

Army's Claims In Burial Dispute 'Unconscionable,' Tribe Says

By **Crystal Owens**

Law360 (June 11, 2024, 6:19 PM EDT) -- A Nebraska tribe seeking to repatriate the remains of two boys from an Indian boarding school cemetery in Pennsylvania has said the U.S. Army's claims that it is exempt from a federal law designed to protect Native American burial sites are "unconscionable."

Indigenous tribes are tasked with the "horrific responsibility" of locating and bringing home the remains of children "from places they never should have been in the first place," the Winnebago Tribe argued in a response Friday, and the U.S. Army exacerbates these challenges by violating the Native American Graves Protection and Repatriation Act.

"Defendants' stance is not only unconscionable, but their arguments for why they are exempt from federal law are irreconcilable with NAGPRA's plain language," the tribe said in the filing. "Defendants' actions defy the purpose of NAGPRA, which recognizes the right of Indian tribes to bring their relatives home expeditiously and in a culturally appropriate manner, and equips tribes with meaningful, enforceable legal mechanisms."

The tribe is asking a Virginia federal court to deny the Army's May 3 motion **to dismiss its lawsuit**, arguing that the Army's historical and present-day mistreatment and misappropriation of human remains demonstrate its misunderstanding that the Carlisle Cemetery is not a "holding or collection."

"Winnebago has clear rights under the Native American Graves Protection and Repatriation Act. The tribe has long been an advocate for the law, and it will continue to fight for its rights and to ensure that federal agencies abide by the law," Native American Rights Fund attorney Beth Wright, who is representing the tribe, said in a statement Monday.

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 United States was so relentless in its efforts in the forced assimilation of Indigenous individuals that by 1926, "more than eighty percent of school-age Indian children had been removed from their families," according to the tribe's response.

According to the Army, the requirements of NAGPRA don't apply to children interred at 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," it said in a memorandum supporting its motion to dismiss.

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 with support from professional archaeologists, board certified physical anthropologists and highly experienced professional cemetarians, it argued.

"Notwithstanding the challenges presented by the imperfect historical records of the cemetery, the research team has created an inventory of 214 of the 229 burial plots, including 166 of the 180 Native American plots," the Army stated.

According to the tribe's response, the Army cannot claim that it's exempt from NAGPRA's provisions because the boys' remains were not freely given to it, and it has no right to possess them. In addition, it argued, the Winnebago Tribe requested their repatriation and demonstrated cultural affiliation with a "preponderance of the evidence."

NAGPRA's provisions, it argued, apply regardless of whether the remains are part of a holding or collection.

The Army ignores provisions of the law that contemplate two circumstances under which human remains that are not necessarily part of a holding or collection can be repatriated, the Winnebago Tribe said.

Repatriation is considered when a federal agency or museum has not established the cultural affiliation of Native American remains and funerary objects pursuant to an inventory, the tribe argued, and nothing in NAGPRA's plain language requires them to be part of a holding or collection.

The second scenario contemplates repatriation when a federal agency or museum did not include Native American human remains in any inventory, it said.

Premised on the assertion that repatriation applies only to human remains that have been inventoried, the U.S. Army claims this proves that the boys' remains must be part of a holding or collection to be repatriated, according to the response.

Even if the Army is correct that provisions of NAGPRA only apply to Native American remains that are part of a museum or federal agency's holding or collection, the boys must nevertheless be returned home, the tribe argued.

The remains at the Carlisle Cemetery constitute a holding or collection, it said, arguing that precedent's interpretation of NAGPRA and the term "holding or collection" are governed by the Indian Canons of Construction.

The Indian canons — which provide that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" — are binding rules for interpreting statutes like NAGPRA that implicate tribal rights and interests that "are rooted in the unique trust relationship between the United States and the Indians," the Winnebago Tribe argued.

"Thus, while Winnebago and defendants interpret the definitions of the terms holding and collection differently, the Indian canons require the court to construe the definitions favorable to Indian tribes," it said.

The U.S. Department of Justice declined to comment on the tribe's response on Tuesday.

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.