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Opinion No. 11-8

Federal and State Law for Reburial and Display of Native American Remains and Artifacts

QUESTIONS

1. Repatriation provisions of the federal Native American Graves Protection and Repatriation Act (NAGPRA) require the State to provide federally recognized tribes a complete inventory of Native American human remains and associated funerary objects after a consultation period with lineal descendents, Indian tribe officials, and traditional religious leaders. But state law requires reburial after scientific analysis of all human remains and Native American burial objects discovered in the course of an excavation, exhumation, or by accident within six months of discovery. Tenn. Code Ann. § 11-6-119. The NAGPRA repatriation process may take longer than the state reburial process, causing the State Archaeologist to violate state law by complying with NAGPRA. Do NAGPRA's repatriation requirements preempt the State's reburial law?

2. Tenn. Code Ann. § 11-6-119 requires both human remains and Native American burial objects to be properly reburied. Does this statute apply in the event that Tennessee repatriates human remains and burial objects to a federally recognized Native American tribe, and the tribe reburies the human remains but chooses to display the burial objects in a museum or for an educational purpose?

OPINIONS

1. It is the opinion of this Office that the NAGPRA repatriation provisions preempt the requirement in Tenn. Code Ann. § 11-6-119 to rebury Native American human remains and burial objects within six months of discovery.

2. Tenn. Code Ann. § 11-6-119 does not apply to Native American tribes. Thus, they are not obligated to rebury Native American burial objects repatriated under the terms of NAGPRA.

ANALYSIS

1. Tennessee's archaeology statutes are found in Tenn. Code Ann. §§ 11-6-101, et seq. The Division of Archaeology (Division) in the Department of Environment and Conservation (TDEC) is responsible for preserving historic, underwater, prehistoric, and paleontological sites,

ruins, and mounds, and for securing material "relating to man in Tennessee". Tenn. Code Ann. § 11-6-101(b)(2)-(4). The Division is also responsible for the display and custody of artifacts, sites, and other tangible results of the State's archaeology program. Tenn. Code Ann. § 11-6-101(b)(6). In 1990, the Legislature amended the archaeology statutes to provide additional protections for Native American human remains and burial objects. 1990 Tenn. Pub. Acts ch. 852. A national movement existed during that time to pass legislation that protects unmarked graves and requires reburial of human remains after a study period. Jack F. Trope and Walter R. Echo–Hawk, *The Native American Grave Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35, 52-53 (1992).

The 1990 amendment made several changes. The Legislature defined "burial grounds," "burial object," and "human remains." Tenn. Code Ann. § 11-6-102(2), (3), and (7). It prohibited the display of Native American remains, including those held by the Division. Tenn. Code Ann. §§ 11-6-104(b) and -117. It provided a protocol for any person who encounters human remains on public or private land, requiring the person to stop immediately disturbing the ground and to contact the coroner or local law enforcement. Tenn. Code Ann. § 11-6-107(d). If these officials have no forensic or criminal concerns about the site, they must contact the Division. *Id.* Human remains and burial objects reported to the Division are to be treated as state property in accordance with Tenn. Code Ann. § 11-6-104 and reburied in accordance with Tenn. Code Ann. § 11-6-119 and/or Title 46, Chapter 6, in the event of terminating the use of land as a cemetery. *Id*.

According to Tenn. Code Ann. § 11-6-104(a), all artifacts and other materials excavated, discovered, donated, or otherwise acquired by the Division shall be the property of the State of Tennessee, with the Division having custody. Furthermore, the Division must assure that the material is properly and adequately safeguarded. *Id*. With regard to human remains and Native American artifacts, Tenn. Code Ann. § 11-6-119 states that:

> Any human remains or any Native American burial objects discovered in the course of an excavation, exhumation or accidentally, and any such remains and their associated burial objects confiscated under the provisions of § 11-6-118, shall be properly reburied following scientific analysis within six (6) months of such discovery or confiscation in accordance with procedures formulated by the advisory council which are appropriate to Native American traditions. Upon request for scientific or medical research, the director of the division may grant an extension of not more than six (6) months before reburial is required.

Thus, human remains and Native American burial objects must be reburied within six months of discovery, after scientific analysis. The Division Director may grant a six-month extension for additional scientific or medical research. But the Legislature limited the amount of time between discovery and reburial to no longer than twelve months.

Congress enacted NAGPRA in 1990 and sought to accomplish two main goals. First, NAGPRA provides for the protection and ownership of human remains, funerary objects, sacred objects, and objects of cultural patrimony discovered on federal and tribal lands. 25 U.S.C. § 3002. Second, NAGPRA provides for the repatriation of such materials by museums and federal

agencies to lineal descendents, Native American tribes, and Native Hawaiian organizations. 25 U.S.C. §§ 3003-3005. The portion of NAGPRA relevant to this opinion is that dealing with repatriation.

NAGPRA's repatriation provisions apply to the State of Tennessee because the State is a "museum" for purposes of the Act. A "museum" is defined as any institution or State or local government agency that receives federal funds and has possession of, or control over, Native American cultural items. 25 U.S.C. § 3001(8). Cultural items, as defined under 25 U.S.C. § 3001(3), include human remains and associated funerary objects. The NAGPRA regulations further define "receives federal funds" as follows:

> The phrase "receives Federal funds" means the receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. For example, if a museum is a part of a State or local government or a private university and the State or local government or private university receives Federal funds for any purpose, the museum is considered to receive Federal funds for the purpose of these regulations.

43 C.F.R. § 10.2(a)(3)(iii). Tennessee "receives Federal funds" within the meaning of this definition. The NAGPRA regulations also define "possession" and "control" of Native American cultural items:

> The term "possession" means having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations.
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> The term "control" means having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency.

43 C.F.R. § 10.2(a)(3)(i) and (ii). The Division has possession or control over Native American cultural items as defined by this regulation. *See* Tenn. Code Ann. § 11-6-104(a) (Division is custodian of all artifacts obtained through state archaeology program).

Under NAGPRA, each museum and federal agency with possession or control over holdings or collections of Native American human remains and associated funerary objects must

inventory the items and identify their geographical and cultural affiliation. 25 U.S.C. § 3003(a).[1] The initial inventory was due on or about November 16, 1995, and this opinion assumes that the Division has already prepared an inventory in accordance with NAGPRA. *See* 25 U.S.C. §§ 3003, 3005 and 43 C.F.R. § 10.10 (regarding inventory and repatriation process).

The NAGPRA regulations recognize, however, that acquisitions are of an ongoing nature. Museums and federal agencies must prepare an inventory within two years of acquiring a new holding or collection, or locating a previously unreported holding or collection of human remains and associated funerary objects. The regulations provide in part:

> (b) New holdings or collections.
>
> (1) Any museum or Federal agency that, after completion of the summaries and inventories as required by §§ 10.8 and 10.9, receives a new holding or collection or locates a previously unreported current holding or collection that may include human remains, funerary objects, sacred objects or objects of cultural patrimony, must:
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> (ii) Within 2 years of receiving a new holding or collection or locating a previously unreported current holding or collection, or within 2 years of the effective date of this rule, whichever is later, prepare, in consultation with any affiliated Indian tribe or Native Hawaiian organization, an inventory as required by § 10.9 of these regulations. Any museum that has made a good faith effort to complete its inventory, but which will be unable to complete the process by this deadline, may request an extension of the time requirements under § 10.9(f).

43 C.F.R. § 10.13(b)(1)(ii). The requirement for consulting with any affiliated Indian tribe and completing an inventory within two years conflicts with the Division's obligation under Tenn. Code Ann. § 11-6-119 to rebury human remains and funerary objects within six months of discovery because the time to comply with the federal NAGPRA requirements exceeds the time to comply with the State's requirement for reburying human remains and burial objects. Furthermore, if upon notice, a tribe or descendent requests repatriation, the item must be returned within 90 days of notice. 43 C.F.R. § 10.10(b)(2).

The question is whether the NAGPRA provisions for inventory and repatriation preempt Tennessee's statutory requirements for the prompt reburial of human remains and Native

[1] Tennessee's archaeology statutes and NAGPRA use different nomenclature for burial items. Tenn. Code Ann. § 11-6-102(3) has one term, "burial object," to describe the items that "were demonstratively buried with an individual or the burial pit or mound associated with an individual or the structure created to house the body." NAGPRA uses the term "funerary object" and distinguishes between "associated" and "unassociated" funerary objects. 25 U.S.C. § 3001(3)(A) and (B). "Associated funerary objects" are "reasonably believed to have been placed with individual human remains either at the time of death or later" where both the human remains and objects are presently in the possession or control of a museum or federal agency. *Id*. "Unassociated funerary objects" are the same, except that the human remains are not presently in the possession or control of a museum or federal agency. *Id*. For purposes of this opinion, the terms used relate to the respective federal and state statutory schemes.

American burial objects. Congress may expressly preempt or preempt by implication state law. Express preemption occurs when a federal law includes a preemption clause that clearly withdraws specified powers from the states. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). There are two types of implied preemption, field preemption and conflict preemption. Field preemption occurs when a federal statutory scheme is so extensive and detailed that it leaves no room for supplementary state regulation. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). Conflict preemption may occur when it is impossible to comply with both the federal law and the state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Implied preemption also may occur when state law stands as an obstacle to the accomplishment and execution of the federal law's purpose. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941).

NAGPRA's only express statement of federal preemption is found in 25 U.S.C. § 3005(f), which states that, "[a]ny museum which repatriates any item in good faith pursuant to this chapter shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this chapter." *See* Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 Cardozo J. Int'l & Comp. L. 409, 431 (2003) ("NAGPRA itself provides specifically for a preemption of state fiduciary law by stating that any good faith restitution made by a museum pursuant to NAGPRA will not create liability under state law."). If the Division exercises good faith in repatriating Native American human remains and burial objects in accordance with NAGPRA, then it should not be liable for failing to rebury any of those items in a timely manner as set forth in Tenn. Code Ann. § 11-6-119 because NAGPRA expressly preempts the state law. But 25 U.S.C. § 3005(f) applies to those items that are actually repatriated. For items that are culturally unidentifiable, or to which there are multiple claims, we must continue the analysis for field and conflict preemption.

It does not appear that Congress intended field preemption by enacting NAGPRA's repatriation provisions regarding human remains and burial objects. First, the repatriation provisions apply to state agencies only if they receive federal funding. 25 U.S.C. § 3001(8). Another indication that Congress did not intend to preempt the field is that 25 U.S.C. § 3009(5) provides that "[n]othing in this chapter shall be construed to limit the application of any State or Federal law pertaining to theft or stolen property." Further, Congress mandated in the National Historic Preservation Act (NHPA) that the Secretary of the Interior promulgate guidelines to ensure that federal, state, and tribal historic preservation programs subject to NHPA include plans to encourage the protection of Native American cultural items (as defined in NAGPRA). 16 U.S.C. § 470(h)-4(b)(3). Federal law therefore contemplates state involvement in protecting Native American cultural items, and thus, Congress did not intend field preemption with regard to repatriation.

But NAGPRA's requirements for an inventory of a museum's holdings and for repatriation conflict with Tennessee's requirement for the expeditious reburial of human remains and burial objects. If the Division acquires human remains that are excavated, exhumed, or accidentally discovered, then it must rebury the remains within six months of discovery. Tenn.

Code Ann. § 11-6-119. The Division may extend the time by only six more months for further scientific study. *Id*. NAGPRA requires an inventory to be prepared within two years of receiving a new holding or collection and requires consultation with any affiliated Indian tribe.[2] 43 C.F.R. § 10.13(b)(1). Consultation must begin as early as possible, but no later in the inventory process than the time at which investigation into the cultural affiliation of human remains and associated funerary objects is being conducted. 43 C.F.R. § 10.9(b)(2). A museum is under a further obligation to publish a notice of the inventory within six months of its completion. 43 C.F.R. § 10.9(e)(1).

A museum must repatriate the items within ninety days of a written request. 25 U.S.C.A. § 3005(b). In the event of multiple claims, a museum may retain the item until the dispute is resolved, which could easily exceed the state period for reburial. *Id*. at § 3005(e); 43 C.F.R. § 10.10(c)(2). Multiple claim disputes may be resolved by mutual agreement of the parties, dispute resolution with the aid of the NAGPRA Review Committee, or through litigation in federal court. 25 U.S.C. §§ 3005(e) and § 3006(c)(4); 43 C.F.R. § 10.17. If a museum cannot identify the human remains as affiliated with a lineal descendent or Indian tribe, then the museum must notify the National NAGPRA Program and provide a list of culturally unidentifiable human remains and any associated funerary objects. Inventories, 75 Fed. Reg. 12403 (2010) (to be codified at 43 C.F.R. § 10.9(e)(6)). The museum must dispose of culturally unidentifiable human remains pursuant to 43 C.F.R. § 10.11, which provides prioritized ownership categories. Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12403 (2010) (to be codified as 43 C.F.R. § 10.11).

The state archaeology statutes conflict with NAGPRA by requiring reburial before the Division's allotted time to comply with the federal consultation, inventory, notice, and repatriation requirements. Reburial of human remains and burial objects before completion of the inventory and repatriation process conflicts with the requirement to return items to the proper parties.

The state archaeology statutes also conflict with NAGPRA because human remains and Native American burial objects that are excavated, exhumed, or accidentally discovered become property of the State by operation of law. Tenn. Code Ann. §§ 11-6-104(a) and -107(d). Under NAGPRA, a museum or federal agency does not own cultural items simply by virtue of possession or control. Instead, the legal standard for a museum or federal agency is that it must have a "right of possession" that is defined as "possession obtained with the voluntary consent of an individual or group that had the authority of alienation." 25 U.S.C. § 3001(13). *See* S. REP. No. 473, 101st Cong., 2d Sess. 5 (1990). The State's provision that human remains and Native American burial objects become state property by operation of law is inconsistent with NAGPRA, which requires the knowledge and consent of the appropriate individual or group.

Lastly, we must ask whether Tennessee's reburial statute stands an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines*, 312 U.S. at 67, 61 S. Ct. 399. Congress does not explicitly state the background or purpose anywhere in

[2] A "collection" or "holding" can be as little as a single item. NAGPRA Regulations for Future Applicability, 72 Fed. Reg. 13184, 13186 (2007).

NAGPRA, although the title is self-explanatory. The legislation requires all museums and federal agencies possessing Native American remains and cultural items to provide a summary or inventory of those items for the purpose of facilitating the return of culturally affiliated remains and cultural items to their related Native American tribes. *Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management*, 455 F.Supp.2d 1207, 1210 (D. Nev. 2006). NAGPRA's legislative history shows that Native American tribes called for the repatriation of human remains "for their permanent disposition in accordance with tribal customs and traditions." S. REP. No. 473, 101st Cong., 2d Sess. 1 (1990). The state archaeology provisions are similar to NAGPRA's goal in treating Native American human remains with respect by reburying them "in a manner consistent with original and/or traditional customs." Tenn. Comp. R. and Regs. 0400-9-1-.01. But the role of Native Americans is limited to that of observers in the reburial. Tenn. Code Ann. § 11-6-116(a); Tenn. Comp. R. and Regs. 0400-9-1-.05. Under NAGPRA, possession of the human remains is passed to the Native Americans who are most closely related. By reburying Native American human remains and burial objects, the State would be circumventing the tribes' right to decide the method of permanent disposition. We conclude therefore that Tennessee's statute stands as an obstacle to the accomplishment and exercise of the *full* purposes and objectives of Congress.

For those reasons, it is the opinion of this Office that NAGPRA's repatriation provisions preempt the requirement in Tenn. Code Ann. § 11-6-119 to rebury Native American human remains and burial objects within six months of discovery.

2. The second question concerns the applicability of Tenn. Code Ann. § 11-6-119 in the event the State repatriates Native American burial objects to a federally recognized tribe under NAGPRA, and the tribe wishes to keep the burial objects for a museum or educational display instead of reburying them in accordance with state law. It is the opinion of this Office that Tenn. Code Ann. § 11-6-119 does not apply to the tribe.

Under Tenn. Code Ann. § 11-6-107(d)(1), "[a]ny person who encounters or accidentally disturbs or disinters human remains on either publicly or privately owned land" must immediately cease disturbing the ground and notify the authorities. Once forensic and criminal concerns are ruled out, the authorities must notify TDEC. Tenn. Code Ann. § 11-6-107(d)(2)-(3). Human remains and burial objects reported to the Division will be treated as provided in Tenn. Code Ann. §§ 11-6-104 and -119. Tenn. Code Ann. § 11-6-107(d)(4). Tenn. Code Ann. § 11-6-104 provides that artifacts and other material acquired by the Division shall be the property of the State of Tennessee placed under the custodianship of the Division. As previously explained, Tenn. Code Ann. § 11-6-119 requires the reburial of any human remains and any Native American burial objects in accordance with procedures appropriate to Native American traditions. According to Tenn. Code Ann. § 11-6-104, the State owns all human remains and Native American burial objects that are discovered and, therefore, the State is the only entity with the obligation to rebury them.

Part of the purpose of NAGPRA is to repatriate human remains and associated funerary objects to the rightful tribe or lineal descendent for permanent disposition in accordance with tribal customs and traditions. S. REP. No. 473, 101st Cong., 2d Sess. 1 (1990). NAGPRA is

silent as to the manner of permanent disposition of human remains and burial objects. "Aside from the prohibitions against illegal trafficking in Native American human remains and cultural items that pertain to all persons, there are no requirements for Native American groups regarding the use, access, treatment, or care of repatriated cultural items." Francis P. McManamon and Larry V. Nordby, *Implementing the Native American Graves Protection and Repatriation Act*, 24 Ariz. St. L. J. 217, 245 (1992).

Once the State repatriates human remains and burial objects to a federally recognized Native American tribe, then the tribe has possession and control of the items. The State no longer has custody and control, and NAGPRA leaves the final disposition of cultural items to the lineal descendent and tribes' discretion.

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