

COMPENSATION FOR INDIGENOUS LANGUAGE LOSS

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ABSTRACT

The destruction of Indigenous languages in both the United States and Canada has largely been the result of state-sanctioned boarding schools built and operated on the premise of destroying Indigenous culture. The United Nations Declaration on the Rights of Indigenous Peoples establishes international standards through which states can reconcile such boarding school histories. While Canada has aligned itself with these international standards to take accountability and provide compensation, the United States has lagged behind. This Note explores the history of Indigenous boarding schools, the legal channels through which compensation for Indigenous language loss has been provided in Canada, and how compensation for Indigenous language loss ought to be provided in the United States.

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INTRODUCTION

The United States and Canada operated or supported Indian boarding schools throughout the nineteenth and twentieth centuries with the express purpose of forcibly assimilating Indigenous people. Critical to achieving this purpose was the targeted destruction of Indigenous language. The United States and Canada operated Indian boarding schools with this purpose for over 150 years, resulting in catastrophic Indigenous language loss across North America.¹ Today, the Indigenous languages that survived this cultural genocide are nearly all in danger of going extinct.²

¹ BRYAN NEWLAND, BUREAU OF INDIAN AFFS., FED. INDIAN BOARDING SCH. INITIATIVE INVESTIGATIVE REP. 68, 98 (2024). The impact of these boarding schools on American Indian communities extends far beyond language loss. *See, e.g., id.* at 93–95. The scope of this Comment is restricted, however, to language loss.

² *See* UNESCO, ATLAS OF THE WORLD’S LANGUAGES IN DANGER 117 (Christopher Moseley ed., 3d ed. 2010); Rebecca Nagle, *The U.S. Has Spent More Money Erasing Native Languages than Saving Them*, HIGH COUNTRY NEWS (Nov. 5, 2019), <https://www.hcn.org/issues/51-21-22/indigenous-affairs-the-u-s-has-spent-more-money-erasing-native-languages-than-saving-them/> [https://perma.cc/N9ZN-7VWT].

The international community began to turn its attention to Indigenous rights early in the twenty-first century, recognizing Indigenous rights, acknowledging the damage states have done to Indigenous populations within their national boundaries, and directing states to take action to re-establish and protect Indigenous rights.³ These rights include a right to educate future generations in their native language.⁴

How the United States and Canada have responded to these international calls for accountability and recovery have stark contrasts. While the United States has relegated its role in revitalizing Indigenous language to insufficient *ex gratia*⁵ schemes, Canada has allowed itself to be held accountable in a court of law, and compensation for revitalizing Indigenous languages has far surpassed that achieved in the United States.⁶

This Note will provide a brief history of the Indian boarding schools operated in Canada and the United States, their purpose, and their overall effect on Indigenous language loss in North America. The Note will then assess how the United States and Canada have legally compensated Tribes for language loss caused by the Indian boarding schools, and how their efforts compare to internationally recognized Indigenous rights. Finally, this Note will assess the legal avenues to compensation available in the United States for communities affected by language loss resulting from the Indian boarding schools. This argument is established in four parts.

Parts II and III assess the United States' accountability under federal tort law and treaty law. Part III assesses how language loss itself is better recognized as harm to Tribal entities rather than to individuals. Part IV addresses how the statute of limitations impacts liability for the United States and argues that any such time bar should be equitably estopped from being raised, allowing Indigenous tribes to bring action against the United States government.

³ See generally G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (broadly recognizing the harm done to indigenous peoples and their inalienable rights).

⁴ See *id.* art. 13 (“Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies...”).

⁵ Meaning “as a favor rather than as a matter of right.” *Ex Gratia*, DICTIONARY.COM, <https://www.dictionary.com/browse/ex%20gratia> [<https://perma.cc/9NK5-CHUN>] (last visited Feb. 19, 2025).

⁶ See Larisa Warhol, *Legacies of NALA: The Esther Martinez Native American Languages Preservation Act and Implications for Language Revitalization Policy and Practice*, 51 J. AM. INDIAN EDUC. 70, 83 (2012); *Gottfriedson v. Canada*, [2021], F.C.R. T-1542-12 (Can.); see also *McLean v. Canada*, [2019], Settlement Agreement T-2169-16 (compensating Indian Day School survivors) (Can.).

BACKGROUND

I. INDIGENOUS LANGUAGE LOSS AND INDIAN BOARDING SCHOOLS IN THE UNITED STATES

Starting in 1819 and continuing through at least 1969 the United States operated or supported at least 417 Indian boarding schools across thirty-seven states with the express purpose of forcibly assimilating Indigenous children by employing militarized methods to destroy Indigenous identity.⁷ To “kill the Indian...save the man” became de facto policy.⁸ The United States noted the exceptional bond between parents and children in Indigenous communities and believed that complete isolation of children from their “savage antecedents” was required to destroy Indigenous identity.⁹

Attendance for Indian boarding schools was coercive. Congress authorized the Commissioner of Indian Affairs to force school attendance through withholding of rations, clothing, and other annuities.¹⁰ Indian

⁷ NEWLAND, *supra* note 1, at 92-93. Federal funding for the boarding schools was initiated by what is more commonly known as the “Civilization Fund Act” or the “Indian Civilization Act,” passed on March 3, 1819. *See* An Act Making Provision for the Civilization of the Indian Tribes Adjoining the Frontier Settlements, ch. 85, 3 Stat. 516, 516-17 (1819) (“That for the purpose of providing against the further decline and final extinction of the Indian tribes, adjoining the frontier settlements, and for introducing among them the habits and arts of civilization, the President of the United States shall be, and he is hereby, authorized to employ capable persons of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic; and for performing such other duties as may be enjoined, according to such instructions and rules as the President may give and prescribe for the regulation of their conduct in the discharge of their duties.”); *see also* S. Con. Res. 28, 117th Cong. (2022) (acknowledging the Indian Civilization Act’s horrific legacy). The 417 count is strictly for boarding schools that received federal funding and does not include other educational institutions that operated with only state or without governmental funding. The 417 count is strictly for boarding schools that received federal funding and does not include other educational institutions that operated with only state or without governmental funding. *See* 1 BRYAN NEWLAND, BUREAU OF INDIAN AFFS., FED. INDIAN BOARDING SCH. INITIATIVE INVESTIGATIVE REP. 87 (2022) (discussing characterizations of other educational institutions that mainly involved Indian children).

⁸ *See* Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 45, 45-47 (Isabel C. Borrows ed., 1892).

⁹ *Haaland v. Brackeen*, 599 U.S. 255, 298 (2023) (Gorsuch, J., concurring) (internal citations omitted).

¹⁰ Law of Mar. 3, 1893, ch. 209, § 1, 27 Stat. 628, 635 (repealed 2022) (authorizing the Secretary of the Interior to “establish such regulations as will prevent the issuing of rations or the furnishing of subsistence either in money or in kind to the head of any Indian family for on account of any Indian child or children between the ages of eight and twenty-one years who shall not have attended school during the preceding year in accordance with such regulations”).

families often hid their children or told them to run into the wilderness to escape abduction; in response, official policy went so far as to sanction militarized-style raids to kidnap Indigenous children and force their attendance.¹¹ In instances where there was not enough room for an Indian child to attend local boarding schools, the child was relocated to schools in other states without parental consent.¹² By 1926, nearly 83 percent of American Indian school-age children were attending a boarding school.¹³ Many of these schools operated under the principle of compelling Indigenous children to adopt Christianity, as Christian leaders at the time endorsed assimilation as religious conversion.¹⁴

Effective knowledge of an Indian child's Native language was effectively beaten out of them, with intergenerational impact. Nearly all of these children were punished for speaking their Native language instead of English, even if the child did not know English.¹⁵ Punishments varied in severity, but included flogging, withholding meals, whipping, and solitary confinement.¹⁶ Survivors of the Indian boarding schools would often not allow their own children to learn their Native tongue, both in fear that their children would be subjected to similar treatment and as a trauma response to what they endured.¹⁷ As if these punishments were not harsh enough, United States policy also encouraged isolating students from their fellow Tribal members, so as to isolate them from anyone who might know their language.¹⁸ This further discouraged any use of their Native tongue and forced the students to use English.¹⁹

¹¹ See COMM'R OF INDIAN AFFS., ANN. REP. TO THE SEC'Y OF THE INTERIOR XLI 199 (1886) (statement of U.S. Indian Agent) ("When called upon for children, the chiefs, almost without exception, declared there were none suitable for school in their camps...it became necessary to visit the camps unexpectedly...seize such children...and take them away to school, willing or unwilling. Some hurried their children off to the mountains or hid them away in camp, and the police had to chase and capture them like so many wild rabbits. This unusual proceeding created quite an outcry. Tho men were sullen and muttering, the women loud in their lamentations, and the children almost out of their wits with fright."); see also Law of Mar. 3, 1893, ch. 209, § 1, 27 Stat. 628, 635 (repealed 2022) (authorizing the Secretary of the Interior to withhold rations and funds to Indian families withholding their children from attending boarding schools).

¹² COMM. ON LAB. & PUB. WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 91-501, at 12 (1st Sess. 1969).

¹³ DAVID W. ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928, at 31 (2d ed. 2020).

¹⁴ NEWLAND, *supra* note 1, at 48-49, 71.

¹⁵ See *id.* at 54.

¹⁶ *Id.*

¹⁷ *Id.* at 87.

¹⁸ *Id.* at 40.

¹⁹ *Id.*

Transgenerational trauma inflicted by the boarding schools impacted physical health as well. American Indians who attended boarding school had increased risk of developing chronic physical health problems, and so did their children.²⁰ Particularly, children of Indian men, who already experienced more physical and sexual abuse than women at the boarding schools and whose punishments were associated with their language use, had an increased chance of developing chronic illnesses themselves.²¹ This process had a duplicative effect, as the children of boarding school attendees often attended boarding schools themselves.²² This brutal and systematic attack on language, which often took form in physical abuse, extended, unsurprisingly, to unique and demonstrable physical detriment.

While the damage of such pervasive, coercive, and destructive policies is well-known to Indigenous communities across America,²³ it has only been recently recognized by the United States government. In 2022 and 2024, the United States Department of the Interior officially recognized that federal Indian boarding schools discouraged or prevented the use of Tribal languages (and cultural practices at large) through corporal punishment, violence, and induced trauma.²⁴ The Department of the Interior estimates that the United States government spent over \$23 billion between 1871 and 1969 in supporting federal Indian boarding schools.²⁵ The intentional, cultural genocide conducted by the United States has resulted in nearly all of the Indigenous languages still spoken in the United States today in danger of going extinct.²⁶

²⁰ NEWLAND, *supra* note 1, at 56-57.

²¹ This process, of experiencing trauma that introduces genetic alteration passed to children, is known as epigenetic inheritance. *Id.*

²² NEWLAND, *supra* note 1, at 90.

²³ See Jennifer Davis, *Orange Shirt Day and the Federal Indian Boarding School Initiative*, LIBR. OF CONG.: IN CUSTODIA LEGIS L. LIBRS. OF CONG. (Sep. 30, 2024), <https://blogs.loc.gov/law/2024/09/orange-shirt-day-and-the-federal-indian-boarding-school-initiative/> [<https://perma.cc/8XWN-6YPN>].

²⁴ See NEWLAND, *supra* note 1, at 94-95.

²⁵ *Id.* at 18.

²⁶ See Scott Detrow & Avery Keatley, *The Race to Save Indigenous Languages*, NPR (Feb. 25, 2024, at 17:50 ET), <https://www.npr.org/2024/02/25/1233819688/the-race-to-save-Indigenous-languages> [<https://perma.cc/857Q-CFU9>].

II. LANGUAGE AND CULTURAL LOSS IN INDIAN RESIDENTIAL SCHOOLS
IN CANADA

The Canadian government operated similar boarding schools, called “residential schools.”²⁷ The Canadian government removed over 150,000 Indigenous children—an estimated over thirty percent of school-aged Indigenous children in 1945—²⁸from their families and placed them in residential schools between 1870 and 1997.²⁹ Attendance in Canadian boarding schools was technically voluntary, but by 1920 the government was allowed to compel placement of any Indigenous child not being “properly” educated into a boarding school.³⁰ Government agents had further authority to return children attempting to run away from boarding schools.³¹ The goal of these boarding schools was the same—“kill the Indian in the child”—where children were “forced to unlearn their languages.”³²

Punishments in Canadian residential schools for children expressing their Native customs or tongue were similar to those in the United States’ Indian boarding schools: meals withheld, forced isolation, electrical shocks, pushing needles through the child’s tongue, and sexual abuse.³³ Many children, upon returning home to their families after being separated for years, no longer had a shared language with their own parents.³⁴ The resulting trauma and loss of language were similar, with nearly three quarters of Indigenous languages of Canada being in danger of going extinct.³⁵

The Canadian government has since made great strides to take accountability for its boarding school history. This accountability was spurred by repeated lawsuits over the course of many years by survivors

²⁷ See TRUTH & RECONCILIATION COMM’N OF CAN., *HONOURING THE TRUTH, RECONCILING FOR THE FUTURE 2* (2015) (Can.).

²⁸ *Id.* at 3, 62.

²⁹ NEWLAND, *supra* note 1, at 68.

³⁰ TRUTH & RECONCILIATION COMM’N OF CAN., *supra* note 27, at 62.

³¹ *Id.* at 61.

³² *Id.* at 375.

³³ See Kitigan Zibi, *These Schools Are Our Schools*, THE ECONOMIST, (Oct. 19, 2013), <https://www.economist.com/the-americas/2013/10/19/these-schools-are-our-schools> [<https://perma.cc/RR7W-MFFG>]; Chico Harlan & Amanda Coletta, *Residential Schools Banned Native Languages. The Cree Want Theirs Back*, WASH. POST (July 27, 2022), <https://www.washingtonpost.com/world/2022/07/27/canada-first-nations-Indigenous-language-cree/> [<https://perma.cc/NC7N-QX6X>].

³⁴ TRUTH & RECONCILIATION COMM’N OF CAN., *supra* note 27, at 82-83.

³⁵ UNESCO, *supra* note 2, at 118.

of the boarding schools against the government and boarding school operators, which eventually resulted in the 2006 Indian Residential Schools Settlement Agreement (IRSSA).³⁶ IRSSA called for financial compensation, healing initiatives, and the formation of the Truth and Reconciliation Commission of Canada (TRC), to create a comprehensive report on the boarding schools, laying a foundation for reconciliation.³⁷ While loss of language was initially not recognized as a cognizable damage to the survivors who brought these lawsuits and a statute of limitations often barred any sort of recovery for the victims, the TRC chastised the Canadian legal system for its refusal to “survivor’s claims [relating to loss of language] on the merits.”³⁸ The TRC further recommended that the government not rely on such limitations statutes.³⁹

III. THE UNITED STATES’ TRUST RELATIONSHIP AND LAWS AND TREATIES IMPACTING COMPENSATION FOR VIOLATING INDIGENOUS LANGUAGE RIGHTS

When discussing the United States’ obligation to Indians, it is necessary to address the trust relationship. The United States’ attempts to fulfill its responsibilities within the trust relationship have been insufficient when it comes to the language loss endured by tribes. The attempts also fall short of international standards on the rights of Indigenous peoples set by the United Nations.

Before the boarding school project began, the United States (at least, purportedly) entered into a trust relationship with tribes that affirmed their ability to self-govern.⁴⁰ The trust relationship between tribes and the

³⁶ IRSSA created the Truth and Reconciliation Commission of Canada (“TRC”) to “[Bring] closure to the legacy of Indian residential schools lies at the heart of reconciliation and a renewal of the relationships between Indigenous peoples who attended these schools, their families and communities, and all Canadians.” See *Indian Residential Schools Settlement Agreement*, GOV’T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/1571581687074> [https://perma.cc/PKX5-936U] (last visited Feb. 24, 2026); see also TRUTH & RECONCILIATION COMM’N OF CAN., *supra* note 27, at 1–3, 137, (acknowledging that individual and collective harms had yet to be redressed, even after previous litigation and Canada’s official apology in 2008).

³⁷ *Indian Residential Schools Settlement Agreement*, *supra* note 36.

³⁸ TRUTH & RECONCILIATION COMM’N OF CAN., *supra* note 27, at 166–67.

³⁹ *Id.* at 167 (“We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they conform with the principle that governments and other entities cannot rely on limitation defenses to defend legal actions of historical abuse brought by Aboriginal people.”).

⁴⁰ See Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 ME. L. REV. 305, 306 (2023) (noting that this protective obligation is the “dark matter” of federal

United States is grounded in treaties and international law, where tribes surrendered vast amounts of lands and resources in exchange for protection, aid, and security on reservations.⁴¹ The Supreme Court recognized that a tribe's right to self-governance was not extinguished when it entered into this trust relationship and further affirmed that the United States was obligated to safeguard tribes' welfare as part of the trust relationship.⁴²

This trust relationship is further exercised by a set of interpretive rules protecting tribes when it comes to deciphering congressional acts. When Congress commits the United States to some responsibility to tribes through treaty or statute, those responsibilities are interpreted liberally in favor of tribes, as the tribes would have understood them, and with ambiguities interpreted in favor of the tribe.⁴³ Congress has the authority to abrogate these responsibilities, but it must do so clearly.⁴⁴

As an exercise of those trust responsibilities, Congress has attempted to address language loss suffered by American Indians in various insufficient ways. In 1990 Congress passed the Native American Languages Act (NALA), which states that the official United States policy is to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages," and that "Native American languages shall not be restricted in any... publicly-supported education programs."⁴⁵ In 2006 Congress reinforced NALA by passing the Esther Martinez Native American Languages Preservation Act of 2006 (EMNALA), which expanded the available grants to be given for

Indian law—ever-present and enforceable, but difficult to affirmatively identify, as the treaties and agreements between Tribes and the United States are sparse with details).

⁴¹ *See id.* at 309.

⁴² *See Cherokee Nation v. Georgia*, 30 U.S. 1, 16–17 (1831) (characterizing tribes as "domestic dependent nations" in a relationship with the United States that resembles a ward-guardian relationship, yet are "a distinct political society, separated from others, capable of managing its own affairs and governing itself"); *Worcester v. Georgia*, 31 U.S. 515, 536 (1832) (affirming tribes enter into a relationship with the United States without relinquishing the right to self-govern); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (holding that absent Congressional acts state governments may not infringe upon "the right of reservation Indians to make their own laws and be ruled by them").

⁴³ *See Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) (holding that treaties must be construed "in the sense in which they would naturally be understood by the Indians"); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973) (holding ambiguities in statutes are to be resolved in favor of Indians).

⁴⁴ *See United States v. Dion*, 476 U.S. 734, 738–40 (1986) ("Congress' intention to abrogate Indian treaty rights must be clear and plain").

⁴⁵ 25 U.S.C. §§ 2901–06.

language revitalization.⁴⁶ While NALA and EMNALA took affirmative steps away from the United States' assimilation policy, neither are sufficient mechanisms through which effective restoration can be accomplished.

First, NALA did not create a pathway for compensation for damages associated with language loss.⁴⁷ In 1995 the Office of Hawaiian Affairs sued the Department of Education for failure to sufficiently teach the Hawaiian language in public schools on grounds that the Department of Education's actions violated NALA.⁴⁸ The court ruled that NALA did not create a cause of action against the United States for failing to act in accordance with NALA beyond, perhaps, *not restricting* Native American languages in federally funded education programs.⁴⁹ NALA placed no affirmative duty on any governmental body to preserve, protect, or promote Native American languages, as these words were a mere statement of policy goals.⁵⁰

While the United States did not create any sort of affirmative duties onto itself to compensate for loss, Congress expanded NALA and passed EMNALA as an *ex gratia* scheme to promote Native American languages. In 1992 Congress expanded NALA by providing funding for government and American Indian organizations for language revitalization.⁵¹ However, the funding for revitalization of all American Indian languages was a mere \$2 million for 1993.⁵² This funding expanded with the passage of EMNALA in 2006, and, currently, EMNALA provides about \$12 million of funding per year towards Native language revitalization programs.⁵³ While significant, that funding is awarded to less than thirty percent of all language revitalization program funding requests.⁵⁴ The *ex gratia* schemes under NALA and EMNALA, while

⁴⁶ See Esther Martinez Native American Languages Preservation Act of 2006, Pub. L. No. 109-394, 120 Stat. 2705 (2006).

⁴⁷ Off. of Hawaiian Affs. v. Dep't of Educ., 951 F. Supp. 1484, 1494 (D. Haw. 1996) ("Congress did not intend NALA to create a private cause of action against states").

⁴⁸ *Id.*

⁴⁹ See *id.* at 1498.

⁵⁰ See *id.* at 1494.

⁵¹ See Native American Languages Act of 1992, Pub. L. No. 102-524, 106 Stat. 3434 (codified as amended at 42 U.S.C. §§ 2991b-3, 2992d (2006)).

⁵² *Id.* § 3.

⁵³ Esther Martinez Native American Languages Preservation Act of 2006, Pub. L. No. 109-394, 120 Stat. 2705 (2006); Nagle, *supra* note 2.

⁵⁴ Nagle, *supra* note 2.

having a positive impact on language revitalization, have been insufficient in preventing Native languages from becoming endangered.⁵⁵

International standards for Indigenous language rights have also failed to create legal pathway for compensation for Indigenous language loss in the United States but have played a part in opening a legal pathway in Canada. The current international standard for Indigenous Peoples' rights and how states shall redress violations of those rights is laid out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which states: "States shall provide effective mechanisms for...redress for...any action which has the aim or effect of depriving [Indigenous Peoples] of their integrity as distinct peoples...of their cultural values or ethnic identities...or any form of forced assimilation or integration."⁵⁶ The United Nations has additionally stressed the importance of preserving minority languages at large against assimilation by more powerful countries and in the face of globalization.⁵⁷

UNDRIP's legitimacy extends insofar as states are willing to embrace it. The United States' attitude towards UNDRIP has historically ranged from direct opposition to insubstantial support.⁵⁸ Violations of the international standard for Indigenous Peoples' rights has therefore not been recognized in the United States as a cause for legal action. Compensation for the language loss suffered by American Indians has thus been almost entirely limited to insufficient *ex gratia* schemes such as through NALA and EMTALA,⁵⁹ as nearly all Indigenous languages still spoken in the United States are in danger of going extinct.⁶⁰

⁵⁵ EMNALA operates on a competitive grant basis, granting about \$12 million annually to Native American language projects. Only twenty-nine percent of all funding requests were able to be funded. *Id.*; see also Warhol, *supra* note 6, at 83 (characterizing the funding provided by NALA and EMNALA as "meager").

⁵⁶ G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007).

⁵⁷ See Press Release, Off. of the High Comm'r for Hum. Rts., Thousands of Minority Languages Threatened by Assimilation, Conflict & Forced Displacement – UN Expert (Mar. 12, 2013), [https://www.ohchr.org/en/press-releases/2013/03/thousands-minority-languages-threatened-
assimilation-conflict-and-forced](https://www.ohchr.org/en/press-releases/2013/03/thousands-minority-languages-threatened-assimilation-conflict-and-forced) [https://perma.cc/GTA7-JA6R].

⁵⁸ See generally Kristen A. Carpenter, "Aspirations": *The United States and Indigenous Peoples' Human Rights*, 36 HARV. HUM. RTS. J. 41 (2023) (highlighting that the United States refused to support UNDRIP between 2007 and 2010 and explicitly views UNDRIP as an "aspirational document").

⁵⁹ See Warhol, *supra* note 6 (characterizing the funding provided by NALA and EMNALA as "meager").

⁶⁰ Detrow & Keatley, *supra* note 26.

The story of compensation for language loss in Canada is remarkably different. First Nations⁶¹ in Canada initiated two class actions against Canada under theories of tort and breach of fiduciary duty.⁶² Both suits resulted in settlement.⁶³ The government of Canada and First Nations expanded IRSSA to include not only the direct victims of the residential schools, but also their descendants and tribes as separate classes.⁶⁴ This resulted in the Canadian government awarding \$50 million toward the Day Scholars Revitalization Society to support restoring Tribal health across a number of items, including language loss, and another \$2.8 billion to 325 First Nations for loss of language and culture for the First Nations to use themselves.⁶⁵ The remarkable difference in how the United States and Canada have compensated for language loss is partly reflected in how Canada has reacted to UNDRIP. While the United States explicitly labeled UNDRIP as “aspirational,”⁶⁶ Canada has enacted the UN Declaration on the Rights of Indigenous Peoples Act of 2021 to bring Canadian fundamental rights for Indigenous people in line with UNDRIP.⁶⁷

While international documents such as UNDRIP may be taken as nonbinding, the treaties that the United States entered into with American Indian tribes do posit affirmative duties onto the United States.⁶⁸ Between 1778 and 1871, the United States entered into 120 treaties that included provisions guaranteeing educational services be provided to American Indians within the context of the special trust relationship the United States

⁶¹ The term “First Nations” in Canada is used similarly to “tribes” in United States. *See, e.g.,* Kathleen J. Marra, *American Indian Tribes and Canadian First Nations: A Comparison of Issues and Law*, BUSINESS LAW TODAY (Sept. 22, 2016), https://www.americanbar.org/groups/business_law/resources/business-law-today/2016-september/american-indian-tribes-and-canadian-first-nations/ [https://perma.cc/KYU5-TSAW].

⁶² *See* Day Scholars Survivor & Descendant Class Settlement Agreement, Gottfriedson v. Canada, No. T-1542-12 (Fed. Ct. June 4, 2021) ¶ 1-3, Schedule A (Can.); *see* Settlement Agreement, McLean v Canada, No. T-2169-16 (Fed. Ct. Mar. 12, 2019) ¶ 2-3, Schedule C (Can.).

⁶³ *See* Day Scholars Survivor & Descendant Class Settlement Agreement, Gottfriedson v. Canada, No. T-1542-12 (Fed. Ct. June 4, 2021) ¶ A-G (Can.); *see* Settlement Agreement, McLean v Canada, No. T-2169-16 (Fed. Ct. Mar. 12, 2019) ¶ A-H. (Can.).

⁶⁴ *See* Day Scholars Survivor & Descendant Class Settlement Agreement, Gottfriedson v. Canada, No. T-1542-12 (Fed. Ct. June 4, 2021) ¶ 1-3, Schedule A (Can.); *see* Settlement Agreement, McLean v Canada, No. T-2169-16 (Fed. Ct. Mar. 12, 2019) ¶ 2-3, Schedule C (Can.).

⁶⁵ *See* Day Scholars Survivor & Descendant Class Settlement Agreement, Gottfriedson v. Canada, No. T-1542-12 (Fed. Ct. June 4, 2021) ¶ 21 (Can.); *Tk'emlúps te Secwépemc First Nation v. Canada*, [2023] F.C. 327, para. 24 (Can.).

⁶⁶ *See* Carpenter, *supra* note 58.

⁶⁷ *See* United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14 (Can.).

⁶⁸ *See, e.g.,* *McGirt v. Oklahoma*, 591 U.S. 894, 894 (2020).

has with these tribes.⁶⁹ Federal policy that destroys American Indian language and inflicts intergenerational trauma intensified by such destruction may violate such treaties and such damage may be compensable.

IV. SHIFTING LEGAL-POLITICAL LANDSCAPE

The authorities responsible for the atrocities committed through the federal Indian boarding schools in the United States are taking more accountability than ever before. In 2024 the Department of the Interior released its second volume report that acknowledged that the “Federal Indian boarding school system, and assimilationist policies, have severely damaged the ability of American Indian and Alaska Native individuals to use, develop and transmit their languages, oral histories and knowledge to current and future generations,” and recommended that the United States revitalize Native American languages while explicitly referencing the settlements in Canada mentioned above.⁷⁰ In 2024 the United States Conference of Catholic Bishops also issued a formal apology for the Catholic Church’s hand in inflicting multigenerational trauma on American Indians through the federal Indian boarding school system.⁷¹

While this shift in accountability provides hope that the United States will follow Canada in adopting measures similar to UNDRIP, that may not be necessary for every American Indian tribe to argue for compensation. This cultural shift could also impact how courts interpret tribal treaties already in place.

How language loss fits (or does not fit) as a cognizable damage under tort law is also relevant. Though tort law now includes damages for intangible losses⁷² and, in extremely limited circumstances, intergenerational harm,⁷³ the harms suffered by tribes do not fit neatly into these categories. Under the Canadian settlements mentioned above, however, damages were awarded to descendant classes: children of Native

⁶⁹ Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 826 (2001).

⁷⁰ NEWLAND, *supra* note 1, at 69-70, 102.

⁷¹ *Id.* at 77.

⁷² See Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 363 (2006).

⁷³ See Christopher J. Wiener, *Transgenerational Tort Liability for Epigenetic Disease*, 13 DEPAUL J. HEALTH CARE L. 319, 319 (2011).

Americans who attended residential schools.⁷⁴ While recovery of damages for intergenerational harm on an individual level may be limited, expanding the definition of intergenerational harm to descendant classes may open the door to compensation for language loss and accompanying epigenetic harm suffered by tribes due to intentionally executed government policy. The following Part will explore how this theory of damages may be used by tribes in the United States to recover for language loss.

ARGUMENT

This Note will argue for the compensability of Native American language loss resulting from operation of federal Indian boarding schools that were intended to assimilate Native American children and used militarized, identity-altering methodologies to do so.⁷⁵ The argument will proceed by first addressing why language loss should be recognized as a cognizable damage to tribes, as it is a damage that is uniquely lost at a communal level to an entity rather than an individual. Second, this Note will advance a theory of liability that establishes why the United States government should be held responsible for causing massive language loss for Native Americans under a tort claim. Third, this Note will assess damages for language loss under a breach of treaty claim through education provisions within treaties established pre-boarding schools. Finally, this Note argues that equitable tolling should be applied to the statute of limitations that would otherwise bar these claims.

I. LANGUAGE LOSS AS A COGNIZABLE DAMAGE TO TRIBES AS OPPOSED TO INDIVIDUALS

A tribe, as opposed to an individual, is better positioned to seek damages for language loss as a cognizable harm. For tribes, the deprivation of language is a loss of knowledge that is detrimental to cultural preservation and self-determination, and the ability to speak Native languages was only ripped away through targeted cultural genocide exercised against a tribe's children in mass and over decades.⁷⁶ Even if

⁷⁴ See Day Scholars Survivor & Descendant Class Settlement Agreement, *Gottfriedson v. Canada*, No. T-1542-12 (Fed. Ct. June 4, 2021) (Can.), ¶ 21.

⁷⁵ See NEWLAND, *supra* note 1, at 93.

⁷⁶ Congress and the Supreme Court have both taken affirmative actions to protect Indian children in light of the destruction of indigenous culture done through targeting children. See 25 U.S.C.S. §

individuals who were students at these boarding schools were successful in obtaining damages, these damages would compensate only the individual, rather than the tribal community at large.

Descendants of boarding school survivors, in their own capacity, would also be in a poor position to recover damages for language loss. If language loss a transgenerational harm suffered by an individual and their child, it is highly unlikely that such harm would be recognized as cognizable. Even if we consider the unique harms suffered by Indian boarding school students who experienced epigenetic changes resulting from traumatic punishment for speaking their Native languages, and whose children were at an increased risk for chronic illnesses themselves as linked to these epigenetic harms,⁷⁷ the only cases where transgenerational harms have been recognized limit the damages to only the next generation.⁷⁸ Therefore, it is unlikely that such epigenetic harm suffered by Indian boarding school students would be recognized as cognizable under current American jurisprudence if the individual or the individual's parents did not attend a boarding school themselves. The same logic would likely apply in cases where an individual cannot speak their Native language as a result of their parents (or tribe at large) being unable to teach the language due to the assimilation methods employed by boarding schools.

While the legal battle to recognize language loss as a cognizable harm to individual descendants has additional roadblocks besides statute of limitations concerns, recognizing the harm done to a *tribe* for language loss is a different legal landscape. The policy of federal Indian boarding schools was employed against Native American tribes at large, in a pervasive and prolonged manner.⁷⁹ The mission, "to kill the Indian," was not aimed at the individual, but at the collective tribal identity. Additionally, treaties where tribes surrendered land in exchange for education support, which turned into the boarding school program, were

1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe"); *see also* *Haaland*, 599 U.S. 255, 265, (2023) (upholding the Indian Child Welfare Act as constitutional and recognizing that the chances of cultural survival are impeded if Native children are "denied exposure to the ways of their People").

⁷⁷ *See* NEWLAND, *supra* note 1, at 57-58.

⁷⁸ Even in the limited DES cases where transgenerational harm has been recognized, courts have refused to recognize damages going beyond one generation. *See* *Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 377 (1991).; Wiener, *supra* note 74, at 323-25.

⁷⁹ *See* NEWLAND, *supra* note 1, at 18 (finding 417 different boarding schools across 37 states between 1871 and 1969 secured over \$23.3 billion (adjusted for inflation) in operating such schools).

between sovereign nations, reflecting that the tribes' desire, not just individual tribal members desires, to secure cultural survival.⁸⁰

The harms suffered by boarding school survivors and their descendants is then appropriately seen as a collective harm suffered by nations—Native American tribes—rather than harm suffered strictly by individual students and their descendants, similar to entities involved in legal disputes, while the individuals operating the entity may change, the entity maintains its independent legal status throughout time.⁸¹ Viewing tribes as such entities in a legal sense is, of course, nothing new. Besides being named parties in legal actions, tribes are described as “unique aggregations possessing attributes of sovereignty over both their members and their territory ... they are ‘a separate people’ possessing ‘the power of regulating their internal and social relations.’”⁸² The loss of a language can then be equated to a violation of that power, suffered on a tribal level which disrupted their ability to regulate their internal and social relations by systematically stripping away their primary form of internal communication.

It is worth taking a moment to grasp how uniquely damaging language loss is. The grief and trauma resulting from language loss was “one of the most prominent shared experiences of boarding school survivors across the country.”⁸³ American linguist Joshua Fishman describes the loss experienced by Indigenous populations as a loss of sanctity, a loss of kinship, and an imperative duty thrust upon them to revive the language.⁸⁴ Fishman further specifies that stabilizing and revitalizing a language must be done at a community level as Native languages were systematically disrupted at a community level.⁸⁵

While American precedent makes it particularly difficult for descendants of boarding school survivors to claim damages for their severed connections to their Native tongues, tribes have a stronger case for doing so. Tribes are legal entities who persist throughout time and who, when suffering language loss, experience violations of their power to regulate their internal and social relations, as well as losses of culture,

⁸⁰ See NEWLAND, *supra* note 1, at 17-19 (finding 127 treaties implicated the use of Federal Indian boarding schools).

⁸¹ See *N.Y. Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 213 (1998).

⁸² *Id.*

⁸³ NEWLAND, *supra* note 1, at 87.

⁸⁴ Joshua Fishman, *What Do You Lose When You Lose Your Language?*, in STABILIZING INDIGENOUS LANGUAGES 71, 71-81 (2007), <https://jan.ucc.nau.edu/jar/SIL.pdf> [<https://perma.cc/5URA-F4X9>].

⁸⁵ See *id.* at 78.

sanctity, and kinship. This loss is experienced due to a disruption at a communal level and must be remedied at a communal level. For these reasons, language loss is a cognizable harm for tribes.

II. FEDERAL TORT CLAIM

Under tort law, there are two time-barring limitations that must be addressed when assessing liability for historical wrongs. The United States federal government provides a limited waiver of sovereign immunity under the Federal Tort Claims Act (FTCA), allowing for a private tort action to be brought against the United States federal government.⁸⁶ The FTCA provides that damages accrued after January 1, 1945, for injury caused by the wrongful acts of any government employee acting within their scope of responsibility “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”⁸⁷ Additionally, the FTCA provides that tort claims against the United States “shall be forever barred” unless brought against the appropriate federal agency within two years after the claim accrues.⁸⁸ Both of these timing limitations, one for damages accruing before 1945 and one for damages brought forth within two years of accruing, will be addressed.

While the FTCA does not provide for any compensation for damages accrued before 1945, there is a limited argument for characterizing language loss accrued only after the boarding schools ceased operations under the continuous wrong doctrine. The continuous wrong doctrine⁸⁹ provides that the statute of limitations for continuous wrongs does not start to run any earlier than the last day of ongoing injury, and that damages flow from the act as a whole rather than from each individual act, with at least one injurious act occurring within the limitation period.⁹⁰ This doctrine does not grant exceptions for “discrete acts,” but only for “acts that take place over a prolonged period and that by their very nature require repeated conduct to establish an actionable

⁸⁶ 28 U.S.C.S. § 1346. While the FTCA provides that District Courts will have jurisdiction under the FTCA, for claims brought against the United States by Native American Tribes, the U.S. Court of Federal Claims shall have jurisdiction. *See* 28 U.S.C. § 1505.

⁸⁷ 28 U.S.C.S. § 1346(b)(1).

⁸⁸ 28 U.S.C.S. § 2401(b).

⁸⁹ The continuous wrong doctrine is also known as the continuing violation doctrine. *See Alexander v. United States*, 721 F.3d 418, 425 (7th Cir. 2013).

⁹⁰ *See Beard v. Edmondson & Gallagher*, 790 A.2d 541, 548 (D.C. 2002).

claim.”⁹¹ Harms that specifically result from longstanding and wide-sweeping federal policies, therefore, only accrue when such policies are terminated.

Language loss experienced by nearly every federally recognized tribe is such a harm. No “discrete act” caused widespread Native American language loss; rather the longstanding and widespread operation of Indian boarding schools from 1819 until 1969 with the specific intent of cultural destruction, with language as a focal point, did.⁹² Tolling the statute of limitations past 1945 for the federal Indian boarding schools thus fits squarely within the continued wrong doctrine, and operations of the boarding schools prior to 1945 cannot be barred from consideration because the harm caused by pre-1945 operation did not accrue until the 1970s, when the federal Indian boarding schools finally ceased operation.

While the FTCA bars claims that are not made within two years of accruing, this limit is subject to a rebuttable presumption of equitable tolling.⁹³ A court may pause the running of a statute of limitations if the plaintiff passes the *Holland* test:⁹⁴ that the plaintiff “(1) has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.”⁹⁵

The Supreme Court considered how equitable tolling impacts tribes in *Menominee Indian Tribe v. United States*.⁹⁶ The Supreme Court held that a tribe’s mistaken legal understanding did not constitute an “extraordinary circumstance” and that an “extraordinary circumstance” must “have been beyond [the plaintiff’s] control.”⁹⁷ Despite the Supreme Court holding the United States to “the most exacting fiduciary standards,”⁹⁸ within the trust relationship, that trust relationship between the United States and Indian tribes does not override clear statutory language.⁹⁹ Furthermore, absence of prejudice against the United States government is not “an independent basis” to invoke equitable tolling and is only considered after a plaintiff passes both elements of the *Holland*

⁹¹ Torres-Estrada v. Cases, 88 F.4th 14, 24 (1st Cir. 2023).

⁹² NEWLAND, *supra* note 1, at 6.

⁹³ See *United States v. Kwai Fun Wong*, 575 U.S. 402, 405, 408 (2015).

⁹⁴ *Holland v. Florida*, 560 U.S. 631, 649-50 (2010).

⁹⁵ *Menominee Indian Tribe v. United States*, 577 U.S. 250, 255 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

⁹⁶ *Id.* at 250.

⁹⁷ *Id.* at 255.

⁹⁸ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

⁹⁹ *Menominee Indian Tribe*, 577 U.S. at 258-259.

test.¹⁰⁰ Therefore, tribes attempting to bring suit under the FTCA for historic torts, even if under the continuous wrong doctrine, must pass the *Holland* test if time-barred by the two-year limitation from the time the wrong accrued.

In the United States, under *Menominee*, tribes would likely be unable to show such extraordinary circumstances to pass the *Holland* test and bring suit under the FTCA for damages caused by the boarding schools. Tribes have known of the damages of the boarding schools on languages for decades¹⁰¹ and, as *Menominee* held, a limited understanding of the legal system is not a sufficient circumstance to toll the statute of limitations.¹⁰² Even though it is unlikely that the United States government would be prejudiced in defending the operation of boarding schools due to the extensive reporting the United States has already done on the boarding schools,¹⁰³ a lack of prejudice will not toll the statute of limitations.¹⁰⁴

While similar statutes of limitations applied, tribes have nevertheless been allowed to recover for damages suffered long after the boarding schools had been closed down.¹⁰⁵ While Canadian courts as late as 2008 refused to allow descendants of residential school survivors to recover for historic harms that were otherwise time-barred,¹⁰⁶ by 2015 the Canadian courts stated that the statute of limitations would be heavily influenced by the fiduciary relationship between Canada and its Indigenous.¹⁰⁷ Indeed, in litigating liability for damages suffered due to the boarding schools, Canada did not attempt to plead the claims as untimely and allowed settlement.¹⁰⁸ This openness on the part of the Canadian government is in line with UNDRIP's call for compensation for language and cultural loss caused state.¹⁰⁹ While the United States has yet to adopt UNDRIP principles in any sense that is beyond vaguely

¹⁰⁰ *Id.* at 259 n.5.

¹⁰¹ *See, e.g.*, Native American Languages Act of 1992, Pub. L. No. 102-524, 106 Stat. 3434 (1992) (codified as amended at 42 U.S.C. §§ 2991b-3, 2992d (2006)).

¹⁰² *Menominee Indian Tribe*, 577 U.S. at 255.

¹⁰³ *See generally, e.g.*, NEWLAND, *supra* note 1 (reporting extensively on the Federal Indian Boarding School Initiative); NEWLAND, *supra* note 1 (reporting further on the Federal Indian Boarding School Initiative).

¹⁰⁴ *Menominee Indian Tribe*, 577 U.S. at 259 n.5.

¹⁰⁵ *See Tk'emlúps te Secwépemc First Nation v. Canada*, [2023] F.C. 327, para. 25 (Can.).

¹⁰⁶ *Canada (Attorney General) v. Lameman*, [2008] S.C.C. 14 (Can.) (holding that "that the rules on limitation periods apply to Aboriginal claims").

¹⁰⁷ *Gottfriedson v. Canada*, [2015] F.C. 706 (Can.) (opining that, while Canada did not even plead a statute of limitations defense, that it was improper to hold that the claims would be time-barred).

¹⁰⁸ *See generally id.* (allowing action to move forward despite being time-barred).

¹⁰⁹ G.A. Res. 61/295, *supra* note 3, art. 11.

aspirational,¹¹⁰ the recent report from the Secretary of the Interior shows an attitude change towards Indigenous peoples and a recognition of the forceful assimilation they endured at the hands of the United States government.¹¹¹ Additionally, there is an argument that justice demands equitable tolling for historical wrongs against tribes in the United States, which is further explored below.

III. BREACH OF TREATY

Breach of treaty claims may provide another avenue to liability for damage caused by boarding schools. The analysis is treaty-specific but generally follows three steps a tribe would need to complete. First, a tribe would need to establish its sovereign immunity for breach of treaty claims and assess if the treaty has been abrogated by Congress.¹¹² Second, a tribe would need to identify any “rights-creating or duty-imposing language” that imposes a duty on the United States.¹¹³ Third, a tribe would need to assess whether the United States failed to fulfill that duty in the context of the Indian trust relationship.¹¹⁴ Tribes with educational provisions within their treaties can satisfy all three and present a comparative analysis on how similar breach-of-trust claims have been handled in Canada, and how this aligns with international standards set by the United Nations in regards to how States ought to remedy wrongs they inflicted on Indigenous populations.

The United States waives its immunity for breach-of-trust claims based on a specific duty created by treaties when tribes seek monetary damages. When seeking monetary damages, tribes proceed under the Indian Tucker Act, which holds that “the United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe . . . whenever such claim is one arising under the Constitution, laws or treaties of the United

¹¹⁰ See Carpenter, *supra* note 58.

¹¹¹ See generally NEWLAND, *supra* note 1 (writing two Federal Indian Boarding School Initiative reports acknowledging United States’ role in the boarding school system).

¹¹² See *United States v. Dion*, 476 U.S. 734, 737-40 (1986) (“Congress’ intention to abrogate Indian treaty rights must be clear and plain”); see generally U.S. CONST. art. VI, cl. 2 (“...all Treaties made...shall be the supreme Law of the Land...”); see generally *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsr.*, 425 U.S. 463 (1976) (holding that Tribes may sue to enforce rights found in treaties).

¹¹³ *Arizona v. Navajo Nation*, 599 U.S. 555, 568 (2023).

¹¹⁴ See *id.* at 564 (“Congress and the President exercise the “sovereign function” of organizing and managing “the Indian trust relationship”).

States, or Executive orders of the President.”¹¹⁵ The Indian Tucker Act provides a waiver of sovereign immunity, granting the United States Court of Federal Claims jurisdiction on claims “arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.”¹¹⁶ The Indian Tucker Act confers jurisdiction but does not itself provide any substantive rights against the United States to recover damages—the right must be identified in, for example, a treaty.¹¹⁷ Sovereign immunity is thus waived for breach-of-trust claims based on specific duties found in treaties between the United States and Native American tribes when tribes seek monetary compensation.¹¹⁸

Treaties that require that the United States provide education to tribes create a specific duty to *not destroy* the tribe’s language. In order to maintain a breach-of-trust claim under the Indian Tucker Act, tribes must point to text of a treaty that imposes specific duties on the United States and show that the United States violated those duties.¹¹⁹ While not applicable to all tribes, there are at least 127 treaties which contain provisions for tribes that secure educational rights and support from the United States government that implicate Federal Indian boarding schools.¹²⁰ These treaties were often made in exchange for ceding land and living on reservations, but these provisions were not obtained on the condition that the tribes forfeit their language (or traditions and customs at

¹¹⁵ See 28 U.S.C. § 1505.

¹¹⁶ *Id.*

¹¹⁷ See *Navajo Nation v. United States*, 171 Fed. Cl. 246, 256 (2024); *Birdbear v. United States*, 162 Fed. Cl. 225, 232 (2022).

¹¹⁸ Tribes may also initiate breach-of-trust claims based on treaties when seeking equitable remedies. After the Indian Tucker Act was passed, Congress passed 28 U.S.C. § 1362 that states federal district courts “have original jurisdiction of all civil actions brought by any Indian Tribe...wherein the matter in controversy arises under...treaties of the United States.” 28 U.S.C. § 1362. This statute’s purpose was “to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought.” See *Moe*, 425 U.S. at 472-74. Although 28 U.S.C. § 1362 does not itself constitute a waiver of sovereign immunity, sovereign immunity may be waived under other relevant conditions, such as when federal officials have not acted in accordance with law (or treaty). See *Scholder v. United States*, 428 F.2d 1123, 1125 (9th Cir. 1970); see 5 U.S.C. § 702.

¹¹⁹ See *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009).

¹²⁰ NEWLAND, *supra* note 1, at 5 (finding that 127 different treaties implicated Federal Indian boarding schools). For more information, see generally, *Tribal Treaties Database*, <https://treaties.okstate.edu/> (last visited Jan. 12, 2025) (providing a database to see all tribal treaties, where the language of these treaties often specified providing funds for building of schools, teacher’s salaries, or educational benefits broadly, and some included provisions that required the teachers to be of good moral character).

large) over time.¹²¹ The attack on Native American languages as part of a larger assimilation was shoehorned in after these treaties were entered into and enforced in brutal terms—the use of militant techniques carried out by the boarding schools as described above.¹²²

The United States may point to the fact that none of the treaties explicitly place a duty on the United States to preserve a tribe's language,¹²³ and that this duty cannot be read into any sort of general educational provision included in a treaty. The United States may argue that any sort of “language right” was simply not considered at all when drafting the treaty. But following the intentional, pervasive, and utterly destructive effects on Native languages caused by the boarding schools,¹²⁴ tribes must only prove that the educational provisions in their treaties place a duty on the United States to not destroy their languages while providing educational assistance. And, to be clear, the United States, in its mission to assimilate Native Americans through the boarding schools, used language “immersion” methods far beyond what anyone would consider to be acceptable in teaching Native Americans English from the inception of the boarding school projects—the primary mission of the boarding schools was to eradicate the Native American identity.¹²⁵ Therefore, the Native American language loss that resulted from the boarding schools cannot be seen as a side effect of the United States attempting to provide educational support for tribes, but as the primary goal of eradicating Native American identity, which cannot be legitimately interpreted as providing educational support for tribes. Additionally, if conflicts arise when interpreting treaties with Native American tribes, ambiguities must be interpreted in favor of the tribes, and as the tribes would have understood the treaty at the time it was entered.¹²⁶

It is difficult to imagine that any tribe entered into a treaty with the United States government with the understanding that the tribe was

¹²¹ Dussias, *supra* note 69, at 839, 842–43.

¹²² See NEWLAND, *supra* note 1, at 85–89.

¹²³ A Creek treaty from 1866 did explicitly provide for the United States not to interfere with tribal “customs.” See James Fife, *The Legal Framework for Indigenous Language Rights in the United States*, 41 WILLAMETTE L. REV. 325, 364–67 (2005) (assessing the case for treaties creating protection of indigenous language rights as “ephemeral at best,” but not assessing whether a right against intentional destruction of indigenous language was created).

¹²⁴ See NEWLAND, *supra* note 1, at 54.

¹²⁵ See *Haaland v. Brackeen*, 599 U.S. 255, 299 (2023) (Gorsuch, J., concurring) (stating that the head of one Indian boarding school summarized its mission as “[A]ll the Indian there is in the race should be dead. Kill the Indian in him, and save the man”).

¹²⁶ See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200 (1999).

signing a treaty that enabled the United States to traumatize its children for speaking their language—that is to say, effectively *de-educate* their children’s ability to speak their language. When the mission and methods of the Federal Indian boarding schools became known to Native populations, the protection engaged in by tribes in an effort to keep children from being taken away is evidence that tribes did not consent or enter such treaties with the understanding that their language (and tradition and customs at large) would be destroyed.¹²⁷ While examination of every treaty is beyond the scope of this Note, if the United States entered into a treaty with a tribe where the United States was entrusted to provide educational support to tribes, the treaty must be interpreted in favor of how the tribe understood the treaty.

Today, in addition to officially supporting UNDRIP, the United States recognizes Native Americans’ right to learn their languages through the NALA¹²⁸ and EMNALA,¹²⁹ which were enacted to address the decimating impacts past federal policies had on Native American languages.¹³⁰ Yet, the United States engaged in unconscionable assimilation policies for nearly a century under the boarding school policy in disregard of these treaties. The current recognition of Indigenous rights should move the judiciary to afford any interpretive question in maximum favor to the tribes. Relevantly, just as under the FTCA, however, the statute of limitations must also be addressed for breach-of-trust claims.

Outside of the FCTA, the statute of limitations for civil actions against the United States is generally six years after the right of action accrues.¹³¹ Even in cases where the full extent of the damages is not known, the claim accrues when the tribe knew or should have known about the government’s breach of duty.¹³² Even if operation of the boarding

¹²⁷ One telling example of resistance is when nineteen Hopi men in Arizona were imprisoned in Alcatraz for refusing to submit their children to Federal Indian boarding schools. See Barbara Prillaman, *Indian Boarding Schools: A Case Study of Assimilation, Resistance, and Resilience*, in 1 CONTEMPORARY AMERICAN INDIAN HISTORY 12 (2016). See also Comm’r of Indian Affs., *supra* note 11 (describing where government officials resorted to night raids to kidnap the children when Tribes refused to give their children up).

¹²⁸ See Esther Martinez Native American Languages Preservation Act of 2006, Pub. L. No. 109–394, 120 Stat. 2705 (2006).

¹²⁹ Native American Languages Act of 1992, Pub. L. No. 102–524, 106 Stat. 3434 (1992) (codified as amended at 42 U.S.C. §§ 2991b–3, 2992d (2006)).

¹³⁰ 25 U.S.C. § 2901 (providing that “a lack of clear, comprehensive, and consistent Federal policy on treatment of Native American languages...has often resulted in acts of suppression and extermination of Native American languages and cultures”).

¹³¹ 28 U.S.C. § 2401.

¹³² See, e.g., *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1358–59 (Fed. Cir. 2011); see, e.g., *Winnemucca Indian Colony v. United States*, 167 Fed. Cl. 396, 421 (2023).

schools is understood to be an ongoing violation, and the statute of limitations was tolled until the last boarding school ceased operation, the six years would have ended by the 1980s.¹³³ Under this traditional view of government liability, principles of equitable tolling thus do not apply to the tribes wishing to bring action against the United States for loss of language resulting from breach-of-trust.

In the United States, the special trust relationship between the government and tribes does not trigger an exception to a statute of limitations.¹³⁴ Indeed, American courts have stated that the statute of limitations, as a condition of the government's waiver of sovereign immunity, cannot be waived or be subject to estoppel.¹³⁵ This limitation the judicial branch has placed upon itself is principled on separation of powers—that Congress is the body that waives sovereign immunity, and that the judicial branch must not improperly extend that waiver.¹³⁶ Thus, even a decision on the government's part to not raise a timeliness defense (or decision made in the interest of justice), such as what happened in Canada when Canadian courts approved a settlement for loss of language and culture,¹³⁷ is not precedent in American jurisprudence.

But this stringent precedent ought to be overturned in compelling cases. While a claim for breach of trust grounded in treaty educational provisions would certainly be defeated by statute of limitations defenses as they stand now, the United States, following Canada's example and international standards such as UNDRIP, should allow claims stemming from historical wrongs committed against tribes to be brought after the limitations period has expired.

Before the issue of timeliness is addressed more fully, this Note addresses the separate question of whether language loss should even be considered a cognizable loss. I argue that it should be, in accordance with the Canadian approach.¹³⁸

IV. TOLLING A STATUTE OF LIMITATIONS AND HISTORICAL WRONGS

¹³³ See NEWLAND, *supra* note 1, at 6 (finding that the boarding schools operated until 1969).

¹³⁴ See *Hopland Band of Pomo Indians*, 855 F.2d at 1577 (Fed. Cir. 1988) (holding that the general trust relationship does not itself create a money-mandating obligation).

¹³⁵ *Id.*

¹³⁶ See *id.* at 1576–77.

¹³⁷ *Gottfriedson v. Canada*, [2015] F.C. 706 (Can.) (opining, while the Canadian government did not even plead a statute of limitations defense, that it was improper to dismiss the suit because it was “plain and obvious” that the claims would be time-barred).

¹³⁸ See *Day Scholars Survivor & Descendant Class Settlement Agreement*, *Gottfriedson v. Canada*, No. T-1542-12 (Fed. Ct. June 4, 2021) (Can.).

AGAINST TRIBES

Statutes of limitations serve to ensure legal certainty and finality by preventing the indefinite threat of litigation. But the unique circumstances of harms suffered by Native American tribes due to the actions of the United States in its implementation and operation of Indian boarding schools force us to reconsider timely barring. The boarding schools were systemic and prolonged injustices that necessitate departure from the rigid application of statute of limitation principles. The unique trust relationship between the United States and Native American tribes, combined with the insufficiency of current *ex gratia* schemes to prevent language death, together form a strong argument for tolling the statute of limitations for language loss resulting from federal Indian boarding school policies.

The United States government is “required to promote tribal self-government and cultural integrity of Native Americans” as a “guardian-ward” to the tribes.¹³⁹ This relationship is *sui generis*, meaning “of its own kind,” and any findings that apply to Native American tribes do not automatically apply to other historical wrongs committed by the United States.¹⁴⁰ While the Supreme Court has “consistently recognized the undisputed existence of a general trust relationship between the United States and the Native American people,”¹⁴¹ that “general trust relationship” is limited by Congress and is not equivocal to common law trusts.¹⁴²

But why didn’t tribes act against the United States for the egregious crimes committed against them under the guise of education? The answer is that tribes *did take action*. They resisted the ways they knew how—by refusing to cooperate, by hiding their children, and by having their children flee when able.¹⁴³ It is almost certain that the tribes, victims themselves, were systematically prevented from seeking redress—either because they lacked the legal knowledge to seek remedy, that there was never any chance such action would survive due to prevailing racist attitudes, or too, that the impact of language loss takes decades to

¹³⁹ *McBride v. Shawnee Cty.*, 71 F. Supp. 2d 1098, 1102 (D. Kan. 1999).

¹⁴⁰ *Id.*; see also *sui generis*, BLACK’S LAW DICTIONARY 1286 (5th ed. 1979).

¹⁴¹ *United States v. Duro*, 625 F. Supp. 2d 938, 942 (C.D. Cal. 2009).

¹⁴² *Arizona v. Navajo Nation*, 599 U.S. 555, 565-66 (2023).

¹⁴³ See NEWLAND, *supra* note 1, at 4 (documenting that deployment of military to retrieve Native children from families unwilling to surrender their children); NEWLAND, *supra* note 1, at 29 (describing children fleeing and hiding).

materialize. With regards to language loss experienced by tribes due to the boarding schools, the United States has plainly failed in its wardship. In fact, it set out and accomplished the very opposite of its duties for nearly a century. As such, it is hard to see that the tribes are at fault for failing to bring a timely claim when it should have been the United States government bringing the claim on their behalf. The problem was that the United States itself was the bad actor. If this set of circumstances does not demand equitable tolling, I am not sure what does.

Also, nearly all Indigenous languages still spoken in the United States are in danger of going extinct.¹⁴⁴ The *ex gratia* schemes of NALA and EMNALA have been insufficient in preventing Native languages from becoming endangered.¹⁴⁵ The United States cannot continue to rely on intermittent and insufficient Congressional charity to remedy a harm that the United States ought to be held accountable for, the statute of limitations for such a historical wrong ought to be tolled, as was done in Canada and as aligns with international standards for Indigenous rights.

CONCLUSION

The United States and Canada operated or supported Indian boarding schools throughout the nineteenth and twentieth centuries with the purpose of culturally assimilating Indigenous children. This assimilation process was brutal and inhumane.¹⁴⁶ From the start, the policy of these boarding schools was to sever the connection between Indigenous children and their parents and community.¹⁴⁷ Children caught speaking their native language were often traumatically punished: children were flogged, starved, whipped, and put in solitary confinement for speaking their native tongue.¹⁴⁸ Over a century of this practice resulted in exactly what the Canadian and United States governments intended: that many Indigenous communities were assimilated and either lost their language or English took over as the dominant language.¹⁴⁹

¹⁴⁴ Detrow & Keatley, *supra* note 26.

¹⁴⁵ Warhol, *supra* note 6 (characterizing the funding provided by NALA and EMTALA as “meager”).

¹⁴⁶ See NEWLAND, *supra* note 1, at 22 (acknowledging that many Indian children suffered physical, sexual, and emotional abuse at these institutions, and that many Indian children died; and that these harms continue to impact American and Alaska Native individuals and Indian Country” as a result of the boarding schools).

¹⁴⁷ *Haaland v. Brackeen*, 599 U.S. 255, 298 (2023) (Gorsuch, J., concurring).

¹⁴⁸ NEWLAND, *supra* note 1, at 54.

¹⁴⁹ *Haaland*, 599 U.S. at 299 (Gorsuch, J., concurring).

The United States and Canada were forced to reflect on the atrocities of these boarding schools when the United Nations recognized Indigenous rights that included a right to pass down Indigenous language to future generations, and further called on nations to hold themselves accountable and revitalize Indigenous languages they helped destroy.

Canada allowed itself to be held accountable in its courts when it allowed itself to be sued for the damages its boarding school operations had done, despite these historical claims being otherwise time-barred.¹⁵⁰ These damages included damages for language loss.¹⁵¹

In the United States, Indigenous language revitalization has been limited to *ex gratia* schemes, none of which have been significant enough to make any sort of significant revitalization effort.¹⁵² Because these *ex gratia* schemes have been unsuccessful, the United States has failed to meet international standards for the treatment of its Indigenous languages. The United States must thus open itself up to accountability, as Canada has done, and allow itself to be sued for damages caused by its operation of Indian boarding schools.

Language loss ought to be a cognizable harm for which damages may be awarded. Further, Indigenous tribes should be recognized as entities who suffered damage from boarding schools because language loss occurs on a community level and is not confined to individuals.

Language loss as a damage could be recognized under either federal tort law or treaty law, if a tribe's treaty had provisions securing educational rights for its children. Educational treaty rights, while not explicitly securing a right to pass on Indigenous language, ought to be construed in favor of the Indigenous party, and no reasonable interpretation of securing treaty educational rights would include prohibiting passing down an Indigenous language.

While claims under either theory, tort or treaty, are time-barred, the unique circumstances of the wrongs committed by the United States government in the operation of the boarding schools and the damages suffered by Indigenous tribes thereafter ought to result in the equitable tolling of the statute of limitations. Allowing this would move the United States further in line, similarly to Canada, with international standards for treatment of Indigenous peoples and recognition of Indigenous rights.

¹⁵⁰ Gottfriedson v. Canada [2015] F.C. 706 (Can.)

¹⁵¹ *Id.*

¹⁵² Dussias, *supra* note 69, at 22.