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Neb. Tribe Appeals Ruling To 4th Circ. In Army Burial Row

By **Crystal Owens**

Law360 (October 22, 2024, 5:13 PM EDT) -- A Nebraska tribe will ask the Fourth Circuit to overturn a lower court's decision that determined that the U.S. Army isn't required to repatriate the remains of two Indigenous children from an Indian Boarding School cemetery in Pennsylvania, arguing that the ruling is an affront to tribal sovereignty.

The Winnebago Tribe of Nebraska on Monday filed its **notice of appeal** to the Fourth Circuit in a Virginia federal district court and will argue that the remains of Samuel Gilbert and Edward Hensley are allowed to be exhumed from the Carlisle Indian Industrial School under the Native American Graves Protection and Repatriation Act, according to its attorneys.

"We have encountered similar challenges in litigating cases such as these and have always persevered. This case is no different. We will continue to advocate for our rights and the dignity of our ancestors," Beth Wright, a Native American Rights Fund attorney representing the tribe, said in a statement after the lower court's ruling.

In August, U.S. District Judge Claude M. Hilton **determined** that the boarding school cemetery is not a "holding or collection" under NAGPRA and that requiring the Army to exhume the children's remains would invert the law that's designed to respond to the illegal excavation of burial sites on tribal and federal lands.

"NAGPRA's first objective is to protect Native American burial sites and to require excavation of such sites only by permit," Judge Hilton said. "While the court acknowledges Winnebago's interest in possessing Samuel and Edward's remains, the court will not order the excavation of buried remains."

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 tribe sued the U.S. Army in January, arguing it violated provisions of NAGPRA when it denied the tribe's request in December to repatriate the children's remains.

The Army sought to dismiss the lawsuit in June, arguing that the site **is exempt from NAGPRA** 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.

It 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 cemeterians, the Army argued.

According to attorneys representing the tribe, the lower court's ruling must be corrected to keep the U.S. Army from continuing to disregard the rights of tribal nations that extend beyond the immediate

issue of repatriating the remains.

The Army, they argued, is defying Congress' intent of the law and "perpetrating the very injustices that led to the creation of NAGPRA"

Congress created the law in 1990 to ensure what the Winnebago Tribe seeks in its lawsuit, the attorneys said, which is to vindicate the sovereign prerogative of tribal nations to facilitate the culturally appropriate repatriation of their relatives' remains in the wrongful possession or control of federal agencies.

Danelle Smith, general counsel for the tribe, said the lower court's ruling is a "temporary setback, not a defeat."

"The court's decision does not align with the established principles of federal Indian law and policy, which are designed to respect tribal sovereignty," Smith said in a statement.

According to Judge Hilton's ruling, the tribe disregarded provisions of NAGPRA that address repatriation when inventory and summary processes establish cultural affiliation that only apply to holdings or collections.

The tribe, the judge said, argued that Congress hid a "far-reaching requirement" in those provisions to return any remains possessed or controlled by a federal agency.

"But Congress does not 'hide elephants in mouseholes,'" Judge Hilton said in the order, citing the 2001 Supreme Court ruling in *Whitman v. American Trucking Associations Inc.*

If the provisions of NAGPRA that govern repatriation through inventory and cultural affiliation establishments is untethered to the law's definition of a "holding or collection," it could compel exhumation of tribal graves anywhere on federal land — including those created according to the descendants' wishes or tribal custom, according to the order.

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 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, nearly 1,000 Indigenous children died in boarding schools run by the federal government and churches over the course of 150 years, according to **a 2024 report** by the U.S. Department of the Interior.

"This case transcends the repatriation of two young boys; it strikes at the heart of tribal sovereignty and the sacred duty to honor and ensure Native American ancestors are treated with the dignity and respect they deserve," Gregory Werkheiser, an attorney with Cultural Heritage Partners, said in a statement. "We're eager to take this fight to the Fourth Circuit and secure a ruling that holds federal agencies accountable to fully comply with NAGPRA. The fight for justice isn't over, and we're confident the Fourth Circuit will correct this mistake."

The Department of Justice declined to comment on the appeal on Tuesday. Counsel for the tribe couldn't immediately be reached for further comment.

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. A case number for the U.S. Court of Appeals for the Fourth Circuit wasn't available on Tuesday.

--Editing by Rich Mills.

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