No. 17-7003

ORAL ARGUMENT NOT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALABAMA-QUASSARTE TRIBAL TOWN,
Plaintiff – Appellant,

v.

UNITED STATES OF AMERICA; RYAN ZINKE,[1] in his official capacity as Secretary of the United States 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 THE DEFENDANTS-APPELLEES

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## GLOSSARY

| | |
|---|---|
| APA | Administrative Procedure Act |
| App. | Plaintiff's Appendix |
| AQTT | Alabama–Quassarte Tribal Town |
| Board | Interior Board of Indian Appeals |
| Creek Nation | Muscogee (Creek) Nation |
| ICCA | Indian Claims Commission Act |
| OIWA | Oklahoma Indian Welfare Act |
| Supp. App. | Defendants' Supplemental Appendix |

## STATEMENT OF RELATED CASES

This case was previously before the Court in Case No. 10-7094, on appeal from the district court's order of September 21, 2010, setting aside a conclusion that the Department of the Interior does not hold any assets in trust for the plaintiff-appellant and remanding the matter for further administrative proceedings. App. 89. The United States filed that appeal protectively, and the Court dismissed it on the government's motion before briefing on the merits had begun. Counsel is not aware of any other prior or related appeals.

## INTRODUCTION

Alabama–Quassarte Tribal Town (AQTT), a federally recognized Indian Tribe, appeals from the judgment by the district court for the Eastern District of Oklahoma dismissing AQTT's claims that the Secretary of the Interior violated general principles of trust law by failing to assign AQTT title to lands that the Secretary acquired in trust between 1941 and 1942 for the Muscogee (Creek) Nation, to whom AQTT's members belong, and by upholding Interior's determination that it was not required to provide AQTT with an accounting of funds derived from leasing that land. The district court's judgment should be affirmed in all respects.

Dismissal of the land claims is warranted on numerous, independently sufficient grounds. First, the Quiet Title Act retains the government's sovereign immunity to suit for claims like AQTT's seeking title to Indian trust lands. Nor does the waiver in the Administrative Procedure Act (APA) allow the land claims, which seek to compel agency action that is discretionary, not ministerial. Moreover, the land claims first accrued in the early 1940s when title was acquired. The claims are therefore barred by both the Indian Claims Commission Act and the statute of limitations. Additionally, because the claims seek to divest the Creek Nation of beneficial title to the lands, the

district court did not abuse its discretion in holding that tribe to be a required party in whose absence the action should not proceed.

The district court also correctly affirmed the decision of the Interior Board of Indian Appeals (Board) that Interior does not owe AQTT an accounting because AQTT is not the beneficial owner of the funds derived from leasing the lands held in trust for the Creek Nation. That conclusion is supported by substantial evidence in the record demonstrating that that the Board's conclusions were not arbitrary, capricious, or contrary to law. The Board's decision should be upheld, and the district court's judgment affirmed in its entirety.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. 1331 for claims arising under the Administrative Procedure Act, 5 U.S.C. 706(2), and the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. 4011, challenging the determination by the Board that the Department does not hold any funds in trust for AQTT. AQTT also invoked the district court's jurisdiction under 28 U.S.C. 1331, 1361, and 1362, to compel the government to convey title in the Wetumka lands to AQTT. However, the court lacks jurisdiction because AQTT fails to identify a waiver of the government's

sovereign immunity as to those claims. *See Normandy Apartments, Ltd. v. HUD*, 554 F.3d 1290, 1295 (10th Cir. 2009).

This Court has jurisdiction under 28 U.S.C. 1291, as AQTT appeals from a final judgment disposing of all parties' claims. App. 129.

The district court entered judgment on December 30, 2016, and AQTT filed this appeal on January 18, 2017 (App. 22), which is timely under Fed. R. App. P. 4(a)(1)(B).

## ISSUES PRESENTED

1. Whether the district court's dismissal of AQTT's land claims should be affirmed because AQTT has waived the opportunity to challenge the court's holding that the land claims are barred by the Quiet Title Act.

2. Whether the government has waived its sovereign immunity to suit for the land claims.

3. Whether the land claims are barred by the Indian Claims Commission Act because they first accrued before August 13, 1946.

4. Whether the land claims are barred by the six-year statute of limitations for civil actions against the government because they first accrued before December 29, 2000.

5. Whether the district court properly exercised its discretion in determining that the land claims may not proceed without the Creek Nation, a required party that cannot be joined as a result of its tribal immunity.

6. Whether the Interior Board of Indian Appeals' determination that the funds held in trust by Interior comprising income derived from the Wetumka lands are beneficially owned by the Creek Nation, for whom the land is held in trust, was supported by substantial evidence in the record and was not arbitrary, capricious, or contrary to law.

## STATEMENT OF THE CASE

### *1. Statement of facts*[2]

#### *a. The Creek Nation and Tribal Towns*

The Creek Indians have historically governed themselves through a confederacy of geographic units called "tribal towns," or *talwa*, each with its own autonomous political organization and leadership. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1229 (10th Cir. 2014) (citing *Harjo v. Andrus*, 581 F.2d 949, 951 n.7 (D.C. Cir. 1978)); *accord* Supp. App. 46. An individual Indian's "membership [in a talwa] was determined by ancestry rather than geography; a child became a member of his or her mother's talwa." *Stidham*, 762 F.3d at 1229. "[S]ince membership is hereditary and towns may adopt new

[2] Record citations refer to the plaintiff's appendix (App.) and to the government's supplemental appendix (Supp. App.) by page number.

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.

Largely at the urging of the United States, the Creeks adopted a constitution in 1867 creating a centralized government that somewhat mirrored the United States' federal structure. *Stidham*, 762 F.3d at 1230. Tribal towns served as the basis for representation in the Creek Nation's central government and continued their social and political organization. *See Stidham*, 762 F.3d at 1230; Supp. App. 46-47.

***b. Acquisition of the Wetumka lands***

In 1937 Congress enacted the Oklahoma Indian Welfare Act (OIWA), 49 Stat. 1967, which sought to assist Indians in Oklahoma by providing them some of the benefits that had recently been granted to other Indians under the Indian Reorganization Act of 1934, from which Oklahoma tribes were exempt. 25 U.S.C. 5118; *see* H.R. Rep. No. 74-2408, at 3 (1936); S. Rep. No. 74-1232, at 6 (1935). Accordingly, Section 3 of OIWA authorizes recognized bands of Indians "to organize for [their] common welfare" and to adopt constitutions and bylaws according to procedures established by the Secretary. 25 U.S.C. 5203. In 1939, AQTT organized under OIWA Section 3 by conducting a vote to ratify a constitution and bylaws according to a process approved by the

Secretary. App. 182-83. Article IX of AQTT's constitution preserves its members' rights "as citizens of the Creek Nation." App. 180.

Section 1 of OIWA provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: Provided, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired * * * .

25 U.S.C. 5201. Exercising that authority, the United States acquired 878.25 acres of land in Hughes County, Oklahoma, an area known as the Wetumka Project, between November 19, 1941 and April 29, 1942. App. 51, 94-95; *see*, *e.g.*, App. 415-16. Title to the land 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." App. 415 (capitalization changed). The tracts were intended to provide AQTT Indians with sites to build homes and establish modest farms. *See* App. 194-95, 230-31.

Interior officials generally assumed that the lands would eventually be assigned to AQTT. *See*, *e.g.*, App. 38-39, 184, 192, 196. However, no assignment was ever made. By contrast, lands acquired around the same time as the Wetumka lands with similar deed language for use by another federally recognized tribal town were assigned to that tribe through a proclamation by the Secretary not long after the lands were first acquired. *See* Supp. App. 45 (Thlopthlocco Tribal Town).

Although the precise reason for the lack of assignment of the Wetumka lands to AQTT is not expressly stated, Interior's field staff experienced difficulties working with AQTT's members, who were unable to agree upon a plan for agricultural production the following season. *See* App. 38, 184, 192-97. Mindful of the urgent wartime demands for maximum food production, in early 1943 Interior decided to issue revocable permits for immediate use of the land. *See* App. 38, 196. Interior officials held out the possibility that such permits might be issued by the Creek Tribe itself if AQTT were "unable to function." App. 196.

***c. Surface Lease Income Trust***

In 1943, Interior established a monetary account for depositing income from leasing the Wetumka lands. *See* App. 185. Income was deposited into the account from 1961 until 1976, when the Creek Nation informed Interior that it

no longer wished to lease the land. *See* App. 216, 226, Supp. App. 52. After that time, the Creek Nation continued to use the land for agricultural development. *See* App. 339, Supp. App. 1. From time to time, Interior authorized disbursements from the account for AQTT's benefit with authorization from the Principal Chief of the Creek Nation and representatives of AQTT. App. 337. Although no deposits to the account were made after leasing ended, the trust has continued to accrue interest. App. 216.

### *2. Procedural history*

#### *a. Administrative requests for relief*

Since at least the 1980s, AQTT has requested Interior to assign the title in the Wetumka lands to AQTT. *See*, *e.g.*, App. 343-61, 364-65, 371-79. In 1996, Interior determined that under its applicable regulations, it may not make such an assignment without the consent of the Creek Nation. App. 368-70. Ever since that time, the Creek Nation has consistently opposed assignment of title in the lands to AQTT, chiefly because assignment would raise problems of overlapping jurisdiction and would interfere with the Nation's programs and services. App. 383-86. Interior's efforts to resolve the dispute informally in a manner acceptable to all sides have proved unsuccessful.

### *b. Complaint and early district-court proceedings*

On December 29, 2006, AQTT filed a complaint seeking (1) a declaratory judgment that the United States has failed to fulfill its fiduciary obligations to the tribe; and (2) a mandatory injunction directing the government to assign title to the Wetumka lands to AQTT and to make a full accounting of funds and assets held for the tribe. App. 31-35. At the parties' request, the case was stayed for eight months while the parties explored settlement, which proved 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. App. 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 United States. App. 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. App. 56. Finally, the court held that the land claims should be dismissed

under Fed. R. Civ. P. 19 for failure to join the Creek Nation, an indispensable party. App. 58. The court declined to dismiss the claim for an accounting of the money derived from the land, stating that it lacked sufficient information to rule on that claim. *Id*.

After additional settlement discussions and the opportunity for discovery, the parties filed cross-motions for summary judgment on the accounting claims. The court issued a written opinion denying the government's motion on the ground that an Interior employee's statement in a declaration that Interior does not hold any funds or assets in trust for AQTT represented a final agency action reviewable under the APA. App. 76-77. Further, the court found enough evidence in the record to raise a genuine issue of material fact about whether the United States holds any assets in trust for AQTT, and it denied summary judgment on that basis. App. 83-84.

The court reviewed the government's conclusion about ownership of the Surface Lease Income Trust—a term the court used to refer to the accounts into which income from leasing the Wetumka lands had been deposited—and held that it was arbitrary and capricious. App. 88. The court therefore remanded the matter for further investigation and explanation, directing the government to assemble a full administrative record and to reconsider its

decision about ownership of the trust, suggesting that it should allow the Creek Nation 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, which ordered production of the administrative record and full briefing, in which the Creek Nation was allowed to participate. Supp. App. 36-37. After considering the parties' arguments and reviewing the record, the Board issued a decision concluding that beneficial title to income from the Wetumka lands vested in the Creek Nation when the lands were taken into trust for that tribe, and that the record did not demonstrate that the trust was ever later assigned to AQTT. *In re Alabama–Quassarte Tribal Town v. United States*, 59 IBIA 173, 201 (reproduced at Supp. App. 3, 31).

Conducting *de novo* review of the record before it, the Board found that the historical facts were essentially undisputed. *Id.* at 175 (Supp. App. 5). In determining whether AQTT beneficially owns the trust as a matter of law, the Board first concluded that the evidence did not demonstrate that AQTT owned the income derived from the lands by virtue of having a vested interest in that income at the time the land was acquired. *Id.* at 197-99 (Supp. App. 27-29). Next, the Board determined that there was no evidence in the record

demonstrating that AQTT acquired an interest in the income at some later time, *e.g.*, when the land was leased between 1961 and 1976. *Id.* at 199-200 (Supp. App. 29-30). Finally, the Board determined that the record evidence concerning how Interior historically regarded AQTT and other Creek tribal towns as "subordinate" bands within the Creek Nation explained Interior's administration of the Wetumka lands and funds. *Id.* at 200-01 (Supp. App. 30-31).

***d. Amended complaint and litigation after remand***

After the Board issued its decision, AQTT filed an amended complaint in the district court naming the Creek Nation as an additional party and asserting two new claims. First, AQTT alleged that a 1980 tribal council resolution by the Creek Nation relinquished any interest that the Nation held in the Wetumka lands, no longer making the Nation an indispensable party to the suit. App. 103-104. Second, AQTT challenged the Board's decision as arbitrary, capricious, unsupported by the facts, and not in accordance with law. App. 104.

The Creek Nation filed a motion to dismiss the new claim against it, which the district court granted, holding that the Nation had not waived its immunity to suit and that any claim based on the 1980 tribal council resolution was barred by the statute of limitations. App. 119-20. The parties filed cross-

motions for summary judgment on the remaining claims, and the district court granted summary judgment to the United States. App. 128. The court affirmed the Board's decision, finding it "well-reasoned and supported by the evidence," and neither arbitrary nor capricious, and demonstrating that the Board "considered every important aspect of the problem" by providing explanations of its decision "that were consistent with the evidence before it." App. 127. The court entered judgment for the United States (App. 129), and AQTT appeals.

## STANDARD OF REVIEW

The district court's order dismissing the 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). Dismissal under Rule 19 for failure to join a required party is reviewed for abuse of discretion, and the supporting legal conclusions are reviewed *de novo*. *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999).

The Court reviews *de novo* the district court's decision upholding the action of the Board, which may be set aside only if it was "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); *see Miami Tribe of Ok. v. United States*, 656 F.3d 1129, 1142 (10th Cir. 2011). Agency action is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The factual premises of the Board's decision must be upheld if they are supported by "substantial evidence," which means "enough [evidence] to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn is one of fact." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (internal quotation marks omitted). *see INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (decision reviewed under substantial-evidence standard can be reversed only if the evidence "was such that a reasonable factfinder would have to conclude" in challenger's favor). The substantial evidence standard is even more deferential than the "clearly erroneous" standard for appellate review of trial-court findings of fact. *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999).

## SUMMARY OF ARGUMENT

The district court correctly dismissed the land claims and properly entered judgment upholding the Board's decision that Interior need not provide AQTT with an accounting of income from that land because the land and money are held for the benefit of the Creek Nation rather than AQTT.

1. This Court may dispose of the appeal from dismissal of the land claims on any of several independent grounds. Most simply, AQTT affirmatively says that it is not challenging the district court's holding that the Quiet Title Act precludes review of the land claims, enabling the Court to affirm the dismissal on forfeiture grounds alone.

Nor is there any other available waiver of federal sovereign immunity authorizing suit over AQTT's land claims. Although AQTT asserts that the APA provides a basis for its suit, the APA is unavailable for two principal reasons. First, although the statute provides a waiver of sovereign immunity for a defined set of suits against the United States, that waiver does not confer authority for courts to grant relief if another statute granting consent to suit "expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702. The Quiet Title Act is such a statute, and for that reason, AQTT may not invoke the APA. Second, even if the APA's sovereign immunity waiver applied to the land claims, AQTT would not be entitled to the relief it seeks. The APA

authorizes courts to compel agency action that is owed for a mandatory, discrete duty that is essentially ministerial. Assigning title to AQTT is highly discretionary, making it an inappropriate object of relief under the APA for that reason as well.

Additionally, the district court correctly held that because AQTT contends that the land has always been held for its benefit, the land claims first accrued when beneficial title was acquired for the Creek Nation, rather than for AQTT, nearly 70 years ago. Thus, the claim is barred both by the Indian Claims Commission Act—which required a broad array of Indian claims accruing before August 13, 1946, to be brought to the Commission within five years—and by the general six-year statute of limitations applicable to civil actions against the government. Although AQTT has from time to time asked the Secretary to assign it title to the land, those requests neither toll the accrual of its claim nor provide any basis to conclude that its claim is anything other than untimely.

Furthermore, the district court's conclusion that the land claims should not proceed absent the Creek Nation, a required party that cannot be joined due to its immunity, was not an abuse of discretion. AQTT's claims seek to divest the Creek Nation of its equitable title to the land, requiring that tribe's joinder. The Creek Nation has not disclaimed its interest in the land but rather

has asserted that interest on many occasions. Nor did it waive immunity by participating in administrative proceedings during remand, consistent with the district court's recommendation that Interior consider its views.

2. The determination by the Interior Board of Indian Appeals that the Secretary does not owe AQTT an accounting of funds derived from the land because that land is held for the benefit of the Creek Nation was not arbitrary, capricious, or contrary to law, and it was supported by substantial evidence as to the Board's factual findings. After comprehensively reviewing the record evidence of Interior's dealings with AQTT and the Creek Nation regarding both the land and the funds derived from surface leases, the Board concluded that the lands and funds were intended to be beneficially owned for the Creek Nation, whom the United States historically regarded as a centralized confederacy of the various tribal towns, including AQTT. AQTT points to nothing in the record, nor did the Board find any evidence, assigning AQTT the beneficial title in the lands or the funds. The Board's conclusion that AQTT holds no such title is rational and should be upheld.

## ARGUMENT

### *I. The district court's dismissal of the land claims should be affirmed.*

#### *A. AQTT has forfeited the ability to obtain reversal of the district court's order dismissing the land claims because it waived any challenge to the district court's holding that the Quiet Title Act bars those claims.*

AQTT bases this suit on the premise that the United States has a responsibility to assign the beneficial interests in the Wetumka lands to AQTT rather than the Creek Nation, for whom the land is already in trust. Thus, by seeking to alter the assignment of property rights in the Wetumka lands, AQTT seeks to quiet title to the lands in itself, contrary to the terms in which title is now held. That action, however, is barred by the Quiet Title Act, as the district court correctly held. That Act provides that the "United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights," but it "does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a(a); *see United States v. Mottaz*, 476 U.S. 834, 842-43 (1986).

AQTT expressly waives any challenge to the district court's Quiet Title Act holding in a footnote (Pl. Br. 25 n.4). That waiver is fatal to AQTT's appeal regarding the land claims (*id.* at 24-35) because the Quiet Title Act holding provides an independent ground for dismissing those claims in their

entirety. Although AQTT argues the district court's holding prohibits AQTT merely from recovering "*any* lands" as opposed to the Wetumka lands in particular (*id.* at 25 n.4 (emphasis in original)), that distinction makes no difference. AQTT claims an interest in the lands adverse to the terms on which the United States holds title. The Quiet Title Act provides the exclusive waiver of the government's sovereign immunity for AQTT to obtain the relief it seeks. *See Block v. North Dakota*, 461 U.S. 273, 286 (1983); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220 (2012) ("adverse claimants" under the Quiet Title Act are those "assert[ing] a claim to property antagonistic to the Federal Government's"). Because courts may not quiet title to *any* Indian lands, they necessarily may not do so for the Wetumka lands.

### *B. The district court correctly dismissed the land claims.*

#### *1. The government has not waived its sovereign immunity to suit.*

AQTT's land claims fail because they are not premised on a valid waiver of the United States' sovereign immunity. Although the district court did not reach that issue, this Court may affirm the dismissal on "any ground sufficiently supported by the record." *GF Gaming Corp. v. City of Black Hawk, Colo.*, 405 F.3d 876, 882 (10th Cir. 2005).

The United States cannot be sued without its consent, and only Congress, not the courts, may waive the government's sovereign immunity. *See United States v. Navajo Nation*, 556 U.S. 287, 289 (2009); *accord Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992). Any waiver "cannot be implied but must be unequivocally expressed" in the statutory text. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (internal quotation marks, citation omitted); *accord Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Flute v. United States*, 808 F.3d 1234, 1239 (10th Cir. 2015). Moreover, any such waiver must be construed "strictly in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Unless a plaintiff's claim falls within the terms of a statute waiving sovereign immunity, the court lacks jurisdiction, and suit may not proceed. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *Flute*, 808 F.3d at 1247.

***a. The APA's waiver of sovereign immunity does not encompass the land claims because the Quiet Title Act forecloses the relief AQTT seeks.***

AQTT relies on the APA, 5 U.S.C. 706, to provide a basis for its action, which it describes as "in the nature of mandamus and injunctive relief" seeking to compel the Secretary "to perform a duty owed." App. 92; *see also* App. 76 (district court's determination that AQTT did not plead any non-APA claims).

AQTT's assertion that the APA is available as a waiver of sovereign immunity is incorrect.

The APA was amended in 1976 to provide a waiver of sovereign immunity for a defined set of suits against the United States: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (codified as 5 U.S.C. 702).

The last sentence of Section 702, however, makes clear that that the APA is not available to AQTT as a waiver of immunity: "Nothing herein"—that is, nothing in the APA's waiver—"confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* The Quiet Title Act is such a statute. As relevant here, that Act permits suits "to adjudicate a disputed title to which the United States claims an interest." 28 U.S.C. 2409a(a). The United States claims an interest in the property in trust for the Creek Nation, and AQTT "dispute[s]" the Creek Nation's beneficial title to that land, arguing that it, and not the Creek Nation, should hold the beneficial title. The "adjudicat[ion]" of "disputed title" is

precisely the relief provided by the Quiet Title Act. Because the express limitations of the Quiet Title Act prohibit that relief in the circumstances of this case, AQTT may not rely on the APA's waiver of sovereign immunity to seek that relief. *See Block*, 461 U.S. at 286; *see also Brown v. General Servs. Admin.*, 425 U.S. 820, 834 (1976) (holding that "a precisely drawn, detailed statute pre-empts more general remedies," even when, on the facts of a particular case, the narrower statute provides no relief); *cf. Patchak*, 567 U.S. at 220 (Quiet Title Act did not bar APA challenge to decision taking land into trust where plaintiff "is not an adverse claimant" of title to the land).

***b. Regardless, the APA does not provide a basis for the land claims because the OIWA does not impose a discrete, nondiscretionary duty to assign AQTT title to the lands.***

Moreover, even if the APA might otherwise provide a waiver of federal sovereign immunity, the APA does not itself authorize the relief that AQTT seeks. The APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. 706(1). However, "a claim under [section] 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (*SUWA*) (emphasis in original); *accord Wyoming v. U.S. Dep't of the Interior*, 839 F.3d 938, 942 (10th Cir. 2016). As the Supreme Court explained in *SUWA*, the APA "empowers a

court only to compel an agency to perform a ministerial or nondiscretionary act, or to take action upon a matter, without directing how it shall act." 542 U.S. at 64 (emphasis in original).

Although AQTT seeks to compel the Secretary to transfer title in the Wetumka lands to that tribe rather than to the Creek Nation, that action is not "unequivocal[ly] command[ed]" by any statute. *Id.* at 63. OIWA requires title to any lands that the Secretary acquires under the Act to be taken "in trust for the tribe * * * for whose benefit such land is so acquired." 25 U.S.C. 5201. That is precisely what the Secretary did when he acquired the land in trust for the Creek Nation, to whom AQTT's members belong. *See In re AQTT*, 59 IBIA at 189 n.30 (Supp. App. 19 n.30) (finding it "undisputed" by the parties "that AQTT citizens have dual citizenship in AQTT and in the Creek Nation") (citing administrative brief by the Creek Nation, Supp. App. 39-40, 44); *cf. Stidham*, 762 F.3d at 1231 (noting that "all of [another] Tribal Town's members seem to be eligible for Muscogee Nation membership"). Considering the Creek Nation's history and the role of tribal towns in its governing structure, discussed above at pp. 4-5, OIWA cannot reasonably be understood as divesting the Secretary of discretion to take title to the lands through the arrangement here or commanding him to transfer the lands to one federally recognized band of Creek Indians from the Creek Nation more broadly. *See*

*Pawnee Cty. Bd. of Comm'rs v. United States*, 139 F.2d 248, 252 (10th Cir. 1943) (noting that "Congress did not limit the scope of the [OIWA] to any particular tribe or class of Indians").

Based on an October 1980 resolution by the Creek Nation's tribal council purportedly relinquishing any equitable interest in the land (App. 114-15), AQTT argues that the Secretary now has a merely "ministerial task of making a record of the transfer" of the Wetumka lands to AQTT. Pl. Br. 22, 32. That argument is incorrect because the 1980 resolution has been superseded by later resolutions objecting to the Secretary's transferring title in the land to AQTT. *See* App. 385-86, Supp. App. 55-56. But even assuming that the 1980 resolution remains valid, AQTT's argument still fails. While OIWA vests the Secretary with the authority to acquire land "by assignment" of interests in "trust or otherwise restricted lands now in Indian ownership," it does not deprive the Secretary of the discretion to ensure that the quality and character of the lands is "in proportion to the respective needs" of the Indians for whom the land is acquired. 25 U.S.C. 5201. That is hardly a ministerial task, and it therefore cannot be subject to a claim under Section 706(1) of the APA in light of *SUWA*, 542 U.S. at 63-64.

Moreover, pursuant to his authority to direct the Executive Branch's "management of all Indian affairs," 25 U.S.C. 2, the Secretary has established

criteria for determining whether to acquire land in trust that is already within the boundaries of existing trust lands, allowing consideration of factors such as the "need of the * * * tribe for additional land," the "purposes for which the land will be used," and the "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. 151.10(b), (c), (f); *see also* App. 369-70 (determining that these criteria would apply to any assignment of the Wetumka lands). The criteria provide ample discretion to preclude the application of Section 706(1), even if a tribe consents to the transfer of title.

Additionally, any mandatory duty that OIWA may impose is limited to restricting the terms on which the Secretary may acquire title to the Wetumka lands. But title to those lands was acquired not later than 1942. Yet the APA's waiver of sovereign immunity was not enacted until 1976, and it does not apply retroactively. S*ee United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 930 (10th Cir. 1996); *accord Flute*, 808 F.3d at 1240 n.4. That waiver therefore does not encompass AQTT's claim that the Secretary owes a duty to acquire title to the lands in AQTT's name.

Contrary to AQTT's assertions (at 12, 14), the fact that the Creek had not organized under OIWA as of 1942 did not mean that the Creek Nation ceased to exist as a federally recognized Indian tribe. As of 1943, the Supreme Court stated, "Congress has not terminated [its guardianship] relation with

respect to the Creek Nation and its members. That Nation still exists, and has recently been authorized to resume some of its former powers." *Board of Cty. Comm'rs v. Seber*, 318 U.S. 705, 718 (1943) (citations and footnote omitted); *see also Wheeler v. U.S. Dep't of the Interior*, 811 F.2d 549, 550 (10th Cir. 1987) (rejecting the argument that "the right of the Cherokee Nation to self-government is diminished by their failure to reorganize under the * * * Welfare Act"). Nor does OIWA limit the Secretary's authority to acquire lands under Section 5201 only to Indian tribes organized under Section 5203. *Cf.* 25 U.S.C. 5206 (authorizing the Secretary to make loans "to associations or corporate groups organized pursuant to this subchapter").

***c. AQTT identifies no other sovereign immunity waiver fairly encompassing the land claims.***

No other authority that AQTT invokes (*e.g.*, at 1) provides the requisite waiver of sovereign immunity granting the district court jurisdiction of AQTT's land claims. District courts have jurisdiction under 28 U.S.C. 1331 of "all civil actions arising under the Constitution, laws, or treaties of the United States." They also have jurisdiction under 28 U.S.C. 1362 of similar actions "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." Both statutes, however, "require[e] that there be a statutory or constitutional underpinning for the cause of action." *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1058 (10th Cir. 1993) (Section

1362); *see also Normandy Apartments*, 554 F.3d at 1295 ("general jurisdictional statutes, such as 28 U.S.C. 1331, do not waive the Government's sovereign immunity").

AQTT also invokes 28 U.S.C. 1361 for district court jurisdiction of "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Before such a writ may issue, "the duty of the officer involved must be ministerial, plainly defined, and peremptory," such as "a positive command * * * so plainly prescribed as to be free from doubt." *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364, 367 (10th Cir. 1966). For the same reasons discussed above at pp. 23-26 that AQTT cannot satisfy the terms of Section 706(1) in the APA, *see SUWA*, 542 U.S. at 63, AQTT also cannot meet its "heavy burden" to demonstrate that the mandamus requirements are "clearly met." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) (citation omitted).

Finally, AQTT's repeated references to "federal common * * * law" and the "general law" concerning private fiduciaries (Pl. Br. 1, 23, 39), cannot save its case, for a waiver of sovereign immunity must be expressly and unequivocally "found somewhere in the federal code." *Fletcher v. United States*, 730 F.3d 1206, 1211 n.2 (10th Cir. 2013); *see Murdock Mach.*, 81 F.3d at 930.

Common-law principles may be relevant in the context of the government's relationship with Indian tribes, if at all, only after a waiver of sovereign immunity and a cause of action based on a specific statute have both been established. *See Flute*, 808 F.3d at 1242-43 (citing, *e.g.*, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011)); *Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982) ("[T]he federal government generally is not obligated to provide particular services or benefits [to Indians] in the absence of a specific provision in a treaty, agreement, executive order, or statute.").

***2. The land claims are precluded from review by statute.***

***a. The land claims are barred by the Indian Claims Commission Act.***

The district court held that AQTT's land claims were barred by the Indian Claims Commission Act (ICCA), Pub. L. No. 79-726, 60 Stat. 1049 (1946), which waived the government's sovereign immunity and provided a cause of action to all Indian claims against the government that accrued before 1946 so long as they were filed within a five-year period. *Id.* at 1052 (formerly codified at 25 U.S.C. 70k (1976)).[3] That holding was correct, and the factual determination supporting the court's holding were not clearly erroneous.

In enacting the ICCA, Congress created the Indian Claims Commission, "a quasi-judicial body to hear and determine all tribal claims against the

[3] The Indian Claims Commission terminated on September 30, 1978.

United States that accrued before August 13, 1946." *Navajo Tribe v. New Mexico*, 809 F.2d 1455, 1460 (10th Cir. 1987). The Act imposed a five-year period within which to file petitions asserting any "Indian claims in law and equity then existing and arising under the Constitution, federal law, and treaties between Indian tribes and the United States." *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1152 (10th Cir. 2015) (quoting *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 331 (D.C. Cir. 2009)). "Congress deliberately used broad terminology in the Act in order to permit tribes to bring all potential historical claims and to thereby prevent them from returning to Congress to lobby for further redress." *Id.*; *see also Navajo Tribe*, 809 F.2d at 1465 (characterizing the statute's language as "sweeping" and noting that the statute sought to "finally provide a forum for the resolution of all possible accrued claims" by Indian tribes). Thus, the ICCA "bars claims involving allotments or other property, claims involving title, claims to equitable relief, claims for damages, and related constitutional and procedural claims that accrued before 1946 and were not brought by August 13, 1951." *Pueblo of Jemez*, 790 F.3d at 1152 (quoting *Oglala Sioux Tribe*, 570 F.3d at 331-32 (emphasis omitted)).

AQTT contends that the government was responsible for taking title to the Wetumka lands in trust "for the tribe, band, group, or individual Indian for

whose benefit such land is so acquired." 25 U.S.C. 5201. The gravamen of its claim is that the land should be titled in trust for AQTT because the lands were originally intended for its benefit. That alleged failure to assign the lands, however, should have been evident to AQTT at the time the United States originally acquired title to the land in trust for the Creek Nation in 1942-43. No other events were required for such a claim to accrue.

AQTT had eight years after the last land acquisition to bring a claim before the Indian Claims Commission. AQTT does not dispute that 1942 or thereabouts "may be the initial point when the AQTT could have asked" for the land to be assigned to it. Pl. Br. 27. AQTT nonetheless argues that all the events necessary for its claim to accrue did not occur until many years later, possibly as late as 2005, when AQTT contends that the government was still considering whether to assign the lands. *Id.* 28.

AQTT is incorrect. "A claim against the United States first accrues on the date when all events have occurred which fix the liability of the Government and entitle the claimant to institute an action," so long as the plaintiff "knew or should have known" that it had a claim. *Ute Distrib. Corp.*, 584 F.3d at 1282-83 (brackets, internal quotation marks omitted). The district court's determination (App. 51) that AQTT should have known no later than April 29, 1942 that the Secretary was acquiring the Wetumka lands in trust for

the Creek Nation, rather than for AQTT, was correct. The lands were under the physical control of AQTT's members beginning in 1941 (*see* App. 95, Pl. Br. 23), and a late-1942 letter attached to the complaint indicates that the land was purchased at "the insistence" of AQTT leaders seeking to provide housing for tribal members. App. 110.[4] Moreover, the language in the land deeds entrusting their benefits to the Creek Nation does not mention AQTT expressly (App. 95), and, as the district court found, the lands were placed in trust for the Creek Nation "immediately upon their purchase." App. 51. The record supports the district court's conclusion that AQTT "should have known" that the terms of the title to the lands it possessed when the last of the four tracts was acquired on April 29, 1942, App. 51, four years before the date by which the claims had to accrue to become subject to the ICCA.

AQTT contends (at 26-28) that the district court incorrectly construed its claim as seeking to challenge the original assignment of the lands or to reform the deed, rather than to compel the Secretary to take action that AQTT asserts (at 19) it has yet to take. There are several problems with that argument. First, as AQTT acknowledges (at 27), "[t]here is no specific timeframe when the United States ha[s] to assign the lands." Allowing AQTT to characterize its claim as a challenge to agency inaction therefore undercuts the rationale for

[4] Although we cite the first amended complaint, the pertinent allegations do not materially differ from those in the original complaint.

the statute of limitations, which is to "preven[t] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). This Court should follow others that have refused to allow litigants to revive old claims by characterizing them as challenges to agency inaction in analogous circumstances. *See*, *e.g.*, *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923, 933-34 (9th Cir. 2010); *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1578–79 (Fed. Cir. 1988); *cf. Bergman v. United States*, 751 F.2d 314, 317 (10th Cir. 1984) (allowing each day that an agency fails to take a required action to constitute a new violation of law "would, in practical effect, mean that the [limitations period] would never run").

Additionally, AQTT's characterization of its claim as a challenge to Interior's alleged inaction on its request to assign the lands is belied by the complaint, which does not limit the relief AQTT seeks to an order requiring federal officials to determine only *whether* to assign title to AQTT, as would be expected if AQTT wished to compel Interior merely to take action on its request. Instead, AQTT seeks an injunction compelling Interior actually "to *make* the assignment to the AQTT of [the Wetumka] trust lands." App. 105

(emphasis added). However, any duty the Secretary may have had to take title to the lands in trust for AQTT as the tribe "for whose benefit such land is so acquired" necessarily arose at the time the land was "so acquired," as the district court correctly held—not six decades later. 25 U.S.C. 5201; *see* App. 52.

***b. The land claims are time-barred under 28 U.S.C. 2401(a).***

Title 28, United States Code, section 2401(a) provides in pertinent part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." AQTT's land claims fail to satisfy that statute of limitation for the same reasons just discussed—the district court correctly concluded that the claims first accrued at the time the properties were taken into trust in 1941 and 1942.

AQTT contends that a 1980 Creek Nation tribal resolution that the government produced during discovery in this case forms the basis for a claim in its amended complaint that the Creek Nation has disclaimed its beneficial interests in the Wetumka lands. But a tribal ordinance, like any government resolution, is a public act that can be discovered with reasonable diligence by monitoring the governing council's proceedings, requesting public documents, and researching records in the public domain.

Additionally, AQTT and other tribal towns requested that resolution from the Creek Nation in support of the towns' own declaration of their intent to have title in the lands assigned to them. Supp. App. 53. Tribal town leaders are listed as recipients on a letter transmitting the Creek Nation's resolution to Interior shortly after it was enacted. *See* Supp. App. 54 (copying "Tribal Town Mekko"). In any event, AQTT should have known about the resolution no later than October 1993, when its representatives were copied on a communication from Interior attaching the resolution. Supp. App. 34-35. AQTT provides no authority that would toll its claim until the document is produced in litigation with the United States many years later.

This Court has not resolved whether Section 2401(a) is jurisdictional or whether the statute is subject to equitable doctrines to which AQTT would have to resort for its contention that the limitations period did not begin to run until the 1980 resolution was produced in discovery. But even assuming those doctrines could apply to Section 2401(a), AQTT cannot satisfy them. For example, the continuing violations doctrine "cannot be employed where the plaintiff's injury is definite and discoverable and nothing prevented plaintiff from coming forward to seek redress." *Ute Distrib. Corp.*, 584 F.3d at 1283 (internal quotation marks omitted). Similarly, equitable tolling is unwarranted unless the circumstances rise to the level of "active deception." *Impact Energy*

*Res., LLC v. Salazar*, 693 F.3d 1239, 1246 (10th Cir. 2012). Given the evidence of AQTT's actual knowledge of the resolution well before the date it brought this litigation, neither doctrine would be appropriate to invoke in this case.

### *3. The district court correctly dismissed the land claims on the ground that the Creek Nation is a required party to quieting title to the lands but cannot be joined due to its sovereign immunity.*

The district court dismissed the land claims on the additional ground that the Creek Nation was required but could not be joined as a party due to sovereign immunity and that the action could not proceed in its absence. App. 58. Initially, the Creek Nation would not have been necessary for the suit to proceed under the APA. That is so because any relief in such a hypothetical case would be sought solely from federal officials based on the propriety of their actions or omissions. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001) ("Because plaintiffs' action focuses solely on the propriety of the Secretary's determinations, the absence of the Wyandotte Tribe does not prevent the plaintiffs from receiving" the requested relief). If AQTT had so limited its land claims, the Creek Nation's absence would not have impeded the government's ability to protect its interests or affected the district court's ability of to afford complete relief; nor might the government potentially be made subject to inconsistent obligations if litigation on the claims, as limited, went forward. *See* Fed. R. Civ. P. 19(a)(1).

AQTT, however, did not limit its claims in such a manner, as demonstrated above at pp. 18-19. Instead, AQTT sought a transfer of property in which the Creek Nation holds a beneficial interest. See App. 104-05. In that context, the district court did not abuse its discretion when concluding that the action could not proceed in the Creek Nation's absence. *See Tewa Tesuque v. Morton*, 498 F.2d 240, 242 (10th Cir. 1974) (finding nonparty tribe indispensable where plaintiffs sought equitable relief concerning a lease held by the nonparty tribe that the Secretary had cancelled).

To effectuate the transfer of title that AQTT seeks, Interior must obtain the Creek Nation's consent. Interior's regulations provide that a tribe like AQTT "may acquire land in trust status on a reservation other than its own when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition," with some exceptions that do not apply here. 25 C.F.R. 151.8. The Board has upheld Interior's reliance on requiring the Creek Nation's consent when declining to assign the beneficial interests in land to another tribal town. *See Kialegee Tribal Town v. Muskogee Area Dir.*, 19 IBIA 296, 304 (1991). Interior determined that the regulation requiring consent to an assignment of trust lands held for another tribe applies here, too. *See* App. 369.

AQTT contends (at 29-34) that the Creek Nation waived its tribal immunity by participating in administrative proceedings on remand before the Board and that, through an October 1980 tribal resolution, it relinquished whatever interest it had in the Wetumka lands. Both contentions are misplaced. First, the Creek Nation did not waive its immunity by voluntarily participating in the Board proceedings. *See* Supp. App. 36 n.1. Suits against Indian tribes are "barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citations omitted); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (waiver of tribal immunity "cannot be implied but must be unequivocally expressed") (internal quotation marks omitted). A tribe's voluntary participation in administrative proceedings "is not the express and unequivocal waiver of sovereign immunity" that case law requires. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994); *accord Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1017-18 (9th Cir. 2016). That is especially so here, where the district court suggested that it would be helpful for Interior to consider the Creek Nation's views on remand. App. 88; *see also* 43 C.F.R. 4.313(a) (providing for participation by *amicus curiae* before the Board).

Nor does the October 1980 tribal resolution provide a sufficient basis to compel the Secretary to convey title to AQTT. A claim based on that resolution is time-barred for the reasons discussed above at pp. 33-35. In any event, the Creek Nation's consent is a necessary but insufficient prerequisite to an assignment of title in the lands to AQTT. *See supra* at pp. 24-25. Before deciding to make such a transfer, the Secretary must evaluate the regulatory factors for acquiring land in trust, which are highly discretionary. *See* 25 C.F.R. 151.10; App. 369-70. And under OIWA, the Secretary retains the discretion to evaluate whether the assignment is in proportion to the AQTT's respective needs, *see supra* at p.24. Thus, the district court's holding that the resolution "does not establish ownership," and that "[f]urther action" by Interior "would be necessary to transfer the property" was correct. App. 379 n.6. In any event, as already discussed at p. 24, the resolution was superseded by later enactments of the Creek Nation's council.

## *II. The district court's dismissal of the trust-funds claims should be affirmed because the Board's order was not arbitrary, capricious, or contrary to law.*

Trust funds include "money derived from the sale or use of trust lands," which, in turn, are defined as "any tract or interest therein, that the United States holds in trust status for the benefit of a tribe or an individual Indian." 25 C.F.R. 115.002. Accordingly, the Board analyzed ownership of the Surface Lease Income Trust by addressing whether AQTT acquired an interest in the

income derived from the land—first due to the possibility that it held an interest in the land when it was first acquired, and second due to the possibility that it later acquired an interest in the land. *In re AQTT*, 59 IBIA at 197-98 (Supp. App. 27-28). The Board's negative answer to both questions was correct.

First, beneficial ownership of the property did not vest in AQTT at the time the land was acquired. Specifically, the land was taken into trust for "the Creek Tribe of Oklahoma." App. 415. The Secretary was indisputably referring to the Creek Nation, which, as discussed above at pp. 4-5 and 25-26, had long existed as an Indian tribe and was otherwise eligible to have land taken into trust for its benefit under OIWA. *See*, *e.g.*, *Seber*, 318 U.S. at 718; *Wheeler*, 811 F.2d at 550; *Pawnee Cty. Bd. of Comm'rs*, 139 F.2d at 252. Furthermore, the deed language contemplates an additional step by which the land might eventually be assigned to AQTT. Specifically, it would be held for the Creek Nation "*until such time* as the use of the land is assigned by the Secretary of the Interior" to a tribe like AQTT organized under OIWA, and only "*then* in trust for such tribe, band, group or individual." App. 415 (emphasis added).

The Board's conclusion that both of the steps contemplated by the deeds—acquisition in trust and assignment—had to be taken through a formal written instrument of conveyance was reasonable. As the Board correctly

pointed out, the assignment of beneficial title involves "conveyance of a property interest." *In re AQTT*, 59 IBIA at 198 (Supp. App. 28). Where the Secretary wanted to make such an assignment to a tribal town, he did so through a written proclamation. *See* Supp. App. 45 (assigning lands in trust for the benefit of the Thlopthlocco Tribal Town). The conclusion that beneficial title to the lands has never been assigned to AQTT is consistent with statements to that effect by Interior officials over the years. See, e.g., App. 184, 213, 216, 222, 254, 334, 336.

Relatedly, the Board found no evidence of "a trust instrument that divested from the Creek Nation, and vested in AQTT, the beneficial ownership of income accruing from the Wetumka Project lands." *In re AQTT*, 59 IBIA at 174 (Supp. App. 4). The conclusion that such an agreement would have been made through a formal, written instrument is supported by the Board's recognition that the right to receive the profits and income accruing from the property is an incident of owning real property. *Id.* at 198 (Supp. App. 28), *citing* 63C Am. Jur. 2d Property 1 (2014). Having found no such instrument in the record, the Board's conclusion that AQTT did not acquire ownership of the income from the lands at the time the lands were acquired was not arbitrary or capricious.

The Board also correctly concluded that AQTT did not acquire ownership of the income from the Wetumka lands through any later conduct by Interior transferring an interest in the lands or the trust to AQTT. *In re AQTT*, 59 IBIA at 199-200 (Supp. App. 29-30). Despite accepting the premise of AQTT's argument here—that funds derived from leasing the lands were used exclusively for the benefit of AQTT's members for a significant time period—the Board nonetheless concluded that Interior consistently treated the Creek Nation as the beneficial owner of the lands. *Id.* at 199 (Supp. App. 29). Specifically, the Creek Nation's Principal Chief signed the leases for the lands as the "lessor," even though AQTT's representatives sometimes had a role in "recommending" whether the leases should be approved. *Id.* (internal quotation marks omitted); *see*, *e.g.*, App. 244, 248, 258, 275, 286, 292, 297, 309 (lease agreements).

The same principle generally held true for the use of the trust funds: Budget requests for use of the funds were routinely approved by the Creek Nation's Principal Chief, to whom Interior directed its communications about the fund. *In re AQTT*, 59 IBIA at 186-87 (Supp. App. 16-17) (summarizing evidence); *see*, *e.g.*, App. 315, 326, 331 (correspondence with the Creek Nation's Principal Chief); *see also* App. 314 (responding to budget inquiries from both AQTT and the Creek Nation by "request[ing] that proper reply, by

letter, be directed to Chief McIntosh" of the Creek Nation), App. 316 (same). To be sure, deviations from this general practice may have occurred; but where they did, they do not indicate any intent to transfer beneficial ownership of the funds to the AQTT for use at its sole discretion. *Compare* App. 318 (withdrawal request signed by AQTT members identifying their tribe as "Creek") *with* App. 324 (letter delaying AQTT's request to withdraw funds until Interior received an approving resolution from the Creek Nation).

That AQTT's members had a say in the use of the funds was consistent with Interior's historical policy of treating the tribal towns as separate but subordinate sovereigns within the Creek Nation. Regardless of whether that policy correctly reflected the way that tribal towns or the Creek Nation view themselves, the Board's conclusion that such treatment did not manifest an intention by Interior to transfer ownership of the funds from the Creek Nation to AQTT was not arbitrary or capricious.

AQTT argues (at 38-39) that it should be the beneficial owner of the trust funds, relying on general trust-law principles about settlor intent and on the use to which the land and funds have been put. However, the "general trust relationship" between the United States and Indian tribes "'is not comparable to a private trust relationship' with all of its attendant fiduciary obligations." *Flute*, 808 F.3d at 1243 (quoting *United States v. Jicarilla Apache Nation*, 131 S.

Ct. 2313, 2323 (2011). Rather, the trust relationship between the United States and Indian tribes "is a creature of statute," *id.*, defined primarily by "specific, applicable, trust-creating statute[s] or regulation[s]." *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009); *accord Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982). Absent a violation of such authorities, "neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." *Navajo Nation*, 556 U.S. at 302; *see Jicarilla Apache Nation*, 131 S. Ct. at 2325.

As already discussed at pp. 23-26, AQTT cannot establish that the OIWA creates a specific, mandatory obligation for the United States to reassign the lands to it from the Creek Nation, especially given the unique role of tribal towns, the undisputed dual membership of AQTT's citizens in the Creek Nation, and the history of the federal government's interaction with the Creek Nation and tribal towns generally. For those reasons, the Board's conclusion that the income derived from the lands is not owned by AQTT was not arbitrary, capricious, or contrary to law.

## CONCLUSION

For these reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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## STATEMENT REGARDING ORAL ARGUMENT

AQTT did not request oral argument. If the Court would find oral argument helpful to decide any of the issues presented, however, the government stands ready to participate in any oral argument that the Court schedules.

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

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Date: September 25, 2017

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## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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*s/ Brian C. Toth*
BRIAN C. TOTH

# ADDENDUM

UNITED STATES CODE
TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

**§ 702. Right of review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

**UNITED STATES CODE (1976 Edition)**
**TITLE 25—INDIANS**
CHAPTER 2A—INDIAN CLAIMS COMMISSION

## § 70. Creation of Commission

There is created and established an Indian Claims Commission, hereafter referred to as the Commission.

## § 70a. Jurisdiction; claims considered; offsets and counterclaims

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 1491 of title 28: Provided, That expenditures for food, rations, or provisions shall not be deemed payments on the claim. The Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if It finds that the nature of the claim and the entire

course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

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**§ 70k. Limitation of time for presenting claims**

The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

**UNITED STATES CODE**
**TITLE 25—INDIANS**
SUBCHAPTER VIII—INDIANS IN OKLAHOMA: PROMOTION OF WELFARE

## § 5201. Acquisition of agricultural and grazing lands for Indians; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: Provided, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross-production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is authorized and directed to cause to be paid.

**UNITED STATES CODE**
**TITLE 25—INDIANS**
SUBCHAPTER VIII—INDIANS IN OKLAHOMA: PROMOTION OF WELFARE

## § 5203. Organization of tribes or bands; constitution; charter; right to participate in revolving credit fund

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): 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.

**UNITED STATES CODE**
**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

**§ 2409a. Real property quiet title actions**

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

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**UNITED STATES CODE**
**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

**§ 2401. Time for commencing action against United States**

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 25, 2017, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Mr. Eugene Kenneth Bertman
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Date: September 25, 2017

*s/ Brian C. Toth*
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