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 REPLY BRIEF TO THE RESPONSE BRIEF OF THE MUSCOGEE (CREEK) NATION

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INTRODUCTION

Both the Muscogee (Creek) Nation and the United States Appellees seek to have this Court defer to the District Court and the Interior Board of Indian Appeal's factual determinations when there has never even been an evidentiary hearing in this case. The issues in this case are deeply intertwined with the facts. The Alabama-Quassarte Tribal Town (hereinafter the "AQTT") deserves its day in court against 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 "United States"). Moreover, the Muscogee (Creek) Nation has already waived its interest in the property.

What can be lost in this appeal is that the District Court's judgment is a compilation of three Orders and Opinions that when added together dismissed all the AQTT's claims. This Court should reverse the decisions of the Trial Court and allow the case to proceed or, at the very least, provide the AQTT an opportunity to amend the Complaint.

The Tribe 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 the United States violated their trust obligation by failing to assign certain lands in the State of Oklahoma, known as the Wetumka Project[1], to AQTT; and (2) the United States 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 the United States to assign the AQTT the Wetumka Project lands and provide a full and complete accounting of AQTT's trust assets. *Id.*

By way of a motion on the pleadings, the District Court improperly dismissed all claims related to the. It is evident that the District Court considered evidence outside the initial pleadings and, further, denied the AQTT the opportunity for discovery. Next, the District Court erred because the Muscogee (Creek) Nation is not a necessary party, or, at the very least, if the Nation is, it voluntarily appeared in this action to defend its claimed interest in the Wetumka Project land and the monetary trust. Finally, the District Court erred in affirming the decision of the Interior Board of Indian Appeals (hereinafter the "IBIA") in light of the

[1] The Wetumka Project is the name given to 878.25 acres purchased in Hughes County, Oklahoma for the benefit of the Tribe.

overwhelming historical facts that the AQTT exclusively used the land and that the AQTT exclusively benefitted from the trust fund account. Thus, these decisions of the District Court must be reversed, and the matter remanded to the District Court for trial.

REPLY TO THE PRIOR RELATED APPEALS

To clarify, the prior appeal, which was Case No. 10-7094, was dismissed as premature.

REPLY TO THE STATEMENT OF JURISDICTION

The Muscogee (Creek) Nation raises its sovereign immunity defense in its Statement of Jurisdiction. As will be explained in the Argument and Authority section, the Muscogee (Creek) Nation is not a necessary party to this action and additionally, if it is, its sovereign immunity was waived when the Muscogee (Creek) Nation entered in this case to assert a claim to the Wetumka Project lands.

ARGUMENT AND AUTHORITY

REPLY TO ARGUMENT I: THE DISTRICT COURT IMPROPERLY DISMISSED THE FIRST AMENDED COMPLAINT AGAINST THE MUSCOGEE (CREEK) NATION

The Muscogee (Creek) Nation (hereinafter the "MCN") first

responsive proposition raises three issues to the AQTT's Opening Brief. The MCN claim that it did not waive sovereign immunity when it participated in the IBIA proceedings. Further, the MCN claim that they are a necessary party to the District Court proceedings, in part because it claims to own the land and in part because it participated in the IBIA proceedings. Finally, the MCN claim that the AQTT's claims are time-barred.

1. The MCN have waived sovereign immunity with respect to the Wetumka Project lands and the resulting trust fund held by the United States

There is no dispute that the MCN and the AQTT enjoy immunity from suit in the United States Federal Courts. However, the issue in this case is not the basic premise of sovereign immunity, but whether the Muscogee (Creek) Nation waived that immunity. There is no dispute that the MCN may waive its sovereign immunity.

The Muscogee (Creek) Nation admits that it participated in the IBIA proceedings and admits that those proceedings were the result of a remand from the District Court. A Tribe's intervention in a lawsuit is a waiver of sovereign immunity and subjects the Tribe to suit. *See United States v. State of Or*egon, 657 F.2d 1009, 1014 (9th Cir. 1981)(The tribe's

intervention to establish fishing rights constituted consent to district court's jurisdiction to issue and modify equitable decree which encompassed the tribe's rights.) As admitted by the MCN, it participated in the IBIA proceedings to protect its claimed rights to the Wetumka Project lands and the Wetumka Project lands funds held by the United States. As found in the *Oregon* case, the MCN has waived sovereign immunity. To find otherwise, would allow the MCN to pop in and out of lawsuits at its choosing, using the Federal courts when the decisions are favorable to the MCN and asserting sovereign immunity when the courts are not favorable, or even just less favorable.

2. The Muscogee (Creek) Nation is no longer a necessary party

As identified in AQTT's First Amended Complaint, the Muscogee (Creek) Nation is not a necessary party to the lawsuit. The AQTT can obtain relief solely from the United States. Two issues present themselves on this claim. First, the MCN have executed a resolution in its law-making body, its General Counsel, transferring the Wetumka Project lands to the AQTT. Further, even if the Wetumka Project lands are now MCN lands, the United States can be surcharged with damages.

3. Under the law, the Court must accept as

true that the AQTT was unaware of the MCN resolution until the Administrative Record was produced

To defeat the AQTT's claim to the property, the MCN claims that it **subsequently** rescinded its resolution transferring the property. Once the property was transferred the MCN could not unilaterally rescind that transfer and take the land back. The United States is obligated to recognize the separate sovereignties of the MCN and the AQTT. It cannot simply ignore the AQTT's rights as a sovereign in favor of the MCN. In either case, the MCN is not a necessary party to the litigation because the United States is not obligated to follow the wishes of either tribe.

The United States Supreme Court has recognized Indian tribes as distinct, independent political communities, qualified to exercise many of the powers and prerogatives of self-government. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327, 128 S.Ct. 2709, 2718 (2008). "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030 (2014)(quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct.

905, 112 L. Ed. 2d 1112 (1991)). The individual Tribes retain their sovereign authority until **Congress** provides otherwise. *Id.* (emphasis added.) Each Tribe has regulatory, taxing and other inherent power that "centers on the land held by the tribe and on tribal members within the reservation." *Id.* Thus, no one Tribe can be declared greater than another as each are sovereigns in their own right.

Once the MCN completed the transfer to the AQTT as sovereigns, the United States could not simply ignore the transfer, as it has done to-date. Moreover, the MCN and the AQTT are sovereigns and can act as sovereigns, including the transfer of lands, unless and until Congress provides otherwise. Once the MCN transferred the property to AQTT by resolution and sent the 1980 Resolution to the United States for recording, the transfer was complete. If the MCN are correct in its argument that the United States can ignore its transfer of the property to the AQTT, then the MCN are not necessary parties to the litigation, because the issue is solely one as to whether the United States has an agreement with the AQTT for the land.

It is well-settled law that a transfer of interest in land is complete upon delivery of a proper conveying document to the grantee. Courts

have interpreted delivery broadly, holding that delivery occurs generally when a grantor has evidenced its intent to give effect to the document. Here, the MCN executed the 1980 Resolution, conveying all of the MCN's interest in the Wetumka Project lands to the AQTT. And, the MCN took the additional step of providing the 1980 Resolution to the Bureau of Indian Affairs ("BIA") for recording. The MCN has no reason for taking the additional step of recording the 1980 Resolution at the BIA, unless it intended for the US Defendants to conduct the mere ministerial task of showing the transfer of interest on the US Defendants' books.

Once the 1980 Resolution was recorded, only Congress could unilaterally act to undo the transaction, and such unilateral Congressional action would have required just compensation under the Takings Clause of the Fifth Amendment. The MCN argues that resolutions passed by the MCN are sufficient to rescind the 1980 Resolution. However, upon delivery of the 1980 Resolution to the BIA, the MCN no longer had any interest in the Wetumka Project lands and could not pass valid resolutions rescinding the transfer. Delivery of the interest was complete, and the MCN could no longer rescind the transfer. Therefore, in order for the MCN to reaquire the lands, the AQTT would

have had to transfer the lands back to the MCN.

In addition to common-law principles that prevent the MCN from rescinding the 1980 Resolution, there are additional principles concerning the government-to-government relationships between the US Defendants and the AQTT that prevent the MCN from contesting the ownership of the Wetumka Project lands. Once the MCN transferred the property to the AQTT, the MCN was powerless to undo that transaction unilaterally because both are sovereigns in the eyes of the United States, no matter the underlying Tribal relationship. Thus, for the MCN to regain the property by a later resolution, the AQTT would have to consent to that transaction. AQTT has never acted to transfer its interest in the Wetumka Project to the MCN. The resolutions identified by the MCN do not contain the concurrence of the AQTT and therefore, are not sufficient to divest title to the Wetumka Project land from the AQTT.

REPLY PROPOSITION II: THE AQTT'S CLAIMS ARE NOT TIME-BARRED.

The AQTT's claims are not barred by this Court's prior rulings of laches because the statute of limitations did not begin to run until the United States claimed that it did not hold land in trust for the AQTT, which occurred during the case. In addition, 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. Finally, laches is inapplicable to this case, as the MCN sufficiently transferred its interest in the Wetumka Project and the related Proceeds of Labor Account. The AQTT simply seeks to compel the U.S. Defendants to complete the ministerial act of recognizing its interest. In fact, laches applies to the MCN as it waited over ten years to attempt to rescind the 1980 Resolution.

Neither does the statute of limitations under the Indian Claims Commission Act, 25 U.S.C. § 70k (1976) or 28 U.S.C. 2401(a) apply to this case, because, as Trial Court determined, the issues in this case did not arise until after the filing of this suit. This Court has already determined that United States did not make an administrative decision that the AQTT did not hold any assets until after the start of the case. [Dkt. 135, Order & Opinion, pp 10-12 and n.8]. Thus, the claim for the accounting is timely and this Court can determine the effectiveness of the 1980 Resolution.

Additionally, the AQTT did not learn about the 1980 Resolution until it was produced in by the United States during the lawsuit. [Dkt.

174, Amended Complaint, ¶ 37.] Thus, the claim did not accrue until it was aware of the United States' breach, which was after the lawsuit started.

The MCN also do not address the timeliness of this Court's review of the IBIA Decision. Certainly, the six-year statute of limitations under 28 U.S.C. 2801(a) has not run on a decision rendered in October 2014. Finally, the doctrine of laches would apply to the MCN, not the AQTT.

> Laches may only be found, 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). The MCN explains, in detail, that the 1980 Resolution was public knowledge within the MCN. Yet, it did nothing for more than fifteen years before enacting TR-96-10 and TR 96-13 in a futile attempt to reclaim lands it had already conveyed away. [Dkt. 182, Brief in Support of the Motion to Dismiss of the Muscogee (Creek) Nation, pp. 2 and 13.] There is no law that requires the AQTT, an independent sovereign, to review the records of the MCN. It is irrelevant that some AQTT citizens may be citizens of the MCN. That does not create an obligation on the AQTT to investigate the MCN records. Moreover, the reality is that the MCN waited

too long to rescind the 1980 Resolution.

CONCLUSION

The Trial Court improperly dismissed the Wetumka Land claims, not viewing the facts and reasonable inferences most favorable to the non-movant, the AQTT, but instead viewing the facts and the reasonable inferences most favorably to the movants, the United States and the MCN. Thus, the Wetumka Land claims were improperly dismissed. Then, after dismissing the Wetumka Land project claims, the Court shirked its responsibilities and remanded the case to the Department of the Interior, where the MCN intervened in the case. Instead of coming up with a reasoned decision, to be appealed and scrutinized, the Secretary assigned the matter to the IBIA, which decided this complicated and factually difficult case in summary fashion. On remand, to avoid an unfavorable decision, the MCN sought to then be dismissed from the lawsuit on sovereign immunity grounds, which was granted by the Court. Finally, to add insult to injury, the District Court simply stamped its approval on a flawed process.

The Tribe is entitled to its day in court. The United States has represented that it **will** transfer the Wetumka Project lands to the AQTT.

It has failed to do so. Moreover, the United States is holding monies that are clearly for the benefit of the AQTT. Thus, in looking at the facts most favorable to the non-movant on all three motions, this Court must reverse the Trial Court and allow the AQTT's claims to proceed to a trial.

Dated: December 11, 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 2,514 words.

Dated: December 11, 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 December 11, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 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.

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