

May 2017

Preservation Over Profits: The Conflicting Interest of Hickory Ground and Exploring Options for Preserving the Sacred Parcel

Ashley Ray

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/ailj>



Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Ray, Ashley (2017) "Preservation Over Profits: The Conflicting Interest of Hickory Ground and Exploring Options for Preserving the Sacred Parcel," *American Indian Law Journal*: Vol. 2 : Iss. 2 , Article 9.
Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol2/iss2/9>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in American Indian Law Journal by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.

PRESERVATION OVER PROFITS: THE CONFLICTING INTERESTS OF HICKORY GROUND AND EXPLORING OPTIONS FOR PRESERVING THE SACRED PARCEL

Ashley Ray*

INTRODUCTION

During the summer of 2012, the Poarch Band of Creek Indians¹ announced the \$246 million expansion of their electronic bingo casino in Wetumpka,² Alabama. Situated in an ideal location off of highway 231 overlooking the Coosa River, the Wind Creek Wetumpka Casino was designed to include a 20-story hotel tower, 285 rooms, and a 90,000 square foot gaming floor featuring more than 2,500 electronic bingo machines.³ Scheduled to open May 2013,⁴ the casino promised to be an economic boon to the tribal community. The only problem with the ambitious business venture: there are nearly fifty-seven Native bodies buried underneath the construction site on what is considered sacred ground.⁵

*Ashley Ray is a 2014 J.D. Candidate at the University of Idaho, College of Law and earned a Bachelor's of Science at the University of Florida. The author would like to dedicate this article to her maternal grandmother, Robbie Bruner, for inspiring her to learn more about the Creek culture. The author also wants to thank the staff at Seattle University's *American Indian Law Journal* for all of their hard work and dedication.

¹ Hereafter, the Poarch Band of Creek Indians will be referred to as the Poarch Band throughout this article.

² Wetumpka is derived from the Indian words "we-wau" (water) "tum-cau" (rumbling). Peggy Blackburn, *Wetumpka...A Proud Past*, WETUMPKA HERALD'S HISTORIC ELMORE COUNTRY MAGAZINE (1997), available at <http://www.cityofwetumpka.com/Default.asp?ID=478> (last visited May 19, 2014). We-wau-tum-cau, Anglicized to Wetumpka, was the Creek Nation description of a prominent area in present-day Alabama where the water was plentiful.

³ Kim Chandler, *Oklahoma Creeks Files Lawsuit to Stop Wetumpka Casino*, AL.com, (December 12, 2012, 9:42 PM), http://blog.al.com/spotnews/2012/12/oklahoma_creeks_file_lawsuit_t.html (last visited May 19, 2014).

⁴ *Id.*

⁵ *Id.*

Hickory Ground, the proposed expansion site, is a sacred site that is culturally and spiritually important to the Muscogee (Creek) Nation,⁶ of which the Poarch Band is a descendant tribe.⁷ Not only was Hickory Ground once the capital of the Creek Nation, it is a place where the Creek Nation's ancestors are buried.⁸ Many Creek Nation members pray and honor their ancestors on this site.⁹ The preservation of sacred sites, like Hickory Ground, is very important to Native Americans because many Native American religious practices are land-based, and these sites play a vital role in preserving the Native culture.¹⁰ According to Native tradition, the Poarch Band's construction disturbed the ancestors who were laid to rest on Hickory Ground when they began their casino expansion.

Once the Creek Nation heard about the construction on the sacred site, they filed a lawsuit and pursued an injunction to halt construction on Hickory Ground.¹¹ The lawsuit focuses on two related tribal groups' competing interests between contemporary and traditional values. Even though the Poarch Band and the Creek Nation share the same ancestry, they are two different tribes with different values. The Poarch Band is focused on tribal economic growth, while the Creek Nation is focused on preserving their culture and protecting their ancestors. This article will

⁶ Hereafter, the Muscogee (Creek) Nation, the official federally recognized name of the tribe, will be referred to as the Creek Nation throughout this article. Although the spelling of the original name of the Creek Nation is not material to the legal issue discussed in this article, please note that Mvskoke (pronounced muhs-GO-ghee) is the traditional word to describe the largest cultural group in the Creek Nation. There are also several variations of spellings of Mvskoke, including Muscogee, Muskogee, Muskoche, Maskoki, and Maskoke. Sarah Deer & Cecilia Knapp, *Muscogee Constitutional Jurisprudence: Vhakv Em Pvtakv (the Carpet Under the Law)*, 49 TULSA L. REV. 125, 181 (2013), available at <http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1258&context=facsch> (last visited May 19, 2014).

⁷ *Muscogee (Creek) Nation History* MUSCOGEE (CREEK) NATION, <http://www.muscogeenation-nsn.gov/Pages/History/history.html> (last visited May 19, 2014).

⁸ *History of Hickory Grounds*, HICKORY GROUNDS, <http://www.savehickoryground.org/history/> (last visited May 19, 2014).

⁹ *Id.*

¹⁰ Alex Tallchief Skibine, *Towards A Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 270 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042038 (last visited May 19, 2014).

¹¹ Chandler, *supra* note 3.

highlight the conflicting interests between cultural preservation and tribal economic developments, as well as options for resolving the inter-tribal conflict.

Part I of this article will begin with a description of the legal actions and overall conflict over Hickory Ground. Part II will discuss the historical context of Hickory Ground and its cultural and religious significance, while emphasizing the relationship between the Creek Nation and the Poarch Band. Part III will explore federal laws and policies applicable to the conflict of Hickory Ground. Part IV will analyze the conflict and resolution of a similar case which also involved two kinship tribes and a sacred site. Finally, this article will conclude by providing lessons and recommendations to resolve this inter-tribal conflict without the intervention of the federal court system.

I. BACKGROUND TO THE INTER-TRIBAL CONTROVERSY OVER HICKORY GROUND AND FEDERAL LAWSUIT.

The Poarch Band planned to expand the Wind Creek Wetumpka Casino at Hickory Ground located in Wetumpka, Alabama. The expansion of the Wind Creek Casino is estimated to cost the Poarch Band approximately \$246 million to complete the project.¹² The construction of the casino expansion would encroach on Hickory Ground, a sacred site to the Creek Nation.¹³ During the course of construction, the Poarch Band excavated nearly sixty human remains to build the casino.¹⁴ The excavated human remains are lineal ancestors belonging to the Creek Nation in Okmulgee, Oklahoma.¹⁵ If the construction continues as

¹² *About Hickory Ground (Oce Vpofv)*, HICKORY GROUND (2014), <http://www.savehickoryground.org/about/> (last visited May 19, 2014) (containing, *inter alia*, Press Release, George Thompson, Official Statement of Oce Vpofv Mekko (Hickory Ground Chief) (Aug. 30, 2012)).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; Press Release, Muscogee (Creek) Nation, *Muscogee (Creek) Nation Sues to Stop Casino Development on Sacred Burial Grounds*, HICKORY GROUND (Dec. 12, 2012), [http://www.savehickoryground.org/news-events/2012/12/muscogee-\(creek\)-nation-sues-to-stop-casino-development/](http://www.savehickoryground.org/news-events/2012/12/muscogee-(creek)-nation-sues-to-stop-casino-development/) (last visited May 19, 2014).

planned, the expansion will cause even further desecration to Hickory Ground.¹⁶

The claim was filed in federal court. On December 12, 2012, the Creek Nation filed a federal lawsuit against the Poarch Band to stop the construction of the casino on the historic ceremonial and burial grounds.¹⁷ The suit claims that in April 2012 the Poarch Band excavated approximately fifty-seven sets of human remains to construct their casino.¹⁸ The members of the Creek Nation are upset by the encroachment on Hickory Ground because the sacred site includes a ceremonial ground, a tribal burial ground, and individual graves.¹⁹ Moving the remains to a new site would not be adequate because the religious practices of the Creek Nation are rooted in the land at Hickory Ground. The Creek Nation believes that excavating and opening the graves greatly disturbed the eternal peace of their resting ancestors.²⁰

In the Poarch Band's August 2012 newsletter, Tribal Chairman Buford Rolin reported that the development of the Wetumpka casino would continue. According to the Poarch Band's calculations, the Poarch Band had occupied the land since the early 1800s.²¹ Since they claim to have occupied Wetumpka, Alabama for nearly 200 years, the Poarch Band's tribal government expects to manage and use its property at its discretion.²² The Poarch Band stated in a press release memorandum that "as a recognized sovereign nation, Poarch Creek is under no legal obligation to negotiate with any other government about the use of its own

¹⁶ *About Hickory Ground*, *supra* note 12.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *History of Hickory Ground*, *supra* note 7.

²⁰ Complaint at 6, *Muscogee (Creek) Nation v. Poarch Band of Creek Indians*, No. 2:12-cv-01079-MHT-CSC (Ala. 2012), *available at* http://www.savehickoryground.org/media/1541/complaint_filed_12-12-12.pdf (last visited May 19, 2014).

²¹ *An Overview of the Historical/Genealogical Records of the Muskoke (Creek) Indians*, STATE OF ALA. INDIAN AFFAIRS COMM., http://www.aiac.alabama.gov/Gen_Creek.aspx (last visited May 19, 2014).

²² Press Release, Poarch Creek Resumes Development of Wetumpka Property (Oct. 31, 2012).

land.”²³ In 1984, the Poarch Band became a federally recognized tribe, and is the only federally recognized tribe in the State of Alabama.²⁴ In 1984, 231.54 acres of land were taken into trust and on April 12, 1985, 229.54 acres were declared a reservation²⁵ by the United States government.²⁶ In the Poarch Band’s August 2012 newsletter, Rolin reported that the development of the Wetumpka casino would continue:

This project will provide much needed jobs to tribal members and our neighbors in Wetumpka. We have seen Wind Creek in Atmore have a very positive ripple effect on the economy, and we look forward to seeing other businesses in the Wetumpka community grow and prosper because of this development.²⁷

This statement signified that the economic development would lead to a more prosperous tribal community among the Poarch Band if the casino were expanded. The general manager of Wind Creek Casino in Wetumpka predicts that the casino expansion and new hotel are expected to create 500 to 600 jobs with an increased payroll of \$20 million, at the very least.²⁸ However, the Wind Creek casino is not the sole source of gaming revenue for the Poarch Band.²⁹ In fact, the Poarch Band manage and own three casinos: the Wind Creek Casino & Hotel in Atmore, the

²³ *Id.*

²⁴ *Tribal History*, THE POARCH BAND OF CREEK INDIANS (2014), http://www.poarchcreekindians.org/westminster/tribal_history.html (last visited May 19, 2014).

²⁵ “A federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe.” *Frequently Asked Questions*, U.S. DEPT. OF THE INTERIOR, <http://www.bia.gov/FAQs/> (last visited May 19, 2014).

²⁶ *Tribal History*, *supra* note 24.

²⁷ Buford Rolin, *Chairman’s Corner*, POARCH CREEK NEWS (The Poarch Band of Creek Indians, Atmore, Ala.), Aug. 2012, at 3.

²⁸ Matt Ocarmus, *Protested Poarch Creek Casino Expansion Nearing Completion*, NATIVE AM. TIMES, BUS.—GAMING (Jul. 28, 2013), <http://www.nativetimes.com/index.php/business/gaming/9013-protested-poarch-creek-casino-expansion-nearing-completion> (last visited Apr. 19, 2014).

²⁹ THE POARCH BAND OF CREEK INDIANS (2014), <http://www.poarchcreekindians.org/westminster/index.html> (last visited Apr. 19, 2014).

Wind Creek Casino Wetumpka, and the Creek Casino Montgomery.³⁰ The Poarch Band essentially have a monopoly on all Indian gaming in Alabama's Indian Country, though the gaming industry in Alabama is smaller than most states because they are the only federally recognized tribe in that state.³¹ The exact amount of revenue generated by the Poarch Band's casinos is unknown due to the confidentiality of the data.³² Although the data is confidential, the Indian gaming in Alabama was ranked fourth in revenue growth for 2012 with a 10.8 percent growth, and ranked number one in revenue growth among all states from 2008 to 2011.³³ The Indian gaming in Alabama achieved a 26.4 percent growth in 2011.³⁴ The Poarch Band also increased their electronic gaming machines by nearly 28 percent in all three casinos in 2012.³⁵

However, to many tribes like the Creek Nation, preserving traditions and heritage is far more important than tribal economic growth. The Chief of the Creek Nation believes "[t]here is nothing in our culture which is more reprehensible than the opening of a grave."³⁶ His powerful statement signifies the importance of spirituality to the Creek Nation. Keeping ancestors in their resting place is culturally and spiritually important to the tribal citizens of the Creek Nation. Part of the tribe's beliefs involves awareness of spiritual beings and the honoring of ancestors.³⁷ Citizens of

³⁰ *Id.*

³¹ George Altman, *Study: Alabama Indian casino revenue growth fastest in nation*, AL.COM (Mar. 11, 2012, 7:20 AM), http://blog.al.com/live/2012/03/study_alabama_indian_casino_re.html (last visited Apr. 19, 2014).

³² Gale Toensing, *Latest Gaming Industry Report: Indian Gaming Made Small Gains in 2011*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Mar. 3, 2013), <http://indiancountrytodaymedianetwork.com/2013/03/26/latest-gaming-industry-report-indian-gaming-made-small-gains-2011-148353> (last visited Apr. 19, 2014).

³³ *Indian Gambling Revenue Growing in Alabama*, BUSINESS WEEK, (last visited May 19, 2014).

³⁴ *Id.*

³⁵ Toensing, *supra* note 32.

³⁶ Press Release, Official Statement of Oco Vpofv Mekko (Hickory Ground Chief) George Thompson, (Aug. 30, 2012) (on file with George Thompson), *available at* <http://www.savehickoryground.org/about/> (last visited Apr. 19, 2014).

³⁷ Walker, A.C., & Thompson, *Muscogee Creek Spirituality and Meaning of Death*, OMEGA: J. OF DEATH & DYING, 129, 146 (2009).

the Creek Nation treat their ancestors with the utmost respect.³⁸ Removing the buried ancestors from Hickory Ground interferes with the Creek Nation's ability to honor and pray for their ancestors.³⁹

George Thompson, Hickory Ground Chief for over forty-two years, presented an official statement about the significance of Hickory Ground. Within his statement, he mentioned his responsibilities to his ancestors:

As the Oce Vpofa Mekko,⁴⁰ I fight for our people because I have to face them someday when I die and I will have to explain to them how hard I fought to preserve their final resting place. When my spirit comes to face them, I do not want my spirit to walk through your casino to greet them.⁴¹

Chief Thompson's formal statement spoke volumes about the importance of Hickory Ground. In 2002, a Native American Graves Protection and Repatriation Act (NAGPRA) claim against the Poarch Band and the Bureau of Indian Affairs quoted Chief Thompson: "Hickory Ground Tribal Town claims this ownership as the lineal descendants of the person[s] herein buried" and that "the Cultural Property is of primary cultural importance to the people of Hickory Ground Tribal Town."⁴²

³⁸ *Mvskoke (Creek) Customs and Traditions Agriculture*, MUSCOGEE (CREEK) NATION, <http://www.muscogeenation-nsn.gov/Pages/CultPres/pdf/mvskokecustomsandtraditions.pdf> (last visited Apr. 20, 2014).

³⁹ See Complaint at 8-9, *Muscogee (Creek) Nation v. Poarch Band of Creek Indians*, No. 2:12-cv-01079-MHT-CSC (Ala. 2012), available at http://www.savehickoryground.org/media/1541/complaint_filed_12-12-12.pdf (last visited May 19, 2014).

⁴⁰ Oce Vpofa Mekko is the traditional name for the Chief of Hickory Ground. Being a Chief of Hickory Ground is a lifelong and highly respected position. *History of Hickory Grounds*, *supra* note 8.

⁴¹ *About Hickory Ground*, *supra* note 12.

⁴² Letter from George Thompson, Ocevpofov (Chief), Hickory Ground Tribal Town, to Director of National Park Service (March 12, 2008) (on file with the Muscogee Creek Nation).

II. HISTORICAL BACKGROUND OF HICKORY GROUND AND THE RELATIONSHIP BETWEEN THE MUSCOGEE (CREEK) NATION AND THE POARCH BAND OF CREEK INDIANS.

A. *The Historical Function of Hickory Ground*

Historically, the Creek Nation resided all across the southeastern region of the United States prior to 1500 AD and occupied millions of acres throughout the southeast, including land within the territory which is now Alabama.⁴³ The historic Creek Nation built expansive towns within the river valleys in the present states of Alabama, Georgia, Florida and South Carolina.⁴⁴

The Creek Nation Tribal Towns upheld political autonomy and had several roles.⁴⁵ Hickory Ground Tribal Town was the last capital of the National Council of the Creek Nation prior to the Trail of Tears,⁴⁶ and was a gathering point for the Creek Nation and other Southeastern tribes.⁴⁷ While the Creek Nation Tribal Towns were generally autonomous, Hickory Ground functioned in a unique manner: it was a location where many political functions and governing decisions of the entire Creek Nation were discussed.⁴⁸ It was a place where Creek Nation citizens discussed pressing tribal issues, such as allotment and relocation.⁴⁹ The government system at Hickory Ground was designed to preserve traditional tribal customs and laws.⁵⁰ Hickory Ground was also a place of commerce

⁴³ *Tribal History*, *supra* note 24.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ The Trail of Tears is known as the forced relocation of Native American nations from southeastern area of the United States following President's Jackson Indian Removal Act of 1830. It was a tragic historic event where tens of thousands of Native Americans died while traveling from their homes in to Indian Territory, which is present day Oklahoma. The removal included many members of the Cherokee, Muscogee (Creek), Seminole, Chickasaw, and Choctaw Nations, among others. Walker, A.C., & Thompson, *supra* note 37.

⁴⁷ *Tribal History*, *supra* note 24.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Sidney L. Harring, *Crazy Snake And The Creek Struggle For Sovereignty: The Native American Legal Culture And American Law*, 34 AM. J. LEGAL HIST. 365, 367 (1990).

where tribal elders often conducted town business.⁵¹ Not only did Hickory Ground serve political purposes, it was also culturally and spiritually important. Also functioning as a ceremonial site, Hickory Ground was, and currently is, a location for traditional religious activity.⁵² The Wind Creek casino is built on a particular portion of the sacred parcel of land that includes a ceremonial ground, burial sites, and individual graves belonging to ancestors of the Creek Nation.⁵³

B. Prior Relationship Between The Creek Nation and Poarch Band

The historical origin of the relationship between the two tribes is just as important as the historical background of Hickory Ground. The current tension between the Creek Nation and the Poarch Band stems from the division of the original Creek Nation when two groups, the Upper Creek Indians and Lower Creek Indians, adopted different policies regarding Euro-American settlers.⁵⁴ When Hickory Ground became a part of the United States as the Mississippi territory, the population of Euro-Americans increased greatly in the Southeast.⁵⁵ The Upper Creeks (ancestors of the modern-day Creek Nation) advocated resisting the Euro-American settlers, whereas the Lower Creek (ancestors of the modern Poarch Band) preferred to cooperate with the Euro-American settlers.⁵⁶ Because of these differences, the Creek Nation quickly divided themselves into two groups: the Upper Creeks and the Lower Creeks.⁵⁷ The Upper Creeks believed that tribes needed to unite against the United

⁵¹ See Kenneth W. McIntosh, *Crazy Snake Uprising*, ENCYCLOPEDIA OF OKLA. HISTORY AND CULTURE <http://digital.library.okstate.edu/encyclopedia/entries/c/cr004.html> (last visited May 19, 2014).

⁵² HICKORY GROUND, www.savehickoryground.org (last visited May 19, 2014).

⁵³ CAMERON B. WESSON, HOUSEHOLDS AND HEGEMONY: EARLY CREEK PRESTIGE GOODS, SYMBOLIC CAPITAL, AND SOCIAL POWER 105 (2008).

⁵⁴ *Id.*

⁵⁵ *Tribal History*, *supra* note 24.

⁵⁶ *Muscogee (Creek) Nation History*, *supra* note 7.

⁵⁷ The Upper Creek are the present-day Creek Nation and the Lower Creek are present-day Poarch Band of Creek Indians.

States to avoid further Euro-American expansion and assimilation.⁵⁸ In contrast, the Lower Creeks preferred to cooperate and ally with the United States government.⁵⁹ By the early 1800s, the two groups were more than geographically distinct: the Upper Creeks were less assimilated than the Lower Creek Indians and maintained traditional political and social practices.⁶⁰ Ultimately, these differences in beliefs eventually led to the Creek Civil War in 1813 and the War of 1812.⁶¹

The early 1800s was a pugnacious period for the Creek Nation. In June 1812, the United States declared war on Britain, most commonly known as the War of 1812.⁶² This war led to the Battle of Horseshoe Bend that took place in central Alabama at the end of the Creek Civil War.⁶³ The Upper Creeks refused to succumb to further cultural assimilation, and strenuously fought in the Battle of Horseshoe Bend.⁶⁴ The United States military and the Lower Creek Indians became allies during the Battle of Horseshoe Bend, under the command of Andrew Jackson, and defeated the Upper Creeks.⁶⁵ The Upper Creek Indians lost the conflict and were forcibly relocated, while the Lower Creek Indians were permitted to stay on the ancestral Creek Indian lands. As a result, the Poarch Band, the descendants of the Lower Creek Indians, now maintain possession of the Creek lands once held in common by both Upper and Lower Creek Indians. In 1836, Congress permitted land grants to certain tribal families

⁵⁸ *Eastern Indian Wars*, SMITHSONIAN NAT'L MUSEUM OF AM. HISTORY, <http://amhistory.si.edu/militaryhistory/printable/section.asp?id=3> (last visited May 19, 2014).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See id.*

⁶² "The War of 1812 was a 32-month military conflict between the United States and the British Empire and their Indian allies. The War resulted in no territorial change between the British Empire and the United States, but a resolution of many issues that stemmed from the American War of Independence. The United States declared war in 1812 for several reasons, including trade restrictions, the impressment of American merchant sailors into the Royal Navy, British support of Tribes who opposed American expansion by the European settlers, and possible American interest in annexing Canada." IAN W. TOLL, *SIX FRIGATE: THE EPIC HISTORY OF THE FOUNDING OF THE U.S. NAVY* 28 (2006).

⁶³ *Eastern Indian Wars*, *supra* note 58.

⁶⁴ *Id.*

⁶⁵ *Id.*

and their heirs from the Poarch Band in the Wetumpka area.⁶⁶ However, these tribal families were gradually impoverished and increasingly discriminated against.⁶⁷

C. Removal Era

When Andrew Jackson became President of the United States, he signed the Indian Removal Act on May 28, 1830.⁶⁸ Not only did this Act grant the President authority to negotiate removal treaties with southeastern tribes, but also infamously led to the Trail of Tears.⁶⁹ In essence, the Indian Removal Act was a relocation policy that forced Indians to move to lands west of the Mississippi River in exchange for lands east of the Mississippi River.⁷⁰ The government removal policy was designed to be voluntary and peaceful if tribes agreed to the conditions of the federal law.⁷¹ There were a few tribes who cooperated with the relocation policy peacefully.⁷² However, many tribes resisted the Act because they did not want to uproot from their homes.⁷³ The Creek Nation was one of the tribes who refused to relocate.⁷⁴

In the 1830s, the Creek Nation was forcibly removed to present-day Oklahoma under the Indian Removal Act implemented by President Jackson.⁷⁵ During the Removal Era, the Poarch Band allied with the United States government and fought the Creek Nation; thus, the Poarch Band was permitted to stay in Alabama as a reward for their service to the

⁶⁶ *Tribal History*, *supra* note 24.

⁶⁷ *Id.*

⁶⁸ Indian Removal Act of 1830, 4 Stat. 411.Ch. 148 (1830). The Indian Removal Act of 1830 mainly affected Tribes that were located in the southeastern nations. The Tribal members who wished to remain in the eastern area were eventually forced to become citizens of their home state. *Id.*

⁶⁹ SEAN MICHAEL O'BRIEN, IN BITTERNESS AND IN TEARS: ANDREW JACKSON'S DESTRUCTION OF THE CREEK AND SEMINOLES 53 (2003).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Muscogee (Creek) Nation History*, *supra* note 7.

⁷⁴ *Id.*

⁷⁵ Indian Removal Act of 1830, 4 Stat. 411.Ch. 148 (1830).

government.⁷⁶ The Creek Nation resisted relocation, but President Jackson forced the remaining tribal members to leave the eastern territory.⁷⁷ In 1836, the United States Secretary of War ordered the removal of the Upper Creeks.⁷⁸ By 1837, approximately 15,000 Upper Creeks had migrated west,⁷⁹ even though they never signed a removal treaty.⁸⁰

After being forcibly removed to another region by the government, the Creek Nation attempted to reestablish their tribal government which took many years. The Creek Nation adopted a written constitution in 1867 that created a Principal Chief, a Second Chief, a judicial branch, and a legislative body comprised of a House of Kings and a House of Warriors.⁸¹ The Creek Nation also established a new capital in 1867 in Okmulgee, Oklahoma.⁸² Because the Creek Nation took steps to create a constitution and legislative body, the Creek Nation became a federally recognized tribe.

The history between the Creek Nation and the Poarch Band is extensive and has caused long-term tensions between these tribes. Unfortunately, the current controversy regarding Hickory Ground only furthers the divide between these two tribes who were once kin.

⁷⁶ *Tribal History*, *supra* note 24.

⁷⁷ *Id.*

⁷⁸ O'BRIEN, *supra* note 69, at 53.

⁷⁹ TIM ALAN GARRISON, THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 3 (2002) (Due to the terrible weather conditions and exhaustion, many Indians died on this journey).

⁸⁰ *Indian Removal Era*, PBS ONLINE, <http://www.pbs.org/wgbh/aia/part4/4p2959.html> (last visited May 19, 2014).

⁸¹ Representation in both houses, House of Kings and House of Warriors, of this Legislative assembly was determined by Tribal Town. *Muscogee (Creek) Nation History*, *supra* note 7.

⁸² *Id.*

D. Hickory Ground Status

The importance and location of Hickory Ground was not recognized again until the 1960s by a team of anthropologists.⁸³ In August 1980, the Alabama Historic Commission nominated Hickory Ground to be registered in the National Register of Historical Places because of its significance as the last capital of the National Council of the Creek Nation in the Creek Nation original homeland.⁸⁴ On February 12, 1980, the Poarch Band of Creek Indians sought to acquire Hickory Ground by submitting an application to the government for a historic preservation grant to purchase the sacred parcel.⁸⁵ Unlike many eastern tribes, the Poarch Band were not removed from their tribal lands and continued to live in or around their modern day reservation in Alabama, after most eastern tribes had been removed from their tribal land.⁸⁶ The Poarch Band received the historic preservation grant, purchased Hickory Ground, and the Alabama Historical Commission transferred the title of the parcel to the Poarch Band Indians.⁸⁷ Prior to the transfer of title, the Poarch Band stated that they invited the Creek Nation to partner with them on the application for a historic grant to purchase Hickory Ground, but the Creek Nation failed to respond to their invitation by the submission deadline.⁸⁸

Through the efforts of the Alabama Historical Commission and the Poarch Band of Creek Indians, in August 1980 Hickory Ground was

⁸³ Cameron Wallace Gill, *A Ceramic Analysis of Proto-Historic Domestic Structures from 1EE89: A Transitional Culture on the Coosa*, 8 (2010).

⁸⁴ *Alabama Properties Listed On The National Register of Historic Places*, ALA. HISTORICAL COMM. (2012), http://preserveala.org/pdfs/TAX_CREDIT/New_Folder/List_NR_Properties_n_AL.pdf (last visited May 19, 2014).

⁸⁵ Letter from Larry D. Hailey, Poarch Band of Creek Indians, to F. Lawrence Oaks, Executive Director, Alabama Historical Commission (February 12, 1980) (on file with Larry D. Hailey) [hereinafter Letter from Hailey].

⁸⁶ *Tribal History*, *supra* note 24.

⁸⁷ Press Release, The Poarch Band of Creek Indians, *Cultural Landmark Unaffected by Poarch Band of Creek Indians* (Aug. 16, 2012), http://www.poarchcreekindians.org/wmlib/pdf/pr/2012_aug_16.pdf (last visited May 19, 2014).

⁸⁸ *Id.*

purchased by the Poarch Band.⁸⁹ The Poarch Band of Creek Indians stated in a letter to the Alabama Historic Commission that acquisition of Hickory Ground was “principally a protection measure,” which means that the Poarch Band also sought to preserve Hickory Ground.⁹⁰ The letter further stated that Hickory Ground “will be jointly owned by both groups of Creeks. Both groups of Creeks will be equally responsible for the protection and care of the site.”⁹¹ In other words, the Poarch Band promised to preserve and protect Hickory Ground. Although there is a possibility that the statement may not be a legally binding promise, the statement may have delegated the responsibility of preserving Hickory Ground to both groups of Creeks. The Creek Nation maintained Hickory Ground by appointing a Chief to preside over the sacred parcel.⁹²

After the Poarch Band acquired title, Hickory Ground was placed under a twenty year easement by Alabama that limited development on the property as a measure of precaution.⁹³ In the Poarch Band’s petition for federal recognition, the Poarch Band of Creek Indians mentioned that they descend from a small community of approximately thirty Lower Creeks who received a land grant near Tensaw, Alabama, as compensation for assisting the United States in fighting against and removing the Creek Nation from the southeast.⁹⁴ Although the Poarch Band had already purchased Hickory Ground, the federal government affirmed that Hickory Ground was a part of the Poarch Band’s reservation

⁸⁹ Samantha Earnest, *Construction of Place, Culture, and Identity in Historic Preservation: A case Study of Hickory Ground Alabama* (May 21, 2009) (unpublished Ph.D dissertation, Florida State University College of Social Sciences and Public Policy) (on file with Florida State University College Library), *available at* <http://diginole.lib.fsu.edu/cgi/viewcontent.cgi?article=1277&context=etd> (last visited May 19, 2014).

⁹⁰ Letter from Hailey, *supra* note 85.

⁹¹ *Id.*

⁹² *Muscogee (Creek) Nation History*, *supra* note 7.

⁹³ Earnest, *supra* note 89, at 129.

⁹⁴ Final Determination for Federal Acknowledgement of the Poarch Band of Creeks, 49 Fed. Reg. 24083 (1984), *available at* <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001318.pdf> (last visited May 19, 2014).

lands when the Poarch Band of Creek Indians became a federally recognized tribe in 1984.⁹⁵

Beginning in 1985, the Bureau of Indian Affairs (BIA) declared eight parcels of land to be “reservation” land.⁹⁶ After the Poarch Band of Creek Indians were recognized, the United States Secretary of the Interior accepted those 8 parcels of land into trust status for the Poarch Band.⁹⁷ Seven of the parcels were located in Escambia County, where members of the Poarch Band of Creek Indians were located.⁹⁸ The 8th parcel of land, which is Hickory Ground, was located over 100 miles away, and taken into trust for Poarch Band even though there was “no significant population of Poarch Band in that immediate area.”⁹⁹ This probably occurred because the Poarch Band purchased title of the parcel in 1980.

Although the Poarch Band of Creek Indians promised to preserve the Hickory Ground for the benefit of all Creek Indians, tribal economics and profits became a top priority. After the expiration of the easement, the Poarch Band of Creek Indians planned to build a casino on Hickory Ground.¹⁰⁰ The Poarch Band of Creek Indians also planned to excavate and exhume graves found on Hickory Ground.¹⁰¹ The Creek Nation called the construction “deplorable” and claimed that many burials were disturbed during the initial building phase of the casino.¹⁰² The Alabama Historical Commission and Alabama’s delegation of the House of Representatives publically opposed the casino expansion.¹⁰³

⁹⁵ *List of Federal and State Recognized Tribes*, NAT’L CONFERENCE OF ST. LEG, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#mt> (last visited May 19, 2014).

⁹⁶ 50 Fed. Reg. 15502-03 (1985).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Sebastian Kitchen, “*Oklahoma tribe opposes Creek casino in Alabama*” MONTGOMERY ADVERTISER. (Aug. 13, 2012).

¹⁰¹ *Id.*

¹⁰² MUSCOGEE (CREEK) NATION, *supra* note 6.

¹⁰³ H.R. 240, 107th Cong.(2001) (Entitled: “To ensure that certain property which was taken into trust by the United States for the benefit . . . of the Poarch Band of Creek Indians of Alabama shall be protected and shall not be used for gaming.”).

In addition to the Creek Nation some members of the Poarch Band were also in opposition of the construction.¹⁰⁴ In fact, a letter was written on behalf of approximately fifty Poarch Band of Creek Indian tribal members to the Alabama Historical Commission.¹⁰⁵ They believed “the site should be preserved and protected from destruction.”¹⁰⁶ Both groups of tribal members valued the sacredness of Hickory Ground and opposed any development on the ceremonial site.

III. EXPLORING FEDERAL LAW AND POLICIES TO PROTECT HICKORY GROUND AS A BURIAL SITE AND THE PARALLEL SITUATION REGARDING THE HURON INDIAN CEMETERY AS POTENTIAL LEGAL OPTIONS.

As mentioned earlier, the culture and spirituality of Native Americans are typically geographical due to each tribe’s connection to its sacred sites.¹⁰⁷ To protect the religions of the Native Americans, the federal government established legislation to help protect cultural objects. Addressed in section A, are possible federal options to resolve this conflict by using federal legislation. Section B addresses an inter-tribal option and methodology for preserving sacred cultural sites, such as Hickory Ground.

A. Federal Options

1. *The Native American Graves Protection and Repatriation Act (NAGPRA).*

Tribal communities had, and continue to have, concerns regarding the extraction of burial remains of ancestors and cultural objects on and off tribal lands.¹⁰⁸ To remedy this problem, tribal leaders and lobbyists encouraged Congress to pass legislation that requires the repatriation of

¹⁰⁴ Letter from James E. Linam, Semevpayv, Poarch Band of Creek Indians, to Lawrence F. Oaks, Executive Director, Alabama Historical Commission (June 1, 1988) (on file with James Linam).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ ANGELIQUE TOWNSEND EAGLE WOMAN & STACEY L. LEEDS, MASTERING AMERICAN INDIAN LAW, 140 (2013).

¹⁰⁸ *Id.* at 149.

tribal human remains and cultural objects.¹⁰⁹ This act is the Native American Graves Protection and Repatriation Act (NAGPRA) and was passed in 1990.¹¹⁰ It was one of the first acts where the federal government made a major attempt to assist with the preservation of Native American culture. As a result of NAGPRA, the individual or tribe associated with the burial remains or cultural artifact must be consulted.¹¹¹ Based on the legislative history of passing the NAGPRA, it was intended to be a policy that applied to conflicts between Indians and non-Indians. The Hickory Ground conflict is unique because the NAGPRA has the potential to be applied in an inter-tribal conflict.

The legislative intent of the NAGPRA¹¹² is pertinent to the lawsuit between the Creek Nation and the Poarch Band because the Creek Nation and the Poarch Band of Creek Indians are both federal recognized tribes. According to the NAGPRA, exhuming Native American human remains and cultural objects is not permitted. The Legislature's purpose in enacting NAGPRA was to provide the protection of Native American graves and the repatriation of Native American remains and cultural patrimony.¹¹³ In 1988, the Select Committee on Indian Affairs held hearings on S. 187, a bill to provide a process for the repatriation of Native American cultural patrimony.¹¹⁴ In those hearings, the Committee received testimony from witnesses representing museums and various tribes.¹¹⁵

¹⁰⁹ *Id.*

¹¹⁰ The Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2006).

¹¹¹ EAGLE WOMAN & LEEDS, *supra* note 107, at 149.

¹¹² Typically, only federally recognized tribes are protected under the NAGPRA. The NAGPRA defines "Indian Tribes" as any tribe, band, nation, or other organized group or community of Indians, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. 25 U.S.C. § 3001(7) (2006). "Indian Tribes" are only federally-recognized tribes, which have received funds and assistance from other departments of the federal government. Consequently, many non-federally recognized tribes are excluded from protection under the NAGPRA despite the NAGPRA's purpose. *Id.*

¹¹³ S. REP. NO. 101-473, at 13 (1990). *available at* http://www.nps.gov/nagpra/mandates/US_Senate_Rpt_9-26-90.htm (last visited May 19, 2014).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Several witnesses, including representatives of the American Association of Museums (AAM), requested that the Committee delay any further action on this bill or any other repatriation measure in order to allow the museum community an opportunity to enter into a dialogue with the Indian community on repatriation issues.¹¹⁶ According to the legislative background of the NAGPRA, “the purpose of the dialogue was to develop recommendations to address the necessity of responding to tribal demands for repatriation.”¹¹⁷ Congress primarily designed these recommendations and dialogues for non-Indian institutions and museums.¹¹⁸

The NAGPRA includes provisions for unclaimed and culturally unidentifiable Native American cultural items and intentional or inadvertent discovery of Native American cultural items on federal and tribal lands.¹¹⁹ The NAGPRA even provides a process for museums and federal agencies to return certain Native American cultural items to lineal descendants.¹²⁰ This federal act protects numerous cultural objects and human remains¹²¹ from excavation and removal.¹²² Additionally, the NAGPRA prohibits the intentional excavation or removal of Native American burial remains from tribal lands, without proven consultation with, and consent of, the appropriate Indian tribe.¹²³

When the lineal descendants of human remains that are excavated or found on federal or tribal lands cannot be determined, the NAGPRA mandates a two-part analysis.¹²⁴ The first inquiry is whether human remains, cultural patrimony, or objects are Native American within the

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 25 U.S.C. § 3002(a)(1) (2006).

¹²⁰ *Id.*

¹²¹ The term “human remains” is not defined in the definition section of the statute. Congress may have assumed that the term “human remains” was unambiguous and did not need an expressed definition. 25 U.S.C. § 3001(2006).

¹²² *NAGPRA Compliance*, ASS’N OF AM. INDIAN AFFAIRS, , http://indian-affairs.org/programs/aaia_repatriation_nagpra.htm (last visited May 19, 2014).

¹²³ 25 U.S.C. § 3002(c)(2) (2006).

¹²⁴ *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004).

statute's meaning.¹²⁵ If the remains or items are not Native American, then the NAGPRA does not apply.¹²⁶ However, if the remains are Native American then the NAGPRA applies, triggering the second inquiry of determining which persons or tribes are most closely affiliated with the remains or cultural objects.¹²⁷ Here, since both tribes are affiliated with the burial remains, the second inquiry of the NAGPRA analysis would need to be analyzed to determine which tribe culturally affiliated the most with the burial remains. However, the Creek Nation are probably more closely affiliated with the sacred ground and burial remains because their Chief presides over Hickory Ground and Creek Nation cultural ceremonies still take place on the sacred site.

Particular definitions under this federal act are also crucial in determining the rights of tribes affiliated with burial remains when two tribes come into conflict, and should be closely analyzed to determine which tribe's rights should prevail. One definition to evaluate is the meaning of "lineal descendants." The NAGPRA narrowly defines lineal descendants as

an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe by the common law system of descent to a known Native American individual whose remains, funerary objects, or sacred objects are being requested under these regulations. This standard requires that the earlier person be identified as an individual whose descendants can be traced.¹²⁸

According to this definition, though narrow, if an individual from the Creek Nation was able to trace his or her ancestry directly and establish direct kinship to one of the people who was buried in Hickory Ground, then the Creek Nation may have a viable claim under the NAGPRA.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 43 C.F.R. § 10.14(b)(2013).

When analyzing the overall structure of NAGPRA, the legislative purpose behind the law was to protect and preserve Native American sacred objects, burial remains, and any other items that derived from Native American culture and traditions.¹²⁹ However, based on the legislative history of passing the NAGPRA, it seems Congress actually intended NAGPRA to be a policy that applies to conflicts between Indians and non-Indians, particularly museums and other institutions.¹³⁰ Congress established this policy because cultural misunderstandings frequently occurred between museums, archaeologists, and tribes.¹³¹ The Hickory Ground conflict is unique because the NAGPRA could be applied in an inter-tribal conflict, despite the implicit legislative purpose.

Additionally, there are only a few cases where courts have applied NAGPRA, and even fewer cases where one tribe attempted to bring a NAGPRA claim against another tribe. In one case, an individual tribal member filed a suit against the chairman of the Oneida Tribe of Indians of Wisconsin asserting violations of NAGPRA.¹³² In that case, the individual tribal member claimed that the Oneida Tribe built a parking lot over the burial site of his ancestors.¹³³ The court held that “the NAGPRA applies mainly to federal agencies and museums, and the tribe is neither.”¹³⁴ Therefore, based on the purpose and legislative intent of the NAGPRA, the NAGPRA would probably at best serve more as a strong guidance in inter-tribal conflicts

The NAGPRA could also be applied to preserve lands. For instance, the State of South Dakota proposed developing camping spots, new roads, comfort stations, parking lots, and dumping stations on a burial site for the Yankton Sioux Tribes.¹³⁵ In that case, the court applied the

¹²⁹ H.R. No. 101-877 at 8 (1990), *available at* <http://www.nps.gov/nagpra/mandates/HR101-877.pdf> (last visited May 19, 2014).

¹³⁰ *Id.* at 10.

¹³¹ *Id.*

¹³² Hawk v. Danforth, No. 06-C-223, 2006 E.D. Wis. WL 6928114 (E.D. Wis. Aug. 17, 2006).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 209 F.Supp.2d 1008, 1011 (2002).

NAGPRA and held that there was a public interest to protect the Native American cultural site and ordered a temporary injunction.¹³⁶ The court also ordered a temporary injunction because the construction prevented tribal citizens from accessing the location for religious purposes.¹³⁷

Based on the policy and guidance of the NAGPRA, the Poarch Band of Creek Indians would not be in compliance with the NAGPRA, if the NAGPRA were to apply, because the Poarch Band exhumed and reburied burial remains before consulting with the Creek Nation. Even though both tribes may have ancestors buried at Hickory Ground, there is a sufficient amount of evidence that demonstrates that the Creek Nation has a stronger cultural relationship to the buried remains than the Poarch Band. For instance, the Creek Nation has a Chief whose main duties consist of protecting and conducting cultural ceremonies on Hickory Ground.¹³⁸ The Poarch Band's use of Hickory Ground is economic in nature, not cultural.

The Poarch Band purchased Hickory Ground; they should not have removed the burial remains until contacting all lineal descendants of the human remains. As specified in the NAGPRA, all lineal descendants of the burial remains must be contacted.¹³⁹ If the members of the Creek Nation are the lineal descendants of the ancestors who were buried on Hickory Ground, the Creek Nation would have the highest priority rights to ownership and control of the human remains and funerary objects according to the NAGPRA.¹⁴⁰

Furthermore, there are no exception clauses within the NAGPRA that would allow burial remains to be removed under any circumstances, including tribal economic purposes.¹⁴¹ When the Poarch Band of Creek Indians removed ancestors from Hickory Ground, the culture and traditions of the Creek Nation were affected. Their actions substantially

¹³⁶ *Id.* at 1024.

¹³⁷ *Id.* at 1026.

¹³⁸ *History of Hickory Grounds*, *supra* note 8.

¹³⁹ 25 U.S.C. § 3003 (2006).

¹⁴⁰ This right is protected under NAGPRA. 25 U.S.C. § 3001(2) (2006).

¹⁴¹ *Id.*

deviated from standards expressed in the NAGRPA. Their actions were not only contrary to the NAGPRA policy, but also violated the Poarch Band of Creek Indians' own Historic Preservation Code.¹⁴² The code states, "there shall be no further archeological related activity conducted and no construction or development, except for any maintenance and construction required to protect the site, on Hickory Ground or Hickory Ground Ceremonial Grounds Site."¹⁴³ The Poarch Band's code further states, "[a]ny human remains on tribal Lands shall not be exhumed without the consent of the Tribal Council, the THPO, and the lineal descendants of the deceased."¹⁴⁴ In this case, the lineal descendants would include the Creek Nation. Based on the guidance of the NAGPRA and the Poarch Band's Historic Preservation Code, tribal economic developments do not preempt the preservation of one's tradition and heritage. Thus, the Poarch Band violated both policies by excavating and moving ancestors.

As mentioned earlier, the NAGPRA was proposed and implemented because there seemed to be a cultural misunderstanding between Indians and non-Indians with regards to cultural sacred objects and burial remains. In the legal conflict between the Creek Nation and the Poarch Band of Creek Indians, there are no apparent cultural misunderstandings between the tribes. The Poarch Band of Creek Indians are well aware of the significance of the burial remains on Hickory Ground.¹⁴⁵ The NAGPRA should serve as a guidance to resolve this conflict and other similar inter-tribal conflicts.

2. The National Historic Preservation Act.

The National Historic Preservation Act (NHPA) contains a general policy to preserve cultural objects and prevent substantial alterations of

¹⁴² Poarch Band of Creek Indians, Alabama, Code of Ordinances: The Tribal Code of The Poarch Band Of Creek Indians, Title 39 Tribal Historic Preservation, Chapter VI Protection of Historic Property, Burial Grounds, or Sacred Sites, Sec. 39-6-6 https://library.municode.com/HTML/15235/level3/THTRCOPOBACRIN_TIT39TRHIPR_CHVIPRHIPRBUGRSASI.html (last visited May 19, 2014).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at Sec. 39-6-1.

¹⁴⁵ Letter from Hailey, *supra* note 85.

historic foundations that have significance to the Nation's heritage.¹⁴⁶ One significant component of the NHPA requires federal agencies to consider and monitor impacts on historic properties.¹⁴⁷ *Historic property* is any district, building, structure, site, or object that is eligible for listing in the National Register of Historic Places because the property is significant at the national, state, tribal, or local level in American history, architecture, archeology, engineering, or culture.¹⁴⁸ One of the federal agencies that monitor historic properties is the National Park Service through implementation of Tribal Historic Preservation Programs.¹⁴⁹

The National Park Service oversees the Tribal Historic Preservation Programs that were included under the NHPA. The NHPA was amended in 1992 to allow tribes to enter into agreements with the National Park Service.¹⁵⁰ The agreements helped develop programs in Indian Country¹⁵¹ that would fulfill the purpose of the NHPA. The relevant language in the NHPA is as follows:

(d) Historic properties of Indian tribes: (1)(A) The Secretary shall establish a program and promulgate regulations to assist Indian tribes in preserving their particular historic properties. The Secretary shall foster communication and cooperation between Indian tribes and State Historic Preservation Officers in the administration of the national historic preservation program to ensure that all types of historic properties and all public interests in such properties are given due consideration, and to encourage coordination

¹⁴⁶ 16 U.S.C. § 470(b)(3) (2006).

¹⁴⁷ Nat'l Historic Preservation Act of 1966, Pub. L. No. 89-665 (codified as amended at 16 U.S.C. § 470 (2000)), *available at* <http://www.fema.gov/environmental-planning-and-historic-preservation-program/national-historic-preservation-act-1966> (last visited May 19, 2014).

¹⁴⁸ 16 U.S.C. § 470(w) (2006).

¹⁴⁹ *What Are Tribal Historic Preservation Officers?*, NAT'L ASS'N OF TRIBAL HISTORIC PRESERVATION OFFICERS (2013), <http://www.nathpo.org/aboutthpos.htm> (last visited May 19, 2014) [hereinafter *Preservation Officers*].

¹⁵⁰ 16 U.S.C. § 470(w) (2006).

¹⁵¹ Indian Country is a legal term used to describe tribal lands, which include Indians allotted lands, Indian reservations, and dependent Indian communities. 18 U.S.C. § 1151 (2006).

among Indian tribes, State Historic Preservation Officers, and Federal agencies in historic preservation planning and in the identification, evaluation, protection, and interpretation of historic properties.¹⁵²

The purpose of Tribal Historic Preservation Program and Tribal Historic Preservation Officers is to support the preservation, maintenance, and revitalization of the culture and traditions of Native peoples of the United States.¹⁵³ Primarily through the support of Tribal Historic Preservation Programs, such as the National Park Service, this preservation occurs.¹⁵⁴

The National Association of Tribal Historic Preservation Officers (NATHPO) offers training and technical assistance on federal historic preservation laws. The NATHPO is guided by three main principles: “1) Tribal Sovereignty—the inherent right of Indian Nations to self-government, 2) Confidentiality – recognition of the need to respect the confidentiality of information regarding Native cultural and ceremonial practices and places of religious or cultural significance, and 3) No boundaries-.”¹⁵⁵ NATHPO recognizes that the interest of preserving Indian culture and heritage often extends far beyond the boundary lines of present-day Indian reservations. These officers were established to assist in activities relating to trans-boundary cultural and environmental issues.¹⁵⁶

Historic preservation is crucial in maintaining and preserving tradition, heritage, and culture. In this case, Hickory Ground is protected under the NHPA because it is a culturally significant site that is listed in the National Register of Historic Places.¹⁵⁷ One of the key responsibilities of preservation officers is to negate any negative impacts on historic properties, such as Hickory Ground. Perhaps, proper involvement of a

¹⁵² 16 U.S.C. § 470(a) (2006).

¹⁵³ *Preservations Officers*, *supra* note 149.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Tribal Historic Preservation Officer or the enforcement of the NHPA could have prevented this inter-tribal conflict.

On November 21, 1984, 231.54 acres of land were taken into trust status for the Poarch Band.¹⁵⁸ On April 12, 1985, the federal government declared that 229.54 acres owned by the Poarch Band to be a reservation.¹⁵⁹ Included in the Poarch Band's reservation is Hickory Ground. In 1999, the National Park Service made a Tribal Historic Preservation Officer agreement with the Poarch Band. Within the agreement, the National Park Service granted the Poarch Band and the Tribal Historic Preservation Officer responsibility over Hickory Ground.¹⁶⁰

The National Park Service and the Poarch Band of Creek Indians violated the NHPA by allowing construction on Hickory Ground before consulting the Creek Nation. As a requirement under the NHPA, the National Park Service must first notify and consult with any tribes whose culture and traditions may be affected within the Poarch Band of Creek Indian Reservation.¹⁶¹ Yet, the NHPA does not specify how notification is to be implemented. Because Hickory Ground is a sacred territory for the Creek Nation, the National Park Service and the Poarch Band were required to consult with the Creek Nation before making alterations to Hickory Ground.

According to the agreement between the National Park Service and Poarch Band, both parties are required to "cooperate with individuals to ensure that historic properties are taken into considerations at all levels of planning and development."¹⁶² Even though the Creek Nation is not a party in the agreement, the members of the Creek Nation are individuals who would want to be put on notice of all levels of planning and development on Hickory Ground. The Poarch Band failed to cooperate

¹⁵⁸ *Tribal History*, *supra* note 24.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ National Park Service Agreement, U.S. DEP'T OF THE INTERIOR & THE POARCH BAND OF CREEK INDIANS OF ALA., For the Assumption By the Tribe of Certain Responsibilities Pursuant to The National Historic Preservation Act (May 24, 1999) (authored by Chairman for the Poarch Band of Creek Indians).

¹⁶² *Id.*

with the Creek Nation before expanding the casino on the sacred Hickory Ground. In addition, the Poarch Band of Creek Indians assumed the role of preserving and protecting Hickory Ground as mentioned in their agreement with the National Park Services. Thus, the Poarch Band should have taken into account the cultural perspectives of the Creek Nation before construction began on Hickory Ground. If the actions of the National Park Services and the Poarch Band were consistent with the policies of the NHPA, the Hickory Ground would probably still be protected, preserved, and intact.

3. The American Indian Religious Freedom Act.

The freedom to practice religious and cultural beliefs is essential to Native American culture. “While the free exercise clause of the first amendment protects American Indian religious freedom, courts have often failed to recognize the fundamental differences between tribal religions and monotheistic Western religions.”¹⁶³ Once Congress realized that Native American beliefs and religions were essential to preserving the Native culture, and distinct from Western culture, Congress passed the American Indian Religious Freedom Act (AIFRA) in 1978. AIFRA makes clear that:

[i]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.¹⁶⁴

The legislative purpose of the AIFRA was to preserve the religious freedom and beliefs of tribes and individual tribal members. In, *Lyng v.*

¹⁶³ Diane Brazen Gould, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion*, 71 IOWA L. REV. 869, 879 (1986).

¹⁶⁴ 42 U.S.C. § 1996 (2006).

Northwest Indian Cemetery Protective Ass'n, the Supreme Court held that the federal government was permitted to allow road construction and timber harvesting on the Chimney Rock section of the Six Rivers National Forest that was used for religious purposes by members of three tribes: the Yurok, Karok, and Tolowa.¹⁶⁵ “Legislation presents a potential avenue for buttressing the Free Exercise interests of Native Americans, but as the American Indian Religious Freedom Act shows, that path is also likely to prove rough and narrow.”¹⁶⁶ Even though Congress made an attempt to protect the religions of Native Americans, the AIFRA is used merely as a policy and not as an enforceable law.¹⁶⁷ This policy could be used to support a tribe’s claim, but “the AIRFA does not create a cause of action or any judicially enforceable rights.”¹⁶⁸ Unfortunately, the outcome of this case was shattering to Native American religious freedom practices and religious freedom rights.

The Creek Nation could bring a claim under the AIFRA, but the likelihood of prevailing would be difficult. Similar to the Chimney Rock of the Six Rivers National Forest in *Lyng*, Hickory Ground is a sacred site that is used for religious and cultural purposes. Because ancestors were buried in Hickory Ground, religious activities that are held by the Creek Nation are distinctive to that sacred ground. Hickory Ground is religiously significant and a one-of-a-kind religious site that cannot be reproduced.

Beneficially, there are courts that agree that the AIRFA obligates and encourages federal agencies to protect Indian religious freedom by requiring federal agencies to consult with tribes who are affected and create policies that would promote Indian religious freedom.¹⁶⁹ So, in this matter, federal agencies should follow the AIFRA policy by not allowing construction on Hickory Ground because the construction restricts the Creek Nation from freely exercising their religious practices. However, “the

¹⁶⁵ *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442 (1988).

¹⁶⁶ John Celichowski, *A Rough and Narrow Path: Preserving Native American Religious Liberty in the Smith Era*, 25 AM. INDIAN L. REV. 1, 34 (2001).

¹⁶⁷ *Id.*

¹⁶⁸ *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1488 (D. Ariz. 1990), *aff'd sub nom.*, *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991).

¹⁶⁹ *Id.*

AIRFA does not require Indian traditional religious considerations to always prevail to the exclusion of all else.”¹⁷⁰ The Creek Nation could apply the AIFRA to the conflict on Hickory Ground and encourage the application and policy of AIFRA.

B. Inter-Tribal Option

One of the oldest sites in Kansas City, Kansas is the Huron Indian Cemetery.¹⁷¹ The Huron Indian Cemetery was a parcel of land that was the focal point in an inter-tribal conflict between the Wyandot Nation of Kansas and the Wyandotte Tribe of Oklahoma.¹⁷² The Huron Indian Cemetery is culturally and spiritually meaningful. The cemetery is a historic place enriched with heritage and traditions.¹⁷³ In fact, in 1971, the cemetery was listed on the National Register of Historic Places.¹⁷⁴ Later, the inter-tribal conflict was resolved amongst the two tribes without federal government intervention.¹⁷⁵

In 1842, the Wyandot Indians signed a treaty to give their reserved land in Michigan and Ohio in exchange for land in Missouri.¹⁷⁶ Many members of the Wyandot Indians died from diseases and hardship during the long journey to Missouri.¹⁷⁷ To honor their ancestors, the Wyandot Indians began a cemetery near present-day Kansas City, Kansas.¹⁷⁸ It was a place where the Wyandot Indians laid their ancestors to rest. The cemetery is well known as the Huron Indian Cemetery. Similar to Hickory Ground, the Huron Indian Cemetery became a religious site where the Wyandot Indians conducted ceremonies.¹⁷⁹

¹⁷⁰ *Id.*

¹⁷¹ Historic Landmarks and Historic Districts, Huron Indian Cemetery (Wyandot Nat'l Burying Ground), UNIFIED GOV'T OF WYNADOTTE CTY. & KAN. CITY, KAN., at 9 (2011) available at <http://www3.wycokck.org/Dept.aspx?id=9502> (last visited May 19, 2014).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ UNIFIED GOV'T OF WYNADOTTE CTY., *supra* note 171 at 9.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1.

¹⁷⁸ *Id.*

¹⁷⁹ UNIFIED GOV'T OF WYNADOTTE CTY., *supra* note 171 at 10.

Due to tribal reorganization and general relocations, the Wyandot Indians were divided into two groups.¹⁸⁰ The Wyandot Indians are now the Wyandot Nation of Kansas and the Wyandotte Tribe of Oklahoma. The Wyandotte Tribe of Oklahoma relocated to Oklahoma and the Wyandot Nation of Kansas continued to live in the Kansas City area. The Wyandot Nation of Kansas had ceremonial burials in the Huron Indian Cemetery that continued through 1965.¹⁸¹ There is also one major difference between these tribes. The Wyandotte Tribe of Oklahoma is federally recognized, whereas the Wyandot of Kansas are still seeking federal recognition.¹⁸²

In February 1994, the Principal Chief of the Wyandotte Tribe of Oklahoma planned to build a high-stakes bingo parlor on the sacred grounds of the Huron Indian Cemetery.¹⁸³ The Principal Chief proposed to remove all the graves in the Huron Indian Cemetery to Oklahoma.¹⁸⁴ When the proposal became public, there were many who were opposed to the idea.¹⁸⁵ Those who opposed the idea were descendants of the Wyandot Nation of Kansas, residents of Kansas City, and some members of the Wyandotte Tribe of Oklahoma.¹⁸⁶ According to the Bureau of Indian Affairs, the Huron Indian Cemetery was the only land in Kansas that the Wyandotte Tribe of Oklahoma had an assertion to reclaim.¹⁸⁷

Over the years, the Wyandotte Nation of Oklahoma continued to explore ways to increase revenues for their tribe, including redevelopment of the Huron Cemetery. Descendants in Kansas vigorously resisted these efforts. The Wyandot Nation of Kansas and the Governor of Kansas brought suit to prevent the Secretary of the Interior from taking a tract of

¹⁸⁰ *Id.* at 3.

¹⁸¹ *Id.* at 8.

¹⁸² *List of Federal and State Recognized Tribes*, *supra* note 94.

¹⁸³ UNIFIED GOV'T OF WYNADOTTE CTY., *supra* note 171 at 9.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 10.

land into trust on behalf of the Wyandotte Nation of Oklahoma and approving gaming activities on the tract.¹⁸⁸

Fortunately, the two tribes resolved the issue with the Huron Indian Cemetery. In 1998, the Wyandotte Nation of Oklahoma and the Wyandot Nation of Kansas reached a mutual agreement regarding the cemetery.¹⁸⁹ The agreement called for the permanent protection and preservation of the Huron Indian Cemetery as a cemetery and burial ground for both parties.¹⁹⁰ The Wyandotte Nation of Oklahoma agreed to not sell, transfer, or convey their interest in the land where the cemetery resided.¹⁹¹ Both tribes further agreed to preserve the Huron Indian Cemetery for religious, cultural, and related uses appropriate to its sacred history and use.¹⁹² As a result of the agreement, the bingo parlor was not constructed on the Huron Indian Cemetery and no human remains were removed.

Furthermore, both tribes took the initiative to create an equitable resolution. Both tribes decided to administer a five-member Huron Cemetery Commission, with two members from each tribe and a fifth neutral member chosen by the other four.¹⁹³ The Huron Cemetery Commission was formed and in charge of the restoration, protection, and maintenance of the property.¹⁹⁴ The agreement called for the Wyandot Nation of Kansas to drop the lawsuit and their opposition to gaming on the religious site.¹⁹⁵ The Wyandotte Nation of Oklahoma was also required to take no action regarding the Wyandot Nation of Kansas' effort to obtain federal recognition.¹⁹⁶ Although well intentioned, the agreement was made on two conditions: (1) there must be approval of another gaming site in Kansas City, Kansas; and (2) there must be approval of the settlement agreement by the Bureau of Indian Affairs.¹⁹⁷ To date, neither condition

¹⁸⁸ *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1256 (10th Cir. 2001).

¹⁸⁹ UNIFIED GOV'T OF WYNADOTTE CTY., *supra* note 171 at 10.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ UNIFIED GOV'T OF WYNADOTTE CTY., *supra* note 171 at 10.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

has occurred. The Huron Indian Cemetery is still intact with approximately 400 ancestors laid to rest in the sacred ceremonial ground.¹⁹⁸ Most importantly, an inter-tribal conflict was resolved between the tribes without the direct intervention of the federal government.

The legal action between the Creek Nation and the Poarch Band of Creek Indians is parallel to the Huron Indian Cemetery conflict. Similar to the Creek Nation and the Poarch Band of Creek Indians, there was a division between two tribes that shared the same ancestry. Like the issues revolving the conflict of Hickory Ground, there were conflicts between preserving a cultural burial ground and profiting from tribal economic developments. As tribal economic wellbeing was a top priority for the Wyandotte Nation of Oklahoma, as is tribal economic wellbeing a top priority for the Poarch Band of Creek Indians. Even though gaming is a massive revenue generator for tribes, there should be a balance between cultural preservation and tribal economic development. Also, similar to the conflict over Hickory Ground, the land status was a crucial element in determining the outcome of the Huron Indian Cemetery. Although the issues regarding the Huron Indian Cemetery were difficult and maybe at times emotional, the inter-tribal issue was resolved between the two kin tribes. Both tribes managed to come to a mutual agreement by using tribal laws and policies.

IV. CONCLUSION: LESSONS AND RECOMMENDATIONS TO RESOLVE INTER-TRIBAL CONFLICT.

Tribal sovereignty is essential to all tribes. Justice Marshall stated in a foundational federal Indian law case, that tribes have the ability to resolve their own tribal affairs without the intervention of the federal government.¹⁹⁹ The Creek Nation and the Poarch Band chose to bring their claim to federal court, but depending on the federal government to handle such matters could affect the cultural aspects of the case.

¹⁹⁸ *Id.* at 11.

¹⁹⁹ *Worcester v. Georgia*, 31 U.S. 515, 543 (1832).

The legal action over Hickory Ground between the Creek Nation and the Poarch Band of Creek Indians was filed in federal court.²⁰⁰ If the Creek Nation and the Poarch Band came to a resolution without resorting to federal government involvement, the resolution would be a promotion of tribal sovereignty.²⁰¹ This option would also enhance tribal court credibility.²⁰²

The best approach for tribes to avoid the federal court system is to adopt a form of the Tribal Exhaustion Doctrine. The Tribal Exhaustion Doctrine is a jurisdictional rule that requires both members and non-members of a tribe to bring forth civil claims in tribal court forums first, and should be enforced.²⁰³ The United States Supreme Court held that there must be an exhaustion of tribal remedies prior to federal court adjudication.²⁰⁴ This includes filing an appeal with all levels of the neutral tribal court's higher courts, including an inter-tribal governing body²⁰⁵ and the Supreme Court, if available.²⁰⁶ Consequently, the Court's ruling in *Nat'l Farmers Union Insurance Co.* led to the establishment of the Tribal Exhaustion Doctrine.²⁰⁷ The policy behind the Doctrine is to not only support tribal sovereignty and self-determination, but also provide tribal courts the first opportunity to analyze the legality of civil claims within tribal jurisdiction. Although the Tribal Exhaustion Doctrine is generally applied

²⁰⁰ Haring, *supra* note 50 at 367.

²⁰¹ Matthew L.M. Fletcher, *Toward A Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 704 (2006).

²⁰² Jonodev O. Chaudhuri, Fed Bar Career Panel, Nat'l Native American Law Students Association Fed Bar Conference (Apr. 10, 2014) list of speakers available at <http://nationalnalsa.org/wp-content/uploads/2014/03/2014-NNALSA-Newsletter.pdf> (last visited May 19, 2014).

²⁰³ Carey Austin Holliday, *Denying Sovereignty: The Louisiana Supreme Court's Rejection of the Tribal Exhaustion Doctrine*, 71 LA. L. REV. 1339, 1340 (2011).

²⁰⁴ *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

²⁰⁵ The inter-tribal governing body would be similar to the Northwest Intertribal Court System (NICS). The NICS is an inter-tribal organization that provides court services and personnel to the individual tribal courts of its members in the Pacific Northwest. N.W. INTERTRIBAL COURT SYS. (2009), <http://www.nics.ws> (last visited May 19, 2014).

²⁰⁶ This recommendation is based on the expectation that the appeal process is available in the neutral Tribal court forum that was selected by the Council of Elders.

²⁰⁷ *National Farmers Union Ins. Cos.*, 471 U.S. at 857.

between Indian and non-Indian parties, the Doctrine is a good guidance for tribes to help find a solution within inter-tribal conflicts.

The tribal court system is “modeled on state and federal courts and are Anglo-American legal constructs.”²⁰⁸ Even though the structure of the tribal legal system may have tainted tribal traditions in resolving conflicts, using the tribal court system is still the best option. Tribal courts are most likely to take into consideration custom and traditions. Additionally, the Tribal Exhaustion Doctrine further promotes and encourages tribal self-government and self-determination and must be exercised before tribes resort to the federal court system.

Filing a federal court claim pertaining to Hickory Ground only causes further division between the Creek Nation and the Poarch Band of Creek Indians. If the tribes cannot reach a mutual agreement, then a claim should be filed in tribal court in lieu of bringing the matter to federal court. To avoid judicial prejudices, claims from inter-tribal conflicts should be filed in a neutral tribal court forum. Perhaps, the neutral tribal court forum location could be decided by a Council of Elders. Similar to the resolution from the Huron Indian Cemetery matter, the Council of Elders should be a panel of five elders where there are two members from each tribe and the fifth is selected by the other four members of the Counsel

Once the neutral tribal court forum is determined, the parties should file that action in that tribal court. If either the Poarch Band or the Creek Nation wished to appeal the neutral tribal court’s decision, then the appellant should exhaust all tribal remedies within that tribal court’s system. This approach would fulfill the judicial needs of the tribes as well as upholding tribal customs and traditions when a case is decided. Since the Creek Nation may have difficulties prevailing under some federal claims (like NAGPRA and AIFRA), a model involving the Tribal Exhaustion Doctrine may be the most beneficial option. This particular option would also give the Creek Nation the opportunity to use tribal laws and policies,

²⁰⁸ Fletcher, *supra* note 201 at 720 (2006).

such as the Poarch Band's own Historic Preservation policy, against the Poarch Band.

Allowing tribes to resolve their own legal issues in a tribal court forum would enhance tribal sovereignty among tribal Nations. A model involving the Tribal Exhaustion Doctrine would also avoid federal government intervention and potential cultural misunderstandings. If tribes cannot mitigate or settle an inter-tribal conflict through tribal judicial systems, or if an inter-tribal court forum is not available, only then should the federal court system be a possible option.