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#94042
NO.
STATE OF NEBRASKA
OFFICIAL
MAY 31 1994
DEPT. OF JUSTICE

DATE: May 24, 1994

SUBJECT: Legality of an Intentional Excavation to Locate a Pioneer Cemetery Under the Unmarked Human Burial Sites and Skeletal Remains Protection Act

REQUESTED BY: Senator C.N. "Bud" Robinson
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

Veterans organizations and other local parties in the Fort Calhoun area have apparently expressed interest in locating and commemorating in some fashion the cemetery where more than 200 soldiers and dependents from the Cantonment Missouri and Fort Atkinson were buried from 1819 through 1827. The cemetery is believed to be approximately one and one-half miles north of the historic site of Fort Atkinson in Washington County based, in part, upon six graves which were discovered and excavated in 1956 and 1958, but the exact location of the cemetery is unknown. The suspected location of the cemetery is on private land which has been cultivated for many years obscuring any surface evidence of the graves, and further archeological investigations would be necessary to confirm the location of the cemetery and determine its extent.

The Unmarked Human Burial Sites and Skeletal Remains Protection Act (the Act), 1989 Neb. Laws LB 340, is codified at ***Neb. Rev. Stat. §§*** 12-1201 through 12-1212 (1991) and ***Neb. Rev. Stat. §*** 28-1301 (1989). Section 28-1301 (2) (a) makes it a Class I misdemeanor when any person "[k]nowingly digs up, disinters, removes, or carries away from its place of deposit or burial any such [human skeletal] remains or goods, attempts to do the same, or aids, incites, assists, encourages, or procures the same to be done." However, Section 28-1301 (3) (f) also provides that:

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> This section shall not apply to . . . any archaeological excavation by the Nebraska State Historical Society or its designee in the course of the execution of the duties of the society if any human skeletal remains or associated burial goods discovered during such excavation are disposed of pursuant to section 12-1208.

You have now asked for our opinion as to whether certain archeological investigations could be conducted under the Act for the intentional purpose of locating and delimiting the Fort Atkinson Cemetery. Specifically, those investigations would involve the use of non-intrusive methods to locate the graves such as aerial photography, ground-penetrating radar, etc. as well as intrusive methods such as trenching and excavation with hand tools. Intrusive methods would likely result in the disturbance of graves, and if graves were discovered, the skeletal remains, coffin furniture and burial inclusions, if any, would be temporarily removed for forensic study to establish sex, age pathologies and other information that might aid in discerning the identities of the decedents. While no such archeological investigation is presently underway or planned at this time, you have asked whether such an intentional archeological search for the Fort Atkinson Cemetery could be lawfully conducted under the Act. From discussions with your staff, we understand that you contemplate remedial legislation in the event that we conclude that such an archeological investigation is unlawful.

The provisions of Section 28-1301 (3) (f) establish three requirements which must be met in order for an archaeological investigation or excavation to avoid the penalty provisions set out in the initial portion of that statute. First, the archaeological excavation must be conducted by the Nebraska State Historical Society (the Society) or its designee. Second, the archaeological excavation must occur in the course of the execution of the duties of the Society. Third, any human skeletal remains or associated burial goods discovered during such an excavation must be disposed of pursuant to section 12-1208.[1] Therefore, to be lawful, the proposed intrusive excavations delimiting the Fort Atkinson

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[1] That statute requires notice to the Society when human skeletal remains or burial goods have been discovered. The remains must then be reburied by the appropriate county attorney and county coroner in accordance with the wishes of any known relatives of the decedent or in accordance with the wishes of the appropriate Indian tribe in the case of certain remains of American Indian origin. Remains of non-American-Indian origin for which no relatives are known may be reburied after a one-year scientific study if the study period is considered necessary or desirable by the Society.

Cemetery described in your opinion request must meet those three requirements.

It appears to us that the archaeological excavation proposed in your opinion request could be conducted so as to clearly meet the first and third requirements of Section 28-1301 (3) (f). Either the Society could conduct the search for the Fort Atkinson Cemetery, or it could execute some form of written designation for another organization to perform that task. Moreover, in the event that human skeletal remains or burial goods were discovered or disturbed in the course of the investigation, steps could be taken to dispose of those remains in strict accordance with Section 12-1208.

Whether the archaeological excavation proposed for the location of the Fort Atkinson Cemetery would meet the second requirement of Section 28-1301 (3) (f) as a duty of the Historical Society is more problematic. However, under Section 3 of LB 1236 enacted into law during the 1994 legislative session, the powers and duties of the board of trustees of the Society now will include:

> (7) To, according to appropriate museum and archival standards, collect, assemble, preserve, ***classify***, and exhibit, where appropriate, all . . . museum, ***archaeological, and ethnographic specimens, and all other objects regardless of physical form*** that serve to illustrate the history of Nebraska and the Great Plains in particular, or of western America in general;

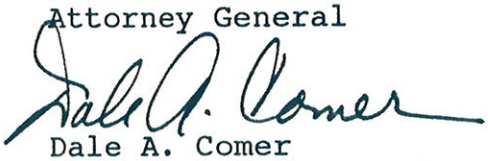
(emphasis added). It appears to us that this portion of LB 1236 can be read broadly enough to create a duty for the Society to engage in such projects as the location of the Fort Atkinson Cemetery. Consequently, the project which is the subject of your opinion request, if conducted by the Society or its designee, could be considered as involving the execution of the duties of the Society.

As a result, we believe that the archaeological excavation described in your opinion request would generally be lawful under the Unmarked Human Burial Sites and Skeletal Remains Protection Act so long as the project was conducted in such a way as to meet the requirements of Section 28-1301 (3) (f). However, as is often the

case, since such projects are not explicitly allowed in the Act, remedial legislation would make this matter clearer.

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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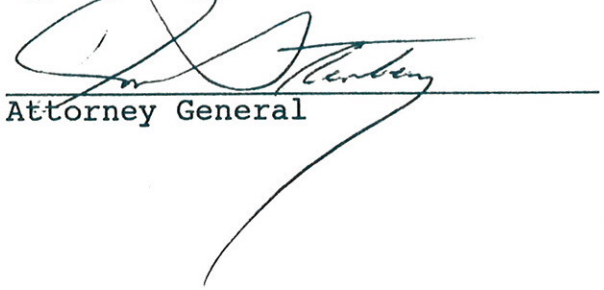
cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved by:



Attorney General