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## Army Fights Neb. Tribe's Bid To Repatriate Children's Remains

By **Crystal Owens**

Law360 (April 30, 2025, 6:12 PM EDT) -- The U.S. Army is fighting an appeal by a Nebraska tribe to undo an order denying the repatriation of two of its children buried at a Pennsylvania boarding school cemetery, telling the Fourth Circuit that the lawsuit fails to allege facts under a law designed to protect Indigenous burial sites.

According to the Army, the lawsuit fails to allege facts establishing that the remains at issue fall within the scope of the Native American Graves Protection and Repatriation Act. The remains are those of individuals who died while at the boarding school and were buried in the school's cemetery — circumstances that do not make the remains a part of federal "holdings" or "collections," as those terms are commonly understood or defined by NAGPRA's implementing regulations.

Nothing in the plain language of Sections 3003 or 3005(a)(4) requires, or even contemplates, repatriation of remains interred in a cemetery, it told the Fourth Circuit.

The remains of the children, who were residents of the former Carlisle Indian Industrial School when they died and are buried in its cemetery, do not constitute a "collection" or "holding" under provisions of the Native American Graves Protection and Repatriation Act, or NAGPRA — terms commonly understood or defined by the law's implementing regulations, the U.S. Army argued in a Tuesday **response**.

"Nothing in the plain language of Sections 3003 or 3005(a)(4) requires, or even contemplates, repatriation of remains interred in a cemetery," it told the appellate court.

The Winnebago Tribe of Nebraska is challenging U.S. District Judge Claude M. Hilton's August **order**, which held that the Army is not required under NAGPRA to repatriate the remains of Samuel Gilbert and Edward Hensley from the former boarding school's cemetery.

According to Judge Hilton's ruling, the boarding school cemetery is not a "holding or collection" under NAGPRA and requiring the Army to exhume the children's remains 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 interred on boarding school grounds before it closed in 1918, according to the Office of Army Cemeteries.

According to the Army, Section 3003 of NAGPRA directs agencies and museums to prepare inventories of "holdings or collections" of human remains and associated funerary objects and to identify their geographical and cultural affiliations.

Section 3005(a)(4) of the law says that when the cultural affiliation of Indigenous remains and cultural objects has not been established in an inventory prepared under Section 3003, they can be returned to a tribe that can show those ties through a preponderance of evidence.

The regulations define a "holding or collection" under Section 3003, as an accumulation of one or more objects, items or human remains for any temporary or permanent purpose, including: academic interest, accession, catalog, comparison, conservation, education, examination, exhibition, forensic purposes, interpretation, preservation, public benefit, research, scientific interest or study, the Army told the court.

"Therefore, repatriation of the students' remains is not required under Section 3005(a)(4).

NAGPRA does not define those terms, but both the ordinary usage and regulatory definition require some affirmative act of gathering or acquisition by the government for specific purposes, which is not present here," it argued.

The Winnebago Tribe of Nebraska sued the U.S. Army in January 2024, arguing it violated provisions of NAGPRA when it denied the tribe's December 2023 request to repatriate the children's remains.

According to its brief to the Fourth Circuit, the Army is **exploiting the cemetery** as a repository for human remains by conducting research and other activities that serve its goals rather than respecting the sovereignty and traditions of Indigenous people.

In addition, it told the appellate court, the 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 military institution 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.'"

The Army countered the tribe's arguments on Tuesday, saying its interpretation of Section 3005(a)(4) suggests that the provision "provides for repatriation when a federal agency or museum did not, for whatever reason, create an inventory of remains in its possession or control."

But if Congress had intended to so dramatically broaden the scope of the repatriation requirement — by requiring repatriation simply if an inventory is not compiled or created — it would have done so using clear language to that effect, the Army argued.

Instead, it said, Congress focused Section 3005(a)(4) on whether remains addressed in Section 3003 are included in an inventory that was prepared pursuant to Section 3003.

"In other words, Section 3005(a)(4) is directed to repatriation of remains that are subject to the inventory requirement, but are not included on a prepared inventory," the Army said.

The Winnebago Tribe's arguments regarding treaties, the Indian Canons of Construction and NAGPRA's legislative history fare no better, the Army told the Fourth Circuit.

The government interred the children "for the purpose of giving their remains a place to rest," it argued, so they do not satisfy either the ordinary or regulatory definition of "holdings" or "collections" under NAGPRA.

According to the response, the federal government does not dispute that ground-penetrating radar was used at the cemetery, however, the tribe's lawsuit alleges no facts establishing that the surveys were conducted for the purpose of studying the remains.

The Army, it said, does not conduct tours that exploit the cemetery.

"At the [Carlisle] Barracks, the government acknowledges the presence of the Carlisle Cemetery in pamphlets that are made available for historical walking tours of the barracks. The tours, which are not available to the general public, have never included the burial ground as a 'stop' on the tour," it argued.

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 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 Adam J. Gustafson, Thekla Hansen-Young and Tamara Roundtree of the U.S. Department of Justice's Environment and Natural Resources Division.

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.

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