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US Army Looks To Dismiss Tribe's Repatriation Lawsuit

By **Crystal Owens**

Law360 (May 6, 2024, 9:58 PM EDT) -- The U.S. Army is seeking to dismiss efforts by a Native American tribe to repatriate the remains of two boys from one of the largest former Indian boarding schools in the country, arguing that it is "ready and willing" to assist to return them to their final resting places.

According to the Army, the requirements of the Native American Graves Protection and Repatriation Act do not apply to the 180 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 says in a Friday **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 through support from professional archaeologists, board certified physical anthropologists and highly experienced professional cemetarians, it says.

"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 states.

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 last December to repatriate the remains of Samuel Gilbert and Edward Hensley.

"Today, Winnebago continues to experience the pain of knowing that Samuel's and Edward's spirits remain lost and unable to rest as they have been waiting to come home for nearly 125 years," it says in the Jan. 17 complaint that also seeks an injunction requiring the U.S. Army to repatriate the boys' remains.

The Army's position that the Carlisle Cemetery doesn't constitute a "holding" of Native American remains obfuscates the standard applicability of the law that determines the tribe's request, the tribe argues in the complaint.

Under NAGPRA, the actual standard is whether Native American remains are possessed or controlled by federal agencies, the Winnebago Tribe says.

"It is obvious and undisputed that Samuel's and Edward's remains are Native American human remains in defendants' possession and

control. And even if relevant, defendants' position is incorrect, as Samuel's and Edward's remains are part of a holding or collection for the purposes of NAGPRA," the tribe contends. "By refusing to repatriate Samuel and Edward to Winnebago pursuant to NAGPRA, defendants violated federal law, unlawfully denied Winnebago its right to have Samuel and Edward repatriated and undermined Congress's objectives in enacting NAGPRA in 1990."

There's no dispute that the cemetery in Carlisle, Pennsylvania, includes Native American remains, the Army says in its memo looking to dismiss the lawsuit for failure to state a claim.

However, under NAGPRA regulations, a "holding or collection" means an accumulation of one or more objects, items or human remains for any temporary or permanent purpose, it argues, adding that those purposes include academic interest, accession, catalog, comparison, conservation, forensic and scientific interest.

"In our cemeteries we commemorate and honor the dead; we do not hoard or amass the dead," the Army states.

As the Winnebago Tribe rightfully asserts, the boarding school system for Native Americans "is yet another source of national shame," and " ... regardless of the stated intent of its creators and administrators, it cannot be denied that that system far too often served as an instrument of racism and abuse," the Army says.

But NAGPRA is not a vehicle for rendering judgment on the Native American public school system or for affirmatively relocating the contents of the cemeteries where students at those schools were laid to rest, it argues.

"NAGPRA Sections 3003 and 3005 are concerned with archaeological collections, not graveyards," the Army asserts.

According to the Native American Rights Fund, the history of the Carlisle site represents a haunting legacy of Indian boarding schools that were weaponized against Indigenous children and tribal nations in the late 19th and 20th centuries.

Gen. Richard Henry Pratt, who founded the Carlisle Indian Industrial School, characterized the mission of boarding schools as being to "kill the Indian, save the man," NARF said.

"The Army ignores how it has treated these remains as a tourist attraction, subject of research and anything else to suit its purposes. Winnebago simply seeks to direct the handling and disposition of its relatives' remains, which never should have been at Carlisle to begin with," Beth Wright, an attorney with the Native American Rights Fund told Law360 on Monday.

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

The Carlisle boarding school 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.

According to the tribe's lawsuit, Samuel Gilbert and Edward Hensley were sent by the Army to the boarding school on Sept. 7, 1895.

Hensley and Gilbert were to attend the school for five years, but died four years and 45 days later, respectively, of unknown causes, the tribe says. Records show that Carlisle officials never notified their families or the tribe of their deaths and as such, they have no choice or input about where or how they are buried, the tribe notes.

The burial site has come under increased scrutiny throughout the past year as Native Americans have ramped up pressure on lawmakers to enforce provisions of NAGPRA, including a December 2023 **update to the law** that gives tribes greater involvement in determining how and to whom remains and sacred objects should be returned.

Once the law went into effect in January, museums and universities throughout the country **were forced to cover** their Native American displays unless they had prior consent from lineal descendants, tribes or Native Hawaiian Organizations before allowing any exhibition of, access to or research of human remains and cultural items.

Last September, the U.S. Army **agreed to return** the remains of Amos LaFromboise and Edward Upright after members of the Sisseton Wahpeton Oyate and Spirit Lake Tribe worked for nearly seven years for a plan that would allow the boys to be reburied with specific tribal ceremonies.

Officials with the Office of Army Cemeteries **had agreed** in May 2023 to exhume the remains of five Native American children, including LaFromboise and Upright.

The remains of Beau Neal of the Northern Arapaho Tribe, Edward Spott of the Puyallup Tribe and Launy Shorty of the Blackfeet Nation were also to be returned home, the OAC said.

Thus far, the remains of 32 children have been returned to relatives for reburial out of the cemetery, according to the Army.

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 Kristen Becker.