establish its case on the merits. Fed. R. Civ. P. 56(c)(1)(B).

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*, 475 U.S. 574, 586-87 (1986) (citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for plaintiff." *Anderson*, 477 U.S. at 252.

VII. ARGUMENT

In its motion, AQTT asserts two arguments in support of its position that the decision is

arbitrary and capricious and violates the Administrative Procedure Act: (1) by passage of TR 81-2, the Muscogee (Creek) Nation relinquished any interest is held in the Surface Lease Income Trust, and (2) the history of the Surface Lease Income Trust demonstrates that the account was meant to belong to AQTT. ECF No. 202. As shown below, AQTT's motion is without merit and should be denied.

AQTT fails to demonstrate that the IBIA's decision is arbitrary and capricious and otherwise contrary to law. Rather, the IBIA's determinations that AQTT never acquired beneficial ownership of the Surface Lease Income Trust and the AQTT cannot acquire beneficial interest in trust property through intent alone are well-supported by the record. The Muscogee (Creek) Nation resolution passed in 1980 (TR 81-2) neither transferred title to the Wetumka Project Lands nor provided AQTT with beneficial interest in the Surface Lease Income Trust. In any event, the Muscogee (Creek) Nation later repealed TR 81-2, and, as a result, any possible claim that AQTT might have had concerning the resolution accrued in 1980. As the IBIA found, the historical record shows that, notwithstanding the Interior Department and the Muscogee (Creek) Nation allowing AQTT to use funds from the Surface Lease Income Trust, beneficial title to the Surface Lease Income Trust never passed and was never assigned by Interior or the United States to AQTT from the Muscogee (Creek) Nation. Accordingly, this Court should deny AQTT's motion and issue summary judgment to Defendants in this case.

A. The IBIA Properly Found that AQTT did not obtain Beneficial Ownership of the Surface Lease Income Trust as soon as the Wetumka Project Lands were purchased

AQTT argues that the history of the Surface Lease Income Trust shows an intent by Defendants that the account is held for its beneficial interest. AQTT also argues that the

Muscogee (Creek) Nation's 1980 Resolution (TR 81-2) demonstrates that the Nation relinquished its interest in the account to AQTT. AQTT's arguments are baseless.

In determining whether AQTT holds beneficial interest in the Surface Lease Income Trust as a matter of law, the IBIA examined the evidence regarding the creation of the trust for the Wetumka Project Lands and income. 59 IBIA at 197. The IBIA concluded that the record did not demonstrate that AQTT acquired beneficial ownership of the income from the Wetumka Project Lands when they were purchased and that thus AQTT not acquire beneficial ownership of the Surface Lease Income Trust through a previously vested beneficial ownership of all income accruing from the lands. *Id.*

AQTT fails to meet its burden to show that the IBIA's decision was arbitrary and capricious, a clear error of judgment, and not based on the relevant factors. AQTT cannot overcome the strong presumption in favor of upholding the IBIA's administrative determination. Therefore, the Court should deny AQTT's motion and grant Defendants' cross-motion for summary judgment.

B. The History of the Surface Lease Income Trust Shows that the Account is not for the AQTT

As the IBIA found, the history surrounding the Surface Lease Income Trust does not support AQTT's assertion that the account was held for its benefit. Although, as the IBIA noted, there at one time appeared a desire to transfer beneficial interest of the account, as the IBIA noted, such transfer never took place and Interior has always held the account in trust for the benefit of Muscogee (Creek). 59 IBIA at 198. Defendants have never held the Wetumka Project Lands in trust for AQTT's benefit. *See* 2008 Order at 9-14. Defendants have never held the Surface Lease Income Trust in trust for AQTT's benefit. 59 IBIA at 174. Interior never took

action to assign either the lands or the Surface Lease Income Trust to AQTT. *Id.* at 199.

During the time that the Wetumka Project Lands were leased, Interior consistently treated the Muscogee (Creek) Nation as the beneficial owner of the use of funds from the Surface Lease Income Trust, at least until 1980. *Id.* Budgets for the use of the Wetumka Project Lands-related funds were approved by the Muscogee (Creek) Nation's Principal Chief, without any apparent objection by AQTT. As the IBIA found, the record shows that any involvement AQTT had in the administration of the lands and funds was not to the exclusion of the Muscogee (Creek) Nation's Principal Chief, who was treated by Interior at the time as the "sole embodiment of the Creek governmental authority." 59 IBIA 200 (citing *Harjo v. United States*, 420 F. Supp. at 1127 n.42, 1129, 1139, 1140). The Muscogee (Creek) Nation was historically and is presently in control of the Wetumka Project Lands. Its Principal Chief approved farming and grazing leases and, when the Nation decided to cease agricultural leasing on tribal lands in 1976 in favor of running a tribal operation, agricultural leasing ceased on the Wetumka Project Lands. AR-006776. The names of the Muscogee (Creek) Nation and the Wetumka Project appear on the Surface Lease Income Trust account, in addition to that of AQTT. 59 IBIA at 200. The IBIA found that the record demonstrates that Interior treated AQTT subordinate to the Muscogee (Creek) Nation, with rights dependent on and derived from or through the Creek Nation. *Id.*

Notwithstanding the record evidence, AQTT argues that the IBIA decision is arbitrary and capricious because the record contains evidence that Defendants intended the Surface Lease Income Trust to benefit AQTT and that intent creates a cognizable beneficial interest. AQTT's argument is meritless. As the IBIA found, while there is some historical record evidence of an intent to use the funds to benefit AQTT, there is no record evidence of any trust instrument by

the Interior Department or the United States assigning or transferring beneficial title to the Surface Lease Income Trust from the Muscogee (Creek) Nation to AQTT. *Id.* at 198.

The IBIA found that, when AQTT organized under the OIWA, it did so as a "recognized band." *Id.* at 200. While such OIWA organization gave AQTT an independent status under federal law, it did not sever AQTT's relationship with the Muscogee (Creek) Nation. *Id.* Also it did not appear that AQTT itself asserted that organizing under the OIWA altered its relationship with the Muscogee (Creek) Nation. *Id.* Both the Interior Department and the Muscogee (Creek) Nation's Principal Chiefs understood that the Wetumka Project Lands were intended to benefit those Creeks who were AQTT members. *Id.* at 200-201. Because, as the IBIA found, AQTT members were considered to be part of the Muscogee (Creek) Nation, allowing AQTT to benefit from the Wetumka Project Lands while the Muscogee (Creek) Nation retained beneficial title was not internally inconsistent. *Id.* at 201. Thus it follows that treating the Wetumka Project Lands as if they were for the benefit of AQTT members did not carry any implication or inference that AQTT was the beneficial owner of the Surface Lease Income Trust as a matter of law. *Id.*

AQTT fails to demonstrate how the IBIA's analysis is a clear error of judgment or how it is otherwise not in accordance with law. In keeping with the Muscogee (Creek) Nation's ownership of the Wetumka Project Lands, the Surface Lease Income Trust is the beneficial property of the Nation and not AQTT. These funds are held in trust for the Creek Nation because they were derived from Muscogee (Creek) Nation trust assets and lands. 25 C.F.R. § 115.002 (defining trust funds as money derived from trust lands). The Muscogee (Creek) Nation's ownership of such funds is further evident from the fact that disbursements of those

funds required the approval of the Creek Nation until it determined that its approval was no longer necessary. 59 IBIA at 194-95.

AQTT has pointed to no authority that confers on AQTT an enforceable interest in the trust property of the Muscogee (Creek) Nation. *See, e.g., E. Band of Cherokees v. United States*, 20 Ct. Cl. 449, 483 (1885), *aff'd.*, 117 U.S. 288 (1886) ("the Eastern Band of Cherokee Indians . . . have no rights in law or in equity in and to the moneys, stocks, and bonds held by the United States in trust for the Cherokees."); *Prairie Band of Potawatomi Indians v. United States*, 143 Ct. Cl. 131, 153 (Ct. Cl. 1958) (upholding that Indian Claims Commission's finding that the Eastern Potawatomie were not entitled to share in the tribal benefits of another tribe). That failure is not surprising inasmuch as no evidence exists of an instrument of assignment or conveyance of beneficial ownership of the income to AQTT when or after the Wetumka Project Lands were acquired. 59 IBIA at 199.

C. The passage of TR 81-2 did not relinquish the Muscogee (Creek) Nation's Interest in the Surface Lease Income Trust

AQTT contends that the IBIA decision is arbitrary and capricious because IBIA failed to consider the import of a resolution (TR 81-2) passed by the Muscogee (Creek) Nation in 1980. AQTT asserts that passage of TR 81-2 demonstrated the Muscogee (Creek) Nation's intent to relinquish claim to the Surface Lease Income Trust. *See* Pl.'s Mot. at 8-9. AQTT's assertion is unfounded. AQTT ignores events subsequent to the passage of TR 81-2 that place the resolution in full proper context and show that the Muscogee (Creek) Nation did not intend to – and indeed never did – relinquish any claim to the Surface Lease Income Trust.

In October of 1980, the Muscogee (Creek) Nation passed TR 81-2, which was entitled "A Tribal Resolution requesting that lands held in trust for tribal towns under the Oklahoma Indian

Welfare Act (48 Stat. 1967) be assigned to the Alabama-Quassarte, Kialegee, and Tholopthlocco Tribal Towns of Oklahoma."[2] AR007018. Through this resolution, the Muscogee (Creek) Nation requested the Secretary of the Interior "to assign to the Muscogee (Creek) Nation all lands within the jurisdictional boundaries of the Muscogee (Creek) Nation which are held in trust by the United States, pursuant to the [OIWA], pending their assignment to a tribe, band or individual." AR-007095-96. The Muscogee (Creek) Nation further requested that Interior implement six distinct actions, including placing land and mineral title in the name of the respective tribal towns "as was intended under the [OIWA]," appropriating emergency operating budgets for each tribal town, providing financial statements and complete audits of tribal town accounts, and disbursing tribal funds to the tribal towns as directed and approved by the respective tribal councils. *Id.*

TR 81-2 directed the Principal Chief of the Creek Nation to forward the resolution to the Secretary of the Interior and to the BIA "for federal action," and "upon receipt, deliver up the assignment to the National Council for ratification." *Id.* On October 4, 1980, the Speaker of the Muscogee (Creek) National Council signed the resolution; however, the Principal Chief of the Muscogee (Creek) did not sign it. *Id.* In accordance with Article VI, Section 6(a) of Muscogee (Creek)'s Constitution, the resolution passed without executive action and became law on October 18, 1980. AR-007097.

Subsequently, however, the Muscogee (Creek) Nation Tribal Council enacted a new resolution that repealed TR 81-2. On November 10, 1980, one month after enacting TR 81-2, the Muscogee (Creek) Nation National passed a new resolution, TR-81-02, "a resolution of the

[2] AQTT also cites to AR-007095-96, which appears to be an alternate version of TR 81-2.

Muscogee (Creek) Nation confirming executive actions proclaimed on September 29, 1980, declaring the validity of elections held on November 1, 1980, judging the returns and qualifications of members of the National Council, and declaring invalid and void certain actions taken by private citizens after their removal from tribal office." AR-001274. The new resolution was enacted, in part, to void TR 81-2 and revoke the Nation's request to assign lands held in trust for its benefit to the Creek tribal towns, including AQTT.

The record demonstrates that, despite knowing about TR 81-2, AQTT never claimed at or within six years of that time that the resolution relinquished the Muscogee (Creek) Nation's beneficial interest in the Surface Lease Income Trust. As the record shows, during an October 1993 meeting of the Three Creek Tribal Towns Task Force, in which AQTT participated, the task force requested that the BIA review the validity of TR 81-2. AR-001273. In following up on the resolution, the Agency Superintendent forwarded a copy of the resolution to the BIA Area Director, along with the Muscogee (Creek) Nation's subsequently enacted resolution voiding TR 81-02. AR-001274-5; *see also* AR-001272 (Oct. 27, 1993, letter from Agency Superintendent to Principal Chief, Muscogee (Creek) Nation, enclosing positions of the three tribal towns regarding TR 81-2 and requesting follow-up on the specific issues).

In rendering its decision, the IBIA considered the totality of the historical controversy over the Wetumka Project Lands and the Surface Lease Income Trust and the Muscogee (Creek) Nation's position on its interest in the Surface Lease Income Trust. The IBIA reviewed, *inter* alia, Interior Department memoranda discussing the management and use of the lands and AQTT's interactions with Interior, including AQTT's requests that the Wetumka Project Lands be assigned to it so that it would no longer have to seek the approval or consent of the Muscogee

(Creek) Nation to receive and use the benefits of the lands. 59 IBIA at 193. The IBIA considered that the Muscogee (Creek) Nation enacted TR 81-2 and that it voided that resolution less than a month later. Additionally, the IBIA took into account that the Muscogee (Creek) Nation has consistently asserted its interests in the Surface Lease Income Trust. *See* AR-09794-95 (Oct. 14, 1996, Resolution TR 96-13 that "oppos[ed] the assignment of certain lands known as the Wetumka or Dustin Projects" to the AQTT); AR-09813-15 (on Jan. 28, 1997, the Creek Nation Principal Chief approved NCA 97-14, which declared that the Creek Nation was the beneficial owner of the Wetumka Project Lands and its underlying minerals). Based on its careful consideration, the IBIA properly concluded that, given the full breadth of the historical record, the Muscogee (Creek) Nation never relinquished its interest in the Surface Lease Income Trust to AQTT.

The IBIA's deliberative approach is unlike that of AQTT, which focused and built its entire case on one document, taken out of proper context, from a historical record spanning over sixty years. AQTT cannot overcome the presumed validity of the IBIA's decision or the deference that this Court should pay to that decision. Defendants are entitled to summary judgment, and the Court should deny AQTT's motion on the claim.

D. AQTT's Claims Regarding the Import of TR 81-2 are untimely

Any claims premised on the allegation that TR 81-2 effectuated a transfer of interest of the Surface Lease Income Trust to AQTT are untimely. As the Court found in its 2016 Order, TR 81-2 was drafted, signed, and filed with the United States. *Id.* at 5 (citations omitted). TR 81-2 was a public document of which AQTT was well aware. As discussed above, the record shows that AQTT had knowledge of TR 81-2 and, in 1993, if not earlier, requested that the BIA

review the resolution's validity. AR-001273. Even though TR 81-2 is a public document, the administrative record demonstrates that AQTT also had separate notice of the resolution and appeared to engage in discussions as to its impact on the Muscogee (Creek) Nation's interest in the Surface Lease Income Trust.

Given that definitive historical record, it is clear that AQTT's claims that TR 81-2 effectuated a relinquishment of the Muscogee (Creek) Nation's interest in the Surface Lease Income Trust are untimely. The applicable statute of limitations set forth in 28 U.S.C. § 2401(a) provides a plaintiff with six years to file a claim. *See* 2008 Order at 7-11. As the Court has found, any possible claim AQTT has regarding TR 81-2 accrued in 1980. 2016 Order at 5. Therefore, AQTT had until October 4, 1986, to file a claim challenging that TR 81-2 transferred beneficial title of the Surface Lease Income Trust to it. AQTT did not file any such claim. The six year statute of limitations for doing so has passed. *Id.* TR 81-2 does not provide AQTT with a beneficial interest in the Surface Lease Income Trust.

VIII. CONCLUSION

The IBIA's decision is the result of its careful and thorough analysis of the voluminous historical record and arguments of the parties made before it on appeal. In making its decision, the IBIA examined the full administrative record, which AQTT did not challenge and which included information about how the Wetumka Lands were acquired, how the lands were administered, and how the income derived from the land was administered. The IBIA looked at the evidence from the various time periods and how these records informed the parties' interactions over the years. As a result of its extensive review, the IBIA came to the justifiable conclusion that beneficial title to the Surface Lease Income Trust vested in the Muscogee

(Creek) Nation when the lands were taken into trust for it and that the record does not demonstrate a subsequent assignment of the Surface Lease Income Trust was ever made to AQTT.

AQTT's challenges to the IBIA decision, based on the Muscogee (Creek) Nation's passage of TR 81-2 and on the history of the Surface Lease Income Trust, fail to show that the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. First, the IBIA committed no error in not discussing TR 81-2 in its timeline. The resolution, which was subsequently voided, did not relinquish the Muscogee (Creek) Nation's interest in the Surface Lease Income Trust. Further, any claim AQTT may have had regarding the resolution's import is time barred. Second, the IBIA, in reviewing the record, properly determined that it was appropriate for Interior to view AQTT as benefitting from the Wetumka Project Lands and income without an assignment of the legal beneficial ownership of the lands or income to AQTT. AQTT fails to show why the Court should deviate from the presumption that the decision is presumed to be valid. Rather, the Court should uphold the IBIA's decision and find that it was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, and was based upon consideration of the administrative record and is entitled to due deference. The Court should deny AQTT's motion for summary judgment and grant Defendants' cross-motion for summary judgment.

Respectfully submitted this 16th day of September, 2016,

JOHN C. CRUDEN
Assistant Attorney General

/s/ Jody H. Schwarz
JODY H. SCHWARZ
ANTHONY HOANG

United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, DC 20044
Phone: (202) 305-0245
(202) 305-0241
Fax: (202) 305-0506
E-mail: jody.schwarz@usdoj.gov
anthony.hoang@usdoj.gov
Attorneys for Defendant

OF COUNSEL:

SHANI WALKER
United States Department of the Interior
Office of the Solicitor
Division of Indian Affairs
Washington, DC 20044

THOMAS KEARNS
Office of the Chief Counsel
Bureau of the Fiscal Service
United States Department of the Treasury
Washington, D.C. 20227

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filings to the parties entitled to receive notice.

/s/ Jody H. Schwarz
Jody H. Schwarz