CASE NO. 17-7003
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALABAMA-QUASSARTE TRIBAL TOWN,	)
Plaintiff-Appellant,	)
v.	)
THE UNITED STATES OF, AMERICA SALLY JEWELL, Secretary of the United States, Department of Interior KEVIN K. WASHBURN, Associate Deputy of the Department of the Interior, JACK LEW, Secretary of the Treasury, THE MUSCOGEE, (CREEK) NATION	)
Defendants-Appellees.	)

On Appeal from the United States District Court
for the Eastern District of Oklahoma
The Honorable Ronald A. White
District Court Case No. CIV-06-558-RAW

APPELLANT'S OPENING BRIEF

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July 17, 2017

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PRIOR AND OTHER RELATED APPEALS

Alabama-Quassarte Tribal Town v. The United States of America, et al., Case No. 10-7094 (10th Cir. 2011), which was dismissed prior to resolution as premature.

STATEMENT OF JURISDICTION

(A) District Court Jurisdiction

The United States District Court for the Eastern District of Oklahoma had jurisdiction pursuant to 28 U.S.C. §1331 and § 1362, as a suit brought by an Indian tribe recognized by the Secretary of the Interior arising under the Constitution, treaties, and federal common and statutory law. To the extent Plaintiff/Appellant sought to compel the United States of America, Sally Jewell, the Secretary of the United States Department of Interior, Kevin K. Washburn, Associate Deputy of the Department of the Interior, and Jack Lew, Secretary of the Treasury (collectively hereinafter the "Defendants/Appellees"), to perform their fiduciary duties owed to Plaintiff/Appellant, the District Court had jurisdiction under 28 U.S.C. § 1361, 5 U.S.C. §§ 702, 704, 706. The claims brought by the Plaintiff/Appellant involve the application of Federal law as Plaintiff/Appellant, a Federally recognized Indian Tribe, sought a declaratory judgment and an injunction for an accounting of its

trust property and an order compelling the Defendants/Appellees to assign it certain lands in Oklahoma known as the Wetumka Project lands.

(B) Court of Appeals Jurisdiction

Jurisdiction is proper before this Court under 28 U.S.C. § 1291, as the Judgment entered on December 30, 2016, by the United States District Court for the Eastern District of Oklahoma, which granted Summary Judgment in favor of Appellee, was the final order. This Court has jurisdiction over "'final' decisions of the district court—that is, those decisions that 'leave[] nothing for the court to do but to execute judgment." *Albright v. UNUM Life Ins. Co. of America*, 59 F.3d 1089, 1092, 33 Fed.R.Serv.3d 93 (10th Cir. 1995) (*citing Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945)). The United States District Court for the Eastern District of Oklahoma resolved the Plaintiff's claims in several orders and opinions during the course of the litigation, which culminated in the December 30, 2016 Judgment.

(C) Timeliness of the Appeal and Assertion that Appeal is From a Final Order

The United States District Court for the Eastern District of

Oklahoma entered its' final Judgment on December 30, 2016, Plaintiff/Appellant filed its' intent of appeal of that judgment on January 18, 2017. Thus, the appeal is timely.

Plaintiff/Appellant appeals from the District Court's grant of several judgments, which combined resolved all of Plaintiff/Appellants claims. Plaintiff/Appellant appeals (1) the partial judgment on the pleadings that dismissed Plaintiff/Appellant's claim for the assignment of certain lands in Oklahoma known as the Wetumka Project, (2) the judgment dismissing the claims against the Muscogee (Creek) Nation, and (3) the final summary judgment in favor of the Defendants/Appellees resolving the Plaintiff/Appellant's remaining claims over the trust accounting.

STATEMENT OF ISSUES FOR REVIEW

I. THE DISTICT COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS DISMISSING PLAINTIFF/APPELLANT'S CLAIM FOR ASSIGNMENT OF CERTAIN LANDS IN OKLAHOMA KNOWN AS THE "WETUMKA PROJECT."

II. THE DISTIRCT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE UNITED STATES DETERMINING THAT THE UNITED STATES DOES NOT HOLD ANY PROPERTY IN TRUST FOR THE PLAINTIFF/APPELLEES.

STATEMENT OF THE CASE

This appeal is from several judgments by the District Court that dismissed the Plaintiff/Appellants claims. Initially, the District Court improperly dismissed the Wetumka Project land claims brought by Plaintiff/Appellant despite the claims accruing after the bar in Indian Claims Commission Act (the "ICCA"), 25 U.S.C. 70k, which is August 13, 1946, and within the six-year statute of limitations provided by 28 U.S.C. § 2401(a). Moreover, the District Court erred because the Muscogee (Creek) Nation is not a necessary party, or, at the very least, they voluntarily appeared in this action to defend its claimed interest in the trust property. Additionally, the District Court erred in affirming the decision of the IBIA in light of the overwhelming historical facts that the AQTT exclusively used the land and that the AQTT exclusively used the trust account. The IBIA based its whole decision on the fact that there was no one document in the record that assigned beneficial ownership of the trust to the AQTT. Thus, these decisions of the District Court must be reversed and the matter remanded to the District Court for trial.

The Plaintiff/Appellant, the Alabama-Quassarte Tribal Town (the "AQTT"), filed this lawsuit in the United States District Court for

Eastern District of Oklahoma on December 29, 2006. In its Complaint, the AQTT sought a declaratory judgment that (1) the United States of America, Sally Jewell, the Secretary of the United States Department of Interior, Kevin K. Washburn, Associate Deputy of the Department of the Interior, and Jack Lew, Secretary of the Treasury (collectively hereinafter the "Defendants/Appellees") violated their trust obligation by failing to assign certain lands in the State of Oklahoma, known as the Wetumka Project, to AQTT; and (2) the Defendants/Appellees failed in their fiduciary obligation to provide a sufficient accounting of the funds held in trust for the AQTT. (Complaint, D.C. Dkt. #2). The AQTT also sought injunctive relief to compel Defendants/Appellees to assign the AQTT the Wetumka Project lands and provide a full and complete accounting of AQTT's trust assets. *Id.*

Defendants/Appellees filed an answer on March 30, 2007 denying the claims. The case was administratively closed on June 4, 2007 to allow time for parties to participate in alternative dispute resolution procedures. (Answer to Complaint, D.C. Dkt. #26; Order, D.C. Dkt. #30). Those efforts did not result in a resolution of the case and it was reopened on February 4, 2008. (Order, D.C. Dkt. #38).

On March 13, 2008, Appellees sought partial judgment on the pleadings, which in actuality sought to dismiss all of the AQTT's claims. (Defendant's Motion for Partial Judgment on the Pleadings and Memorandum in Support, D.C. Dkt. #41). On November 17, 2008, the Court granted in part and denied in part the Defendants/Appellees' Motion. The District Court dismissed all of AQTT's claims with respect to the Wetumka Project lands pursuant to (1) the Indian Claims Commission Act (the "ICCA"), 25 U.S.C. § 70k (1976) because the claims arose before August 13, 1946, (2) 28 U.S.C. 2401(a) because the claims accrued prior to the six-year statute of limitations, (3) 28 U.S.C. § 2409(a) barred any quiet title claims, and (4) that the Creek Nation was an indispensable party. (November 17, 2008, Order and Opinion, D.C. Dkt. #50). In the Order, the District Court did not dismiss the accounting claims. *Id.*

On January 11, 2010, the parties filed competing motions for summary judgment and Defendants/Appellees filed a motion to dismiss. (Plaintiff Alabama-Quassarte Tribal Town's Motion for Summary Judgment, D.C. Dkt. #89; Defendants' Motion for Dismissal or, in the alternative, for Summary Judgment, D.C. Dkt. #92). Of note, in

Defendants/Appellees' motion, they claimed, for the first time, that they did not hold any assets in trust for the AQTT. *Id.* at p. 3; Declaration of Warren Austin, ¶¶ 20, 22.

On September 21, 2010, the District Court denied both motions. However, the District Court remanded the matter to the Defendants/Appellees' "to assemble a full administrative record to include all of the evidence they possess with regard to the Surface Lease Income Trust[1] and reconsider their decision on the matter of ownership of the Surface Lease Income Trust." (September 21, 2010 Order and Opinion, D.C. Dkt. #135 at 23).

The AQTT appealed the September 21, 2010 judgment to the 10th Circuit. (Notice of Intent to Appeal, D.C. Dkt. #137). However, because both summary judgment motions were denied and the case was remanded to the Defendants/Appellees, the appeal was dismissed as premature. (USCA Decision, D.C. Dkt. #168).

The Defendants/Appellants assigned the remanded matter to the Interior Board of Indian Appeals (the "IBIA"). The Defendants/Appellees

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[1] The Surface Lease Income Trust consists of an IIM account (number xxxx0008) used to collect fees from leasing the Wetumka Project lands. In 1987, the IIM account was transferred to a Proceeds of Labor account (number xxxx7067).

constructed an "Administrative Record" of over 4,900 documents containing over 7,000 pages. The IBIA then set a briefing schedule with assistance from the parties.

After the briefing was completed by the parties, the IBIA issued a decision on October 23, 2014 on a summary basis after reviewing the administrative record and despite noting that "[a]s the [District Court] recognized, the historical evidence – at least viewed in one light – appears to point strongly to beneficial ownership of the Trust by AQTT." 59 IBIA 173, 198. The IBIA held that the Defendants/Appellees were not holding any funds in trust for the AQTT. (59 IBIA 173, 201).

After the IBIA's decision, the case returned to the United States District Court for the Eastern District of Oklahoma. The AQTT moved to add the Muscogee (Creek) Nation as a Defendant and add a claim related to a Muscogee (Creek) Nation resolution the AQTT discovered when provided the "administrative record" that requested the Defendant/Appellees to assign the Surface Lease Income Trust and the Wetumka Project Lands to the AQTT. (Motion to Amend the Complaint, D.C. Dkt. #172). After being served with the First Amended Complaint (D.C. Dkt # 174), the Muscogee (Creek) Nation moved to dismiss the

claims against it on sovereign immunity grounds, which was granted on January 7, 2016. (Motion to Dismiss, D.C. Dkt. #181; January 7, 2016 Order and Opiniomn, D.C. Dkt. #193). The order also dismissed the AQTT's claim regarding the Muscogee (Creek) Nation's resolution because the District Court held it was a "public document" and, thusly, the statute of limitations ran in 1986. After the Order and Opinion, the only remaining claim was the review of the administrative decision holding that the Defendants/Appellees did not hold any AQTT property.

With assistance of the parties, the District Court set a briefing schedule. The AQTT filed its Motion for Summary Judgment on July 22, 2016. (Motion for Summary Judgment, D.C. Dkt. #202). Defendants/Appellees filed a response and also moved for Summary Judgment on September 16, 2016. (Response and Cross Motion for Summary Judgment, D.C. Dkt. #212). The parties filed the necessary responses and replies.

The District Court entered its order and opinion on December 30, 2016. (December 30, 2016 Opinion and Order, D.C. Dkt. #218). The District Court found the IBIA's Decision to be "well-reasoned and supported by the evidence," thus, granted Appellees' Motion for

Summary Judgment. *Id.* at 6. Moreover, the District Court held that even if Muscogee (Creek) Resolution was not a public document, "it merely states the intent of the Creek Nation that lands held in trust for the tribal towns be assigned to those tribal towns … [thus] [f]urther action would be necessary to transfer the property." *Id.* at n.6. Thus, it did not reverse its decision on that claim.

This appeal is over the United States District Court for the Eastern District of Oklahoma's (1) Partial Judgment entered on November 17, 2008, which dismissed AQTT's claims over the assignment of the Wetumka Project lands, (2) the January 7, 2016 Order and Opinion, which dismissed the Muscogee (Creek) Nation and the claim over the Muscogee (Creek) Nation's resolution that requested the Defendants/Appellees to assign the trust property to the AQTT, and (3) the December 30, 2016 Order and Opinion granting Appellees' Motion for Summary Judgment, which upheld the October 23, 2014 IBIA Decision and denied AQTT's Motion for Summary Judgment.

STATEMENT OF THE FACTS

A. The Alabama-Quassarte Tribal Town

The Oklahoma Indian Welfare Act ("OIWA") provides that

> [a]ny recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe.

Id. In doing so, the Secretary of the Interior is authorized to issue a charter of incorporation to the Tribe or Band that organizes under the OIWA. *Id.* Thus, on January 10, 1939, Plaintiff/Appellee, the Alabama-Quassarte Tribal Town (the "AQTT"), organized pursuant to the OIWA. (Complaint, D.C. Dkt. #2, ¶ 1.) The Secretary of the Interior issued it a corporate charter and since that time, the AQTT has been a Federally-recognized Indian Tribe. 81 Fed. Reg. 19 (January 29, 2016) at 5020.

The AQTT's tribal headquarters are located in Wetumka, Hughes County, Oklahoma. (Complaint, D.C. Dkt. #2, ¶ 1). The AQTT is one of three tribal towns recognized under the OIWA. (Complaint, D.C. Dkt. #2, ¶ 9). These towns were originally part of a confederacy of tribal towns that constituted the Muskogee (Creek) Nation. (Complaint, D.C. Dkt. #2, ¶ 10). The Muskogee (Creek) Nation confederacy was not federally recognized until August 20, 1979. *Id.*

B. Acquisition of the Wetumka Project Lands

The OIWA authorizes the Secretary of the Interior

> to acquire … any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: Provided, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title 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

25 U.S.C. § 5201. Thus, in 1938, the Department of the Interior began discussions with members of the AQTT to acquire land in order to assist 21 AQTT families who were in desperate need. (59 IBIA 173, 178; Nov. 7, 1941 Letter from BIA Land Field Agent to Director of Lands). The Commissioner endorsed a proposal to purchase four tracts of land "for the use and benefit of the Indians of AQTT." (59 IBIA 173, 178; Nov. 3, 1941 Letter from Commissioner to Secretary.) Thus, from 1941 to 1942, the United States purchased 878.25 acres of land in Hughes County, Oklahoma.[2] The land purchase became known as the "Wetumka Project."

[2] 59 IBIA 173, 178; Deed from General American Life Insurance Co., Apr. 29, 1942; Deed from Millie King, April 13, 1942; Deed from C.E. Russell and Maude Russell, Feb. 4, 1942; Deed from Ada M.

(59 IBIA 173, 178)

Each deed contained the following language in the granting clause

> [Seller] … does hereby grant, bargain, sell and convey unto the United States, IN TRUST for the Creek Tribe of Oklahoma, until such time as of the use of the land is assigned by the Secretary of the Interior to a tribe, band, or cooperative group organized under the [OIWA], or to an individual Indian, then in trust for such tribe, band, group, or individual ….

Id.[3] The historical record is unclear as to why the deeds used "the Creek Tribe of Oklahoma" instead of the AQTT, as there was no Federally recognized Indian Tribe by that name under the OIWA or otherwise at the time. *Id.* Nonetheless, it is undisputed that the intent of the United States, when executing the deeds and purchasing the land, was to eventually assign the lands to the AQTT. (*Id.* at 179; Jan. 8, 1943, Letter from Walter V. Woehlke to Superintendent.) Specifically, the Assistant to the Commissioner stated in a letter dated Jan. 8, 1943, that "although it is intended eventually to assign these lands to the [AQTT], the land has not yet been assigned …." (*Id.* at 179-180; Jan. 8, 1943, Letter from

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Johnson, Nov. 19, 1941.

[3] There was a slight difference in the wording in the deed from Millie King, Apr. 13, 1942, which provided, in part, "in trust for the Creek *Tribes* of Oklahoma, until such time as …." (emphasis added).

Walter V. Woehlke to Superintendent; *see also* Nov. 9, 1989 Memorandum from Dennis Springwater, Deputy, to the Assistant Secretary – Indian Affairs.)

C. The Surface Lease Income Trust

From the inception of the Wetumka Project until sometime in 1976, all the proceeds from the use of the lands were deposited into an account used by the AQTT. In this case, District Court called the money trust the Surface Lease Income Trust. The Surface Income Trust consists of IIM account number xxxx0008 that was later converted to a Proceeds of Labor account in 1987 (number xxxx7067). The ledger sheets for the IIM refer to the account as the "Alabama-Quassarte Tribal Town (Oklahoma), Wetumka Project – Creek Tribe." (59 IBIA 173, 185). The Proceeds of Labor account identifies the owner of the account as the AQTT. *Id.* After 1976, the records show that only interest deposits were made into the account. *Id.* The evidence shows that the only Indian Tribe to ever benefit from the Surface Lease Income Trust was the AQTT. *Id.*

D. Administration of the Wetumka Project

From the very beginning of the project, the AQTT have occupied the property and used it for the benefit of the AQTT. (*Id.* at 184)[Letter of May 18, 1956 from Linus L. Gwinn, Appendix Pg. 198] The Wetumka

Project Trustees, all of whom were AQTT members, were primarily responsible for the day-to-day management of the Wetumka Project lands. [Letter of September 29, 1964 from Daniel Beaver, Appendix Pg. 234, Letter of August 18, 1964 from Virgil N. Harrington, Appendix Pg. 232, Letter of October 16, 1964 from Marie L. Wadley, Appendix Pg. 235]. The farming and grazing leases were all reviewed and approved by the AQTT trustees. [Minutes of the Meeting of the Wetumka Project dated January 4, 1963, Appendix Pg. 236; Grazing Leases dated February 26th, 1964, April 27th, 1965, and January 26th, 1966, Appendix Pg. 238; Notice of Public Auction of Indian Land for Agricultural or Hay and Grazing Lease dated January 30th, 1963, Appendix Pg. 250; Letter of February 14, 1963 from C. C. Marrs, Appendix Pg. 251; Letter of February 15, 1968 cancelling Wetumka Project lease, Appendix Pg. 255.] Moreover, the United States actively encouraged the participation of the AQTT. [Letter of April 19, 1972, from Merzl Schroeder, Appendix Pg. 254.] Finally, the AQTT have been instrumental in the leasing of the property. [Farming and Grazing Lease dated May 1, 1958, Appendix Pg. 255.] Even the IBIA noted that

> [t]he historical record clearly shows that the Department purchased the Wetumka Project

> lands with the intent to "eventually" assign the lands to the AQTT, at "some unspecified future date." … The Department initially provided a preferential right to AQTT members to obtain revocable permits and to use the lands (e.g. for AQTT's church). Homesite permits were granted to AQTT members, and when agricultural leases were entered into it appears that at least some, and possibly many, of the lessees were AQTT members. Funds derived from the leases appear to have been used exclusively, at least during the 1961-1976 period, for the Project, thus benefiting the lands and the AQTT members using the lands.

58 IBIA 173, 199 (citations omitted.)

The IBIA also made note that the Defendants/Appellants had the Chief of the Muscogee (Creek) Nation execute many of the Wetumka Project leases. The IBIA found that the Defendants/Appellees kept the Muscogee (Creek) Nation involved with the land. This is not an important fact as up until 1970s, the "Chief" of the Muscogee (Creek) Nation was appointed by the President of the United States and was required to execute any document provided him by the United States. *Harjo v. Kleppe*, 420 F.Supp. 1110. 1132 (D.D.C. 1976); Five Tribes Act, 34 Stat. 137 (April 26, 1906). Moreover, the Muscogee (Creek) Nation's governing council was prevented from making any law, ordinance or resolution unless the same be approved by the President of the United

States. *Id.* at 1129; Five Tribes Act, 34 Stat. 137. So, to the extent that the Muscogee (Creek) Nation existed at that time, the Muscogee (Creek) Nation was required to do whatever the United States directed it to do. Further, the fact can be turned around as the AQTT have always been involved with the property and with the execution of the leases.

E. Use of the Surface Lease Income Trust

The monies in the Surface Lease Income Trust were always used by the AQTT. [Memorandum to Budget Director dated March 12, 1964, Appendix Pg. 314; Letter dated March 20, 1964 from Virgil N. Harrington, Appendix Pg. 315.] The Defendants/Appellants routinely disbursed funds to the AQTT. [Memorandum to Area Budget Officer dated March 16, 1964, Appendix Pg. 316] Indeed, when the Defendants/Appellees converted the IIM account to a Proceeds of Labor Account, the Muscogee (Creek) Nation was not informed. [Letter from Jimmy L. Gibson dated November 13, 1987, Appendix Pg. 331; GO7 – Okmulgee Agency Index, Appendix Pg. 323.] Moreover, the United States has always represented to the AQTT that the Surface Lease Income Trust was the property of the AQTT. [Agreed Upon Procedures Report, Appendix Pg. 399.]

F. The Failure to Assign the Property

On September 30, 1987, the AQTT petitioned for an assignment of the lands. [Letter from Willard C. McBride dated September 30, 1987, Appendix Pg. 343.] The Defendants/Appellees have yet to make a decision as to that petition. [Letter from Hazel E. Elbert dated November 18, 1987, Appendix Pg. 362; Dear Tribal Leaders Letter dated October 4, 1996, Appendix Pg. 368; Letter from Rebecca Torres dated December 2, 1996, Appendix Pg. 371.] In 1996, the Defendants/Appellees outlined a procedure that it would follow to determine when it would be time to assign the Wetumka Project lands to the AQTT. [Dear Tribal Leaders Letter dated October 4, 1996, Appendix Pg. 380] The Defendants/Appellees noted that the language in the deeds clothed them with "complete discretion in dealing with the equitable interests in trust lands." [Dear Tribal Leaders Letter dated October 4, 1996, Appendix Pg. 380]. In 1996, the AQTT submitted its formal position on the Wetumka Project. [Letter from Rebecca Torres dated December 2, 1996, Appendix Pg. 371.] In 1997, the Muscogee (Creek) Nation simply objected to the assignment to the AQTT. [Letter from George Almerigi dated June 2, 1997, Appendix Pg. 383]. From that point forward, the

Defendants/Appellees never decided the issue.

G. Conclusion of the IBIA

The IBIA noted that this was an anomalous situation in which

> [l]ands acquired in trust for one tribe are then used for the benefit of another, and income from the lands is placed in a trust account bearing the name of a tribe that does not hold beneficial title to the lands.. As the [District Court] recognized, the historical evidence – at least viewed in one light – appears to strongly to beneficial ownership of the Trust by AQTT.

59 IBIA 173, 198. The historical record shows that "the Department purchased the Wetumka Project lands with the intent to "eventually" assign the lands to the AQTT" at some point in the future. 59 IBIA 173, 199. Despite that, the IBIA's sole basis for its conclusion, in the face of the historical facts, is that "absent from the historical record is any trust instrument whereby beneficial title to the Trust was assigned by the Secretary from the Creek Nation to AQTT." 59 IBIA 173, 198.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing the Wetumka Project land claims made by Plaintiff/Appellant. The district court cited the Indian Claims Commission Act, 25 U.S.C. 70k, and the six-year statute of limitations in 28 U.S.C. § 2401(a) as grounds for dismissal of Plaintiff's claims. Neither statute properly applies to the case at hand. In addition, the district court held the Muskogee (Creek) Nation to be a necessary party to suit, and granted the Muskogee (Creek) Nation's Motion to Dismiss on the grounds of sovereign immunity. This decision is also erroneous.

The Indian Claims Commission Act and 28 U.S.C. § 2401(a) work to bar claims not raised by a plaintiff in a timely manner after accrual of the claim. The problem with the Court's decision below is that it found claims accrued upon purchase of the lands known as the Wetumka Project. However, the Court misconstrued the AQTT's claim for relief, which requested an order compelling Defendants/Appellees to assign the beneficial interest in the Wetumka Project lands to the AQTT. A cause of action accrues when all elements necessary to state the claim have occurred. Here, the United States maintained that the lands would be

transferred to the AQTT at some time in the future, and in fact, maintained that position as late as 2005. The AQTT filled the present suit in 2008, well within the six year statute of limitations applying to the claim.

The District Court also erroneously dismissed claims against the Muskogee (Creek) Nation, citing sovereign immunity and the Muskogee (Creek) Nation's position as a necessary party. However, the Muskogee (Creek) Nation voluntarily waived its sovereign immunity by entering an appearance and requesting affirmative relief from the District Court. Even if the Muskogee (Creek) Nation did not waive sovereign immunity as to the claims of the AQTT's ownership of the Wetumka Project lands, the Muskogee (Creek) Nation has long since disclaimed all interest in the lands. In Muskogee (Creek) Nation Resolution No. TR-81-12, the Muskogee (Creek) Nation requested that all lands held by Defendants and intended to be assigned to the Federally-recognized Tribal Towns be assigned immediately. Resolution No. TR-81-12 is sufficient evidence under Federal regulation to transfer all interest of the Muskogee (Creek) Nation to the various Tribal Towns, including the AQTT. The sole task remaining was the Defendants' ministerial task of making a record of the

transfer.

The District Court also erred in affirming the IBIA's decision. Taken the facts in the light most favorable to the non-movant, the AQTT, shows that the AQTT were the beneficial owners of the Wetumka Project lands and the Surface Lease Income Trust. The United States Supreme Court has long recognized the trust responsibility the United States has placed on itself in its dealings with the Indians. The evidence shows that the United States had every intention, upon purchase of the Wetumka Project lands and for nearly sixty years thereafter, to transfer the Wetumka Project lands to the AQTT. Further, it was the intent of the trustee, the Defendants, to convey to the AQTT the monies and economic benefits of the Wetumka Project lands to the AQTT. Nothing is more evident of this intent than that the AQTT has been in physical control of the land since its purchase. The monies in the Surface Lease Income Trust were never used for the benefit of any Tribe or Nation other than the AQTT. The Defendants cannot simply ignore the history of the Surface Lease Income Trust, and the general law of trusts to convey the AQTT"s property to another tribe.

ARGUMENT AND AUTHORITY

PROPOSITION I: THE DISTICT COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS DISMISSING PLAINTIFF/APPELLANT'S CLAIM FOR ASSIGNMENT OF CERTAIN LANDS IN OKLAHOMA KNOWN AS THE "WETUMKA PROJECT."

The District Court erred in dismissing the Wetumka Project land claims in its November 17, 2008 Order and Opinion (D.C. Dkt. No. 50). Plaintiff's claims regarding the Wetumka Project lands accrued after August 13, 1946, thus the Indian Claims Commission Act (the "ICCA"), 25 U.S.C. 70k, does not apply. Additionally, the District Court erred because the Wetumka Project land claims accrued within the six-year statute of limitations in 28 U.S.C. § 2401(a). Moreover, the Muscogee (Creek) Nation is not a necessary party, or, at the very least, they voluntarily appeared in this action to protect its interest in the property. Finally, the District Court erred in dismissing Plaintiff's claims based on the Muscogee (Creek) Nation's resolution because the District Court had to take the factual allegations in the Amended Complaint as true. Therefore, this Court should reverse the decision of the District Court dismissing the claims and remand the case for further proceedings.

A. Standard of Review for a Judgment on the Pleadings

"A motion for judgment on the pleadings under Rule 12(c) is treated

as a motion to dismiss under Rule 12(b)(6)." *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000). This Court's "standard of review is therefore *de novo*." *Id.* This Court will "uphold a dismissal under Rule 12(b)(6) only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." *Id.* (citations omitted.) Likewise, this Court must "accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the non-moving party." *Id.* (citations omitted.)

In its order on the Defendants/Appellees' Motion for Partial Judgment on the Pleadings, the District Court held that the statute of limitations had run on all of AQTT's claims involving the Wetumka Project lands and that the Muscogee (Creek) Nation was a necessary party.[4] (Order and Opinion, D.C. Dkt. #50; Order and Opinion D.C. Dkt No. 218.)

B. The ICCA and 28 U.S.C. 2401(a).

The District Court incorrectly determined that the accrual of the

[4] The District Court also held that the Quiet Title Act barred the AQTT from recovering *any* lands. That ruling is not being appealed as the AQTT seek assignment of the Wetumka Project lands not *any* lands.

claims occurred between November 19, 1941 and April 29, 1942, thus both ICCA and 28 U.S.C. 2401(a) barred the claims. The ICCA provides that all claims that accrued prior to August 13, 1946 are barred if not brought before August 13, 1951. 25 U.S.C. § 70k (1976). Further, 28 U.S.C. § 2401(a) requires that claims against the United States must be brought within six years of their accrual. The problem with the Court's decision is that it misconstrues the claim for relief, which is for an order compelling the Defendants/Appellees to assign the property to the AQTT. Thus, the claim did not arise simply when the land was purchased.

"[A] cause of action "accrues" when it comes into existence." In explaining what that means, this Court has held that "under federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred." *United States v. Hess*, 194 F.3d 1164, 1175 (10th Cir. 1999). Here, all the events did not occur before 1946, as the United States still maintained that the lands would eventually be assigned to the AQTT.

Thus, based solely on the Complaint, the District Court could not determine when the claim accrued. The Complaint alleges that "878 acres of land has been purchased by the Government for the eventual use

of the members of the AQTT." (Complaint, ¶ 24(a), D.C. Dkt. 2.) Further, the Complaint seeks an order for the United States to assign the land as intended. *Id.* at ¶ 25. There is no specific timeframe when the United States had to assign the lands. This claim accrues only when the Defendants/Appellants fail to assign the property after a request by the AQTT. The issue in this case is centered on the Defendants' current refusal to assign the Wetumka lands to the AQTT. It is not why the lands were not originally assigned in 1942 or a request for a reformation of the deeds, which form the foundation of the District Court's ruling. That timeframe may be the initial point when the AQTT could have asked, but a claim only accrues when all events necessary for a claim have occurred. Thus, there needs to be a request to assign the Wetumka Project lands and a refusal by the United States. The issue is when did the claim accrue for the failure of the Defendants/Appellants to assign the property. Even the District Court recognized that there was an obligation on the United States to eventually assign the Wetumka Project. (Order and Opinion, D.C. Dkt. 50, n. 3.) The Complaint sufficiently makes a claim for a declaratory judgment and an order to direct the Defendants/Appellees to assign the Wetumka Project lands.

To the extent necessary, as to evidence outside the Complaint, as shown by the subsequent evidence produced in this case, the AQTT petitioned for the assignment of the property in 1987. [Letter from Willard C. McBride dated September 30, 1987, Appendix Pg. 343] The Defendants/Appellees were still considering that assignment as late as 2005. (Exhibit 1, Plaintiff's Opposition Brief in Response to Defendants' Motion for Partial Judgment on the Pleadings, D.C. Dkt. #46.) Thus, the claims accrued are after the ICCA deadline and well within the six-year statute of limitations in 28 U.S.C. § 2401(a).

At worst, the District Court should have granted the AQTT leave to amend the Complaint to add the facts necessary to establish the date of the denial by the United States. But, in essence, the Complaint was sufficient to survive a Rule 12(c) motion. This Court should reverse the District Court and remand the matter for further proceedings.

C. The Muscogee (Creek) Nation is not a necessary party and, in any event, the Nation voluntarily appeared to protect its interests.

The Muscogee (Creek) Nation is not a necessary party. First, the Defendants/Appellees noted that the language in the deeds clothed them with "complete discretion in dealing with the equitable interests in trust lands." [Dear Tribal Leaders Letter dated October 4, 1996, Appendix Pg.

368]. Thus, the Defendants/Appellees have already determined that that the Muscogee (Creek) Nation is not a necessary party because they have unfettered discretion as to when to assign the Wetumka Project lands. Further, the Muscogee (Creek) Nation voluntarily appeared in the case, effectively waiving its sovereign immunity. Finally, the Muscogee (Creek) Nation waived any claim to the Wetumka Project land when it issued its resolution requesting the Defendants/Appellees transfer the trust property to the AQTT.

i. The Muscogee (Creek) Nation Voluntarily Appeared in the Case.

The Muscogee (Creek) Nation voluntarily appeared in this case and defended its claim to the Wetumka Project land and the Surface Lease Income Trust. By doing so, the Muscogee (Creek) Nation voluntarily waived its sovereign immunity. That waiver extends to the ownership of the Proceeds of Labor Account and the underlying dispute over the Wetumka Project. The issues are so interrelated that waiver of sovereign immunity to one has to be a waiver of sovereign immunity to the other.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L.

Ed. 2d 106 (1978) (citations omitted). Thus, in general, suits against Tribes are barred unless: (1) the Tribe unequivocally expresses a waiver; or (2) Congress abrogates the Tribe's immunity. *Id., See also Michigan v. Bay Mills Indian Cmty.,* 134 S. Ct. 2024, 188 L. Ed. 2d 1071, 82 U.S. L.W. 4398, 24 Fla. L. Weekly Fed S 765. (2013).

The standard for reviewing a motion to dismiss for subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) is set forth in *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). In *Holt*, this Court held that:

> [M]otions to dismiss for lack of subject matter jurisdiction take two forms. First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.
>
> Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve jurisdictional facts under Rule 12(b)(1).

Id. (Citations omitted.)

The "Answer Brief of the Muscogee (Creek) Nation" provides:

> For the reasons set forth herein, the Muscogee (Creek) Nation respectfully requests the Interior Board of Indian Appeals to find and order that the Surface Lease Income Trust is the beneficial property of the MCN and not the AQTT.

(Appendix Pg. 131, Answer Brief of the Muscogee (Creek) Nation, p. 3.) The brief shows that the Muscogee (Creek) Nation voluntarily appeared and set up a defense to the claims of the AQTT.

The Muscogee (Creek) Nation voluntarily waived its sovereign immunity and to the extent that it is a necessary party, it can be joined to the suit. However, newly discovered facts show that MCN is only necessary for the review of the IBIA decision as it has already relinquished its interest in the Wetumka Project and the Surface Lease Income Trust.

ii. The MCN Are No Longer a Necessary Party

The Amended Complaint shows that the Muscogee (Creek) Nation has released its interest in the Wetumka Project and the Surface Lease Income Trust on October 18, 1980 to AQTT. Once it transferred its interest, the Muscogee (Creek) Nation did not have authority to deprive the AQTT of the property without the AQTT's consent.

The Muscogee (Creek) Nation's Resolution No. TR-81-12 was sufficient, in and of itself, to end the Muscogee (Creek) Nation's interest in the trust as the Defendants/Appellees only had the ministerial task of making a record of the transfer. Resolution No. TR-81-12 identifies the land that is transferred and whom to transfer the land. Under Federal regulation, a "[t]itle document is any document that affects the title to or encumbers Indian land and is required to be recorded by regulation or Bureau policy." 25 CFR 150.2(l). Moreover, Indian Land is

> … an inclusive term describing all lands held in trust by the United States for individual Indians or tribes, or all lands, titles to which are held by individual Indians or tribes, subject to Federal restrictions against alienation or encumbrance, or all lands which are subject to the rights of use, occupancy and/or benefit of certain tribes. For purposes of this part, the term Indian land also includes land for which the title is held in fee status by Indian tribes, and U.S. Government-owned land under Bureau jurisdiction.

There can be little doubt that the Wetumka Project is Indian Land and that Resolution No. TR-81-12 was intended to affect the title to that Indian Land. Thus, it is sufficient to be a title document and transferred the Muscogee (Creek) Nation's beneficial interest in the land to the AQTT. Further, the resolution was properly filed with the United States

as it was included in the Administrative Record by the United States before the IBIA on remand. [Index of the Administrative Record, Doc. No. 4178.] Therefore, the 1980 Resolution, in and of itself, was sufficient to transfer title and the Muscogee (Creek) Nation is no longer a necessary party.

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, supra.* at 2030(*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. Thus, once the Muscogee (Creek) Nation completed the

transfer to the AQTT as sovereigns, the United States could not simply ignore the transfer. The Muscogee (Creek) Nation and the AQTT are sovereigns and can act as sovereigns, including the transfer of lands, unless and until Congress provides otherwise.

iii. The Amended Complaint was Sufficient to Survive a Motion to Dismiss Regarding the Claim over the Resolution

As plead, the 1980 Resolution is new evidence not previously known by the AQTT and therefore, the claim did not accrue until it was produced in this case. The standard of review on a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) is judged on whether "[a] complaint will survive [] if it alleges a plausible claim for relief." *Dias v. City of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009). "The complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in the original). Further, for the purposes of a motion to dismiss, the court must take all the factual allegations in the complaint as true. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1204 (10th Cir. 2002).

The AQTT did not learn about the 1980 Resolution until it was produced in the Administrative Record by the United States. [Dkt. 174, Amended Complaint, ¶ 37.] Thus, the claim did not accrue until the AQTT was aware of the United States' failure to comply with the 1980 Resolution, which was after the lawsuit started.

D. Conclusion

The District Court erred in dismissing the Wetumka Project land claims in its November 17, 2008 Order and Opinion (D.C. Dkt. No. 50). Plaintiff's claims regarding the Wetumka Project lands accrued after August 13, 1946, thus the Indian Claims Commission Act (the "ICCA"), 25 U.S.C. 70k, does not apply. Additionally, the District Court erred because the Wetumka Project land claims accrued within the six-year statute of limitations in 28 U.S.C. § 2401(a). Moreover, the Muscogee (Creek) Nation is not a necessary party, or, at the very least, it voluntarily appeared in this action to protect its interest in the property. Finally, the District Court erred in dismissing Plaintiff's claims based on the Muscogee (Creek) Nation's resolution because the District Court had to take the factual allegations in the Amended Complaint as true. Therefore, this Court should reverse the decision of the District Court

dismissing the claims and remand the case for further proceedings.

PROPSITION II: THE DISTIRCT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE UNITED STATES DETERMINING THAT THE UNITED STATES DOES NOT HOLD ANY PROPERTY IN TRUST FOR THE PLAINTIFF/APPELLEES.

The District Court erred in affirming the IBIA's decision. The IBIA agreed that the facts, in the light most favorable to the AQTT showed that the AQTT were the beneficial owners of the property.

A. Review of Summary Judgment

The Appellate Court reviews "the district court's grant of summary judgement *de novo*, applying the same legal standard used by the district court under Fed.R.Civ.P. 56(c)." *James Barlow Family Ltd. Partnership v. David M. Munson, Inc.*, 132 F.3d 1316, 1319 (10th Cir. 1997) (citation omitted), *cert denied*, 523 U.S. 1048, 118 S.Ct. 1364, 140 L.Ed.2d 513 (1998).

The district court granted Appellees' Motion for Summary Judgment on December 30, 2016. (Judgment, D.C. Dkt. #219).

The District Court reviewed the Appellees actions in regards to the trust funds as an agency action. "When reviewing a final agency action, an appellate court 'takes an independent review of the agency's action and is not bound by the district court's factual findings or legal

conclusions.'" *United Keetoowah Band of Cherokee Indians of Okla. v. United States Dept. of Housing and Urban Dev.*, 567 F.3d 1235, 1239 (10th Cir. 2009) (citation omitted). The District Court reviewed the Appellees actions to determine if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Opinion and Order, D.C. Dkt. #135).

The District Court erred when it reviewed the agency's decision under the arbitrary and capricious standard. A question of trust interpretation is a question of law and should be reviewed by appellate courts under the de novo standard of review. *Corr v. Corr*, 2001 OK CIV APP 31, ¶ 10, 21 P.3d 642, 644 (citation omitted). The issue is one of law. Therefore, this Court should review the evidence de novo.

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, even 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 where 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.

The sole issue is hinges on the failure of the IBIA to find a document that assigned the Surface Lease Income Trust to the AQTT. The IBIA held that "[t]he historical record clearly shows that the Department purchased the lands with the intent to "eventually" assign the lands to

the AQTT, at "some unspecified future date." [Memorandum for the Commissioner of Indian Affairs dated February 12, 1943] . Moreover, the IBIA held that

> The Department initially provided a preferential right to AQTT members to obtain revocable permits and to use the lands (e.q. for AQTT's church). Homesite permits were granted to AQTT members, and when agricultural leases were entered into it appears that at least some, and possibly many, of the lessees were AQTT members. Funds derived from the leases appear to have been used exclusively, at least during the 1961-1976 period, for the Project, thus benefiting the lands and the AQTT members using the lands.

What held up the IBIA, is the inability of it to find any document that "officially" assigned the lands to the AQTT. The problem is that the IBIA found that the use of the lands was not to the exclusion of the Creek Nation, but the use of the lands was also not to the exclusion of the AQTT either.

CONCLUSION

This Court should reverse the District Court's dismissal and summary judgement of the AQTT's claims. The AQTT should have its day in court to resolve the Wetumka Project land claims. The AQTT sufficiently plead a cause of action for the Court to compel the Defendants/Appellees to assign the Wetumka Project lands to the AQTT

as was originally intended. Moreover, the AQTT has been the only Tribe to benefit from the Surface Lease Income Trust. Thus, the IBIA decision was contrary to law and fact.

Dated: July 17, 2017

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CERTIFICATE OF COMPLAINCE WITH RULE 32(a)(7)

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B), because this brief, exclusive of the items listed in Rule 32(a)(7)(B)(iii), contains XXXX words.

Dated: July 17, 2017

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CERTIFICATE OF DIGITAL SUBMISSION

Counsel for Appellant hereby certifies that all required privacy redactions have been made, which complies with the requirements of Federal Rule of Appellate Procedure 25(a)(5).

Counsel also certifies that the hard copies submitted to the Court are exact copies of the ECF Filing from July 19, 2017.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (XXXX) and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that seven (7) printed copies of the foregoing will be shipped by Federal Express overnight delivery to the Clerk, United States Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, 1823 Stout Street, Denver, Colorado 80257-1823, for delivery to the Court within two (2) business days of the above date.

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