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McGirt Policy Briefs: Cultural Resources

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McGirt Policy Briefs

Cultural Resources

By Monte Mills

JANUARY 2021

*McGirt and the Work of Rebuilding of Tribal Nations:
A Tribal Nation Building Colloquium*

A Collaboration Between the HPAIED and NNC



THE HARVARD PROJECT ON AMERICAN
INDIAN ECONOMIC DEVELOPMENT



NATIVE NATIONS CENTER
The UNIVERSITY of OKLAHOMA

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Regulation of the Environment and Natural Resources

Introduction and Overview

On July 9, 2020, the United States Supreme Court issued its decision in *McGirt v. Oklahoma*. Although the only actual effect of that decision was on Mr. McGirt's state court criminal conviction, rendering it invalid in light of the continuing existence of the Muscogee (Creek) Nation's reservation, the implications of *McGirt* reverberated throughout Oklahoma and the nation. By rejecting Oklahoma's arguments that the march to statehood had resulted in the implicit disestablishment of the Creek's reservation (and, by analogy, those of the neighboring and similarly situated Cherokee, Chickasaw, Choctaw, and Seminole Nations), Justice Gorsuch's opinion on behalf of the Court's majority reaffirmed that nearly all of eastern Oklahoma remains Indian Country. The governments of those Five Tribes now face the practical challenges posed by reclaiming territorial sovereignty mostly denied to them for over a century.

That work of rebuilding tribal sovereignty poses much difficulty and significant opportunities. This project, *McGirt and the Work of Rebuilding of Tribal Nations: A Tribal Nation Building Colloquium*, is focused on assisting tribal governments and others in assessing and tackling those challenges. The Colloquium's thesis best describes this objective:

...*McGirt* carr[ies] challenging implications [including] the potential for important expansions of tribal powers – across broad swaths of tribal governmental responsibilities. At the same time, a number of non-tribal governments are sounding alarms that threaten heightened hostility to tribal sovereignty. Ample evidence exists to drive home the point that hostility between Tribal governments and their non-Tribal counterparts seldom serves the interests of either of their respective citizenry. It will be critical for Tribal leaders and non-tribal political actors to approach the exercise of Tribal powers in the post-McGirt era with wisdom and vision founded on facts, evidence, and sound legal principles.

Therefore, through a series of briefing papers on a variety of topics, the Colloquium aims to provide “theoretically sound and fact-grounded examples and lessons that can help to separate the prose from the poetry of Tribal sovereignty and governance.” This briefing paper does so in the context of cultural resources and tribal efforts to protect them.

The term “cultural resources” broadly encompasses a wide range of issues and items of cultural importance to tribes. Depending on the context, the term could refer to geographic areas or landscapes of importance to tribes (sometimes referred to as

“sacred sites”),¹ discrete items of cultural significance such as those used in ceremonies or central to a tribe’s history, Native American human remains and associated funerary objects, or other matters central to tribal beliefs, practices, or lifeways.

Historically, federal law promoted the destruction, dispossession, or scientific value of these resources for non-tribal interests, an approach that resulted in the disconnection of many tribes from critical resources.² In the early 1990s, however, tribes secured important Congressional legislation to address that history of cultural destruction and, through amendments to the National Historical Preservation Act (NHPA)³ and the passage of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA),⁴ can now bring to bear important and substantive federal rights to protect certain resources. The Archaeological Resources Protection Act (ARPA),⁵ though enacted in the 1970s, may also provide some protection for certain resources, particularly to the extent that its requirements are incorporated into NAGPRA.⁶

By confirming the reservation boundaries of the Five Tribes, *McGirt* affirmed a broad application of NHPA and NAGPRA, both of which rely on reservation boundaries to define important aspects of their reach.⁷ Therefore, the Five Tribes, their constituencies, and partners may need to reassess their options and authorities for asserting their cultural protection priorities.

One important caveat before presenting that discussion: given the despicable history of federal protections for tribal cultural resources and the many shortcomings of current federal cultural resource protection laws, many tribes have exercised their own sovereign powers to enact tribal laws focused on protecting those resources.⁸ Notwithstanding the importance and meaningfulness of those tribal protections; however, the power and enforceability of those laws is often hamstrung by the Supreme Court’s limitations on tribal criminal and regulatory jurisdiction, particularly over non-Indians.⁹ Other briefing papers in this colloquium address criminal and civil regulatory issues and those analyses would also be relevant when considering the

¹ See, e.g., Executive Order 13,007, *Indian Sacred Sites*, May 24, 1996, *republished* 61 Fed. Reg. 16,771 (May 19, 1996).

² See, e.g., HILLARY HOFFMANN AND MONTE MILLS, *A THIRD WAY: DECOLONIZING THE LAWS OF INDIGENOUS CULTURAL PROTECTION*, 70-73 (2020).

³ Title XL, Pub. L. 102-575, 106 Stat. 4753 (Oct. 30, 1992); see also HOFFMANN AND MILLS, *supra* note 2, at 89-90, 101-04.

⁴ 25 U.S.C. §§ 3001-3013 (2018); See also HOFFMANN AND MILLS, *supra* note 2, at 83-88.

⁵ 16 U.S.C. §§ 470aa-470mm (2018); See also HOFFMANN AND MILLS, *supra* note 2, at 81-83.

⁶ See 25 U.S.C. § 3002(c)(1) (2018).

⁷ See, e.g., 25 U.S.C. § 3001 (15) (2018) (defining “tribal land” to include “all lands within the exterior boundaries of any Indian reservation”); 54 U.S.C. § 300319 (2018) (same).

⁸ See, e.g., HOFFMAN AND MILLS, *supra* note 2, at 107-12.

⁹ See, e.g., *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981).

scope and extent of tribal power to protect cultural resources beyond the federal laws described herein.

McGirt and Cultural Resources

As noted elsewhere, the upshot of *McGirt* is that the reservations of the Five Tribes, which were established and guaranteed by their treaties with the United States, remain extant. The recognition of these reservations is particularly relevant in the context of cultural resources because both NHPA and NAGPRA offer specific protections and rights for matters arising within the exterior boundaries of Indian reservations.¹⁰ Thus, post-*McGirt*, the Five Tribes have broader authority under federal law to address and protect cultural resources within their reservations and will likely need to consider how and whether to assert or take advantage of those opportunities under each statute.

A. The National Historic Preservation Act (NHPA).

Although originally focused on the protection of historic buildings and landmarks as determined by state and local governments, Congress amended the NHPA in 1992 to provide tribal governments with meaningful avenues for protecting cultural resources as well.¹¹ Central to these authorities is the responsibility of the federal government to consult with tribes to identify “[p]roper[ies] of traditional religious and cultural importance,”¹² that may be eligible for inclusion on the National Register of Historic Places. The federal government must then “take into account the effect”¹³ of a wide range of federal decisions upon any such “historic properties” and must consult with both state and tribal authorities when doing so.¹⁴ These federal consultation requirements apply regardless of the location of those historic properties but the NHPA provides specific authority for tribes to assume greater responsibilities over “tribal land,” which the statute defines as “all lands within the exterior boundaries of any reservation.”¹⁵

On tribal land, the NHPA authorizes a tribe to assume the responsibilities of a State Historic Preservation Officer, or “SHPO.”¹⁶ By doing so, a tribe can take on a range of responsibilities, including determining where such properties may exist, proposing their listing in the National Register, and consulting with federal agencies about the potential for effects on such properties.¹⁷ Importantly, in order to do so, the tribe must designate an official responsible for those responsibilities and develop a plan

¹⁰ NAGPRA, 25 U.S.C. § 3001 (15) (2018) (defining “tribal land” to include “all lands within the exterior boundaries of any Indian reservation”); NHPA, 54 U.S.C. § 300319 (2018) (same).

¹¹ See HOFFMANN AND MILLS, *supra* note 2, at 89-90, 101-04.

¹² 54 U.S.C. § 3002706(a) (2018).

¹³ 54 U.S.C. § 3006108 (2018).

¹⁴ 54 U.S.C. §§ 3002303, 302701(e) (2018).

¹⁵ 54 U.S.C. § 300319 (2018).

¹⁶ 54 U.S.C. § 3002702 (2018).

¹⁷ See *id.*, 54 U.S.C. § 3002302 (2018) (listing SHPO responsibilities).

for carrying them out, which must be submitted to the Secretary of the Interior for review.¹⁸ The Secretary of the Interior will then review the plan, consult with the SHPO, and determine (1) whether the tribe is “fully capable” of carrying out those responsibilities, (2) the plan defines any remaining responsibilities of the Secretary or the SHPO, and (3) whether the plan provides that, “with respect to properties neither owned by a member of the Indian tribe nor held in trust by the Secretary for the benefit of the Indian tribe, *at the request of the owner of the properties*, that the State Historic Preservation Officer, in addition to the tribal preservation official, may exercise the historic preservation responsibilities.”¹⁹

Thus, the NHPA authorizes tribes to take over the bulk of authority for consulting and working with the federal government to protect all historic properties within their reservation boundaries. All of the Five Tribes have established THPOs and, according to information from the Oklahoma Historical Society, four of the Five (Cherokee, Choctaw, Muscogee (Creek), and Seminole) have secured federal approval from the Secretary of Interior according to the preceding standards.²⁰ Following *McGirt*, however, these THPOs may now exercise the authority of the SHPO across all lands within their reservation boundaries, subject to the proviso above that, “with respect to properties neither owned by a member of the Indian tribe nor held in trust by the Secretary for the benefit of the Indian tribe, *at the request of the owner of the properties*, that the State Historic Preservation Officer, in addition to the tribal preservation official, may exercise the historic preservation responsibilities.”²¹ The Five Tribes may want to revisit their THPO plans with regard to this proviso and work with the Secretary to ensure that the scope and extent of their authority is confirmed and defined within their reservation boundaries.

B. The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).

NAGPRA provides important substantive protections for tribes seeking to protect and repatriate important cultural items and focuses on Native American human remains, associated funerary objects, and other discrete items of cultural value or patrimony.²² Like the NHPA, certain NAGPRA provisions turn upon whether an activity takes place within “tribal land,” which the law also defines as “any lands within the exterior boundaries of any Indian reservation.”²³

Unlike the NHPA, however, NAGPRA’s provisions vest tribes with important rights of “ownership or control” of certain of these “cultural items”²⁴ that may be discovered

¹⁸ 54 U.S.C. § 3002702(2)-(3) (2018).

¹⁹ 54 U.S.C. § 3002702(4) (2018) (emphasis added).

²⁰ *Tribal Governments and Section 106 Consultation*, OKLAHOMA HISTORICAL SOCIETY, <https://www.okhistory.org/shpo/tribal106.htm> (last visited February 5, 2021).

²¹ 54 U.S.C. § 3002702(4) (2018) (emphasis added).

²² *See, e.g.*, 25 U.S.C. § 3002 (2018).

²³ 25 U.S.C. § 3001(15) (2018).

²⁴ 25 U.S.C. § 3001(3) (2018). *See also* 25 U.S.C. § 3002(a)(2) (2018).

upon or excavated from tribal lands after the law's enactment in 1990.²⁵ In addition, NAGPRA prohibits the further removal of any such items from tribal lands unless properly permitted pursuant to the Archaeological Resources Protection Act (ARPA) and adequate consultation with the tribe on from whose lands they would be removed has occurred.²⁶ Finally, NAGPRA also requires that appropriate tribal officials be notified of any inadvertent discovery of Native American human remains or cultural items on tribal lands, i.e., within the boundaries of that tribe's reservation.²⁷

After *McGirt*, therefore, the Five Tribes can now rely upon these NAGPRA-recognized rights to protect cultural items that may be discovered within their reservations. In addition, however, the recognition of the Tribes' rights to "ownership or control" of cultural items coming from their tribal lands may also support Tribal requests for the return and repatriation of certain cultural items previously discovered but removed from those lands.²⁸

Conclusion

In the wake of *McGirt* and its corollary decisions recognizing the treaty-reserved reservation boundaries of the Five Tribes, leaders and officials of those Tribes will confront a range of issues across the spectrum of governance related to their sovereign concerns within those territories. With regard to cultural resources, both the National Historic Preservation Act (NHPA) and Native American Graves Protection and Repatriation Act (NAGPRA) rely on reservation boundaries as the basis for defining tribal lands. Because both statutes authorize additional tribal authorities and rights upon tribal lands, the Five Tribes may also consider whether and how best to take advantage of those additional powers and protections to protect their cultural resources pursuant to these federal laws.

²⁵ 25 U.S.C. § 3002(a)(2) (2018). NAGPRA defines "cultural items" broadly to include both funerary objects associated with Native American human remains and those unassociated with such remains, sacred objects, and items of cultural patrimony. The law recognizes the primary rights of lineal descendants to funerary objects associated with Native American human remains but, if those lineal descendants cannot be determined and for all other cultural items, the law vests tribes with the preeminent rights of 'ownership and control.'

²⁶ 25 U.S.C. § 3002(c) (2018).

²⁷ 25 U.S.C. § 3002(d) (2018).

²⁸ See 25 U.S.C. §§ 3005(a)(5)(B) (providing that, upon request, "'sacred objects' and items of 'cultural patrimony' shall be expeditiously returned" to tribes that can demonstrate "ownership or control.")