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## Failure To Return Remains Violates Human Rights, Court Told

By **Crystal Owens**

Law360 (June 18, 2024, 8:56 PM EDT) -- A nonprofit tribal organization and a South Carolina tribe are backing a challenge to the U.S. Army that seeks to repatriate the remains of two Native American children from an Indian boarding school cemetery in Pennsylvania, arguing that failure to do so constitutes a continuing human rights violation.

The United South and Eastern Tribes Sovereignty Protection Fund — representing 33 federally recognized tribes — and the Catawba Nation argued in an amicus brief that the court "should not be fooled" by the Army's false picture of its alleged good intentions in agreeing to apply its own regulations rather than the Native American Graves Protection and Repatriation Act to return the remains of at least 180 children from the graveyard in Carlisle, Pennsylvania. U.S. District Court Judge Claude M. Hilton granted the nonprofit and tribe's motion for leave to file the amicus brief on Monday, according to the order.

"The federal government's recordkeeping when it disinterred and moved the children's bodies for its own purposes in 1927 was callously negligent, making proper compliance with NAGPRA's inventory and other requirements today more difficult for the Army. This does not relieve the Army of its obligations under the law," they said in the June 12 **brief**.

According to the brief, the U.S. Army insists that Regulation 290-5, rather than NAGPRA, should apply to the Carlisle Barracks Main Post Cemetery.

That regulation, the amici argued, was designed for cemeteries containing service members and prisoners of war, not those holding the remains of Indigenous children who never chose military service — many of whom never even chose boarding school.

"Failure to return the remains of our children who are interred at those schools is a continuing human rights violation," they said.

The Winnebago Tribe of Nebraska sued the U.S. Army in January, arguing that it violated provisions of NAGPRA when it denied the tribe's request in December to repatriate the remains of Samuel Gilbert and Edward Hensley, who died at the Carlisle Indian Industrial School.

Buried at the cemetery for more than a century, the boys were two of at least 180 students entombed there from the boarding school before it closed in 1918, according to the Office of Army Cemeteries.

The U.S. Army is looking **to dismiss the case**, arguing in a May 3 motion that the requirements of NAGPRA don't apply to the Carlisle Barracks Main Post Cemetery because the law's plain language says only federal agencies and museums with control over holdings or collections of Indigenous remains must return them to their rightful tribes.

"As the Army has informed plaintiff more than once, defendants are ready and willing to assist in the return of the boys' remains to their rightful resting place, and at the Army's expense. But this lawsuit can be of no help in making that happen, because the invoked provisions of NAGPRA do not apply to the remains interred at the Carlisle Barracks Main Post Cemetery," the brief said.

The Army is currently engaged in a "major effort" to identify all Native American graves at the

Carlisle Cemetery and return the remains to the descendants' families through support from professional archaeologists, board certified physical anthropologists and highly experienced professional cemetarians, it argued.

According to the amici, tribal nations' inherent rights include those to bring the remains of their children home — an argument they said is even more true when those children were taken by the U.S. government from Indigenous communities "for the purpose of ending our cultures and ways of life to facilitate disposition of our lands and resources — too often resulting in our children's deaths."

The former Carlisle Indian Industrial School, now home to the Army War College, had more than 10,000 children spanning nearly 50 tribes come through its doors, where they endured harsh conditions and were exposed to illnesses that caused many deaths.

The Carlisle boarding school, the largest in the country at the time, spawned 24 additional sites for Native American children, where they were forced to cut their hair, forbidden to speak their native languages and taught Christianity as a method of forced assimilation into American society, according to the Carlisle Indian School Project.

In total, more than 500 Indigenous children died in boarding schools run by the federal government and churches over the course of 150 years, according to a 2022 report by the U.S. Department of the Interior.

The DOI, the amici said, is currently attempting to document and atone for the boarding school mark on the country's shared history. However, Army Regulation 290-5 perpetuates the very harms the federal government is currently working to address, they said.

"The Army must stop treating our children as militants and prisoners of war, and it must instead afford them the protections of NAGPRA," they said.

NAGPRA's application to the children held in Carlisle's graveyard could make a meaningful difference in helping to bring them home, the amici said, arguing that the act has more robust protections than the limited procedures of Army Regulation 290-5.

Congress, they said, designed NAGPRA's protections in recognition of the federal government's trust and treaty obligations to tribal nations.

The Catawba Nation, the amici said, has "heart-wrenching" experience in seeking the return of Wade Ayers, who died in 1904 at age 13 of what the Carlisle officials said was "vaccine fever" while attending the boarding school and has been interred there ever since.

Ayers' Catawba relatives fought for years for his repatriation, and because the Army insisted that NAGPRA does not apply to children in the Carlisle graveyard, they were forced to use the disinterment process of Army Regulation 290-5, according to the brief.

As a child with no lineal descendants to request his return under the Army's regulation, the Catawba Nation worked on his behalf. However, when Ayers' grave was disinterred in 2022, the Army found the remains of a girl instead.

According to the amici, the Army told the Catawba Nation and Ayers' relatives that it didn't know the precise location of his remains and could not facilitate his repatriation home.

The Catawba Nation believes that the federal government misplaced Ayers when it moved his body and the bodies of the other children buried at Carlisle in 1927 to make way for the expansion of the Army War College and the construction of a parking lot, according to the brief.

"Indeed, the Army admits in its motion to dismiss that its historical records associated with its movement of the cemetery are so poor that it is not sure the markers are correctly associated with the physical remains named on them," the amici said.

The Army still has not notified the Catawba Nation or Ayers' relatives of the location of his body or otherwise collaborated with them on finding it since the failed disinterment, according to the brief.

Instead, it quietly removed Wade's headstone, the amici argued.

The U.S. Army declined to comment on the amicus brief on Tuesday.

The United South and Eastern Tribes Sovereignty Protection Fund is represented by Dale W. Pittman of the Law Office of Dale W. Pittman PC and Kaitlyn E. Klass of the United South and Eastern Tribes Sovereignty Protection Fund.

The Catawba Nation is represented by its tribal counsel Lydia Locklear.

The Winnebago Tribe of Nebraska is represented by Gregory A. Werkheiser and Jessica R. G. Krauss of Cultural Heritage Partners PLLC, Danelle J. Smith of Big Fire Law & Policy Group LLP, and Beth Margaret Wright, Jason Searle and Wesley James Furlong of the Native American Rights Fund.

The U.S. Army is represented by Rebecca S. Levenson of the Office of the U.S. Attorney for the Eastern District of Virginia and Todd Kim and Peter Kryn Dykema of the U.S. Department of Justice.

The case is Winnebago Tribe of Nebraska v. U.S. Department of the Army et al., case number 1:24-cv-00078, in the U.S. District Court for the Eastern District of Virginia.

--Editing by Rich Mills.

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