Case No. 17-7003

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALABAMA-QUASSARTE TRIBAL TOWN,
Plaintiff - Appellant,
v.
UNITED STATES OF AMERICA; RYAN ZINKE, in his official capacity as Secretary of the U.S. Department of the Interior; JAMES CASON, in his official capacity as Associate Deputy Secretary of the Interior; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury,
Defendants -Appellees,

On Appeal from the U.S. District Court for the Eastern District of Oklahoma
Case No. 6:06-CV-00558-RAW (Hon. Ronald A. White)

RESPONSE BRIEF FOR DEFENDANT-APPELLEE MUSCOGEE (CREEK) NATION

Respectfully submitted,

GALEN L. BRITTINGHAM
KEITH B. BARTSCH
Attorneys
ATKINSON, HASKINS, NELLIS,
BRITTINGHAM, GLADD & FIASCO,
525 South Main Street, Suite 1500
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
Email: gbrittingham@ahn-law.com
kbartsch@ahn-law.com

Oral Argument not requested.

November 27, 2017

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES. iii

GLOSSARY. viii

PRIOR OR RELATED APPEALS. ix

STATEMENT OF JURISDICTION. 1

STATEMENT OF THE ISSUES. 1

STATEMENT OF THE CASE. 2

I. STATEMENT OF FACTS. 2

A. The Creek Nation and Tribal Towns. 2

B. Organization of AQTT and acquisition of Wetumka lands. . . . 2

II. PROCEDURAL HISTORY. 5

A. Administrative request for relief. 5

B. Complaint and district court. 5

C. Proceedings before the Board on Remand. 7

D. Amended complaint and litigation after remand. 7

STANDARD OF REVIEW. 8

SUMMARY OF THE ARGUMENT. 9

ARGUMENT. 12

I. THE DISTRICT COURT'S DISMISSAL OF AQTT'S FIRST AMENDED COMPLAINT AGAINST THE NATION SHOULD

BE AFFIRMED. 12

A. The Nation is entitled to assert sovereign immunity. 12

B. The Nation has not waived its sovereign immunity to suit. . . 16

1. No entry of appearance or request for affirmative relief was made. 16

2. Participation in the administrative proceedings is not an express and unequivocal waiver of sovereign immunity 17

C. The Nation is an indispensable party that cannot be joined because of its sovereign immunity. 19

1. The Nation did not transfer title to the Wetumka Project by way of the 1980 Tribal Resolution. 21

II. THE DISTRICT COURT'S RULING AQTT'S CLAIMS REGARDING THE WETUMKA PROJECT ARE TIME BARRED SHOULD BE AFFIRMED. 26

A. AQTT's claims are barred by the district court's prior orders. 26

1. AQTT's claims regarding the Wetumka Project accrued when those lands were purchased for its benefit and placed in trust for the Nation 27

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT. 30

CONCLUSION. 30

CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF DIGITAL SUBMISSION 32

CERTIFICATE OF SERVICE. 32

TABLE OF AUTHORITIES

PAGE

CASES

Bodi v. Shingle Springs Band of Miwok Indians,
832 F.3d 1011 (9th Cir. 2016). 18,19

Cherokee Nation v. Georgia,
5 Pet. 1, 8 L.Ed. 25 (1831). 1,9, 12

Cheyenne–Arapaho Tribes v. Beard,
554 F. Supp. 1 (W.D. Okla. 1980). 15

Confederated Tribes of Chehalis Indian Reservation v. Lujan,
928 F.2d 1496 (9th Cir. 1991). 20

Davis v. United States,
192 F.3d 951 (10th Cir. 1999). 20

Dayco Corp. v. Goodyear Tire & Rubber Co.,
523 F.2d 389 (6th Cir. 1975). 28

E.F.W. v. St. Stephen's Indian High Sch.,
264 F.3d 1297 (10th Cir. 2001). 15

Enter. Mgt. Consultants, Inc. v. United States,
883 F.2d 890 (10th Cir. 1989) 21

First Bank & Trust v. Maynahonah,
2013 OK CIV APP 101, 313 P.3d 1044. 19

Fletcher v. United States,
116 F.3d 1315 (10th Cir.1997). 14

Harjo v. Andrus,
851 F.2d 949 (D.C. Cir. 1978). 2

Holt v. United States,
46 F.3d 1000 (10th Cir. 1995). 8, 14

Jicarilla Apache Tribe v. Andrus,
687 F.2d 1324 (10th Cir. 1982) 29

Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,
523 U.S. 751 (1998). 12, 18

McClendon v. United States,
885 F.2d 627 (9th Cir. 1989) 21

Michigan v. Bay Mills Indian Cmty.,
134 S.Ct. 2024 (2014). 12, 13

Miner Elec., Inc. v. Muscogee (Creek) Nation,
505 F.3d 1007 (10th Cir. 2007). 14

Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,
498 U.S. 505 (1991) 18

Pearson v. Callahan,
555 U.S. 223 (2009). 14

Pueblo of Jemez v. United States,
790 F.3d 1143 (10th Cir. 2015) 8

Quileute Indian Tribe v. Babbitt,
18 F.3d 1456 (9th Cir. 1994) 18,19

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978). 1,9, 12, 18

Saucier v. Katz,
533 U.S. 194 (2001). 14

Thlopthlocco Tribal Town v. Stidham,
762 F.3d 1226 (10th Cir. 2014) 2

United Klans of Am. v. McGovern,
621 F.2d 152 (5th Cir. 1980)) 28

United States v. Testan,
424 U.S. 392 (1976) 18

Ute Distrib. Corp. v. Sec'y of the Interior,
584 F.3d 1275 (10th Cir. 2009). 8

Wichita & Affiliated Tribes v. Hodel,
788 F.2d 765 (D.C. Cir. 1986) 21

STATUTES

Indian Reorganization Act of 1934

25 U.S.C. § 5118. 3

Oklahoma Indian Welfare Act

25 U.S.C. § 503. 15

25 U.S.C. § 5201. 4

25 U.S.C. § 5203. 3

Muscogee Creek Nation Code Annotated

30 M(C)NCA §1-102 (2007). 28

30 M(C)NCA §1-103 (2007). 28

30 M(C)NCA §1-104 (2007). 28

30 M(C)NCA §1-105 (2007). 28

30 M(C)NCA §1-106 (2007). 28

30 M(C)NCA §1-107 (2007). 28

30 M(C)NCA §1-108 (2007). 28

30 M(C)NCA §1-109 (2007). 28

30 M(C)NCA §1-110 (2007). 28

30 M(C)NCA §1-111 (2007). 28

30 M(C)NCA §1-112 (2007). 28

30 M(C)NCA §1-113 (2007). 28

30 M(C)NCA §1-114 (2007). 28

33 M(C)NCA §1-101(a) (2007) 19

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1362. 1

28 U.S.C. § 2401(a) 1

RULES AND REGULATIONS

Fed. R. App. P. 4(a)(1)(B). 1

Fed. R. App. P. 19. 6

43 C.F.R. 4.313(a) 17

LEGISLATIVE HISTORY

H.R. Rep. No. 74-2408, at 3(1936). 3

S. Rep. No. 74-1232 at 6 (1935). 3

OTHER AUTHORITIES

Black's Law Dictionary (10th ed. 2014). 17, 24

GLOSSARY

AQTT	Alabama-Quassarte Tribal Town
Board	Interior Board of Indian Appeals
Nation	Muscogee (Creek) Nation
OIWA	Oklahoma Indian Welfare Act

PRIOR OR RELATED APPEALS

This case was before this Court in Case No. 10-7094, on appeal from the district court's September 21, 2010 Order, which set aside a finding that the Department of Interior did not hold any assets in trust for the Plaintiff-Appellant and remanded the claims for an accounting to the United States defendants for further investigation and proceedings. Aplt. App. at 89. Claims related to the Wetumka Project lands, which impacted the Muscogee (Creek) Nation ("Nation") were dismissed prior to the appeal being filed. Aplt. App. at 45. Counsel for the Nation is not aware of any other prior or related appeals.

STATEMENT OF JURISDICTION

Alabama-Quassarte Tribal Town ("AQTT") invoked the United States District Court for the Eastern District of Oklahoma's jurisdiction pursuant to 28 U.S.C. §§1331, 1362, seeking a declaratory judgment and injunction for an accounting of its alleged right to the Wetumka Project lands. However, the district court lacks jurisdiction because the Nation has not waived its sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831).

AQTT filed a timely notice of appeal under Fed. R. App. P. 4(a)(1)(B) on January 18, 2017 (Aplt. App. at 22), from a final judgment disposing of all parties and claims, which invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1291. Aplt. App. at 129.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT'S DISMISSAL OF AQTT'S CLAIMS AGAINST THE NATION SHOULD BE AFFIRMED BECAUSE THE NATION IS ENTITLED TO ASSERT SOVEREIGN IMMUNITY.

II. WHETHER THE DISTRICT COURT CORRECTLY DETERMINED AQTT'S LAND CLAIMS ARE TIME BARRED.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The Nation and Tribal Towns

Throughout history, Creek Indians have governed themselves through a confederacy of geographic units, which each had its own autonomous political organization and leadership. These units are called "tribal towns" or *talwa*. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1229 (10th Cir. 2014) (citing *Harjo v. Andrus*, 851 F.2d 949, 951 n.7 (D.C. Cir. 1978); *accord* Aplee. Supp. App. at 46. Membership of these tribal towns is hereditary and determined by ancestry. *Stidham*, 762 F.3d at 1229. "Since membership is hereditary and towns may adopt new members, no Creek can ever actually be considered to be without tribal town affiliation, or the possibility of such affiliation." *Harjo*, 581 F.2d at 951 n.7. In 1867, the Creeks adopted a constitution and created a centralized government, similar in structure to that of the United States. *Stidham*, 762 F.3d at 1230. Despite centralization, the tribal towns maintained their own social and political organizations outside the Nation's central government and continued to serve as basis of representation for the central body. *Id.*; Aplee. Supp. App. at 46-47.

B. Organization of AQTT and acquisition of Wetumka lands.

Congress enacted the Oklahoma Indian Welfare Act (OIWA) in 1937, for the purpose of assisting Oklahoma Indians and providing benefits similar to those granted

to other Indians under the Indian Reorganization Act of 1932, from which Oklahoma Indians were exempt. 49 Stat. 1967; 25 U.S.C. § 5118; *see* H.R. Rep. No. 74-2408, at 3 (1936); S. Rep. No. 74-1232. at 6 (1935). Specifically, Section 3 of OIWA provided "[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." 25 U.S.C. § 5203.

AQTT organized under Section 3 of OIWA in 1939 upon following the proper process and obtaining approval of the Commissioner of Indian Affairs. Aplt. App. at 182-83. Article IX of AQTT's constitution preserves its members' rights "as citizens of the Creek Nation." Aplt. App. at 180.

Pursuant to Section 1 of OIWA, the United States acquired more than eight hundred acres of land held in trust for the benefit of the Nation. Section 1 of OIWA provides in pertinent part:

> [T]he Secretary of the Interior is hereby authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interests in lands, water rights, 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 exercising its authority under Section 1 of OIWA, between November 19, 1941 and April 29, 1942, the United States acquired the above mentioned lands in Hughes County, near Interstate 40, which have been known at various times as the Wetumka Project or the Dustin Project lands. Aplt. App. at 51, 94, 95; *see, e.g.*, Aplt. App. at 415-16.

Title to the Wetumka Project was conveyed to "the United States in trust 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." Aplt. App. at 415. The tracts were intended to provide AQTT with sites to build homes and establish modest farms. *See* Aplt. App. at 194-95, 230-31.

While at one point in time Interior Officials assumed that the lands would eventually be assigned to AQTT, no assignment was ever made. *See, e.g.*, Aplt. App. at 38-39, 184, 192, 196. In contrast, lands acquired around the same time as the Wetumka Project with similar deed language for use by another federally recognized tribal town, Thlopthlocco Tribal Town, were assigned to that tribe through a proclamation by the Secretary not long after the lands were first acquired. *See* Aplee. Supp. App. at 45.

The precise reason for the lack of assignment of the lands to AQTT is not expressly stated. However, Interior's field staff and AQTT were apparently unable

to agree upon a plan for agricultural production for that season. *See* Aplt. App. at 38, 184, 192-97. Due to the wartime demands for maximum food production in 1943, the Interior issued revocable permits for immediate use of the land. *See* Aplt. App. at 38, 196. Interior officials also proposed that such permits might be issued by the Nation itself, in the event AQTT was "unable to function." Aplt. App. at 196.

II. PROCEDURAL HISTORY

A. Administrative request for relief

AQTT has requested the Interior assign it the title in the Wetumka Project lands since the 1980s. *See, e.g.*, Aplt. App. at 343-61, 364-65, 371-79. In 1996, the Interior determined that it could not make such an assignment without the consent of the Nation. Aplt. App. at 368-70. Since that time, the Nation has consistently opposed assignment of title in the lands to AQTT because assignment would raise problems of overlapping jurisdiction and would interfere with the Nation's programs and services. Aplt. App. at 383-86.

B. Complaint and district court

On December 29, 2006, AQTT filed a complaint seeking (1) a declaratory judgment that the United States failed to fulfill its fiduciary obligations to the tribe; and (2) a mandatory injunction directing the government to assign title to the Wetumka Project lands to AQTT and to make a full accounting of funds and assets held for the tribe. Aplt. App. at 31-35. At the parties' request, the case was stayed for

eight (8) months while the parties explored settlement, which was unsuccessful. Once the stay was lifted, the government filed a motion for judgment on the pleadings, which the district court granted in part.

Specifically, the district court granted the United States judgment on the land-related claims on several independent grounds. First, the court determined that the land claims began accruing no later than when the United States acquired the lands in trust on April 29, 1942. Aplt. App. at 51. The court therefore held that jurisdiction was precluded by the Indian Claims Commission Act and by the general six-year statute of limitations for civil actions against the government. Aplt. App. at 53, 55. Next, the court held that the land claims were also precluded by the Quiet Title Act, which preserves the government's sovereign immunity to suits seeking to quiet title to Indian trust land. Aplt. App. at 56. Finally, the court held that the land claims should be dismissed under Fed. R. Civ. P. 19 for failure to join the Nation, an indispensable party. Aplt. App. at 58. The only remaining claim was the accounting of the money derived from the land, as the court stated it lacked sufficient information to rule on the claim. *Id.*

The case continued solely as to the issue of whether the United States held assets in trust for AQTT. Ultimately, the court determined that the government's conclusion regarding ownership of the accounts into which income was deposited from leasing the Wetumka Project lands had been deposited, the Surface Lease

Income Trust, was arbitrary and capricious, and remanded the matter for further investigation and explanation. Aplt. App. at 88. The court directed that the government assemble a full administrative record and reconsider its decision about ownership of the trust. *Id.* The court also suggested that the Nation should be allowed to provide its views on the matter. *Id.*

C. Proceedings before the Board on remand

On remand, the Office of the Assistant Secretary-Indian Affairs referred the matter to the Interior Board of Indian Appeals ("Board"). The Board ordered production of the administrative record and full briefing. Aplee. Supp. App. at 36-37. The Nation responded to a request from the Board concerning an affidavit of confidentiality and filed an answer brief and a supplemental brief in those proceedings. Aplt. App. at 132; Aplee. Supp. App. at 39, 83.

The Board considered the parties' arguments and concluded that beneficial title to income from the Wetumka Project lands vested in the Nation when the lands were taken into trust for that tribe, and that the record did not demonstrate that the trust was ever assigned to AQTT. *In re Alabama-Quassarte Tribal Town v. United States*, 59 IBIA 173, 201 (reproduced at Aplee. Supp. App. at 3, 31).

D. Amended complaint and litigation after remand

AQTT filed an Amended Complaint on March 3, 2015, in the district court naming the Nation as an additional party and asserting two new claims. Aplt. App.

at 90-105. First, AQTT alleged that a 1980 tribal resolution by the Nation relinquished any interest that the Nation held in the Wetumka Project lands, and the Nation was no longer an indispensable party to the action. Aplt. App. at 103-04. Second, AQTT challenged the Board's decision as arbitrary, capricious, unsupported by the facts, and not in accordance with the law. Aplt. App. at 104.

The Nation filed its motion to dismiss the new claims, which was granted on January 7, 2016. Aplt. App. at 119-20. The district court held that the Nation had not waived its immunity to suit and that any claim based on the 1980 Tribal Resolution was barred by the statute of limitations. *Id.* After considering the other parties' cross motions for summary judgment on the remaining claims (Aplt. App. at 128), the court subsequently entered judgment for the United States (Aplt. App. at 129), and AQTT appeals.

STANDARD OF REVIEW

The district court's dismissal of the Wetumka Project land claims for lack of subject matter jurisdiction is reviewed *de novo*, and the underlying factual findings are reviewed for clear error. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); *see Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015) (Indian Claims Commission Act); *Ute Distrib. Corp. v. Sec'y of the Interior*, 584 F.3d 1275, 1282 (10th Cir. 2009) (statute of limitations).

SUMMARY OF ARGUMENT

The district court properly dismissed AQTT's claims against the Nation after determining it lacked subject matter jurisdiction and the land claims were time barred.

This Court may dispose of the appeal from dismissal of the Wetumka Project land claims on several independent grounds. Most importantly, there has been no waiver of sovereign immunity by the Nation authorizing suit over ATTQ's land claims. The Nation is a dependent sovereign nation entitled to sovereign immunity. *Georgia*, 5 Pet. at 17, 8 L.Ed. 25. Suits against Indian tribes are thus barred by sovereign immunity absent the presence of either a clear waiver by the tribe or congressional abrogation of the doctrine of sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 58. The district court's finding that no abrogation or waiver occurred was correct, and the factual determination was not clearly erroneous.

In fact, AQTT has failed to present any evidence of waiver of immunity or any other document showing that the Nation consented to this lawsuit. AQTT claims the Nation waived its sovereign immunity by "entering an appearance" in this case, seeking affirmative relief from the district court, and by its participation in the administrative proceedings before the Board. AQTT's claims are unavailing for several reasons. First, the Nation never entered an appearance in this case. The district court docket sheet for this case did not reveal an entry, pleading, or document filed

on behalf of the Nation until the filing of its Motion to Dismiss. Second, the Nation's request that the Board find and order that Surface Lease Income Trust is the beneficial property of the Nation and not AQTT is a request to merely continue with the status quo, and cannot be construed as the Nation seeking affirmative relief, much less a waiver of sovereign immunity. Finally, the Nation did not waive its sovereign immunity by voluntarily appearing before the Board, at the request of the government, to answer specific questions related to the trust lands. None of the foregoing are the express and unequivocal waiver of tribal immunity required by law.

AQTT spends a considerable amount of time arguing that the Tribal Resolution from 1980 shows that the Nation released its interest in the Wetumka Project. To the contrary, the Nation has, on several occasions, asserted its interest in the land at issue. AQTT bases its argument on the 1980 Resolution, which has been superseded by later resolutions objecting to the Secretary's transferring title in the land to AQTT. Moreover, AQTT bases its claim on actions taken by the United States, the Nation, and others acting on behalf of these entities, which occurred decades ago. Although at one time the intent of the United States apparently included a provision that the land was to be held in trust for members of AQTT for farming and agricultural purposes, no actions were ever taken to finalize any transaction concerning this alleged "intent." Further, there is no authority whatsoever to show that a Tribal Resolution, such as the 1980 Resolution, has any effect on the "title" to real property.

Even if the Nation had waived its sovereign immunity, AQTT's claims cannot stand because they are barred by the applicable statute of limitations. Prior to AQTT filing its First Amended Complaint, the district court correctly dismissed all land claims related to the Wetumka Project lands and held that because the AQTT argues the land has always been held for its benefit, the land claims first accrued when beneficial title was acquired for the Nation, rather than AQTT, nearly seventy years ago. Thus, AQTT's land claims were barred by the Indian Claims Commission Act and the general six-year statute of limitations set forth in 28 U.S.C. § 2401(a).

In its First Amended Complaint AQTT argued that until it "discovered" the 1980 Tribal Resolution, it was unaware that the Nation had "intended" to assign the lands to AQTT. The district court correctly held the 1980 Tribal Resolution "was a public document" and "any possible claim accrued in 1980." AQTT's "discovery" of the 1980 Resolution when it was produced by the government in discovery has no bearing on when AQTT's land claim accrued because the 1980 Resolution is a public document, and, as citizens of the Nation, AQTT can certainly be deemed to have knowledge of the Nation's laws and resolutions. Despite AQTT's alleged discovery of the 1980 Tribal Resolution, its land claim is untimely and barred by statutory limitations, by the prior orders of the district court, and by the doctrine of laches.

ARGUMENT

I. THE DISTRICT COURT'S DISMISSAL OF AQTT'S FIRST AMENDED COMPLAINT AGAINST THE NATION SHOULD BE AFFIRMED.

A. The Nation is entitled to assert sovereign immunity.

The district court correctly determined it has no jurisdiction over the Nation. Aplt. App. at 119. The Nation is a dependent sovereign nation entitled to sovereign immunity. *Georgia*, 5 Pet. at 17, 8 L.Ed. at 25 (Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories). Suits against Indian tribes are thus barred by sovereign immunity absent the presence of either a clear waiver by the tribe or congressional abrogation of the doctrine of sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 58. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

More recently, in *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014), the state of Michigan attempted to enjoin the operation of a casino on land which the Bay Mills Indian Community had purchased with funds from its land trust. Reaffirming a long line of cases, the Court found that such suit was barred by sovereign immunity, stating:

> Among the core aspects of sovereignty that tribes possess – subject, again, to congressional action – is the "common-law immunity from suit traditionally enjoyed by sovereign powers." . . . That immunity, we have explained, is "a necessary corollary to Indian sovereignty and self-governance." . . . (It is "inherent in the nature of sovereignty not to be amenable" to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands. . . . ("It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit"). Thus, we have time and again treated the "doctrine of tribal immunity [as] settled law" and dismissed any suit against a tribe absent congressional authorization (or a waiver).

134 S.Ct. at 2030-31 (citations omitted). To abrogate tribal immunity, "Congress must unequivocally express that purpose." *Id.* at 2033. It is "fundamentally Congress's job, not [the court's], to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain – both its nature and its extent – rests in the hands of Congress." *Id*. at 2037. The Court further emphasized a "fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Id.* at 2039.

The Nation, its government, and citizens have had a continuous treaty relationship with the United States since at least 1790. These treaties have consistently recognized the Nation's right to self-determination. *See, e.g.*, Treaty with the Creeks, Apr. 4, 1832, art. XIV ("The Creek country . . . shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern

themselves."); Treaty with the Creeks and Seminoles, Aug. 7, 1856, art. IV & art. XV, 11 Stat. 699 ("The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek."). As the district court determined, Tribal sovereign immunity deprives this Court of subject matter jurisdiction to decide any of the matters between the parties. Aplt. App. at 119; *see Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). Indeed, tribal sovereign immunity is a matter of subject matter jurisdiction. *See Fletcher v. United States*, 116 F.3d 1315, 1323-24 (10th Cir.1997). The Nation properly asserted tribal sovereign immunity in its motion to dismiss under Fed. R. Civ. P. 12(b).[1] *See Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir.1995). As the Tenth Circuit has explained:

> Such motions may take one of two forms. First, a party may make a facial challenge to the plaintiff's allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint. . . . In addressing a facial attack, the 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." . . . In addressing a factual attack, the court does not "presume the truthfulness of the complaint's factual allegations," but "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)."

---

[1] Issues related to immunity, including sovereign immunity, are threshold questions of law. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *receded from on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009).

E.F.W. v. St. Stephen's Indian High Sch., 264 F.3d 1297, 1302-03 (10th Cir. 2001) (citations omitted).

There is no language whatsoever in the OIWA of 1936 that abrogated the sovereign immunity of any tribe in Oklahoma. The Act provides, in its entirety:

> Any 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. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: Provided, however, that such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 461 et seq.]: Provided, that the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

25 U.S.C. § 5203. There is no language in this statute that discusses or relates to the sovereign immunity of any Oklahoma Indian tribe. The Act simply confirms the inherent right of Oklahoma Indian tribes to organize. *See Cheyenne–Arapaho Tribes v. Beard*, 554 F. Supp. 1, 3 (W.D. Okla. 1980). Without specific congressional abrogation of immunity, AQTT must show some type of waiver by the Nation, which it cannot do.

B. The Nation has not waived its sovereign immunity to suit.

1. No entry of appearance or request for affirmative relief was made.

In AQTT's request to amend to add the Nation as a defendant, AQTT claimed that the Nation waived its sovereign immunity when it "voluntarily entered an appearance in this matter." Aplt. App. at 93; Pl. Br. at 22. However, the Nation has never "entered an appearance" in this case. Prior to AQTT filing its First Amended Complaint on March 3, 2015, no lawyer had entered an appearance for the Nation in the near decade this litigation was pending. The district court docket sheet for this case did not reveal even one entry, pleading, or document filed on behalf of the Nation until the filing of its Motion to Dismiss, which took place on June 8, 2015, nearly ten years after the commencement of this action. Further, the Nation never sought any relief in this matter and never requested any affirmative action from the district court. Thus, AQTT's claim that the Nation somehow "entered an appearance" in this case is simply wrong.

Likewise, AQTT's claim that the Nation waived its sovereign immunity by seeking "affirmative relief" in this action is also incorrect. Aplee. Supp. App. at 104; Pl. Br. at 22. This purported "affirmative relief" is apparently found in a statement from the Nation in the administrative record that "respectfully requests the Interior Board of Indian Appeals to find and order that Surface Lease Income Trust is the

beneficial property of the MCN and not AQTT." Aplt. App. at 132; Pl. Br. at 31. A request by the Board to merely continue with the status quo is hardly a request for "affirmative relief." Indeed, under its definition of various forms of "relief," *Black's Law Dictionary* sets forth the definition of "affirmative relief as "[t]he relief sought by a defendant by raising a counterclaim or crossclaim that could be maintained independently of the plaintiff's action." (10th ed. 2014). This definition has been known in law since 1842. Contrary to AQTT's claims, the Nation has never requested any "affirmative relief" in either this court or before the Board.

2. Participation in the administrative proceedings is not an express and unequivocal waiver of sovereign immunity.

AQTT also argues the Nation waived its sovereign immunity by voluntarily participating in the administrative proceedings. Pl. Br. 29-31. The district court correctly held the Nation did not waive its sovereign immunity by contributing to the administrative proceedings before the Board. Aplt. App. at 119. The Nation simply participated in the proceedings when the district court suggested it would be helpful for Interior to consider the Nation's views on remand. Aplt. App. at 88, *see also* 43 C.F.R. 4.313(a) (providing for participation by *amicus curiae* before the Board).

It is undisputed that production of documents from the Nation was absolutely necessary to both AQTT and the government in order to develop the administrative record before the Board. Thus, the Nation responded to the Board's request

concerning an affidavit of confidentiality and filed an answer brief and a supplemental brief in those proceedings. Aplt. App. at 132; Aplee. Supp. App. at 39, 83. The Nation never denied that it filed certain responses and reports within the administrative proceedings. However, the Nation did not waive its sovereign immunity by voluntarily appearing before the Board, *at the request of the government*, to answer specific questions related to the trust lands. *See* Aplee. Supp. App. at 36 n.1.

Indian tribal governments, such as the Nation, enjoy the same immunity from suit enjoyed by other sovereign powers and are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe,* 523 U.S. at 754; *Santa Clara Pueblo*, 436 U.S. at 58. It is settled law that a waiver of sovereign immunity "'*cannot be implied but must be unequivocally expressed*.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (emphasis in original and citation omitted); *see also Santa Clara Pueblo*, 436 U.S. at 58-59; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (holding the "Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief"); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (holding the tribe's "voluntary participation" in administrative proceedings "is not the express and unequivocal waiver of tribal immunity that we require in this circuit"); *accord Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1017-19 (9th Cir. 2016).

A waiver of sovereign immunity must be clear and express, particularly when the remedy sought is against the Nation itself. *See, e.g.*, *First Bank & Trust v. Maynahonah*, 2013 OK CIV APP 101, 313 P.3d 1044. The Nation's laws provide that any waiver of sovereign immunity must be clear and expressed in writing:

> The sovereign immunity of neither this Nation or any of its agencies or instrumentalities is waived with respect to any provision of any transaction subject to this Title, absent a recorded, properly ratified, express waiver of sovereign immunity.

M(C)NCA Title 33, §1-101(a)(2007).

In the instant case, no waiver can be found by simply citing to the Nation's limited participation in the administrative proceedings. *See* Aplee. Supp. App. at 36 n.1. The Nation's voluntary participation in the administrative proceedings "is not the express and unequivocal waiver of sovereign immunity" that the case law requires. *Quileute Indian Tribe*, 18 F.3d at1460; *accord Bodi*, 832 F.3d at 1017-19. The district court correctly dismissed AQTT's claims as they are not premised on a valid waiver of the Nation's sovereign immunity. Aplt. App. at 119.

C. The Nation is an indispensable party that cannot be joined because of its sovereign immunity.

Contrary to AQTT's claims, the Nation is a necessary party to the litigation involving the Wetumka Project and did not convey its interest in the land at issue in the 1980 Tribal Resolution. Pl. Br. 31-34. In 2008, prior to AQTT filing its First Amended Complaint, the district court properly analyzed the factors under Rule 19

set out by the Tenth Circuit in *Davis*, and determined the Nation was an indispensable party under Rule 19(b) that could not be joined because of sovereign immunity. Aplt. App. at 57-58. The district court dismissed AQTT's claims with regard to the Wetumka Project lands based on its determination that the Nation is an indispensable party. Aplt. App. at 58.

Once it is determined that the Nation is a necessary party under Rule 19, and cannot be joined because of its sovereign immunity, a court "must determine whether . . . in equity and good conscience, the action should be dismissed." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). Typically, where an indispensable tribal party cannot be joined because of sovereign immunity, the action must be dismissed. *Id.* The Tenth Circuit has recognized a "strong policy" under Rule 19(b) favoring dismissal when an Indian tribe is indispensable and cannot be joined because of immunity. *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999).

As the Tenth Circuit remarked in *Davis*, Rule 19, "by its plain language, does not require the absent party to actually *possess* an interest; it only requires the movant to show that the absent party '*claims an interest* relating to the subject of the action.'" 192 F.3d at 958. In the instant case, even AQTT recognizes a possible interest of the Nation, as it asserts the "Muscogee (Creek) Nation may claim some right, title, or interest in and to the IIM monies or the Wetumka Project Lands." Aplt. App. at 97,

104. Any judgment against the Nation would clearly affect the Nation by depriving the Nation of its interest in the Wetumka Project lands and interfering with the Nation's use of the property. The district court's previous finding that the Nation is an indispensable party that cannot be joined because of its sovereign immunity was well supported by the law and should not be disturbed.

1. The Nation did not transfer title to the Wetumka Project by way of the 1980 Tribal Resolution.

Despite the district court's holding in 2008, AQTT still seeks a transfer of property in which the Nation holds a beneficial interest. Alpt. App. at 104-05. AQTT cannot attack that ruling, nearly eight years later, by Amending its Complaint to add the Nation as a defendant. Aplt. App. at 90. Clearly, an Indian tribe is a necessary party to actions affecting its legal and financial interests. *See, e.g.*, *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) (Indian tribe is a necessary party to an action seeking to enforce a lease agreement signed by the tribe); *Enter. Mgt. Consultants, Inc. v. United States*, 883 F.2d 890, 893 (10th Cir. 1989) (Indian tribe is a necessary party to an action seeking to validate a contract with the tribe); *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986) (Indian tribe's beneficiary interest in a trust makes it a necessary party to an action by a minority tribe seeking to obtain redistributions of future income). In this case, the Nation clearly has an interest in the outcome of this action, given the actions of AQTT are

actually directed at the property which is held in trust for the Nation and any income derived from that property.

AQTT argues the 1980 Resolution shows that the Nation released its interest in the Wetumka Project and is no longer a necessary party. Aplt. App. at 90-105;Pl. Br. at 22, 31. AQTT further contends that "once the Nation transferred its interest, it no longer had the authority to deprive AQTT of the property without AQTT's consent." Pl. Br. at 31. To the contrary, the Nation never conveyed its interest in the Wetumka Project—especially not in the 1980 Resolution, and AQTT's First Amended Complaint presented no new evidence supporting such an argument.

While AQTT relies on the 1980 Tribal Resolution, it conveniently excludes subsequent Tribal Resolutions which effectively repealed the 1980 Resolution and all others expressing an opinion that the beneficial interest "should" belong to AQTT. *See* Aplt. App. at 385-86; Aplee. Supp. App. at 55-56, 82. Specifically, in 1996, in Resolution TR 96-10, the National Council "repealed" a former resolution which expressed concurrence that the lands be placed in trust for AQTT. *Id.* Resolution TR 96-10 concludes with the following:

> TR 94-07 and any concurrence thereunder are hereby repealed, and be it further resolved that the Muscogee (Creek) Nation hereby expresses its opposition to any such land being placed in trust for said Tribal Town within the jurisdictional boundaries of the Muscogee (Creek) Nation, unless and until the aforementioned jurisdictional problems and conflicts are resolved by mutual written agreement approved by the National Council, between the Nation and Tribal Town.

Aplt. App. at 385-86. Similarly, TR 96-13 expressed the opposition of the National Council to any assignment of the Wetumka or Dustin Project lands to AQTT. Aplee. Supp. App. at 55-56. It unequivocally expressed the Nation's opposition in its conclusion:

> The Muscogee (Creek) Nation does hereby express its opposition to the proposed or requested assignment of the Wetumka or Dustin Project lands to the said Tribal Town or to any other person, tribe or organization and does hereby authorize the Principal Chief to submit written comments and documentation in opposition to any proposed or requested assignment of said Wetumka or Dustin Project lands or any interest therein.

Id. This opposition by the Nation to the attempts by AQTT to place the land in trust for its interest continued for years. Aplee. Supp. App. at 82.

Moreover, AQTT presents no authority whatsoever to show that a tribal resolution has any effect on the "title" to real property. Initially, the 1980 Tribal Resolution "requests" that the Secretary of the Interior "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 Oklahoma Indian Welfare Act." Aplt. App. at 114-15. Thus, the resolution was, first and foremost, a *request* to assign the lands to the Nation. The very language of the 1980 Tribal Resolution shows that it merely "requests" that certain lands, which are never identified in the document, be placed in the names of the chartered towns. AQTT

makes a baseless assertion that because the 1980 Tribal Resolution "was intended to affect title" it is "sufficient to be a title document and transferred [the Nation's] beneficial interest in the land to AQTT." Pl. Br. at 32. Nothing in the document identifies any land by a legal description, address, or any other designation which would deem it to be a document of "title." A "document of title," is a "written description, identification, or declaration of goods authorizing the holder (usu. a bailee) to receive, hold, and dispose of the document and the goods it covers." *Black's Law Dictionary* (10th ed. 2014). Title is "evidence of a person's ownership rights in property; an instrument (such as a deed) that constitutes such evidence." *Id.* A tribal resolution that does not identify even one square acre of land can hardly be deemed to fit the description of a document of "title." Further, AQTT cannot possibly claim that the 1980 Tribal Resolution is a document of title, and then argue that the subsequent tribal resolutions which effectively repealed the 1980 Resolution are not.

AQTT acknowledged in its Amended Complaint that the lands acquired, including the land at issue here, "[were] taken by 'The United States in Trust 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.'" Aplt. App. at 95. AQTT further admitted that "there was not an explicit reference in the deeds addressing or directing an assignment of the lands to the tribal towns," although it argues there was an intent to do so. *Id.* Still, AQTT admits the "intent" to assign the

lands was "never carried out by way of assigning the Wetumka Project lands to AQTT." *Id.*

As the Board held in its Final Reconsideration Decision, "Title to the Wetumka Project lands was acquired by the United States in trust for the Creek Nation in 1941 and 1942, and remains in trust for the Creek Nation." Aplee. Supp. App. at 3. Through careful and detailed analysis of the historical documents, the Interior Board of Indian Appeals reasoned that "[b]ecause AQTT and its members were considered to be part of the Creek Nation, allowing AQTT to benefit from the Wetumka Project lands and the income was not inconsistent with the retention of beneficial title by the Creek Nation." Aplee. Supp. App. at 31. The Administrative Law judges concluded that "beneficial title to income from the Wetumka Project lands vested in the Creek Nation when the lands were taken in trust for the Creek Nation, and that the record does not demonstrate that a subsequent assignment of the Trust was made to AQTT." *Id.*

Despite the previous rulings by the district court and the Interior Board of Indian Appeals, AQTT continues to assert it is entitled to the Wetumka Project lands because of an alleged "intent" to assign these lands to AQTT. Pl. Br. 14, 22. Except for the addition of the claims against the Nation, AQTT's First Amended Complaint presented nothing new that was not previously addressed by the district court and by the ruling of the Board of Indian Appeals. Furthermore, AQTT's Amended Complaint

presented no authority whatsoever which would require the Nation to convey beneficial title of the Wetumka Project lands to AQTT, as no such authority exists. Therefore, the district court's dismissal of AQTT's First Amended Complaint should not be disturbed.

II. THE DISTRICT COURT'S RULING AQTT'S CLAIMS REGARDING THE WETUMKA PROJECT ARE TIME BARRED SHOULD BE AFFIRMED.

A. *AQTT's claims are barred by the district court's prior orders*.

The district court's determination that AQTT's land claims were time barred was correct, and the factual determination was not clearly erroneous.

On two separate occasions the district court determined that AQTT's land claims were time barred. In 2008, the district first held that AQTT's claims were time barred and noted any cause of action for the assignment of the beneficial title accrued when the lands were acquired. Aplt. App. at 51-55. The court astutely noted that "Plaintiff should have known at least as early as April 29, 1942 that the Wetumka Project lands were being held in trust for the Creek Nation rather than for [AQTT]." Aplt. App. at 51. AQTT's arguments concerning the timeliness of its claims related to assignment of the Wetumka Project lands were rejected and dismissed by the district court. Aplt. App. at 58. The only surviving claim concerned the Surface Lease Income Trust. *Id.* The district court then remanded the claims for an accounting to the

United States defendants for further investigation and proceedings. Aplt. App. at 67-89. The Board issued its Final Reconsideration Decision in 2014, which also rejected AQTT's claims. Aplee. Supp. App. at 2.

When AQTT filed its First Amended Complaint, it essentially requested that the district court overturn the opinion of the Administrative Law judges, overturn its prior rulings, and enter an order requiring the Nation and the government to assign or transfer the beneficial title of the Wetumka Project lands to AQTT. Aplt. App. at 30; Pl. Br. at 24. However, AQTT failed to show any error in these prior rulings. Nor has AQTT presented any newly discovered evidence which would warrant a reconsideration of those rulings nearly seven years after the rulings were entered.

In dismissing AQTT's Wetumka Project land claims for a second time, after considering AQTT's First Amended Complaint, the district court again found the land claims time barred. Aplt. App. at 120. The district court properly rejected AQTT's argument that its claim accrued when it "discovered" the 1980 Tribal Resolution, and this ruling should be affirmed. Aplt. App. at 103, 120; Pl. Br. at 34-35.

1. AQTT's claims regarding the Wetumka Project accrued when those lands were purchased for its benefit and placed in trust for the Nation.

AQTT's argument that its claim did not accrue until it became aware of the 1980 Tribal Resolution when it was produced by the government during discovery fails. Pl. Br. at 35. This Tribal Resolution, like other tribal resolutions, is a public

document. *See* M(C)NCA Title 30, §§1-102 through 1-114 (2007). It was not hidden away or concealed in any way from AQTT, nor has AQTT ever asserted that the document was somehow "hidden." As citizens of the Nation, AQTT citizens, and their government, can certainly be deemed to have knowledge of the Nation's laws and resolutions. *See, e.g.*, *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975); *United Klans of Am. v. McGovern*, 621 F.2d 152, 155 (5th Cir. 1980) (plaintiffs are charged with knowledge of public records as a matter of law).

Even if this document were somehow a "secret" and not "discovered" until recently, AQTT offered no explanation whatsoever as to why it did nothing for more than seventy years concerning beneficial title to the land. Pursuant to law, a "Tribal Resolution" is merely a "formal expression of the policy, opinion, or will of the Muscogee (Creek) Nation relating to some specific matter or thing of significance to the Muscogee (Creek) Nation government and citizens." M(C)NCA Title 30, §1-102(I). As an "opinion," it was not codified as an ordinance or law. Since 1942, the land has been held in trust for the Nation, yet no action was taken on the 1980 Resolution to transfer the beneficial interest or any other interest to AQTT. Aplt. App. at 51.

Furthermore, the fact that AQTT is a federally recognized tribe does not alter the statute of limitations or provide an excuse for AQTT's failure to act on its claims.

Even if the claims were not time barred, AQTT has offered no excuse for its failure to pursue those claims. As the Tenth Circuit has explained:

> Laches may be found, however, where a party, having knowledge of the relevant facts, acquiesces *for an unreasonable length of time in the assertion of a right adverse to his own*. . . . A party must exercise reasonable diligence in protecting his rights. . . .

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1338 (10th Cir. 1982) (emphasis added) (citations omitted). In the *Andrus* opinion, the court determined that the claims by the Jicarilla Apache Tribe were barred by laches because the Tribe waited three years after a ruling by the Tenth Circuit before pursuing its claim for a NEPA violation. The court remarked that "[l]aches does not depend on the subjective awareness of the legal basis on which a claim can be made." *Id.* at 1339. The court also acknowledged that the delay in bringing suit would result in prejudice to the defendants.

AQTT's delay of more than half a century in bringing this action could scarcely be deemed non-prejudicial to the Nation. As the district court remarked in its prior order, since 1942 the land has been held in trust for the Nation. Aplt. App. at 51. For reasons known perhaps only to history, AQTT took no steps whatsoever to have the Wetumka Project lands assigned to AQTT. As citizens of the Nation, citizens of AQTT have never been deprived of the benefits of income from that land. Indeed, all citizens of the Nation, including the AQTT citizens, have benefitted from it. AQTT

has failed to provide any authority for its request to rewrite history. The district court's ruling that AQTT's claims regarding the Wetumka Project lands are time barred should be affirmed.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

The Nation does not request oral argument.

CONCLUSION

The dismissal of AQTT's claims against the Muscogee (Creek) Nation, as discussed herein, was proper and should be affirmed.

Respectfully submitted,

KEITH B. BARTSCH
Attorney

By: GALEN L. BRITTINGHAM
Attorney

By: /s/ Galen L. Brittingham
Galen L. Brittingham, OBA #12226
ATKINSON, HASKINS, NELLIS,
BRITTINGHAM, GLADD & FIASCO,
525 South Main Street, Suite 1500
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
Email: gbrittingham@ahn-law.com

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and 32(g) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), this document contains 7,554 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document was prepared in a proportionality spaced typeface using WordPerfect X5 in 14-point Time Roman Font.

Dated: November 27, 2017

/s/ Galen L. Brittingham

Galen L. Brittingham, OBA #12226
ATKINSON, HASKINS, NELLIS, BRITTINGHAM, GLADD & FIASCO,
525 South Main Street, Suite 1500
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
Email: gbrittingham@ahn-law.com

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing Defendant-Appellee Muscogee Creek Nation's Brief:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft System Center Endpoint Protection Version 4.10.209.0, Antivirus definition 1.251.1412.0, dated November 27, 2017, and according to the program are free of viruses.

Dated: November 27, 2017

/s/ Galen L. Brittingham

Galen L. Brittingham, OBA #12226
ATKINSON, HASKINS, NELLIS,
BRITTINGHAM, GLADD & FIASCO,
525 South Main Street, Suite 1500
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
Email: gbrittingham@ahn-law.com

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November 2017, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing, which will automatically send electronic notification of such filing to all registered attorneys of record.

/s/ Galen L. Brittingham