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Government is ruled negligent in death of boy, 9, at Lassen park

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A Sacramento federal judge ruled Tuesday that the federal government negligently caused the death of a 9-year-old boy in July 2009 at Lassen Volcanic National Park.

U.S. District Judge Troy L. Nunley issued the ruling to penalize the government for the deliberate destruction by National Park Service officials of evidence that is critical in a wrongful death lawsuit filed by the boy's family against the United States.

Nunley's ruling adopts findings and recommendations made almost two months ago by U.S. Magistrate Judge Gregory G. Hollows.

The magistrate judge rebuked Lassen park Superintendent Darlene M. Koontz for the destruction of evidence and for lying in a sworn deposition about an investigator's attempt to interview her.

"It has become all too apparent that (the government) has purposely destroyed material evidence in this case, specifically the retaining wall that caused Tommy Botell's death and injury to his sister," Hollows wrote.

In his order Tuesday, Nunley declared, "It is established for all purposes in this case that (the United States) is deemed to have been negligent in causing the death of Tommy Botell and injury to" his sister.

The Sacramento U.S. attorney's office, which is defending the government, will have no comment on Nunley's order "at this time," said spokeswoman Lauren Horwood.

The explosive findings and recommendations were submitted March 20 to U.S. District Judge Garland E. Burrell Jr., who had presided over the case for nearly two years.

A week later, Nunley was sworn in as Sacramento's newest federal district judge. In keeping with the court's practice, each of the other district judges reassigned a portion of their cases to Nunley. Burrell shifted the wrongful death suit to Nunley, a former Sacramento Superior Court judge.

Tommy Botell and his family came to the park from their home in Tehama County in the summer of 2009. On a hike along a mountain trail, he and his sister sat for a photo-

graph on a retaining wall. The wall gave way, throwing the children down a steep slope. Part of the wall rolled over them, crushing Tommy's brain stem. His mother scrambled to him and he died in her arms. His last words were, "Mommy, I can't see."

His sister suffered serious but not life-threatening injuries.

Hollows found that, even though Koontz had directed that evidence be destroyed - namely the rest of the wall - which would have exposed the culpability of Koontz and some of her staff, it is still clear that she and others who worked at the park knew the wall had long been unsafe, and she was repeatedly warned about its condition.

"What is less clear, although highly suspicious, is whether defendant (destroyed) evidence other than the wall," Hollows wrote. The question of whether other evidence, such as park records, was deliberately destroyed could be answered only after an evidentiary hearing that the district judge would have to order, he wrote.

It could then be decided whether the government's "discretionary function" defense should be precluded, the magistrate judge wrote. The "discretionary function" exception insulates the United States from legal attack over careless and unlawful actions of its employees if a claim is based on the performance or non-performance of a discretionary function or duty, "whether or not the discretion involved be abused."

In the Botell case, the government contends the failure on the part of Koontz and her staff to repair the wall was within their discretion, and so the United States cannot be sued over Tommy's death.

Nunley deferred ruling on whether to convene an evidentiary hearing regarding Hollows' suspicion, based on a number of factors he cited, that other evidence was destroyed. Nunley said he would make that decision after the Botells' pending motion for partial summary judgment is resolved.

Oral arguments on that motion and the government's cross motion for summary judgment are scheduled June 6 before Nunley.

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