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

Eugene K. Bertman
Talley, Turner & Bertman
219 E. Main St.
Norman, OK 73072
gbertman@ttb-law.com
Telephone: (405) 364-8300
Facsimile: (405) 364-7059

October 10, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

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"). This appeal is from the addition of three Orders and Opinions from the District Court that, when added together, dismissed all of 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. [App. 23.]

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 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

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

accounting of the funds held in trust for the AQTT. [Complaint, D.C. Dkt. #2, App. 23.] 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.*

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, it voluntarily appeared in this action to defend its claimed interest in the trust property. The District Court also erred in affirming the decision of the Interior Board of Indian Appeals (hereinafter the "IBIA") in light of the overwhelming historical facts that the AQTT exclusively used the land and that the AQTT exclusively benefitted from the trust fund 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.

REPLY TO THE STANDARD OF REVIEW PRESENTED BY THE UNITED STATES

The United States misrepresents the standard of review in this case. It attempts to give deferential factual finding standards to the District Court, but there was never an evidentiary hearing. Thus, the standard is not one of deference to the District Court, but the allegations in the Complaint must be taken as true and all reasonable factual inferences must be drawn in favor of the AQTT, the non-movant, as explained below.

In order to understand the proper standard of review, this Court must look to the basis for each decision of the District Court. In this case it is complicated because the District Court added together three opinions over the ten-year life of the case to get to a judgment.

The original Complaint provided for two claims. [App. 23.] One claim was for a declaratory judgment and the second claim was for an injunction. For relief, the Tribe demanded that the District Court (1) enter a declaratory judgment determining that the United States failed to provide the AQTT with a full accounting of its trust assets and failed to assign the Wetumka Project lands to the AQTT, (2) issue an injunction

compelling the United States to assign the trust lands to the AQTT and provide a full and complete accounting, and (3) award it costs, attorneys' fees and all other legal and equitable relief. The AQTT also amended the Complaint, after the District Court dismissed the Wetumka Project land claims and after the IBIA decision. [App. 174.] The amended Complaint added the Muskogee (Creek) Nation as a defendant and included allegations related to a newly discovered resolution of the Muskogee (Creek) Nation transferring the Wetumka Project lands to the AQTT.

A. Standard of Review for the November 2007 Order and Opinion

The United States begins by identifying the standard of review for a district court order dismissing the claims related to the Wetumka Project. Those claims were dismissed in the District Court's November 11, 2008 Opinion and Order, which granted in part and denied in part the United States' Motion for Judgment on the Pleadings. [App. 45.] The United States correctly identifies that the review is *de novo* for a motion to dismiss. [Response Brief at p. 13.] The problem is that the United States claims that the underlying factual findings of the District Court are reviewed for clear error, which is not the correct standard. The proper standard is that the facts are reviewed in the light most favorable

to the non-movant, which is the AQTT in this case.

To support its position, the United States cites *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). A review of that case shows that the "clear error" standard only applies to factual findings after a limited evidentiary hearing. The United States failed to review the citation immediately after the quoted section. The full quote accurately provides as follows:

> We review the district court's findings of jurisdictional facts for clear error. *Ohio Nat'l Life* [*v. United States*], 922 F.2d [320,] [] 326 [(6th Cir.1990)] ("Where a trial court's ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court's findings unless they are 'clearly erroneous.'")

Holt, 46 F.3d at 1003.

There was no evidentiary hearing conducted in this case to resolve factual disputes. Thus, the proper standard for the factual findings is that dismissal is only appropriate "when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000)(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.*

B. Standard of Review for the January 2016 Order and Opinion

The next decision of the Trial Court on January 7, 2016 dealt with the Muskogee (Creek) Nation and the Muskogee (Creek) Nation's resolution authorizing the transfer of the land to the Tribe. [App. 193.] As stated above, the decision of the District Court is reviewed by a *de novo* standard and the factual allegations, since no evidentiary hearing was held, must be construed in a light most favorable to the non-moving party, the AQTT. *Atl. Richfield Co.*, 226 F.3d at 1160 (citations omitted).

It is important to note that there were two motions to dismiss. One by the Muskogee (Creek) Nation and one by the United States. The Muskogee (Creek) Nation sought dismissal based on sovereign immunity grounds. The United States sought dismissal of the land claims based on 28 U.S.C. 2401(a).

C. Standard of Review for the December 2016 Order and Opinion

Finally, the District Court granted the United States summary judgment motion and denied the Tribes summary judgment motion on December 30, 2016. [App. 218.] The standard of review used by the District Court was that it could not set aside the IBIA's decision unless

it found the decision to be "arbitrary, capricious, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The United States cites solely to the standard of review for review of the agency's factual determinations. However, the IBIA never conducted an evidentiary hearing. It determined the issue in a summary judgment fashion. Thus, the summary judgment standard should be applicable to a review of that decision.

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). Summary judgment is appropriate if the moving party demonstrates that there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant bears the initial burden of proof and must show the lack of evidence on an essential element of the claim. *Thom v. Bristol–Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2004) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). The non-movant must then

bring forth specific facts showing a genuine issue for trial. *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005). "The court views all evidence and reasonable inferences in the light most favorable to the nonmoving party." *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004).

In this instance, the United States argues that the IBIA decision is afforded a deferential factual standard of review. The problem is that there was no evidentiary hearing before the IBIA. The AQTT was put in a position to prove that the United States held assets for the AQTT as opposed to the United States supporting its decision with facts and evidence. Thusly, the reasonable inferences from the facts must be held in favor of the AQTT. Moreover, the main legal conclusion of the IBIA was based on the Trial Court's dismissal of the land claims. Thus, the correct legal standard is one of review of the facts in the light most favorable to the AQTT, the non-movant.

ARGUMENT AND AUTHORITY

I. THE NOVEMBER 2008 ORDER AND OPINION

A. The Tribe Has Not Forfeited Its Appeal as the Quiet Title Act is Inapplicable to the Claims Raised by the AQTT.

One of the AQTT's claims against the United States, *inter alia*, is

for a finding that the United States has failed to assign the Wetumka Project lands to the Tribe and for an order directing the United States to assign the lands to the Tribe. The United States attempts to recast the claim to fall under the Quiet Title Act, 28 U.S.C. § 2409a (the "QTA"). However, the AQTT is not challenging the United States' ownership of the Wetumka Project lands and, thusly, the QTA is inapplicable to this case. The claims are not seeking to quiet title to the lands or seek a reformation of the deed. Instead, as continually promised by the United States, the AQTT seeks to enforce the agreement and statutory requirement that the United States transfer the Wetumka Project lands to the AQTT.

There is no doubt that the QTA prevents anyone from suing the United States to quiet title to lands held in trust for an Indian Tribe. The United States Supreme Court has effectively explained which sorts of cases the QTA applies. The Supreme Court explained as follows:

> [S]uppose [a plaintiff] had sued under the APA claiming that *he* owned the [Property] and that the Secretary therefore could not take it into trust. The QTA would bar that suit, for reasons just suggested. True, it fits within the APA's general waiver, but the QTA specifically authorizes quiet title actions (which this hypothetical suit is) *except when* they involve Indian lands (which

> this hypothetical suit does). In such a circumstance, a plaintiff cannot use the APA to end-run the QTA's limitations.

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 216, 132 S. Ct. 2199, 2205, 183 L. Ed. 2d 211 (2012). Additionally, the Supreme Court held that a hallmark of the QTA is that the plaintiff in the action must "assert a claim to property antagonistic to the Federal Government's." *Id.* at 220, 2207.

The United States recasts the AQTT's claim to argue that it claims an interest in the Wetumka Project adverse to the terms on which the United States holds title. But, under the dismissal standard, the facts must be looked in the light favorable to the AQTT. In the Complaint, the AQTT alleges that the United States intended to transfer the lands to the AQTT. [Complaint, p.5., App. 27.] Thus, the issue is not whether the deed provides for ownership by the AQTT, but whether an agreement exists between the United States and the AQTT for assignment of the lands. The Complaint provides that "[t]he Wetumka Project lands were clearly purchased with the intent to assign such lands to the [AQTT] …." [Complaint, p. 10, App. 31.] Further, the AQTT alleges that the United States has "acted and are acting in a manner inconsistent with the

fiduciary obligations to the [Tribe]" by failing to assign the Wetumka Project lands. *Id.* This is a fact issue that must be tried by the District Court. The issues in this case have nothing to do with the original deeds or whether the original deeds need to be reformed. In fact, it relates to the second part of the deed that provides that the lands are conveyed "unto the United States in trust … until such time as the use of the land is assigned by the Secretary if the Interior to a Tribe, Band or Cooperative Group organized under the Act of June 26, 1936 (49 Stat. L. 1967), … then in trust for such Tribe, Group or Individual…." [Deeds, App. 415, 417, 418 and 419]

The AQTT's claim regarding the Wetumka Project is not based on a dispute over ownership under the QTA, but the administrative process to assign the lands to the AQTT. The QTA is simply inapplicable to this case. Hence, the District Court's reference that the QTA applied only to a claim for "any lands," not the Wetumka Project lands. As pointed out by the District Court, the Complaint does not ask for *any lands,* but seeks the Wetumka Project lands. [App. 56.] Thus, the Tribe has not waived its appeal with respect to the QTA. It simply is not applicable to the case.

B. The United States Has Consented to Suit

The Trial Court did not dismiss the Wetumka Project land claims pursuant to 5 U.S.C. § 706, §702 or 28 U.S.C. § 1361, as the United States never raised those issues before the District Court. The District Court dismissed the claims based on the ICCA and 28 U.S.C. § 2401(a), which have been addressed by AQTT's opening brief, and which AQTT will reply to later in this brief. [App. 45.] Thus, the United States now requests, for the first time, that this Court determine whether the APA, 5 U.S.C. § 706 or 28 U.S.C. § 1362 apply to the Wetumka Project claim, under the theory that this Court may uphold the District Court's decision for any reason.

These arguments have been waived as it was not argued to the District Court and "[f]ailure to raise an issue in the district court generally constitutes waiver." *Rios v. Ziglar*, 398 F.3d 1201, 1209 (10th Cir. 2005). Nonetheless, the jurisdiction of the District Court was proper under 28 U.S.C. §§ 1331 and 1361 and 5 U.S.C. §§ 702, 704 and 706.

1. The QTA is Inapplicable to This Case.

The QTA is inapplicable to this case, thus, it does not supplant 5 U.S.C. § 706. As explained above, the QTA is not applicable because the AQTT does not challenge the United States' title of the Wetumka Project lands. Instead, the AQTT seeks to have the United States perform the

ministerial function of assigning the lands, in the records of the Department of the Interior, to the AQTT.

2. The APA Provides a Basis for the Wetumka Project Claims

Important to a review under the APA is to determine the underlying claims. Here, the AQTT seeks an assignment of the Wetumka Project lands. Important to this issue, and what must be taken as true based on the Complaint is that the United States agreed to transfer the lands to the AQTT. [Complaint, p.5, App. 27.]

As the United States explains, the APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. 706(1). Section 706 is available where the Tribe asserts a *discrete* agency action that a federal agency is *required* to take. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)(emphasis in original).

On June 26, 1936, the United States enacted the Oklahoma Indian Welfare Act (the "OIWA"). 25 U.S.C. § 5201 *et seq.* It was enacted "to enable the Indians to support themselves." [Complaint, p. 3, App. 25.] As part and parcel, to that, the United States purchased the Wetumka Project lands and represented to the AQTT that it would eventually

transfer the land to the AQTT. [Complaint, p.10, App. 32.]

The OIWA requires that "[t]itle to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group or individual Indian for whose benefit such land is so acquired." *Id.* As explained, the United States has always intended to transfer the Wetumka Project lands to the AQTT. Further, as alleged in the amended complaint, the Muskogee (Creek) Nation requested the United States to transfer the Wetumka Project lands to the AQTT.

Thus, the APA, 5 U.S.C. §§ 702, 704, and 706, is available to compel the United States to either set the requirements necessary for the United States to assign the Wetumka Project lands to the AQTT, or to assign the lands to the AQTT. The United States has an obligation under the law and by agreement to transfer the Wetumka Project lands to the AQTT.

Additionally, the AQTT may invoke 28 U.S.C. § 1361 to compel the United States to perform a duty owed to the AQTT. As explained, the United States, by virtue of statute and agreement, have continually represented that the AQTT are the beneficiaries of the Wetumka Project lands and that it intends to transfer the lands to the AQTT, thus, § 1361 is available.

C. The Wetumka Project Claims Are Not Barred By the ICCA

The AQTT is seeking to have the United States complete its promise to transfer the Wetumka Project lands. Despite that claim, in order to fit the AQTT's claims under the ICCA, the United States recasts the Wetumka Project claim as one seeking to reform the deed or to quiet title to the original deeds. By doing so, the United States argues that the claim arose in 1942. That is not the case, the claim does not arise until there is a refusal by the United States to transfer the lands. The AQTT may compel agency action, to transfer the lands as promised, or, at the very least, force the United States to identify the conditions the AQTT must meet for the transfer to occur.

The United States' argument fails because its recast of the claim fails to view the facts most favorable to the non-movant, the AQTT. The AQTT's claim relates to the failure of the United States to ever assign the lands, despite repeatedly informing the Tribe of its intent to do so.

Thus, based on the Complaint, the Trial Court improperly dismissed the claims under the ICCA. The claims arose by the United States failure to act.

II. THE JANUARY 2016 ORDER AND OPINION

The amended claims are not barred by 28 U.S.C. 2401(a). The AQTT, in its amended complaint, allege that it did not learn of the Muskogee (Creek) Nation's resolution until the administrative record was produced in this case. That allegation must be taken as true. Thus, based on that, the claim was brought within 6 years of discovery.

Despite that allegation, the United States claims that the records of the domestic dependent nation, the Muskogee (Creek) Nation, are its public records. It is not. Moreover, at the very least, this is a fact issue and at this stage in the litigation, the facts must be interpreted in favor of the AQTT, not the United States. Thus, it cannot simply be assumed that the AQTT would be required to monitor the actions of another tribe.

Additionally, there is no evidence that the Muskogee (Creek) Nation records are in the "public domain." On a motion to dismiss, the Court and the United States are go view the facts most favorable to the AQTT. The complaint sufficiently provides that the AQTT was unaware of the resolution until discovery in the case, which must be accepted as true.

To dispute the claim that the AQTT learned about the resolution through the production of the Administrative Record in this case, the United States contends that the 1980 Muskogee (Creek) Nation resolution was received by the Tribes, however the resolution that the United States points to is not the same resolution discovered by the AQTT. Thus, although not cited previously by the United States, the resolution cited by the United States was not at issue in this case.

A. The Muskogee (Creek) Nation is Not 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. Finally, the claims in this case involve the United States promise and statutory requirement to transfer the Wetumka Project lands to the AQTT, thus the rights of the Muskogee (Creek) Nation are not implicated. Moreover, to the extent that the Muskogee (Creek) Nation may be a necessary party, the Muskogee (Creek) Nation, as explained in its opening brief, voluntarily appeared in this case.

III. THE DECEMBER 2016 ORDER AND OPINION

A. The IBIA's Decision is Arbitrary, Capricious and Not in Accordance with Law.

As explained in its opening brief, the decision of the IBIA is flawed. Its legal underpinnings are based on an assumption that the monies must be tied to the ownership of the land. However, a trust is for whatever the trustor establishes. The facts show that the Wetumka Project lands were to be for the benefit of the AQTT. The facts show that the Surface Lease Income Trust was always used for the benefit of the AQTT and the United States reported that trust as AQTT property. Thus, the decision of the IBIA is arbitrary, capricious and not in accordance with the law.

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 movant, the United States. 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. 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. 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, it has given monies that are clearly for the benefit of the AQTT to another tribe. Thus, in looking at the facts most favorable to the non-movant, this Court must reverse the Trial Court and allow the AQTT's claims to proceed.

Dated: October 10, 2017

TALLY, TURNER & BERTMAN

/s/ Eugene K. Bertman____

Eugene K. Bertman
Talley, Turner & Bertman
219 E. Main St.
Norman, OK 73072
gbertman@ttb-law.com
Telephone: (405) 364-8300
Facsimile: (405) 364-7059

Attorneys for Appellant

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 3,965 words.

Dated: October 10, 2017

TALLY, TURNER & BERTMAN

/s/ Eugene K. Bertman____

Eugene K. Bertman
Talley, Turner & Bertman
219 E. Main St.
Norman, OK 73072
gbertman@ttb-law.com
Telephone: (405) 364-8300
Facsimile: (405) 364-7059

Attorneys for Appellant

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 October 10, 2017.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (ESET Antivirus Update 16220) and, according to the program, is free of viruses.

Dated: October 10, 2017

TALLY, TURNER & BERTMAN

/s/ Eugene K. Bertman

Eugene K. Bertman
Talley, Turner & Bertman
219 E. Main St.
Norman, OK 73072
gbertman@ttb-law.com
Telephone: (405) 364-8300
Facsimile: (405) 364-7059

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 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.

/s/ Eugene K. Bertman
Eugene K. Bertman
Talley, Turner & Bertman
219 E. Main St.
Norman, OK 73072
gbertman@ttb-law.com
Telephone: (405) 364-8300
Facsimile: (405) 364-7059

Attorneys for Appellant