STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

91020

STATE OF NEBRASKA
OFFICIAL
MAR 25 1991
DEPT. OF JUSTICE

DATE: March 22, 1991

SUBJECT: Appropriation of Funds for Reimbursement of Expenses Incurred in the Reburial of American Indian Remains Pursuant to Neb.Rev.Stat. § 12-1208 (1990 Cum.Supp.)

REQUESTED BY: Senator Scott Moore, Nebraska State Legislature

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

Neb.Rev.Stat. §§ 12-1201 et seq. (1990 Cum.Supp.) make up the Unmarked Human Burial Sites and Skeletal Remains Protection Act. Among other things, that legislation creates certain obligations for persons who discover human skeletal remains or burial goods associated with an unmarked human burial. It further provides for the disposition of those skeletal remains or burial goods including, in some instances, reburial of those materials. Neb.Rev.Stat. § 12-1208(3) (1990 Cum.Supp.) specifically provides, in pertinent part:

> If the [Nebraska State Historical] society finds that the discovered human skeletal remains or burial goods are of American Indian origin, it shall promptly notify in writing the Commission on Indian Affairs and any known relatives in the order listed in section 71-1339 or, if no relatives are known, any Indian tribes reasonably identified as tribally linked to such remains or goods in order to ascertain and follow the wishes of the relative or Indian tribe, if any, as to reburial or other disposition. Reburial by any such relative or Indian tribe shall be by and at the expense of such relative or Indian tribe.

(Emphasis added). From your correspondence, we understand that the Appropriations Committee of the Legislature is considering a

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request to provide state funds for the reimbursement of expenses incurred in the reburial of American Indian remains under the Act. You are concerned about the propriety of such an appropriation in light of the portion of § 12-1208(3) emphasized above.

Your specific questions are in several parts. First, you wish to know if the Legislature can make either a deficit appropriation or an appropriation for the upcoming biennium to a state agency which would be used directly by that agency itself or paid out to a political subdivision as directed by language in the appropriations bill, for the purpose of reimbursement of expenses incurred in the reburial of American Indian remains pursuant to § 12-1208(3). The expenses involved would have been billed to a relative or an Indian tribe as described in § 12-1208(3).

We do not believe that § 12-1208(3) would prevent such an appropriation. The language at issue in that section simply requires that the reburial of identifiable American Indian remains be "by and at the expense of" the relative or Indian tribe involved. It does not prevent a political subdivision from advancing the funds necessary for such a reburial so long as the monies expended are ultimately recouped from the relative or Indian tribe involved. It does not prevent an appropriation by the State to reimburse the political subdivision; again, so long as the funds expended are ultimately repaid by the affected relative or Indian tribe. However, stating that an appropriation is possible here raises a broader question. Namely, under the present Unmarked Human Burial Sites and Skeletal Remains Protection Act, can any state agency actually reimburse such reburial costs even when the funds have been appropriated.

Under Nebraska law, it is clear that an administrative agency has no power or authority other than that specifically conferred by statute or by a construction of the statutes necessary to accomplish the plain purpose of the act. Nebraska Association of Public Employees, Game and Parks Chapter v. Game and Parks Commission, 220 Neb. 883, 374 N.W.2d 46 (1985); Application of Lincoln Electric System, 207 Neb. 289, 298 N.W.2d 366 (1980). Therefore, a state agency must have statutory authority to make payments of funds appropriated to reimburse the costs of reburial of American Indian remains.

We have also indicated on numerous occasions that appropriations bills must be restricted to making appropriations only and cannot enact substantive law. Opinion of the Attorney General No. 24, February 13, 1981; Opinion of the Attorney General No. 289, May 14, 1980; Report of the Attorney General, 1977-1978, No. 241 at 368 and No. 75 at 112; Report of the Attorney General, 1975-1976, No. 201 at 281. As we stated in our Opinion No. 75 in 1977, substantive language in an appropriations bill "has no legal

or binding effect and may be ignored by the persons charged with the administration of the executive units of government to which the language refers." Report of the Attorney General, 1977-1978, No. 75 at 113. As a result, an appropriations bill appropriating funds for the reimbursement of costs associated with the reburial of American Indian remains cannot be used to actually create authority to make such payments. That authority must be created in the substantive legislation itself.

We can find no language in the Unmarked Human Burial Sites and Skeletal Remains Protection Act which would specifically authorize any state agency to reimburse expenditures incurred by a political subdivision to rebury identifiable American Indian remains when those costs were billed to the affected relative or Indian tribe. Nor can such authority be necessarily inferred from the language of the Act, particularly where the legislative history of those statutes clearly indicates that such costs are to be paid by the relative or Indian tribe seeking reburial. See, Government, Military and Veterans Affairs Committee Statement on LB 340, 90th Legislature, Second Session (1989). Consequently, while an appropriation of funds for such reimbursement might be possible, we do not believe that a state agency would have statutory authority to actually pay out the funds under the provisions of the pertinent statutes.

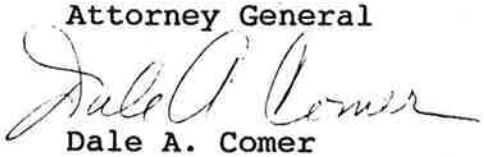
You also ask whether the Legislature may make an appropriation to a state agency for the upcoming biennium to reimburse expenses incurred by the agency or a political subdivision to erect a memorial related to a reburial under § 12-1208(3). For the reasons outlined above, we believe that such an appropriation might be proper but that no statutory authority exists for such a reimbursement.

Finally, you ask whether an appropriation might be made to a state agency for the upcoming biennium to reimburse expenses related to a reburial under § 12-1208(3) which were incurred directly by a relative or interested Indian tribe under that section. We believe that such an appropriation would be in direct

contravention of that portion of § 12-1208(3) which provides that, "[r]eburial by such relative or Indian tribe shall be by and at the expense of such relative or Indian tribe."

Sincerely,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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

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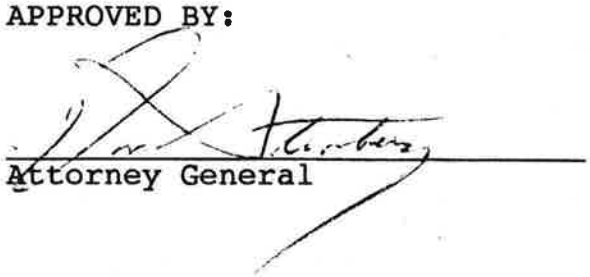

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