**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' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT**

At issue in this case is Plaintiff's Alabama Quassarte Tribal Town's ("AQTT") 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"). Defendants United States of America, S.M.R. Jewell, in her official capacity as 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") cross-moved for summary judgment on AQTT's claim. In its response to Defendants' cross-motion for summary judgment, AQTT presents three arguments as to why it believes the IBIA's reconsidered decision on remand is arbitrary and capricious. AQTT's arguments, however, are unconvincing and ignore the clear administrative record evidence showing that the Department of the Interior ("the

Department" or "Interior") never held the Surface Lease Income Trust account in trust for AQTT's benefit.

First, AQTT argues that because the Surface Lease Income Trust was expended for its benefit, it follows that the account was assigned to it. Use of account funds, however, does not equate ownership of the account. As the IBIA found, the Department never held the Surface Lease Income Trust in trust for AQTT. Second, AQTT argues that the Muscogee (Creek) Nation relinquished its interest in the trust account because the record documents are insufficient to demonstrate that the Muscogee (Creek) Nation voided a resolution. This argument is without merit. The record documents clearly show that the Muscogee (Creek) Nation later repealed the resolution. Setting aside the record documents, the Muscogee (Creek) Nation represented to the Court that it did indeed repeal the resolution in its motion to dismiss AQTT's amended complaint. Third, AQTT argues that its claims are timely because it only recently discovered the Muscogee (Creek) Nation tribal resolution. This argument fails because the record shows that AQTT had knowledge that the Muscogee (Creek) Nation repealed the resolution and, further, AQTT cannot rely on an affidavit submitted with its response to rebut the administrative record of the case.

As this Court has found, Defendants do not hold the Wetumka Project Lands in trust for AQTT. Therefore, as the IBIA properly determined, Defendants do not hold the Surface Lease Income Trust in trust for AQTT. This Court should uphold IBIA's decision and grant summary judgment to Defendants.

## I. ARGUMENT

### A. The IBIA's Procedures for Its Reconsideration on Remand were Proper

As an initial matter, in response to Defendants' statutory background and standard of review statements, AQTT argues that the IBIA decision is procedurally flawed because it failed to order the Regional Director to make a decision in the first instance and instead took on the Regional Director's role in making a decision. ECF No. 210 at 8-11. AQTT misapprehends the nature of the referral authority granted to the IBIA and the procedures it enacted for compiling and reviewing the record and making its final reconsidered decision on remand. There was no impropriety by the IBIA not remanding the matter back to the Regional Director to make a decision; a decision was already made. The Department found that it did not hold the Surface Lease Income Trust account in trust for the AQTT. That decision was before the IBIA on remand. The IBIA conducted a *de novo* review of the decision, considering the evidence and the arguments relied upon by the parties, as well as additional evidence in the record. 59 IBIA 175. After its *de novo* review, the IBIA issued its decision on remand. This process fully complied with the Court's order on remand.

In the 2010 Decision, the Court ordered the Department to "reconsider [its] decision on the matter of the ownership of the Surface Lease Income Trust," finding that while "[a] formal hearing is not necessarily required to compile the administrative record," it suggested that the Department hold a formal hearing before making its decision as to the ownership of the Surface Lease Income Trust. 2010 Order at 22. The Court then remanded the decision to the Department for its reconsideration.

On March 11, 2011, the Chief of Staff for the Assistant Secretary – Indian Affairs, exercising the authority of the Assistant Secretary under 43 C.F.R. § 4.1(b)(1)(ii) and 43 C.F.R. § 4.330(a)(2), referred the matter to the IBIA for the exercise of the review authority of the Assistant Secretary. AR-000030. Under the Department's regulations, the Assistant Secretary may refer matters to the IBIA. *Id.* The Assistant Secretary was recused and had delegated his authority to his Chief of Staff over the matter. *Id.* The Chief of Staff stated that, under the referral, the IBIA would conduct the reconsideration of the Department's decision that it holds no assets in trust for AQTT as required by the Court's 2010 Order, with the administrative record being the filings and administrative record before the Court. *Id.*

To comply with the Court's suggested hearing process, the Chief of Staff recommended that the IBIA require that the Regional Director, represented by the Tulsa Field Solicitor, assemble, in the form of an administrative record, all available documents regarding the ownership of the Surface Lease Income Trust, including all documents filed with the Court as part of this case, and forward the documents to the IBIA. The Chief of Staff then suggested that the IBIA request briefs from AQTT and the Muscogee (Creek) Nation, require any hearings that it determined necessary, and issue a reconsidered decision.[1] AR-000030. On March 22, 2011, the IBIA accepted the referral for it to conduct proceedings on behalf of the Department to issue

[1] The Chief of staff suggested that the IBIA conduct the proceedings consistent with 43 C.F.R. §§ 4.335(a), 4.336, 4.313(a), and 4.337(a), which are the general rules applicable to proceedings on appeal before the IBIA. Consistent with 43 C.F.R. § 4.312, the IBIA's decision would be made in writing and set forth findings of fact and conclusions of law. The decision would also be final for the Department.

a final reconsidered decision on remand from the 2010 Order. AR-00079. The IBIA noted that it would follow the procedural regulations governing appeals to the IBIA, to the extent appropriate. AR-000080.

AQTT now alleges that this procedure was irregular because it never had a chance to refute the IBIA's decision or identify disputed facts that required testimony. ECF No. 210 at 10. These arguments are without merit. First, as AQTT was aware, the matter was on referral to the BIA to conduct proceedings on behalf of the Department and to issue a final reconsidered decision on remand. AR-001781; *see also* 43 C.F.R. § 4.312. As final agency action, there would not be an opportunity for AQTT to challenge the IBIA's decision in that forum. Rather, any challenge to the IBIA's decision would be a judicial challenge to final agency action, as AQTT has done here. Second, as the IBIA noted, it provided the parties with an opportunity to identify material issues of fact and to request an evidentiary hearing by an administrative law judge to further develop the record. No party identified any disputed issues of material fact or requested an evidentiary hearing. 59 IBIA 175. And to the extent AQTT believes that a document was included in the record that was not relevant to the Department's decision (ECF No. 210 at 10 fn.4), AQTT had the opportunity during the IBIA proceedings to weigh in on the contents of the record, AR-000081; 002091, and, as can be expected with a record containing voluminous historical records, a document not directly related to the matter may inadvertently be included. Any such inclusion does not impact the decision made, which was based on the IBIA's *de novo* review of the parties' evidence and arguments, as well as the evidence in the record.

The IBIA's review of the parties' evidence and arguments and the record was in accordance with the nature of the remand and, to the extent appropriate, followed the procedural regulations governing administrative appeals a set forth in 43 C.F.R. part 4. Defendants, therefore, complied with the 2010 Order and the IBIA's decision is entitled to the presumption of administrative regularity and deference.

**B. The IBIA properly found that the Department never held the Surface Lease Income Trust account in trust for AQTT**

AQTT argues that the IBIA decision is arbitrary and capricious because, despite the fact that the IBIA found that the Surface Lease Income Trust account funds were expended for the benefit of AQTT, it nevertheless found that the account was not held in trust for AQTT's benefit. 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. AQTT's receipt of a tribal trust funds reconciliation report does not change this fact. *See* AR-006274. Rather, beneficial title to the trust funds vested in the Muscogee (Creek) Nation when the Wetumka Project Lands were taken into trust for it.

AQTT has not identified any property that is held in trust for its benefit. It has identified only non-monetary trust assets and trust funds that are the property of the Muscogee (Creek) Nation. AQTT cannot point to any authority that would provide it with an enforceable interest in

such property. The fact that the Muscogee (Creek) Nation allowed AQTT to utilize the funds in the account does not provide AQTT with a sufficient property right in which a federal trust responsibility could attach. The Muscogee (Creek) Nation, as the beneficiary of the trust, does not have the ability to confer a trust relationship upon AQTT. *Wolfchild v. United States*, 559 F.3d 1228, 1238 (Fed. Cir. 2009) ("[A] trust is created only if the settlor properly manifests an intention to create a trust relationship."). The use of the funds for AQTT does not "assign" those funds to AQTT. As the record shows, the Department never held the funds in trust for AQTT. IBIA's decision was reasonable and well-grounded on the record before it.

### C. The Muscogee (Creek) Nation did not relinquish its Interest in the Surface Lease Income Trust

Ample evidence exists in the record demonstrating that the Muscogee (Creek) Nation did not relinquish its interest in the Surface Lease Income Trust. AQTT argues that the record documents Defendants cite to as evidence that the Muscogee (Creek) Nation did not relinquish its interests – correspondence with the Muscogee (Creek) Nation and between agency departments – are insufficient proof of the Muscogee (Creek) Nation's actions and, therefore, it follows that the Nation did relinquish its interests in the account. ECF No. 210 at 12-13. AQTT, however, makes no assertion that these documents are wrong. Rather, it merely states that they are insufficient. They are not. The documents, including a Muscogee (Creek) Nation resolution opposing the assignment of the Wetumka Project Lands to AQTT, AR-09794-5, more than adequately demonstrate that the Muscogee (Creek) Nation did not relinquish its interest in the account.

Even to the extent that there is a question as to the sufficiency of the record documents, which Defendants assert there is not, the record citations are also supported by the Muscogee (Creek) Nation's verification that it repealed TR 81-2, a resolution seeking to assign the Wetumka Project Lands to AQTT. In its reply to AQTT's response to its motion to dismiss, the Muscogee (Creek) Nation stated that its Tribal Resolution TR 81-2 did not transfer any title and that subsequent tribal resolutions effectively repealed TR 81-2 and all other resolutions expressing an opinion that the beneficial interest of the Surface Lease Income Trust should belong to AQTT. ECF No. 188 at 5 (citing Resolution TR 96-10 and TR 96-13). Therefore, not only does the record support the fact that TR 81-2 was subsequently repealed, but the Muscogee (Creek) Nation has also confirmed that it indeed enacted resolutions repealing TR 81-2. The Muscogee (Creek) Nation, therefore, did not disclaim an interest in the Wetumka Project lands and the Surface Lease Income Trust.

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

AQTT argues that its claims regarding the import of TR 81-2 are timely because: (1) it did not have any knowledge of TR 81-2 until the record was produced in this case, and (2) there is no evidence that a resolution of the Muscogee (Creek) Nation is a public document. ECF No. 210 at 13. First, as to its knowledge of the resolution, the record belies AQTT's assertions that it had no knowledge. 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 Bureau of Indian Affairs review the validity of TR 81-2. AR-001273. AQTT disputes the record by citing to the Declaration of Tarpee Yargee, AQTT's current Chief. *Id.*, Exh. A ("Yargee Decl.").

In his declaration, Chief Yargee states that AQTT had no knowledge of TR 81-2 until this lawsuit. Yargee Decl., ¶ 10. AQTT, however, cannot rely upon an extra-record declaration, which, in any event, is contradicted by the administrative record. *See Franklin Sav. Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1127, 1138-39 (10th Cir. 1991) (decisions are to be reviewed on the basis of the administrative record and in accordance with the APA); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). The record clearly shows that AQTT had knowledge of the resolution.

Second, AQTT's argument the TR 81-2 is not a public document is unavailing. As the Court already found, TR 81-2 "was drafted, signed, and filed with the United States. . . . This was a public document." 2016 Order at 5 (citations omitted). Given the historical record and the Court's previous order in this case, 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. Any possible claim AQTT has regarding TR 81-2 accrued in 1980. *Id.* TR 81-2 does not provide AQTT with a beneficial interest in the Surface Lease Income Trust.

## II. CONCLUSION

AQTT has failed to demonstrate that the IBIA's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The record, as confirmed by the Muscogee (Creek) Nation, demonstrates that the Nation repealed TR 81-2 and did not relinquish its interest in the Surface Lease Income Trust. Further, any claim AQTT may have had regarding the resolution's import is time barred. 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 grant Defendants' cross-motion for summary judgment.

Respectfully submitted this 14th day of November, 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:

KENNETH DALTON
SHANI N. 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 14th day of November, 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