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## Army Exploits Pa. Boarding School Cemetery, 4th Circ. Told

By **Crystal Owens**

Law360 (January 24, 2025, 4:24 PM EST) -- The U.S. Army is exploiting an Indian boarding school cemetery as a repository for human remains, a Nebraska tribe told the Fourth Circuit, arguing that the military institution is conducting research and other activities that serve its goals rather than respecting the sovereignty and traditions of Indigenous people.

The Winnebago Tribe of Nebraska, which is appealing a lower court's ruling that determined that the Army is not required to repatriate the remains of two Indigenous children from the Carlisle Indian Industrial School in Pennsylvania, in a Tuesday trial **brief**, argued that the Army refuses to follow the provisions of the Native America Graves Protection and Repatriation Act.

"Tribal nations fought hard for their rights under NAGPRA. It is the only federal law that requires the repatriation of Native American human remains, which is exactly what Winnebago seeks here," Native American Rights Fund Staff Attorney Beth Margaret Wright said in a Thursday statement.

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

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 last January, arguing it violated provisions of NAGPRA when it denied the tribe's December 2023 request to repatriate the children's remains.

According to the brief, the U.S. Army conducted ground-penetrating radar surveys to study the cemetery and locate any additional remains that may have been left beneath a parking lot.

Nearly a decade after the boarding school closed, the Army expanded the campus into what is now the Army War College, the tribe said. During its construction, the remains of many children — including Samuel and Edward — were disinterred and "hastily moved" to their current location at Carlisle Cemetery.

At least 14 graves in the cemetery are now marked "unknown" as a result of the transfer, the Winnebago Tribe said, and coffins crumbled as they were handled, remains commingled and other markers were lost or mislabeled.

As part of the Army's public tours of the site, the boarding school cemetery is a feature that focuses on the site's history, the tribe added.

"These tours whitewash the history of Carlisle, downplaying the suffering and deaths of the children buried there and distorting the historical record," it told the appellate court. "Defendants have refused to repatriate the remains of Native children buried at Carlisle Cemetery, citing the cemetery's historical significance and claiming that repatriation would disrupt its 'tranquility.'"

In arguing **to dismiss the lawsuit** last June, the Army said 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.

According to the motion, the Army is 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 former Carlisle Indian Industrial School 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, although the agency has said that number is likely much higher.

Former President Joe Biden **declared the site** a national monument last month, saying the designation will help to ensure that a shameful era of American history is never forgotten or repeated.

The Winnebago Tribe, in its Tuesday brief, told the Fourth Circuit that the lower court erred in dismissing its case by misinterpreting NAGPRA's repatriation provisions.

The plain language of the law does not require Native American human remains to be part of a "holding or collection" to be subject to repatriation, it argued.

Imposing such a requirement undermines NAGPRA's purpose of broadly enabling the return of Indigenous remains to tribes, correcting historical injustices and restoring their control over their relatives' remains, the tribe added.

"I, as a mother and grandmother, would want someone to bring my child back home, but I also want it to be done in a good way and NAGPRA ensures that that is possible," Winnebago Tribal Historic Preservation Officer Sunshine Bear said in a Thursday statement.

Even if the provisions of NAGPRA required Native American remains to be part of a holding or collection, it's clearly established that the Army has collectively managed the remains of Edward and Samuel and used the cemetery for research, education and interpretive purposes, the Winnebago Tribe said.

All these activities, it argued, are consistent with the ordinary meanings of holding and collection under NAGPRA's implementing regulations.

The Winnebago Tribe argued in its appeal that the lower court was wrong to rely on a 2014 Third Circuit ruling in **Thorpe v. Borough of Thorpe** , to dismiss its lawsuit.

According to the brief, that case concerned a fundamentally different legal issue on whether a municipality qualified as a museum under NAGPRA and the applicability of repatriation provisions to Native American human remains buried in the ground.

That case, it said, involved a consensual burial decision made by next of kin, whereas neither the Winnebago Tribe nor Samuel or Edward's families consented to their burials or reburials at the Carlisle cemetery.

Judge Hilton, in dismissing the lawsuit last August, said that the Fourth Circuit has yet to address NAGPRA's scope, however there is persuasive authority in the Thorpe ruling.

Although that case presented a different question, it addressed the law's scope in the challenge by the descendants of Jim Thorpe, a member of the Sac and Fox Nation and an Olympic gold

medalist who attended the Carlisle Indian Boarding School, who sought to disinter his remains from the Pennsylvania borough for reburial in his Oklahoma birthplace.

The Third Circuit held that the borough is not a museum that is subject to NAGPRA's inventory and repatriation requirements, according to the order.

"Here, no one questions the Army is a federal agency under [NAGPRA's provisions], but the Third Circuit's reasoning is instructive," Judge Hilton said.

The Department of Justice declined to comment on the case on Friday.

The Winnebago Tribe of Nebraska is represented by Gregory A. Werkheiser and Jessie Barrington 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 24-2081, in the U.S. Court of Appeals for the Fourth Circuit.

--Editing by Vaqas Asghar.