



INTERIOR BOARD OF INDIAN APPEALS

In Re Alabama-Quassarte Tribal Town v. United States

59 IBIA 173 (10/23/2014)



*See* Memorandum from Chief of Staff, Office of the Assistant Secretary – Indian Affairs to Board, Mar. 11, 2011 (Memorandum from Chief of Staff).<sup>1</sup>

Upon reconsideration, the Board concludes that, notwithstanding the Department’s original intent to eventually assign the lands to AQTT, the practice of allowing AQTT to use and benefit from the lands and the Trust, and the practice of referring to the Trust as “belonging” to AQTT, the Department never took steps that assigned AQTT beneficial ownership of the Trust as a matter of law. The Wetumka Project lands remain in trust for the Creek Nation. The right to income from land is one of the usual incidents of ownership of land, and the record does not include—or clearly point to the existence 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. The inclusion of the “Creek Tribe”—in addition to AQTT—on the name of the account into which surface lease income was deposited between 1964 and 1976, and the Department’s requirement (even if deviated from in several instances) that the Principal Chief of the Creek Nation, and later the Creek National Assembly, approve expenditures from “AQTT’s” account, reinforce our conclusion that AQTT was never assigned beneficial ownership of the Trust.

The Department’s seemingly anomalous practice of allowing lands and income held in trust for one tribe (the Creek Nation) to be used for another tribe (AQTT) is explained in this case by the Department’s historical view (however legally incorrect and objectionable to AQTT), that AQTT was a subordinate band within the Creek Nation. Understood in the historical context, the Department’s treatment of the Trust was not inconsistent with the unity of beneficial ownership of both the land and the income from the land in the Creek Nation.

### **The Administrative Record**

We begin by briefly addressing the administrative record for this proceeding. In *AQTT v. United States*, the parties apparently engaged in extensive discovery, and the court characterized the evidence as “voluminous.” 2010 U.S. Dist. LEXIS 100450 at \*2. At the same time, the court found that the Department’s conclusion about the beneficial ownership of the Trust was arbitrary and capricious, in part, because the Department had “fail[ed] to produce or provide any more than a *de minimus* administrative record. . . .

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<sup>1</sup> In the Office of the Assistant Secretary – Indian Affairs, the authority to refer a matter to the Board resides in the Assistant Secretary, *see* 43 C.F.R. § 4.1(b)(1)(ii), but the Assistant Secretary was recused and delegated his authority over the matter to the Chief of Staff. Memorandum from Chief of Staff at 2 (unnumbered) n.1.

Accordingly, the court remand[ed the] matter to [the Department] for further investigation and explanation.” *Id.* at \*36-37.

The Board provided the parties with an opportunity to identify disputed material issues of fact and to request an evidentiary hearing by an administrative law judge (ALJ) to further develop the record. No party requested such a hearing.

The evidentiary record for these proceedings is the record that was before the court, and includes over 4900 documents, consisting of many more thousands of pages.<sup>2</sup> The record includes additional documents introduced during the *AQTT v. U.S.* litigation, including copies of certain litigation documents that were transmitted to the Board in a supplemental record submitted by the Regional Director. In addition, the Board granted a motion by AQTT to incorporate in the administrative record by reference the PACER<sup>3</sup> list of entries filed with the court in *AQTT v. U.S.*, although the Board required any party relying on any such documents, if not found elsewhere in the record submitted to the Board, to submit them as exhibits during briefing. *See* Order, Nov. 17, 2011.

Thus, the evidentiary record, consisting almost entirely of historical documents, remains the record that was developed in the discovery process in the court proceedings. The Board conducted a *de novo* review of the matter, considering the evidence and arguments relied upon by the parties, as well as additional evidence in the record. No party has identified any disputed material issues of fact or requested an evidentiary hearing. The Board finds that the legal significance of the historical facts and evidence is disputed, but the historical facts are essentially undisputed. *Cf. Citizen Pottawatomie v. Collier*, 142 F.3d 1325, 1331 n.5 (10th Cir. 1998).

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<sup>2</sup> In *AQTT v. U.S.*, the court ordered the Department, on remand, to assemble a full administrative record “to include all of the evidence they possess with regard to” the Trust. 2010 U.S. Dist. LEXIS 100450 at \*37. The Eastern Oklahoma Regional Director, Bureau of Indian Affairs (BIA), initially submitted a record to the Board and certified it as complete. However, in light of some record-related issues raised at the outset of these proceedings and the Regional Director’s supplementation of the record, and in order to comply with the court’s instruction, the Board ordered the Regional Director to submit a final certification stating that, to the best of the Regional Director’s knowledge and belief, a complete and thorough search has been conducted within the Department for all evidence that the Department possesses with regard to the Trust, and that the administrative record, as presently constituted and as described above, includes all such evidence. The Regional Director then submitted the final certification of completeness.

<sup>3</sup> Public Access to Court Electronic Records (PACER) is an electronic public access service used by the Federal judiciary that allows users to access case and docket information online.

## Background

### I. Creek Political Organization and the Organization of AQTT under the Oklahoma Indian Welfare Act as a Federally Recognized Indian Tribe

Historically, Creek towns were independent, self-governing tribes affiliated through a confederacy. *Oklahoma v. Hobia*, No. 12-CV-054-GKF-TLW, 2012 U.S. Dist. LEXIS 100793, at \*10 (N.D. Okla. July 20, 2012). In 1867, due to a litany of historical events, including the forced removal of the Creeks from their lands in the eastern United States to present-day Oklahoma, and the Federal government’s insistence on dealing with a single Creek government, the Creeks adopted a constitution forming a national government, with executive, legislative, and judicial branches. See *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 970-71 (10th Cir. 1987); *Harjo v. Kleppe*, 420 F. Supp. 1110, 1120 (D.D.C. 1976). Eventually, following various Congressional legislation that was intended to eventually destroy and dissolve Creek government, but which never did, the Department came—albeit illegally—to treat the Principal Chief of the Creek Nation as serving at the pleasure of the President of the United States and “as being the sole embodiment of the Creek governmental authority.” *Harjo*, 420 F. Supp. at 1127 n.42, 1129, 1139, 1140.

In the 1930s, during the period of reform in Federal Indian policy intended to reverse previous anti-tribal policies, Congress passed the Oklahoma Indian Welfare Act (OIWA) “[t]o promote the general welfare of the Indians of the State of Oklahoma.” Act of June 26, 1936, Pub. L. No. 74-816, 49 Stat. 1967 (codified as amended at 25 U.S.C. § 501 *et seq.*). OIWA allowed “[a]ny *recognized* tribe or *band* of Indians residing in Oklahoma” to organize and adopt a constitution under rules and regulations issued by the Secretary of the Interior (Secretary), and authorized the Secretary to issue a charter of incorporation to “any such organized group.” 25 U.S.C. § 503 (emphasis added). OIWA also authorized the Secretary to purchase agricultural and grazing lands for Oklahoma Indians, and provided:

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 . . . .

*Id.* § 501.

Following the enactment of OIWA, several Creek tribal towns sought to organize under its provisions, prompting a question within the Department concerning their status as “tribes” or “bands” within the meaning of OIWA. In 1937, the Acting Solicitor (Solicitor) of the Department issued an opinion addressing the issue. See Memorandum from Acting Solicitor to Commissioner of Indian Affairs (Commissioner), July 15, 1937

(1937 Memorandum) (Administrative Record (AR) T-901-010-BIA-ALX-000613-0004). The Solicitor acknowledged that the Federal Government originally recognized Creek tribal towns as independent self-governing tribes, but had subsequently insisted upon a single centralized Creek government. *Id.* at 1. Under its 1867 constitution, the Creek Nation had three branches of government, and each tribal town was represented by delegates in a legislative National Council. *Harjo*, 420 F. Supp. at 1120. The Solicitor recognized that the tribal towns had “an existence not derived from the constitution of the Muskogee [Creek] Nation,” and one that “continu[ed] alongside the constitution.” 1937 Memorandum at 4.

With respect to the tribal towns’ status under OIWA, however, the Solicitor stated that the matter “cannot be considered entirely free from doubt, . . . since Congressional legislation over a long period has treated the Creek Nation as a single nation or tribe and disregarded subordinate groups.” *Id.* at 4. But while it was clear that Congress had recognized the Creek Nation “for the purpose of having one central, responsible agency with which to deal,” the Solicitor found that it was “not clear that Congress intended to deny the existence of the Creek towns as effective organizations.” *Id.*

The Solicitor pointed out that if Creek tribal towns were organized under OIWA, the Federal Government would be required, “in many instances,” to deal directly with the town organizations “as entities independent of the Creek nation and of each other.” *Id.* at 5. “The question,” according to the Solicitor, was whether OIWA “authorize[d] the Department to deal directly with recognized but subordinate bands where Congress in the past has dealt only with the [Creek] nation.” *Id.* The Solicitor answered the question in the affirmative. *Id.* Whether a particular Creek tribal town constituted a “recognized band” was a question of fact, but the Solicitor concluded that sufficient facts had been established to conclude that AQTT and Thlopthlocco Tribal Town were recognized bands, and thus eligible to organize under OIWA. *Id.* at 6.

In 1939, AQTT adopted a constitution, which was approved by the Secretary under OIWA, and under which AQTT became organized as “a recognized band of Indians.” Constitution and Bylaws of the Alabama-Quassarte Tribal Town, Oklahoma (AQTT Constitution), Preamble (AQTT Response Brief (Br.), Ex. D). The Constitution expressly provides that it “shall not in any way be construed to alter, abridge or otherwise jeopardize the rights and privileges of the members of this Tribal Town as citizens of the Creek Nation.” *Id.*, Art. IX. AQTT was also issued a corporate charter under § 3 of OIWA, 25 U.S.C. § 503, under the same name and with the same membership and officers as provided in its Constitution. AQTT Corporate Charter (AQTT Response Br., Ex. C).

## II. Acquisition of the Wetumka Project Lands

Although these proceedings are limited to determining whether AQTT has beneficial ownership of the Trust, the history of the acquisition and administration of the Wetumka Project lands, from which the Trust is derived, is either relevant or otherwise helpful in making our reconsidered determination. Beginning around 1938, the Department began working with members of AQTT to locate land for the United States to purchase for AQTT or its members, who were reported to include 21 families badly in need of lands. Letter from BIA<sup>4</sup> Land Field Agent to Director of Lands, Nov. 7, 1941 (AQTT Response Br., Ex. T). The Commissioner endorsed a proposal to purchase four tracts of land “for the use and benefit of the Indians of [AQTT],” stating that the tracts “will provide lands for farming and homestead purposes for landless Indians.” Letter from Commissioner to Secretary, Nov. 3, 1941 (AQTT Response Br., Ex. S).

In 1941 and 1942, the United States purchased the tracts, totaling 878.25 acres of land in Hughes County, Oklahoma, which became referred to as the Wetumka Project lands. The lands were purchased pursuant to OIWA and with funds appropriated for the rehabilitation of landless or needy Indians. The deeds conveyed the lands 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.”<sup>5</sup>

The reason the Department acquired the Wetumka Project lands “in trust for the Creek Tribe of Oklahoma,” subject to a subsequent assignment, rather than directly in trust for AQTT, is not clear to the Board. The same language was used in deeds for lands acquired for two other Creek tribal towns that were also organized under OIWA—Thlopthlocco Tribal Town and Kialegee Tribal Town. *See* Memorandum from Acting Associate Solicitor, Indian Affairs to Regional Solicitor, Tulsa, July 30, 1973, at 1 (unnumbered) (AR T901-010-BIA-ALX-000173-0149) (quoting language of deed for land for Thlopthlocco); *Kialegee Tribal Town v. Muskogee Area Director*, 19 IBIA 296

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<sup>4</sup> At the time, the office was called the Office of Indian Affairs, but for convenience and to avoid confusion, we use the acronym “BIA” to refer to both the Office of Indian Affairs and the Bureau of Indian Affairs.

<sup>5</sup> Deed from General American Life Insurance Co., Apr. 29, 1942, at 1 (AR T901-030-BIA-G00-000001-0043) (160 acres); Deed from Millie King, Apr. 13, 1942 (AR T901-030-BIA-G00-000003-0017) (33.90 acres); Deed from C.E. Russell and Maude Russell, Feb. 4, 1942 (AR T901-030-BIA-G00-000003-0016) (160 acres); Deed from Ada M. Johnson, Nov. 19, 1941 (AR T901-030-BIA-G00-000003-0018) (524.35 acres).

(1991) (lands acquired for the use of members of Kialegee Tribal Town were purchased in trust for the Creek Tribe of Oklahoma). Only the Thlopthlocco lands were subsequently assigned to the tribal town for whose members the lands had been acquired. *See* Proclamation of the Acting Secretary, Apr. 14, 1941 (AR T901-010-BIA-ALX-000173-0126) (assigning 1,914.96 acres “to be held in trust for the exclusive use and benefit of the Thlopthlocco Tribal Town, being a band of Indians of the Creek Nation organized under [OIWA]”).

It is also unclear from the record why the Wetumka Project lands were never assigned to AQTT, despite the Department’s stated intent to eventually do so. One possible explanation, at least during the period of and immediately following the acquisition, is that Departmental officials believed that AQTT should first develop a plan for the use of the lands, and had not yet done so. In 1942, the Superintendent wrote that AQTT consisted of 25-30 families who “appear to be scattered” throughout 3 counties in Oklahoma. Letter from Superintendent to Commissioner, Dec. 1, 1942, at 1 (unnumbered) (AQTT Response Br., Ex. G). According to the Superintendent, there “appear[ed] to be some dissension as to the use which is to be made of these lands . . . . Representatives of [BIA] have been endeavoring to assist [AQTT] in the preparation of a plan of operation to submit for approval but at the present time have been unable to get an agreement on any proposal.” *Id.*<sup>6</sup> The Superintendent expressed concern that “unless some action is taken immediately these fertile farm lands may be out of production this coming year unless they are leased to white operators.” *Id.* The Superintendent stated that BIA had “tried to get this group to formulate and agree upon a practical plan for the use of the lands but have so far been unable to reach an agreement.” *Id.* at 2 (unnumbered).

Responding to the Superintendent, the Assistant to the Commissioner noted that the lands had been “purchased by the Government for the eventual use of members of [AQTT], an Indian chartered corporation.” Letter from Walter V. Woehlke to Superintendent, Jan. 8, 1943, at 1 (unnumbered) (AQTT Response Br., Ex. E). The Assistant to the Commissioner remarked that “[a]lthough it is intended eventually to assign

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<sup>6</sup> The Superintendent incorrectly described AQTT as “a Federal *Cooperative* chartered under [OIWA].” Letter from Superintendent to Commissioner, at 1 (emphasis added). Section 4 of OIWA, 25 U.S.C. § 504, authorized the Secretary to charter a group of 10 or more Indians, “in convenient proximity to each other,” as a “local cooperative association,” for various purposes, including land management. But AQTT was issued a *tribal* charter of incorporation under § 3 of OIWA, 25 U.S.C. § 503, not a charter as a cooperative under § 4. We note, however, that the language of the deeds for the Wetumka Project lands was sufficiently broad to permit a subsequent assignment to a tribe, band, *cooperative*, or individual Indian.

these lands to [AQTT], the land has not yet been assigned and the town, therefore, is not in a position to make assignments to its members.” *Id.* Noting the reported difficulty in obtaining an agreement among the members of AQTT, the Assistant to the Commissioner stated:

We should not abandon our efforts to have this land eventually assigned to the Tribal Town and to assist the corporation in properly assigning economic units to eligible members. We should assist the Tribal Town Committee to function and eventually accomplish the purposes for which the Tribal Town was incorporated.

*Id.* In the interim, and recognizing the importance of having the land in production because of the national food situation during World War II, the Commissioner’s office authorized the Superintendent to issue temporary revocable permits for use of the land during 1943, with a preference given to members of AQTT. *Id.* at 1-2 (unnumbered).

In related correspondence, the Assistant Secretary stated that “[i]f [AQTT] is unable to function, approval of permits to be issued for these lands should perhaps be sought from the authorities of the Creek Tribe rather than from the Department.” Letter from Assistant Secretary to Commissioner, Feb. 12, 1943, at 1 (unnumbered) (AQTT Response Br., Ex. I). The Assistant Secretary stated that “a further effort should be made to work out some arrangement with the members of [AQTT] themselves,” and expressed concern about Congressional reaction if the Department, “immediately upon completing a purchase of land which, Congress has been told, is needed for landless Indians of a particular group, should authorize action which might result in turning over the use of this land to non-Indians or to Indians of other tribes.” *Id.*<sup>7</sup>

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<sup>7</sup> With respect to the statement that AQTT may have been having difficulty functioning, the Assistant Secretary also noted a report of “the existence of considerable friction between the [Creek] towns and the local Indian service personnel,” and it appears that there was conflict between the local BIA superintendent and AQTT officials. Letter from Assistant Secretary to Commissioner at 2 (unnumbered). In recounting the historical record, we do not intend to make any finding about whether AQTT was, in fact, struggling to function. We cite the historical record solely for the purpose of attempting to explain the *Department’s* actions, and in this regard, evidence of the Department’s understanding of the situation, whether or not correct or justified, is relevant to explaining the Department’s actions, including the intended effect of those actions.

### III. Administration of the Wetumka/Alabama-Quassarte Project Lands

Consistent with the original intent of the Department in purchasing the lands for the “rehabilitation” and benefit of AQTT members, the “Wetumka Project” came to also be referred to as the “Alabama-Quassarte Project,”<sup>8</sup> and the lands came to be referred to as “Alabama-Quassarte lands” and as “tribal town lands.”<sup>9</sup> The record includes minutes of a meeting held with AQTT in 1953 to discuss the future operations of the lands. *See* 1953 Report of Meeting at 1. The meeting was attended by John Davis, Principal Chief of the Creek Nation, and the minutes state that the BIA Area Director “stressed the importance of an effective plan for managing these lands, which will contribute to the real benefit of the members of the Creek Nation.” *Id.*

Correspondence in 1958 refers to the “Wetumka Project” and to leases covering “lands belonging to the Creek Tribe (Wetumka Project).” Memorandum from Realty Officer to Branch of Land Operations, Apr. 1, 1958 (AR T901-010-BIA-ALX-000098-0029). The memorandum refers to a lease for the “Creek Tribe, Wetumka Project,” which was to be “executed by Roley Buck for the tribe.” *Id.* Roley Buck was Principal Chief of the Creek Nation from 1955-1957, which apparently was the time period in which the lease had been submitted by BIA for execution by Buck for the Creek Nation. *See* Letter from Roley Buck to Area Director, Aug. 9, 1956 (AR T901-010-BIA-ALX-000098-0031) (returning for further action leases executed by Buck).<sup>10</sup> Vouchers in the record dating from 1958 refer to the lands as “Creek tribal property Wetumka Project.”<sup>11</sup>

AQTT has directed the Board’s attention to 10 leases that were executed for Wetumka Project lands between 1958 and 1976. One of the earliest leases, for an 8-month period in 1958, identifies the “Tribe” for the lease as “Creek,” and the lands (“Allotment

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<sup>8</sup> *See, e.g.*, Letter from Roley Buck to Area Director, Aug. 9, 1956 (AR T901-010-BIA-ALX-000098-0031); Memorandum from Realty Officer to Branch of Land Operations, Sept. 19, 1956 (AR T901-010-BIA-ALX-000098-0027).

<sup>9</sup> Memorandum Report of Meeting, Aug. 4, 1953, at 1 (1953 Report of Meeting) (AR T901-030-BIA-G00-000008-0195) (meeting held July 31, 1953).

<sup>10</sup> *See also* Muscogee Creek Nation Principal Chiefs, *Mvskoke History*, app. 9 (<http://www.muscogeenation-nsn.gov/Pages/History/pdf/historyresources.pdf>) (last visited Oct. 20, 2014, and copy added to record).

<sup>11</sup> Public Voucher for Refunds, Apr. 23, 1958 (AR T901-010-BIA-ALX-000098-0011) (Refund to Jim Baker); Public Voucher for Refunds, Apr. 23, 1958 (AR T901-010-BIA-ALX-000098-0013) (Refund to John Fish); Public Voucher for Refunds, Apr. 23, 1958 (AR T901-010-BIA-ALX-000098-0015) (refund to Joe Green).

No.”) as “Alabama-Quassarte Tribal Town, Rehabilitation Project-Wetumka.”<sup>12</sup> The tribe and lands are also variously described on the leases as “Alabama-Quassarte Reservation[,], Creek,”<sup>13</sup> “CREEK – WETUMKA PROJECT[,], Alabama-Quassarte Tribal Land,”<sup>14</sup> “Creek Tribe (Alabama-Quassarte Tribal Land),”<sup>15</sup> and “Alabama-Quassarte Tribal Land.”<sup>16</sup> Other documents in the record similarly refer to the leases as being with or for the “Alabama-Quassarte Reservation (Creek Tribe),” for land “located in the Creek Nation, Oklahoma,”<sup>17</sup> or “on lands of the Creek Nation, Alabama-Quassarte Reservation.”<sup>18</sup>

All of the leases are signed by the Principal Chief of the Creek Nation for the “Lessor.”<sup>19</sup> Beginning in the early 1960s, several of the leases are also signed, “Approval Recommended,” by AQTT members who are identified as members of the “Board of Trustees.”<sup>20</sup> The record indicates that BIA appointed AQTT members as “Tribal Trustees”

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<sup>12</sup> Farming and Grazing Lease No. 53015, May 1, 1958 – Dec. 31, 1958 (AQTT Response Br., Ex. K).

<sup>13</sup> Farming and Grazing Lease No. 53039, May 1, 1958 – Dec. 31, 1958 (AQTT Response Br., Ex. DD); Farming and Grazing Lease No. 53343, Feb. 1, 1959 – Dec. 31, 1961 (AQTT Response Br., Ex. DD); Farming and Grazing lease No. 54399, Jan. 1, 1962 – Dec. 31, 1966 (AQTT Response Br., Ex. L & DD).

<sup>14</sup> Grazing Lease No. 54965, Jan 1, 1962 – Dec. 31, 1962 (AQTT Response Br., Ex. EE); Grazing Lease No. 55257, Jan. 1, 1963 – Dec. 31, 1963 (AQTT Response Br., Ex. EE); Grazing Lease No. 55788, Jan. 1, 1964 – Dec. 31, 1964 (AQTT Response Br., Ex. Y & EE).

<sup>15</sup> Farming and Grazing Lease No. 58761, Jan. 1, 1972 – Dec. 31, 1976 (AQTT Supp. Br., Tab 5).

<sup>16</sup> Grazing Lease No. 56267, May 1, 1965 – Apr. 30, 1966 (AQTT Response Br., Ex. Y); Grazing Lease No. 56646, May 1, 1966 – Dec. 31, 1970 (AQTT Response Br., Ex. Y & EE).

<sup>17</sup> Bond for Lease No. 53039 (AQTT Response Br., Ex. DD).

<sup>18</sup> Delinquency notice for Lease No. 54399 (AQTT Response Br., Ex. DD).

<sup>19</sup> For a list of the Principal Chiefs of the Creek Nation and the time periods in which they served, see Muscogee Creek Nation Principal Chiefs, *Mvskoke History*, app. 9.

<sup>20</sup> *See* Grazing Lease No. 54965; Grazing Lease No. 55257; Grazing Lease No. 55788; Grazing Lease No. 56267; Grazing Lease No. 56646. Sometimes the Trustees signatures are on a “Lessee” line (in one case with the word “Lessee” crossed out), and sometimes on a “Lessor” line. *See id.*

for “the Wetumka Project, Creek Tribe of Oklahoma.”<sup>21</sup> It appears that the individuals appointed as trustees for the project by BIA were often, or perhaps always, individuals who were also AQTT government officials. But a “Trustee” is not an office that exists in the organic documents under which AQTT was organized in 1939. *See* AQTT Constitution, Art. V. The Board has found no evidence in the record, and AQTT has identified none, that AQTT ever objected to BIA’s practice of having the Principal Chief of the Creek Nation sign the leases as “lessor.” There is evidence, however, that AQTT believed that its consent, or recommended approval, of leases for the Wetumka Project lands was required, and evidence that BIA understood that consultation with, or approval by, AQTT was either appropriate or required, even if BIA also understood that the Principal Chief of the Creek Nation had the authority to execute leases for the lands. *See* Memorandum from Superintendent to Area Director, Jan. 11, 1971 (AQTT Supp. Br., Tabs 1 & 2) (failure to consult with “the Alabama-Quassarte chief and his Board of Trustees” on a lease “was an oversight” on the part of BIA and the Creek Nation’s Principal Chief; “[w]e did not know [AQTT] approval was required”).

The report of another meeting with AQTT, held in 1972, noted “considerable discussion on the Creek Tribal land known as the Wetumka Project.” Letter from Area Realty Officer to Tribal Operations, Apr. 19, 1972 (AQTT Response Br., Ex. CC; AQTT Supp. Br., Tab 5). The report noted that “[w]hile title to the land is in the Creek Tribe, the file supports the purpose as being for use of the Alabama-Quassarte Town members.” *Id.* AQTT members “expressed an interest in establishing and adopting guidelines governing leasing,” and Creek Nation Principal Chief Claude Cox encouraged them to do so. *Id.*

In 1976, the Creek Nation apparently decided to discontinue leasing of the Wetumka/Alabama-Quassarte Project lands. *See AQTT v. U.S.*, 2010 U.S. Dist. LEXIS 100450, at \*9-10; Letter from Area Director to Principal Chief, Creek Nation, Oct. 1, 1976 (AR T901-010-BIA-ALX-000095-0012); Memorandum from Superintendent, Okmulgee Agency to Area Director, Sept. 2, 1976 (AR T901-010-BIA-ALX-000095-0014).

#### IV. Administration of the Income Derived from the Wetumka Project Lands

The court in *AQTT v. U.S.* defined the Trust as limited to the income (and accrued interest) deposited in trust from surface leases of the Wetumka Project lands between 1961 and 1976. *AQTT v. U.S.*, 2010 U.S. Dist. LEXIS 100450, at \*3-4. However, we find it

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<sup>21</sup> Appointment as Tribal Trustee Documents, AR T901-030-BIA-G00-000003-0074 to -0076 (forms executed by BIA Area Director appointing Samuel Deal, Daniel Beaver, and Sampson Scott, as trustees for the period July 1, 1960 – July 1, 1961).

relevant or useful to at least briefly describe evidence regarding the Department's administration of the pre-1961 income, particularly in light of the fact that AQTT argues that its beneficial ownership interest in the Trust "attached as soon as the [Wetumka Project lands were] purchased with the clear intent of the United States that [they] benefit the AQTT." AQTT Supp. Br. at 3 (unnumbered) (Response to Supplemental Briefing Question 7).

A. Evidence Dating from the Period 1943-1960

In 1943, the Commissioner's office instructed that fees received for the use of the Wetumka Project lands were to "be retained in Special Deposits until such time as it is determined whether the revenues shall be credited to the Alabama-Quassarte Tribal Town or to the Creek Tribe of Oklahoma." Letter from Walter V. Woehlke to Superintendent, Jan. 8, 1943, at 2. Later correspondence states that the rent is "to be credited to the rental earnings of the project." Letter from Supervisor of Extension and Credit to Farm Management Supervisor, Oct. 31, 1949 (AR T901-030-BIA-G00-000008-0197) (regarding a receipt for rent for "Alabama-Quassarte land").

Vouchers in the record dating from the 1950s refer to fees for "Creek tribal property Wetumka Project."<sup>22</sup> Correspondence from 1956 refers to a "revolving fund" into which rent was to be paid, apparently by lessees and members of AQTT who were living in houses on project lands. Letter from District Conservationist to Area Director, May 18, 1956 (AQTT Response Br., Ex. J; AR T901-010-BIA-ALX-000098-0028). A BIA memorandum in 1958 refers to "special deposits" being held in connection with the "Wetumka Project" or for leases covering "lands belonging to the Creek Tribe (Wetumka Project)." Memorandum from Realty Officer to Branch of Land Operations, Apr. 1, 1958.

B. Evidence Dating from the Period 1961-1976

For the leases identified by AQTT for the period between 1961-1976, most provide that rental payments are to be made to "the officer in charge of the Indian agency,"<sup>23</sup> or to

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<sup>22</sup> See AR T901-010-BIA-ALX-000098-0011 (Refund to Jim Baker); AR T901-010-BIA-ALX-000098-0013 (Refund to John Fish); AR T901-010-BIA-ALX-000098-0015 (Refund to Joe Green).

<sup>23</sup> See Farming and Grazing Lease No. 53015; Farming and Grazing Lease No. 53039; Farming and Grazing Lease No. 53343; Farming and Grazing lease No. 54399.

the “Bureau of Indian Affairs.”<sup>24</sup> One lease, however, for the period 1972-76, directs rental payments to the “Bureau of Indian Affairs for credit to the account of the Creek Tribe-Alabama-Quassarte Tribal Town.”<sup>25</sup> And one bill for collection indicates that payment for damages arising from a railroad fire on lands covered by one lease was to be credited to “Rehabilitation Earnings Project[,] Alabama-Quassarte Tribal Town.”<sup>26</sup>

From 1964, and apparently earlier, BIA maintained an Individual Indian Money (IIM) account in which income from the Wetumka Project lands was deposited. The record contains sheets 5 through 10 of an IIM account ledger, with entries beginning on January 1, 1964, and ending on May 10, 1983. IIM Ledgers (AR T901-030-BIA-G00-000003-0053).<sup>27</sup> The name of the account is identified as “ALABAMA-QUASSARTE TRIBAL TOWN (OKLAHOMA), Creek Tribe – Wetumka Project” (sheets 5 and 6) and “ALABAMA QUASSARTE TRIBAL TOWN (OKLAHOMA), Wetumka Project – Creek Tribe” (sheets 7 through 10). IIM Ledgers. Entries on the ledger correspond to leases in the record for the Wetumka Project lands, to balances reported for the AQTT account at various times, and to various disbursements reported in other documents in the record discussed below. *Compare* IIM Ledgers, Sheet No. 5 (balances shown for March and July 1964; disbursement shown for January 1965), *with* Letter from Area Director to W.E. McIntosh, Principal Chief, Creek Tribe, Mar. 20, 1964 (AQTT Response Br., Ex. GG) (reporting balance for March 1964); Letter from BIA Area Director to Daniel Beaver, Aug. 18, 1964 (AQTT Response Br., Ex. U & TT) (balance as of July 8, 1964); Individual Indian Accounts Application (AQTT Response Br., Ex. HH; AQTT Supp. Br., Tab 4) (request for disbursement for drilling and casing water well).

For the period between 1961 and 1976, the record contains evidence demonstrating that BIA, the Creek Nation Principal Chief, and AQTT officials regularly referred to the IIM account as AQTT’s account. *See, e.g.*, Memorandum from Area Director to Area Realty Officer, Nov. 14, 1963 (1963 Area Director Memorandum) (AQTT Supp. Br., Tab 5; AR T901-010-BIA-ALX-000545-0037) (regarding “Alabama-Quassarte and other

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<sup>24</sup> *See* Grazing Lease No. 54965; Grazing Lease No. 55257; Grazing Lease No. 55788; Grazing Lease No. 56267; Grazing Lease No. 56646.

<sup>25</sup> Farming and Grazing Lease No. 58761.

<sup>26</sup> Bill for Collection, Apr. 7, 1964 (AQTT Response Br., Ex. DD).

<sup>27</sup> A BIA memorandum in 1980 indicates that ledger sheets for the period prior to 1964 were not located. Memorandum from Area Realty Officer to Tribal Operations, May 29, 1980, at 2 (1980 Area Realty Officer Memorandum) (AR T901-010-BIA-ALX-000173-0156) (ledger sheets obtained from the Federal Records Center “did not include sheets prior to 1964”).

tribal funds” and the status of “their accounts”; identifying one deposit that “should have been deposited to the Alabama-Quassarte Tribal Town account”); Memorandum from Tribal Operations Officer to Area Director, Mar. 9, 1964, at 3 (unnumbered) (1964 Tribal Operations Officer Memorandum) (AR T901-030-BIA-G00-000008-0193) (inquiry at meeting concerning the amount on deposit “to the credit of” AQTT); Memo from Budget Officer to Area Director, Sept. 22, 1964 (AR T901-010-BIA-ALX-000619-0008) (proposed budget from “Board of Trustees, [AQTT] (Creek Tribal Town),” and referring to the “tribal group” and “their IIM account”).

At the same time—and consistent with AQT’s complaint, since at least 1980, that the Department treated it as subordinate to the Creek Nation rather than as an independent Federally recognized tribe—BIA officials routinely viewed the Principal Chief of the Creek Nation as their primary contact on matters concerning the IIM account into which income from the Wetumka Project was deposited. *See, e.g.*, 1963 Area Director Memorandum (directing Realty Officer to straighten out several accounts so “that we may advise the tribal officials and Principal Chief McIntosh how much money these groups have on deposit”);<sup>28</sup> 1964 Tribal Operations Officer Memorandum at 3 (unnumbered) (report of meeting at which Principal Chief McIntosh was asked to preside; in response to inquiry from Daniel Beaver, Chief of AQT, concerning IIM account balance, “Mr. McIntosh asks that this report be mailed direct [sic] to him and he in turn will discuss the matter with Chief Beaver”); Letter from Area Director to W.E. McIntosh, Principal Chief, Creek Tribe, Mar. 20, 1964 (1964 Area Director Letter) (AQT Response Br., Ex. GG) (BIA’s response to McIntosh’s request). In reporting back to Principal Chief McIntosh, the Area Director stated:

The Alabama-Quassarte Tribal Town (Creek Tribal Town) has a balance of \$1,002.65 on deposit in our Individual Indian Money Section. These monies have resulted from rental of lands and interest, therefore, can be used to repair or improve the Tribal Town houses.

It will be necessary for the governing body of the Tribal Town to submit a plan and justification of the work to be done . . . submitted in the form of a Resolution to the Area Director for approval.

1964 Area Director Letter; *see also* Memorandum from Area Land Operations Officer to Area Budget Officer, Mar. 16, 1964 (AQT Response Br., Ex. HH) (providing information for response).

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<sup>28</sup> In 1963, W.E. McIntosh was the Principal Chief of the Creek Nation. *See* Grazing Lease No. 55257 (signed by “W.E. McIntosh, Chief of the Creek Tribe”); Muscogee Creek Nation Principal Chiefs, *Mvskoke History*, app. 9.

Later that year, BIA forwarded to Principal Chief McIntosh a proposed budget submitted by the “Board of Trustees of the Alabama Quassarte Tribal Town, Wetumka Project, of the Creek Nation.” Letter from BIA Tribal Operations Officer to W.E. McIntosh, Aug. 5, 1964 (AR T901-010-BIA-ALX-000619-0007). The letter stated that Daniel Beaver, Chairman of the Board of Trustees of the Wetumka Project, was requesting BIA approval of the budget. *Id.* Addressing Principal Chief McIntosh, the Area Director stated that “[i]f you concur in this proposed budget, please sign in the space indicated and return all copies to this office.” *Id.*

Additional evidence in the record further illustrates how all parties involved seemingly understood the use of the funds to be subject to the approval of the Principal Chief of the Creek Nation, apparently cooperated for the most part under the auspices of administering the “Wetumka Project,” and often failed to make the sharp “tribal” distinction between the Creek Nation and AQTT that would emerge later. For example, in 1964 the BIA Budget Officer transmitted to the Area Director a budget resolution from the “Board of Trustees, [AQTT] (Creek Tribal Town)” for fiscal year 1965. Memo from Budget Officer to Area Director, Sept. 22, 1964 (AR T901-010-BIA-ALX-000619-0008). The proposed budget for the “Wetumka Project-Rehabilitation Earning Account, Creek Nation” was submitted to BIA by Daniel Beaver as Chairman, Board of Trustees, Wetumka Project, and W.E. McIntosh, Principal Chief of the Creek Nation. Proposed Budget (AQTT Response Br., Ex. V; AR T901-010-BIA-ALX-000619-0004). The heading on the letter reads, “Board of Trustees-Alabama Quassarte Tribal Town, Wetumka Project-Creek Nation.” *Id.*; *see also* Letter from Tribal Operations Officer to Daniel Beaver, Oct. 16, 1964 (AQTT Response Br., Ex. W) (proposed budget approved).

For the withdrawal of funds for the well project, pursuant to the approved budget, the applicants are identified as Willie Jessie, Trustee; Daniel Beaver, Trustee; and Sampson Scott, Trustee; and the Tribe for all three is identified as “Creek.” Individual Indian Accounts Application (AQTT Response Br., Ex. HH; AQTT Supp. Br., Tab 4) (request for \$269.60). In the section of the application for BIA’s approval, reference is made to “IIM Alabama-Quassarte Tribal Town (Oklahoma) Budget approved 9/29/64.” *Id.*

A bill for collection in 1969 for receipt of \$150 in damages to a fence burned by a railroad-caused fire indicates that it is to be credited to “Creek Nation, Alabama-Quassarte Tribal Land.” Bill, June 17, 1969 (AQTT Response Br., Ex. JJ). A note in the file related to the claim states, “Creek Tribe due \$150 for fencing.” Note (AR T901-010-BIA-ALX-000090-0023). The receipt showing a release to the railroad company has a concurrence line for “Sampson Scott, Chairman, Board of Trustees, Alabama-Quassarte Tribal Town.” Letter from Area Director to K.O. & G. Railway Co. (AR T901-010-BIA-ALX-000090-0013).

In 1971, Albert Coachman, identifying himself as “Trustee” in the space on the form provided for tribal identification, signed an application to withdraw \$1500 from the account for “Rebuilding Dining Area for Alabama & Quassarte Church.” Individual Indian Accounts Application, Albert Coachman (AQTT Response Br., Ex. HH; AQTT Response Br. Tab 4). The application was approved by the Area Director on June 17, 1971. *Id.* It is unclear whether BIA consulted with or obtained consent from the Principal Chief of the Creek Nation before approving this disbursement.<sup>29</sup>

For the year 1976, when the Creek Nation decided to discontinue leasing the Wetumka Project lands, there are two entries in the IIM account ledger for lease-related credits, and another lease-related entry in 1978. After July 1978, the only credits to the account are for interest. *See* IIM Ledgers, Sheets No. 9-10.

#### V. Creek Nation Reorganization under OIWA in 1979.

In 1976, in a landmark case for the Creek Nation, a Federal court ruled in favor of the Creek plaintiffs seeking relief against the policy and practice of the Department recognizing and dealing with the Principal Chief of the Creek Nation as the sole embodiment of the Creek Nation’s government. *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976). The court rejected the Department’s argument that Congressional legislation enacted in an era of anti-tribal Federal policy had effectively supplanted the Creek constitutional government created by the 1867 Creek constitution and replaced it with the Principal Chief exercising all of the Creek Nation’s authority. *Id.* at 1127 n.42, 1140, 1142-43.

In 1979, the Creek Nation adopted a constitution through which it reorganized under the provisions of OIWA. *AQTT v. U.S.*, 2010 U.S. Dist. LEXIS 100450, at \*4.

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<sup>29</sup> The minutes for an AQTT meeting held 14 years later, in 1985, refer to the Chief of AQTT as having visited the BIA Area Director, apparently on the subject of AQTT requests to draw on the IIM Account and BIA’s insistence that a request go through the Creek National Council. Meeting of AQTT, Oct. 5, 1985, at 1-2 (1985 Meeting of AQTT) (AR T901-010-BIA-ALX-000573-0060). The minutes report that AQTT Chief Tiger was informed by BIA that “the \$1500 that had been withdrawn from the IIM Account previously by [AQTT] had been signed off by [Creek Nation Principal Chief] Turner Bear.” *Id.* at 1. Turner Bear was Principal Chief from 1957 to 1961, which predates the account ledgers in the record. *See* Muscogee Creek Nation Principal Chiefs, Mvskoke History, app. 9. If the 1985 reference to a \$1500 withdrawal was to the 1971 withdrawal—the only \$1500 withdrawal shown on the 1964-1983 ledgers—then the specific reference to Turner Bear was mistaken.

The 1867 Creek constitution apparently contained no membership provision, *Harjo v. Kleppe*, 420 F. Supp. at 1118, and the Board is not aware of any documents in the record that indicate the existence of a dispute prior to 1979 about the relationship between membership in AQTT and membership in the Creek Nation. But apparently, after the Creek Nation adopted the 1979 constitution, an issue arose about whether an “enrolled” member of a Federally recognized Creek tribal town organized under OIWA could also be a member of the Creek Nation. See Petition of Alabama-Quassarte Tribal Town, Sept. 30, 1987, at 14 (AQTT Response Br., Ex. VV).<sup>30</sup> And as noted earlier, AQTT’s Constitution provides that it “shall not in any way be construed to alter, abridge or otherwise jeopardize the rights and privileges of the members of this Tribal Town as citizens of the Creek Nation.” AQTT Constitution, Art. IX.

## VI. The Conflict over the Wetumka Project Lands and the IIM Account

Based upon the evidence relied on by AQTT and other evidence in the record reviewed by the Board, it does not appear that prior to 1980, AQTT objected to the involvement of the Creek Nation’s Principal Chief in the administration of the Wetumka Project lands and the Trust derived from those lands. As noted earlier, *supra* at 183, AQTT objected to the Principal Chief agreeing to a lease without the involvement and approval of AQTT, but the Board has not identified any evidence that, prior to 1980, AQTT contended that the Creek Nation and the Principal Chief of the Creek Nation has no legal right or authority to be involved in decisions regarding the administration and use of the Trust, or that AQTT, and not the Creek Nation, was the beneficial owner of the Trust. At some point, however, the issue arose regarding the relationship between AQTT and the Creek Nation, and the Wetumka Project lands and Trust.

Beginning in 1980, if not sooner, BIA began examining its records on the Wetumka Project lands. A memorandum from the Superintendent to the Area Director reported:

[P]rior to 1961 all farming and grazing leases on the lands designated as Alabama Quassarte Tribal Land Wetumka Project were approved only by the Chief of the Creek Nation. From 1961 on the leases then show the names of

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<sup>30</sup> It appears that the issue of dual enrollment was considered an issue by the Department and by AQTT, but it is unclear whether the Creek Nation ever considered a dual-enrollment prohibition in its 1979 constitution to apply to members of Creek tribal towns, even if the town was Federally recognized as a separate tribe as a matter of Federal law. It is undisputed in these proceedings that AQTT citizens have dual citizenship in AQTT and in the Creek Nation, *see* Supp. Br. of Muscogee (Creek) Nation, Oct. 2, 2013, at 1-2 & Ex. 1.

the Alabama Quassarte Tribal Town Trustees and the Chief of the Creek Nation. This apparently is the beginning of the time when the money was set up in a special account for the Alabama Quassarte Wetumka Project.

We can find no resolution or policy statement which required the money be sent to this special account . . . .

Memorandum from Superintendent to Area Director, Apr. 2, 1980 (AR T901-030-BIA-G00-000003-0055).

A subsequent memorandum from the Area Director noted that the Wetumka Project lands had been purchased “in trust for the Creek Tribe of Oklahoma,” until such time as they were assigned to a tribe, band, cooperative organized under OIWA, or individual Indian, and that BIA’s records did not reflect such an assignment as having been made:

[T]herefore, beneficial interests and title would be considered held by the Creek Nation. For this reason, it has been necessary that matters pertaining to the management and use of the properties in question be handled by the Creek Tribe.

In view of this, release and actual use of the monies credited to an account for the Alabama-Quassarte Tribal Town, Wetumka Project – Creek Tribe, as a result of the provisions of farming and grazing leases, would be at the discretion of the Creek Nation.

Memorandum from Area Director to Superintendent, May 1, 1980 (AR T901-010-BIA-ALX-000091-0005). A memorandum from the Area Realty Officer similarly concludes that matters pertaining to the management and use of the lands would be handled by the Creek Nation, “and revenue received therefrom credited to the Creek Nation.” 1980 Area Realty Officer Memorandum.

In the fall of 1980, AQTT wrote to the Secretary of the Interior, expressing frustration over the manner in which BIA was dealing with AQTT, and focusing in particular on the Wetumka Project lands and funds. *See* Letter from Frank E. Kamp to Secretary, Sept. 24, 1980, at 1 (AR G07ALX0006461 to 6462). The letter states that AQTT had been told by the Superintendent in 1979 that it

had, both, funds in a Trust Account held by [BIA], and property that had been assigned to [it] after [AQTT] had organized under [OIWA]. [The Superintendent], also, stated to the members that, both, the money and the property would be turned over to us after we had elected officers.

We did elect officers . . . and proceeded to submit a request for [funds] from our Trust Account . . . to be used to update our membership

rolls. In reply . . . the Area Director's Office told us that the money really belonged to the Creek Nation, and that we would have to deal with them.

As you can see, in the enclosed letter from the, then, Area Director dated 2/20/63, he states that "All funds so derived, have been deposited in this account and do not accrue to the Creek Tribe."<sup>31]</sup>

If the money in the Trust Account does not belong to [AQTT], why were appointed Trustees from the Tribe able to withdraw money from this account on at least three occasions?

. . . . [W]hy were Tribal members appointed to serve as a Board of Trustees to manage this property?

*Id.* AQTT quoted from a letter in which BIA recognized AQTT as being "a legally distinct entity from the Creek Nation," but which also stated that "the group does come under the Creek Tribe for certain purposes, such as funding, etc.," a position to which AQTT objected. *Id.* at 2.<sup>32</sup>

AQTT's letter to the Secretary followed a letter to the Secretary and joint resolution from all three Creek tribal towns that were organized under OIWA, seeking to correct BIA's failure to deal with them as separate tribes, and objecting to BIA's paternalistic policies and practice of allowing "tribal town assets" to be controlled by the Principal Chief of the Creek Nation. Letter from Curtis Canard to Secretary, Sept. 17, 1980 (AR T901-010-BIA-ALX-000173-0127 to -0129).

A year later, in September of 1981, AQTT again wrote to the Secretary, complaining that the Wetumka Project lands had been misused, and that they should never have been taken in trust for the Creek Nation. Letter from Frank E. Kamp to Secretary, Sept. 22, 1981 (AR G07G000003583 to 3584). In the letter, AQTT notes that it is an Indian tribe with a constitution that was approved by the Secretary, and asserts that "the Creek Tribe should not be thought of as the 'parent' or 'trustee' for [AQTT]." *Id.* at 1. The letter also notes that income from the Wetumka Project lands was deposited into a trust account "in the name of" AQTT, and that "[o]n occasion, monies from this account were withdrawn by [AQTT] and used for improvements to tribal property." *Id.* The letter recounts the representation made by the Superintendent in 1979 that AQTT had a trust account and lands that were assigned to it, but that when AQTT requested funds to update its tribal membership roll, the Area Director had told it that title to the land was in the

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<sup>31</sup> The Board has not located the February 20, 1963, correspondence in the record.

<sup>32</sup> AQTT's letter also refers to an "original request" to BIA, dated May 22, 1980, in which AQTT "asked for two things." Letter from Frank E. Kamp to Secretary at 2. The Board has not located the May 22, 1980, letter in the record.

Creek Nation and the release and use of funds from the account would be at the discretion of the Creek Nation. *Id.* The letter refers to an unsuccessful “appeal” to the Area Office, *see id.*, which apparently was not formally pursued further. The letter asks for the monies and lands to be “returned to” AQTT. *Id.* at 2.

BIA continued to review the matter. *See* Memorandum from Area Realty Officer to Area Director, May 24, 1984 (AR T901-010-BIA-ALX-000173-0144). In 1985, AQTT passed a resolution asking BIA to release funds from the IIM account pursuant to AQTT’s approved 1985 budget. AQTT Resolution, Sept. 7, 1985 (AR T901-030-BIA-G00-000004-0018). The Creek National Council subsequently approved a resolution supporting AQTT to expend funds from “its” (referring to AQTT) IIM account for AQTT’s 1985 budget. Creek Resolution TR85-08, Sept. 28, 1985 (AR T901-010-BIA-ALX-000084-0016) (supporting the AQTT Resolution of Sept. 7, 1985).

At an AQTT meeting held in October 1985, AQTT’s Chief Kenneth Tiger reported a visit with the Area Director, who told him that BIA would not act on a withdrawal request unless it went through the Creek National Council. *See* 1985 Meeting of AQTT at 1-2. The Superintendent explained that the land was purchased for the use of AQTT members, but title was taken in trust for the Creek Nation “and the money in the IIM Account comes from land leases.” *Id.* at 2. The disbursement for AQTT’s 1985 budget eventually occurred on January 2, 1986. *See* Letter from Field Representative to Area Director, Dec. 20, 1985 (AR T901-010-BIA-ALX-000573-0014); AQTT Statement of Account, Jan. 1, 1986 – June 30, 1986 (AR T901-010-BIA-ALX-000084-0017).

A year later, in March 1987, AQTT requested, and BIA approved, another withdrawal from the account for various tribal purposes. *See* AQTT Account Application, Mar. 4, 1987 (AR T901-010-BIA-ALX-000084-0029); AQTT Statement of Account, Jan. 1, 1987 – June 30, 1987 (AR T901-010-BIA-ALX-000084-0019). It is not clear whether AQTT or BIA obtained the consent of the Creek Nation for this budget and withdrawal request. It appears, however, that BIA considered the Creek Nation’s 1985 Resolution, acting on AQTT’s 1985 budget, as granting “blanket approval” for further disbursements to AQTT.<sup>33</sup>

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<sup>33</sup> In *AQTT v. U.S.*, a Departmental official submitted a declaration stating that “[p]ursuant to [the Creek Nation’s 1985 resolution], BIA [has] disbursed funds [from the] account . . . to the AQTT, upon written request of the appropriate duly authorized AQTT official, without the need for prior authorization of the [Creek] Nation.” Declaration of Warren Austin, Dec. 11, 2009, at ¶ 21. We express no opinion on whether BIA’s interpretation of the Creek Nation’s 1985 Resolution was reasonable.

In September 1987, AQTT formally petitioned the Secretary to assign the Wetumka Project lands to AQTT, asked for full accounting of all monies earned from the lands, and asked that the Department make “full recognition” of AQTT as an independent tribe. *See* Letter from Willard McBride to Secretary, Sept. 30, 1987 (AQTT Response Br., Ex. VV; AR T901-030-BIA-G00-000001-0005), and Petition (AQTT Response Br., Ex. VV; AR T901-010-BIA-ALX-000173-0009). The petition notes that the lands were “sometimes referred to as Alabama-Quassarte lands,” but also that “the Secretary has never assigned them to the Alabama-Quassarte, even though the lands were purchased for the eventual use of the Alabama-Quassarte.” Petition at 2. In addition to discussing the lands, the Petition noted that “monies from this trust . . . [were] placed in the [IIM] account for the Alabama-Quassarte and, [AQTT] did receive some of the funds derived from this land.” *Id.* at 6 (citing 1985 budget withdrawal). AQTT asserted that what was needed was for the Secretary to assign the lands to AQTT. *Id.* at 7. “This assignment should, and would, render it unnecessary for [AQTT] to receive the use and benefit of the land without obtaining the approval or consent of the Muskogee (Creek) Nation.” *Id.* AQTT argued that enrolled members of AQTT were excluded from membership in the Creek Nation, and thus the Wetumka Project lands were effectively “excluded for [sic] any use or benefit by the Alabama-Quassarte Tribal Town or its members.” *Id.* at 13-14; *but see supra* at 188-89 & n.30.

#### VII. Transfer of Funds from IIM Account to Proceeds of Labor (PL) Account

In the fall of 1987, BIA discontinued the use of IIM accounts for tribes, and moved funds from existing tribal IIM Accounts to PL accounts. *See* Memorandum from Assistant Secretary – Indian Affairs to Area Directors, Oct. 1, 1987 (AR T901-010-BIA-ALX-000075-0003). BIA created a PL account under the name “Alabama Quassarte Tribal Town,” into which the funds from the IIM account associated with the Wetumka Project were transferred. *See* Memorandum from Muskogee Area Director to Chief, Branch of Trust Fund Accounting, Nov. 24, 1987 (AR T901-010-BIA-ALX-000075-0007) (requesting appropriations numbers for creating PL accounts; handwritten identification of PL account numbers).

A BIA report on the closure of existing Creek Nation IIM accounts included reference to the Hanna Project’s<sup>34</sup> “Creek Rehabilitation Earnings” account, but did not mention the Wetumka Project IIM account. *See* Memorandum from Muskogee Area Director to BIA Field Representative, Dec. 22, 1987 (AR T901-010-BIA-ALX-000075-

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<sup>34</sup> The Hanna Project consisted of lands purchased with the intent to benefit the Creek tribal town of Kialegee. *Muscogee (Creek) Nation v. Muskogee Area Director*, 35 IBIA 27, 29 (2000).

0012); *see also* Letter from Okmulgee Agency Field Representative to Claude Cox, Chief, Creek Nation, Nov. 13, 1987 (AQTT Response Br., Ex. OO). When the Creek National Council took action on the disposition of funds in its IIM accounts, no reference was made to the Wetumka Project funds. *See* Creek Nation Bill Reserving Receipt of Funds from IIM Accounts (AQTT Response Br., Ex. UU).

Consistent with past practices and with the name on the PL account into which the Wetumka Project IIM account funds were transferred, BIA continued to refer to the funds as being “on deposit for” AQTT. *See* Memorandum from Area Director to BIA Field Representative, Oct. 17, 1989 (AR T901-030-BIA-G00-000001-0002); *see also* Memorandum from Field Representative to Area Director, Oct. 23, 1989 (AR T901-030-BIA-G00-000001-0006) (“[AQTT’s] current balance is [amount]”; BIA “reconciles [AQTT’s] trust on a monthly basis.”).

The record includes various continued correspondence, reports, and inquiries to and within BIA concerning an accounting for and the beneficial status of the funds derived from the Wetumka Project lands. In November 1989, the Area Director reported to the Deputy to the Assistant Secretary that the Wetumka Project lands were acquired

as part of the government’s plan to provide lands for farming and homesite purposes for landless Indians in need of rehabilitation in order to give them an opportunity to provide a fair standard of living for themselves. None of the lands have been assigned to [AQTT], nor to any individual, so the beneficial title remains in the Creek Tribe. The Creek Tribe currently manages the former project lands. In the past, a[n] Alabama-Quassarte Tribal Town Board of Trustees had input into the management of the lands. We have no knowledge on whether the board still functions in that capacity. . . .

According to our records, an Individual Indian Monies (IIM) account was established in the name of [AQTT] in which surface lease income from the project lands was deposited. These monies were transferred to a tribal trust fund account under the same name [in 1987], which shows a current balance of \$[ ]. From time to time, disbursements from this account for the use of [AQTT] have been authorized by the Alabama-Quassarte Tribal Board of Trustees and the Creek Tribe.

Memorandum from Muskogee Area Director to Deputy to the Assistant Secretary – Indian Affairs, Nov. 9, 1989 (AQTT Response Br., Ex. QQ).

BIA continued to disburse funds from the AQTT PL account to AQTT, apparently without any further action by the Creek Nation. *See, e.g.*, Public Voucher for Purchases and

Services Other than Personnel, May 7, 1990 (AQTT Supp. Br., Tab 4) (for “Quarterly Drawdown of Alabama-Quassarte Tribal Town for Operations 1990”); Statement of Account: Alabama-Quassarte Tribal Town Account, Fiscal Year 1991 (AQTT Supp. Br., Tab 4).

In 1992, in response to an inquiry from the Creek Nation regarding AQTT’s petition for the Secretary to assign the Wetumka Project lands to AQTT, the Area Director responded to the question of whether AQTT had “receive[d] any income from the lands.”

Yes, it appears that income from surface leases was deposited into an Individual Indian Monies (IIM) account in the name of [AQTT] from 1961 until 1976 when the Creek Tribe advised the Okmulgee Agency Superintendent that they no longer wished to lease any of its tribal land for agricultural purposes. In 1987 those monies were transferred to a tribal trust account under the same name. . . . Disbursements from the account have been authorized from time to time in accordance with [AQTT] budget requests.

Letter from Acting Area Director to Principal Chief Bill S. Fife, Creek Nation, Aug. 5, 1992, at 2 (AR T901-010-BIA-ALX-000084-0002.)

In 1995, AQTT’s Governing Committee Chairperson wrote to the Secretary, reiterating AQTT’s complaint that AQTT, a Federally recognized tribe, had “been placed as a subordinate to the Muskogee Creek Nation,” and that AQTT’s “land and monies have been placed in trust under the umbrella of the (CREATED) Muskogee Creek Nation.” Letter from Augustine Asbury to Secretary, Mar. 6, 1995, at 1 (unnumbered) (AR T901-010-BIA-ALX-000084-0034).<sup>35</sup> AQTT asked that the Wetumka Project “lands and funds resulting from these lands be returned to the Tribal Town.” *Id.* at 2 (unnumbered).

Subsequent correspondence appears largely to repeat the same version of the historical facts: the Wetumka Project lands were purchased by the Department with the intent to eventually assign them to AQTT; they were never assigned and remain in trust for the Creek Nation; the Wetumka Project funds were deposited into an account in “AQTT’s name” or “for AQTT,” and used for AQTT purposes, pursuant to authorizations by AQTT (or the AQTT Board of Trustees) and the Creek Nation. *See, e.g.*, Memorandum from

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<sup>35</sup> AQTT apparently took the position that because the Creek Nation was not organized under OIWA until 1979, it did not exist or was not recognized as a tribe before that time. AQTT repeated that suggestion in the *AQTT v. U.S.* litigation and was rebuffed by the court. *See* 2010 U.S. Dist. LEXIS 100450, at \*4-5.

Acting Area Director to Deputy Commissioner of Indian Affairs, Aug. 11, 1995 (AR T901-030-BIA-G00-000008-0143; AQTT Response Br., Ex. O and PP); Briefing Paper from Director, Office of Trust Responsibilities to Deputy Commissioner, Indian Affairs (AQTT Response Br., Ex. R) (undated). AQTT cited the fact that funds from the account had been paid to AQTT as further evidence that both the Department and the Creek Nation intended the lands for the use and benefit of AQTT. Letter from Rebecca Torres, Chief, AQTT to Area Director, Dec. 2, 1996 (AR T901-010-BIA-ALX-000173-154; AQTT Response Br., Ex. YY). According to Chief Torres, an assignment “should and would render it unnecessary for the AQTT to receive the use and benefit of the land without obtaining the approval or consent of the Muskogee (Creek) Nation.” *Id.* at 4. “The AQTT or its members cannot properly derive any rights or benefits from the Muskogee (Creek) Nation. Thus, the land in question here is excluded for [sic] any use or benefit by the AQTT or its members.” *Id.* at 7.

BIA referred to the PL account as having been “established for the Town,” and considered a tribal leadership dispute within AQTT as possibly having “a bearing on trust assets.” Letter from BIA Field Representative to Chief Rebecca Torres and Floor Speaker Alison Alexander, July 27, 1998, at 2 (AR G07ALX0006501 to 6508).

### **Briefing and Arguments in these Proceedings**

In these proceedings, none of the parties identified any disputed material issues of fact, after being provided an opportunity to do so, and all of the parties declined to submit statements of undisputed facts upon which to rely for their respective arguments. With minor exceptions, it appears that the arguments presented to the Board follow largely along the same lines as the arguments presented to the court.

The Regional Director, through the Tulsa Field Solicitor’s Office, provided only cursory arguments, with no citations to evidence in the record. The Regional Director simply reaffirms the position that BIA took in the *AQTT v. U.S.* litigation.<sup>36</sup> The only new argument presented by BIA to support its position is that a Board decision issued in 2000, relating to a special provision in OIWA regarding the ownership of revenues from minerals under the Wetumka Project (and other OIWA-purchased) lands, applies to the determination whether AQTT is the beneficial owner of the Trust from surface leases. *See Muscogee (Creek) Nation*, 35 IBIA 27. We are not convinced that the Board’s decision in that case—involving markedly different issues, a specific provision in OIWA regarding mineral revenues, and the effect of a compromise settlement between the United States and

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<sup>36</sup> The Creek Nation also filed briefs with the Board taking the same position as BIA, that the Creek Nation, and not AQTT, is the beneficial owner of Trust.

the Creek Nation on a dispute between the Creek Nation and BIA—has any legal bearing on the question of whether AQTT holds beneficial title to the Surface Lease Income Trust. We find it unnecessary to address that case further.

AQTT argues that “the intention of a settlor of a trust should control,” and that the intent of the United States was to assign the Wetumka Project lands to AQTT and that the monies and economic benefits realized from the lands be used for AQTT. AQTT Response Br. at 4. AQTT contends that its beneficial ownership of the Trust attached “as soon as the [Wetumka Project] property was purchased with the clear intent of the United States that it benefit the AQTT.” AQTT Supp. Br. at 3 (unnumbered) (Response to Supplemental Briefing Question 7); *see also* AQTT Response Br. at 5, 11 (Department originally intended to assign the lands to AQTT and repeatedly assured AQTT that it would do so). AQTT argues that it has always physically occupied and managed the lands and that the funds derived from the lands have always been used to benefit AQTT. AQTT contends that the Wetumka Project Trustees were all AQTT members, that they reviewed “and approved” the leases, and that the Department and the Creek Nation “historically, almost universally, acknowledged” AQTT’s beneficial ownership and possession of the Wetumka Project lands. AQTT Response Br. at 7.

AQTT argues that because the lands were intended for use by AQTT, the proceeds from surface uses were credited to AQTT and deposited in AQTT’s account. AQTT contends that disbursements from the account were repeatedly approved by the Department “solely” upon application by AQTT “without requiring any authorization of the Principal Chief of the Creek Nation.” *Id.* at 8. These facts, according to AQTT, “establish that [the trust account] is properly assigned to AQTT.” *Id.* AQTT also contends that “[t]o fully and finally conclude the ownership of the account, the assignment of the Wetumka Project lands must also be finally substantively addressed and resolved.” *Id.* at 11.

## Discussion

### I. Introduction

In determining whether AQTT holds beneficial ownership of the Trust as a matter of law, we first discuss the evidence regarding the creation of the trust for the Wetumka Project lands and income, and AQTT’s argument that it obtained beneficial ownership of the Trust as soon as the Wetumka Project lands were purchased. We conclude that the evidence does not show that AQTT acquired beneficial ownership of the income from the lands when the lands were purchased, and thus did not acquire beneficial ownership of the Trust through a previously vested beneficial ownership of all income accruing from the lands.

We then discuss whether any other evidence relied on by AQTT, or otherwise identified by the Board in its review of the record, demonstrates that AQTT acquired beneficial ownership of the Trust at some later time, e.g., during the 1961-1976 leasing period. We have identified no such evidence.

Finally, we address the historical record in an attempt to explain what appears to be an anomalous situation: Lands acquired in trust for one tribe are then used for the benefit of another, and income from the lands is placed in a trust account bearing the name of a tribe that does not hold beneficial title to the lands. As the court in *AQTT v. U.S.* recognized, the historical evidence—at least viewed in one light—appears to point strongly to beneficial ownership of the Trust by AQTT. But absent from the historical record is any trust instrument whereby beneficial title to the Trust was assigned by the Secretary from the Creek Nation to AQTT. And viewed in the context of the Department’s treatment of AQTT as a “subordinate band” within the Creek Nation, it was not necessarily anomalous for the Department to view AQTT as appropriately benefiting from the Wetumka Project lands and income, without an assignment of the legal beneficial ownership of the lands or the income to AQTT.

## II. The Trust Instruments Vested Beneficial Ownership Interest in the Wetumka Project Lands and Income in the Creek Nation

The instruments that created the trust in the present case are the deeds of conveyance for the Wetumka Project lands, which placed the lands in trust “for the Creek Tribe.” The deeds also authorized the Secretary to *subsequently* assign the lands to another tribe, cooperative, or individual Indian, but did not purport to create a vested beneficial interest in an entity other than the Creek Tribe. As AQTT noted in the litigation, the “plain language of the deeds . . . established a two-step process for transfer of the property.” Plaintiff AQTT’s Motion for Summary Judgment, Jan. 11, 2010, at 18. The fact that both steps involved conveyances of a property interest means, in our view, that each step must be taken through a formal written instrument of conveyance. For example, the assignment of beneficial title to lands to the Thlopthlocco Tribal Town was done through a Secretarial proclamation. *See* Proclamation of the Acting Secretary, Apr. 14, 1941 (assigning 1,914.96 acres “to be held in trust for the exclusive use and benefit of the Thlopthlocco Tribal Town, being a band of Indians of the Creek Nation organized under [OIWA]”).

As a general rule, one of the incidents of ownership of real property is the right to receive the profits and income accruing from the property. 63C Am. Jur. 2d Property § 1 (2014). The deeds of conveyance of the Wetumka Project lands do not assign the income to AQTT, nor do they take the land in trust for the Creek Nation “for the use of” AQTT. *Cf. Trenton Indian Service Area v. Great Plains Regional Director*, 54 IBIA 298, 301 (2012) (appellant had standing to appeal BIA leasing decision where the deed was to “the Turtle

Mountain Band of Chippewa Indians “for the use of” appellant). We have not located, or been directed to, any document in the record that purports to be an instrument of assignment or conveyance to separate the Creek Nation’s beneficial ownership of the lands from one of the property rights that is incident to that ownership—the right to the income—and to convey beneficial ownership of the income to AQTT. Thus, we have found no evidence to support AQTT’s argument that beneficial ownership of the Trust attached to AQTT as soon as the Wetumka Project lands were acquired. *See* AQTT Supp. Br. at 3 (unnumbered) (Response to Supplemental Briefing Question 7).

### III. The Record Does Not Include or Indicate the Existence of a Subsequent Assignment of the Trust to AQTT

The historical record clearly shows that the Department purchased the Wetumka Project lands with the intent to “eventually” assign the lands to AQTT, at “some unspecified future date.” AQTT Response Br. at 5; *see* Letter from Assistant Secretary to Commissioner, Feb. 12, 1943 (AQTT Response Br., Ex. I). And consistent with that intent, the Department initially provided a preferential right to AQTT members to obtain revocable permits and to use the lands (e.g., for AQTT’s church). Homesite permits were granted to AQTT members, and when the agricultural leases were entered into, it appears that at least some, and possibly many, of the lessees were AQTT members. Funds derived from the leases appear to have been used exclusively, at least during the 1961-1976 period, for the Project, thus benefiting the lands and AQTT members using the lands.

But the evidence does not show that the Department ever took action to assign either the lands or, as relevant here, the Trust to AQTT. During the time that the lands were leased, the Department consistently treated the Creek Nation as the beneficial owner of the lands, as evidenced by the requirement that leases be agreed to by the Principal Chief of the Creek Nation as the “lessor.” AQTT’s involvement in leasing the lands was through a Board of Trustees for the “Wetumka Project,” who were appointed by BIA, and who signed leases “recommending” approval. The record does not show that the Trustees objected to involvement by the Principal Chief of the Creek Nation, even if they insisted upon their own involvement as well.

The same is true for the use of funds from the Trust, at least until 1980. Budgets for the use of Wetumka Project funds were approved by the Principal Chief of the Creek Nation—without any apparent objection by AQTT to BIA’s requirement for such approval—and by the BIA-appointed AQTT Trustees for the Project. And at least one drawdown request made by the AQTT Trustees identified their “Tribe” as “Creek.” *See supra* at 187.

Whatever involvement AQTT may have had in the administration of the lands and funds was not to the exclusion of the Creek Nation's Principal Chief, who at the time the Department treated as the "sole embodiment of the Creek governmental authority." *Harjo*, 420 F. Supp. at 1127 n.42, 1129, 1139, 1140. And while AQTT's name appears on the IIM account into which Wetumka Project funds were deposited, so does the name of the Creek Tribe, and the "Wetumka Project." If anything, the record is consistent with AQTT's complaint, at least since 1980, that instead of treating it as a separate Federally recognized Indian tribe, the Department treated it as subordinate to the Creek Nation with rights dependent upon and derived from or through the Creek Nation.

It is true that the PL account, into which the Trust was transferred in 1987, bears only the name of AQTT. But AQTT does not argue that actions taken by BIA in 1987 to move the funds from an IIM account to a PL account, and to create the PL account in AQTT's name, constituted a legal "assignment" of the Creek Nation's beneficial ownership of the Trust to AQTT. We cannot determine who named the PL account, but it seems unlikely that the individual(s) who named the PL account would have had authority to assign the Trust to AQTT. No notice apparently was given to the Creek Nation. Thus, regardless of whether the individual(s) who named the PL account may have believed that AQTT "owned" the funds in the Wetumka Project IIM account, we are not convinced that the actions taken to move the funds into a new account in 1987 effected a legal change in the beneficial ownership of the funds.

#### IV. The Historical Record Explains the Apparent Disjunct Between the Department's Administration of the Wetumka Project Lands and Income and the Beneficial Ownership of the Lands and Income in the Creek Nation.

When AQTT organized under OIWA in 1939, it did so as a "recognized band." Although organization under OIWA gave AQTT an independent status under Federal law, which the Solicitor recognized would require the Department to deal with it as a separate entity for certain purposes, it does not appear that the Solicitor or the Department considered Federally recognized status under OIWA as *severing* the relationship between a tribal town and the Creek Nation as a matter of tribal law. Nor does the record suggest that AQTT believed that organizing under OIWA would alter its relationship with the Creek Nation. To the contrary, AQTT's constitution expressly provides that it shall not interfere with the citizenship of its members in the Creek Nation.

Whether or not the Department was wrong in treating AQTT as a "subordinate band" within the Creek Nation, the fact that the Department did so, in our view, explains its dealings with AQTT in administering the Wetumka Project lands and funds. As a practical matter, both the Department and the Creek Nation's Principal Chiefs understood that the Wetumka Project lands were intended to benefit those Creeks who were AQTT

members. Because AQTT and its members were considered to be part of the Creek Nation, allowing AQTT to benefit from the Wetumka Project lands and the income was not inconsistent with the retention of beneficial title by the Creek Nation. And for the same reason, as relevant here, treating the Wetumka Project as for the benefit of AQTT members would not carry any necessary implication that AQTT, as a Federally recognized tribe, was the beneficial owner of the Trust as a matter of law.

### Conclusion

We conclude that beneficial title to income from the Wetumka Project lands vested in the Creek Nation when the lands were taken in trust for the Creek Nation, and that the record does not demonstrate that a subsequent assignment of the Trust was made to AQTT.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, pursuant to the referral of this matter to the Board by the Assistant Secretary, and based on the record before the Board, the Board concludes that the Surface Lease Income Trust is not held in trust for the Alabama-Quassarte Tribal Town.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge