Linda Willard

DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

#89041

NO.
STATE OF NEBRASKA
OFFICIAL
APR 27 1989
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: April 26, 1989

SUBJECT: Do federal statutes dealing with archaeological resources preempt §9 of LB 340 which requires the return of certain human skeletal remains and burial goods of American Indian origin?

REQUESTED BY: Senator John Weihing
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Dale A. Comer, Assistant Attorney General

Section 9 of LB 340 provides for the return of human skeletal remains or burial goods of American Indian origin by entities in Nebraska receiving state funding or state recognition. You have requested our opinion as to whether this section is preempted by 16 U.S.C. §470jj, a portion of the federal statutes dealing with the protection of archaeological resources. Specifically, you ask if the State Historical Society is a private corporation/entity within the federal statute. As discussed below, we do not believe that the federal statute at issue preempts §9 of LB 340. In essence, the two statutes deal with different matters.

Under the Supremacy Clause of the United States Constitution, federal laws are the supreme laws of the land. ATS Mobile Telephone, Inc. v. Curtin Call Communications, Inc., 194 Neb. 405, 232 N.W.2d 248 (1975). A state statute is void under that Supremacy Clause if federal statutes have either explicitly or implicitly precluded state legislation in the same field. Cox Cable Communications, Inc. v. Simpson, 569 F.Supp. 507 (D.Nebr. 1983). However, for the preemption doctrine to apply, the state and federal statutes in question must regulate the same area. In other words, if the subject matter of a federal statute is different than that of a particular state statute, no preemption can occur.

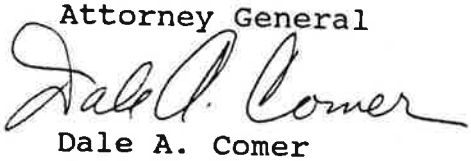
L. Jay Bartel, Elaine A. Catlin, Delores N. Coe-Barbee, Dale A. Comer, David Edward Cygan, Lynne R. Fritz, Denise E. Frost, Yvonne E. Gates, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Donald E. Hyde, Kimberly A. Klein, Charles E. Lowe, Lisa D. Martin-Price, Steven J. Moeller, Harold I. Mosher, Fredrick F. Neid, Bernard L. Packett, Marie C. Pawol, Kenneth W. Payne, Douglas J. Peterson, LeRoy W. Sievers, James H. Spears, Mark D. Starr, John R. Thompson, Susan M. Ugai, Terri M. Weeks, Melanie J. Whittamore, Linda L. Willard

16 U.S.C. §470jj is part of a group of federal statutes dealing with the protection of archaeological resources on federal and Indian lands. Section 470jj provides that the United States Secretary of the Interior shall take such action as is necessary to improve cooperation and the exchange of information among "private individuals having collections of archaeological resources" and federal authorities, professional archaeologists and associations of professional archaeologists. Section 470jj provides further that the Secretary of the Interior shall make efforts to expand the archaeological data base for the archaeological resources of the United States through such increased cooperation among private individuals, professional archaeologists and archaeological organizations.

It seems to us that §470jj and §9 of LB 340 deal with entirely different matters. Section 9 deals with the disposition accorded human skeletal remains and burial goods of American Indian origin. Section 470jj, on the other hand, does not deal in any way with the disposition of such materials. It merely provides that the Secretary of the Interior shall improve cooperation and communication between private individuals and archaeologists, and that the Secretary of the Interior shall attempt to expand the archaeological data base through such cooperation and communication. As a result, we fail to see how §470jj would impact in any way on §9 of LB 340. Consequently, we do not believe that §9 is preempted by the federal statute. This is true regardless of whether the State Historical Society is considered a private corporation or entity. We thus do not need to reach that question in the context of your opinion request.

Sincerely yours,

ROBERT M. SPIRE
Attorney General



Dale A. Comer
Assistant Attorney General

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cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:

Attorney General