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'Tragic History' Can't Rewrite Law In Burial Row, Army Says

By Crystal Owens

Law360 (June 26, 2024, 7:05 PM EDT) -- The U.S. Army says the nation's "tragic history" of injustices done to children through the Indian Boarding School system does not give a federal district court license to rewrite a law aimed at protecting Indigenous burial sites, arguing that a Nebraska tribe's challenge over the repatriation of two children should be dismissed.

At the center of the dispute between the Winnebago Tribe of Nebraska and the U.S. Army is if the remains of at least 180 Native American children, now buried at what once was the Carlisle Indian Industrial School in Pennsylvania, constitutes a "holding or collection" under the provisions of the Native American Graves Protection and Repatriation Act.

"As we have stated, this is a matter of national shame. For the victims' kin, and for members of the affected tribes, it is also no doubt a matter of heartache. But the tragic history of that system does not license this court to rewrite NAGPRA, which is what plaintiff and amici are asking the court to do," the Army said in a **response** on Friday.

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.

In fighting the Army's May 3 motion to **dismiss the lawsuit**, the tribe argued that 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 that 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, in response, said those provisions cannot rescue the tribe's lawsuit since they are concerned with artifact collections, not grave sites.

Its reading of those provisions, the Army argued, requires "the implausible conclusion that Congress intended to require the 'expeditious' exhumation of thousands of grave sites without even a hint, either in the language or the history of the statute, that that was what Congress had in mind."

The ordinary meaning of "holding or collection" within NAGPRA does not apply to cemeteries, it said in the response.

And efforts by the Winnebago Tribe and tribal amici "to save an untenable statutory interpretation by invoking interpretive rules are simply not up to task," it argued.

In backing the Nebraska tribe, the United South and Eastern Tribes Sovereignty Protection Fund and the Catawba Nation of South Carolina argued in an amicus brief earlier this month that 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.

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.

Firing back at those claims, the Army argued that the tribe's reading of NAGPRA assumes that Congress intended to hide one phrase of an all-encompassing requirement to return any remains possessed or controlled by a federal agency regardless of the law's other acts or provisions.

Congress, it said, was referring to remains in "holdings or collections" that did not get captured in NAGPRA's Section 3003 inventory requirement. That requirement says each federal agency and museum in possession or control over "holdings or collections" of Native American remains and associated funerary objects must compile an inventory of such items to the extent possible based on geographical and cultural affiliation.

There are several situations under the statutory scheme in which disinterred remains in a holding or collection would not end up on a Section 3003 inventory, the Army said.

For example, remains that were discovered before 1990 would align with Section 3002, which sets out detailed responsibilities and rights with respect to Native American cultural items unearthed on federal or tribal land after NAGPRA's passage, according to the response.

It is more likely that Congress intended for NAGPRA's provisions requiring the return of un-inventoried Native American remains to fill gaps in the inventory-linked repatriation process for holdings and collections rather than to create a separate, all-encompassing requirement outside that process, the Army said.

In enacting NAGPRA, Congress sought to end the looting of Native American grave sites, provide for the return of Native American remains later unearthed and require museums and federal agencies to document and repatriate their collections of Native American cultural items, according to the response.

"NAGPRA's language and legislative history plainly focus on those two goals, and nowhere suggest an intent to require the exhumation of existing gravesites," the Army said.

Counsel for the parties could not immediately be reached for comment on Wednesday.

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 Vaqas Asghar.