

**Responsible Resource Development and Prevention of Sex Trafficking:  
Safeguarding Native Women and Children on the Fort Berthold Reservation**

February 4, 2016

Kathleen Finn, Erica Gajda, Thomas Perrin, and Carla Fredericks  
American Indian Law Clinic  
University of Colorado Law School

This paper can be downloaded without charge at:  
The American Indian Law Program: <http://www.colorado.edu/law/academics/programs/indianlaw>  
The Social Science Research Network: <http://ssrn.com/abstract=2723517>

## TABLE OF CONTENTS

<b>I. INTRODUCTION .....</b>	<b>3</b>
<b>II. SEX TRAFFICKING, NATIVE WOMEN, AND THE BAKKEN OIL BOOM.....</b>	<b>4</b>
<b>III. OBSTACLES TO CRIMINAL ENFORCEMENT IN INDIAN COUNTRY .....</b>	<b>8</b>
A. CRIMINAL JURISDICTION IN INDIAN COUNTRY .....	8
1. <i>The Indian Country Crimes Act</i> .....	8
2. <i>The Major Crimes Act</i> .....	9
3. <i>Public Law 280</i> .....	12
4. <i>The Indian Civil Rights Act</i> .....	13
5. <i>Judicial Decisions Further Restricting Tribal Criminal Jurisdiction</i> .....	15
<b>IV. TOWARD A SOLUTION.....</b>	<b>17</b>
A. LEGAL REMEDIES.....	17
1. <i>Congressional Restoration of Tribal Jurisdiction</i> .....	19
2. <i>Other Federal Statutes on Sex Trafficking and Sexual Assault on Fort Berthold</i> .....	22
2. <i>State remedies</i> .....	26
4. <i>Civil Considerations</i> .....	28
5. <i>Tribal Mechanisms</i> .....	28
B. COMPREHENSIVE SOLUTIONS .....	30
C. CORPORATE ENGAGEMENT.....	32
1. <i>Corporate Responsibility</i> .....	32
2. <i>Shareholder Action</i> .....	34
3. <i>Corporate Policies</i> .....	36
4. <i>Best Practices</i> .....	39
<b>V. CONCLUSION .....</b>	<b>41</b>

## I. INTRODUCTION<sup>1</sup>

In 2010, large deposits of oil and natural gas were found in the Bakken shale formation, much of which is encompassed by the Fort Berthold Indian reservation, home to the Mandan, Hidatsa, and Arikara Nation (“MHA Nation” or “Three Affiliated Tribes” or “the Tribe”). According to one estimate, in five years the Bakken formation has gone from producing about 200,000 barrels to 1.1 million barrels of oil a day, making North Dakota the number two oil-producing state in the U.S.<sup>2</sup> In fact, the oil boom has been credited with decreasing the unemployment rate in North Dakota to 3.2%, one of the lowest in the United States.<sup>3</sup> However, rapid oil and gas development has brought an unprecedented rise of violent crime on and near the Fort Berthold reservation. Specifically, the influx of well-paid male oil and gas workers, living in temporary housing often referred to as “man camps,” has coincided with a disturbing increase in sex trafficking of Native women.<sup>4</sup> According to one report, sexual assaults on women on the Fort Berthold reservation have increased by 75%.<sup>5</sup> This increase comes at a time when Native women are already 2.5 times more likely to experience violent crimes than other groups of women in the United States.<sup>6</sup>

---

<sup>1</sup> The authors wish to thank Rebecca Adamson, Ken Hall, Monte Fox, Tom Fredericks, Cara Currie Hall, Steven Heim, Susan White, Nick Pelosi, John Fredericks, Suzanne Benally, Victoria Tauli-Corpuz, Sarah Deer, Lucille Echohawk, Michael Johnson, Marilyn Youngbird, Sarah Krakoff, Pat Zerega, and Christina Warner for their assistance with this publication. Any errors are ours alone.

<sup>2</sup> State of ND. Oil and Gas Div., North Dakota Annual Oil Production, *available at* <https://www.dmr.nd.gov/oilgas/stats/annualprod.pdf> (last visited Jan. 24 2016); *See also* Sari Horwitz, *Dark Side of the boom*, THE WASHINGTON POST, (Sept. 28, 2014) *available at* <http://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/>.

<sup>3</sup> Kasia Klimasinka, *No Kids, No Booze, No Pets: Inside North Dakota’s Largest Man Camp*, Bloomberg Business (Feb. 2, 2013), *available at* <http://www.bloomberg.com/news/articles/2013-02-12/no-kids-no-booze-no-pets-inside-north-dakota-s-largest-man-camp>; *See also* Nikke Alex, *Dark Side of Oil Development: Bakken Oil Boom Pumping Sexual Violence into Fort Berthold Reservation*, *available at* <https://drive.google.com/file/d/0B-Ty0AwDkD80cDMwVWxnQ1otTkk/view?pli=1> (last visited Jan. 24, 2016).

<sup>4</sup> *Native American populations ‘hugely at risk’ to sex trafficking*, BISMARCK TRIBUNE (Jan. 5, 2015), *available at* [http://bismarcktribune.com/bakken/native-american-populations-hugely-at-risk-to-sex-trafficking/article\\_46511e48-92c5-11e4-b040-c7db843de94f.html](http://bismarcktribune.com/bakken/native-american-populations-hugely-at-risk-to-sex-trafficking/article_46511e48-92c5-11e4-b040-c7db843de94f.html); Often ‘man camps’ are associated with a culture of violence. *See Sexual Violence on Oil Field ‘Man Camps’ Brought to United Nations’ Attention*, The Lakota Law Project, *available at* <https://lakotalawproject.wordpress.com/2015/05/26/sexual-violence-on-oil-field-man-camps-brought-to-united-nations-attention/> (last visited Jan. 24, 2016); *See also* Alex, *Dark Side of Oil Development*, *supra* note 3; *See also* Katie Cheney, *Rape, Sex Trafficking, and the Bottom Line: Corporations’ Complicity in Violence Against Women*, FIRST PEOPLES WORLDWIDE (March 5, 2015), *available at* <http://firstpeoples.org/wp/rape-sex-trafficking-and-the-bottom-line-corporations-complicity-in-violence-against-women/>.

<sup>5</sup> Damon Buckley, *Firsthand Account of Man Camp in North Dakota from Local Tribal Cop*, LAKOTA COUNTRY TIMES (May 22, 2014), *available at* [http://www.lakotacountrytimes.com/news/2014-05-22/Front\\_Page/Firsthand\\_Account\\_Of\\_Man\\_Camp\\_In\\_North\\_Dakota\\_From.html](http://www.lakotacountrytimes.com/news/2014-05-22/Front_Page/Firsthand_Account_Of_Man_Camp_In_North_Dakota_From.html).

<sup>6</sup> STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, NCJ203097, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 (2004); *See also* NCAI POLICY RESEARCH CENTER, *STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN* (Feb. 2013), *available at* [http://www.ncai.org/attachments/PolicyPaper\\_tWAjznFslemhAffZgNGzHUqIWMRpkCDjpFtxeKEUVKjubxpfGYK\\_Policy%20Insights%20Brief\\_VAWA\\_020613.pdf](http://www.ncai.org/attachments/PolicyPaper_tWAjznFslemhAffZgNGzHUqIWMRpkCDjpFtxeKEUVKjubxpfGYK_Policy%20Insights%20Brief_VAWA_020613.pdf).

The social risks of oil development on American Indian reservations like Fort Berthold are distinct from development in other areas in the United States.<sup>7</sup> The complex and shifting nature of federal Indian law presents legal and practical challenges to law enforcement in civil and criminal contexts.<sup>8</sup> Federal Indian law requires a jurisdictional analysis that focuses on the identity of the perpetrator and the land status of the location where the crime occurred in order to determine which governmental body is responsible for arrest, detention, and prosecution. Further, the historical exploitation of Indian lands and people informs current social and economic conditions that contribute to increased sex trafficking of Native women and children. The combination of these historical and legal dynamics present unique challenges as the MHA Nation considers their options to effectively police and regulate the conduct of non-Native entities on their reservation and in Indian Country.

This paper begins by describing the intersection of sex trafficking and oil and gas development on the Fort Berthold reservation. Next, the paper describes the jurisdictional regime within federal Indian law and other barriers to law enforcement that have created a situation ripe for trafficking and other crime on the Fort Berthold reservation.<sup>9</sup> Third, the paper will examine strategies to address this complex issue including: corporate engagement of relevant companies; tribal capacity and coalition building; and remedies contained in the Violence Against Women Act of 2014. This paper asserts that all of the stakeholders involved in oil development on the Fort Berthold reservation—federal, state, tribal, and public and private companies—must work cooperatively to decisively eliminate sex trafficking of Native women and children.

## II. SEX TRAFFICKING, NATIVE WOMEN, AND THE BAKKEN OIL BOOM

The United States government defines sex trafficking in the Trafficking Victims Protection Act (“TVPA”) of 2000.<sup>10</sup> The definition therein tracks closely with the definition used in the United Nations Palermo Protocols, which the United States ratified in 2001.<sup>11</sup> The TVPA defines trafficking as the act of “recruiting, harboring, transporting, providing, or obtaining a person for labor or services, *through the use of force, fraud or coercion* for the purposes of subjection to involuntary servitude, peonage, debt bondage or slavery”<sup>12</sup> (emphasis added). Sex trafficking is when “a commercial sex act [e.g. prostitution<sup>13</sup>] *is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age*” (emphasis

---

<sup>7</sup> See Raymond Cross, *Development’s Victim or Its Beneficiary?: The Impact of Oil and Gas Development on the Fort Berthold Indian Reservation*, 87 N.D. L.REV. 535 (2011).

<sup>8</sup> Cross, *Development’s Victim* at 547, *supra* note 7.

<sup>9</sup> This paper does not provide an exhaustive account of all civil and criminal remedies available to the MHA Nation.

<sup>10</sup> Pub.L. 106-386; 22 U.S.C.A. § 7101-7110.

<sup>11</sup> G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

<sup>12</sup> 22. U.S.C.A. § 7102.

<sup>13</sup> 12.1 NDCC 29-03 states that (“an adult is guilty of prostitution..., if the adult: is an inmate of a house of prostitution or is otherwise engaged in sexual activity as a business; solicits another person with the intention of being hired to engage in sexual activity; or agrees to engage in sexual activity with another for money or other items of pecuniary value.”); See also Amanda Peters, *Modern Prostitution Legal Reform & the Return of Volitional Consent*, 3 VA. J. CRIM. L. 1, 4 (2015) for Safe Harbor laws regarding prostitution.

added).<sup>14</sup> Because of the interplay of psychological, physical, and emotional abuse, trafficking is often referred to as modern slavery.

Under the TVPA, trafficking does not require transporting the victims from one location to another.<sup>15</sup> Victims can be recruited and sold in one location, or they can be transported to another location.<sup>16</sup> The key aspect of trafficking is the traffickers' goal to exploit the victim and gain financially at their expense by using deceptive practices.<sup>17</sup> Traffickers sometimes require victims to pay off their "debts" that are purportedly incurred during their work, locking victims in an inescapable cycle of debt and repayment controlled by the trafficker. Importantly, a victim held through psychological manipulation or physical force is still considered a victim of sex trafficking regardless of whether she initially consented to engaging in a commercial sex act, such as prostitution.<sup>18</sup>

Native victims of sex trafficking often have several overlapping risk factors, including exposure to domestic violence, sexual assault, and poverty. Often those who enter are trafficked are already victims of sexual, racial and economic exploitation.<sup>19</sup> Native women experience sexual violence at far higher rates than other women in the United States. According to a report completed in 2000, the rate of sexual assault and rape of Native American women was 7.7 per 1,000 women versus 1.1 for white women and 1.5 for African American women.<sup>20</sup> Many scholars and activists have written extensively on the cumulative impact of colonial violence against Native American people, Native women specifically, and its sanctioning of violence against Native women.<sup>21</sup> This generational and historical trauma along with high incidences of poverty, depression, homelessness, and substance abuse in Native communities make Native women and children<sup>22</sup> extremely vulnerable to trafficking.<sup>23</sup> Since socioeconomic inequality is a

---

<sup>14</sup> 22. U.S.C.A. §7102(10).

<sup>15</sup> DEPT. OF STATE, *TRAFFICKING IN PERSONS REPORT* 8 (June 2013), available at <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm>.

<sup>16</sup> *See Id.*

<sup>17</sup> *Id.* at 29.

<sup>18</sup> *Id.* at 29.

<sup>19</sup> Melissa Farley et al., *Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota*, Minnesota Indian Women's Sexual Assault Coalition 4 (2011), [http://www.prostitutionresearch.com/pdfs/Garden\\_of\\_Truth\\_Final\\_Project\\_WEB.pdf](http://www.prostitutionresearch.com/pdfs/Garden_of_Truth_Final_Project_WEB.pdf).

<sup>20</sup> Alexandra Pierce and Suzanne Koeplinger, *New language, old problem: Sex trafficking of American Indian women and children*, Minnesota Indian Women's Resource Center (Oct. 2011) available at [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_NativeSexTrafficking.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_NativeSexTrafficking.pdf).

<sup>21</sup> *See e.g.* Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 Wm. Mitchell L. Rev. 621 (2010); *See* Benjamin Thomas Greer, *Hiding Behind Tribal Sovereignty: Rooting Out Human Trafficking in Indian Country*, 16 J. GENDER RACE & JUST. 453 (2013); *See also* *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Oversight Hearing before the S. Comm. on Indian Affairs*, 112<sup>th</sup> Cong. (2011) (statement of Professor Sarah Deer).

<sup>22</sup> Exploration of the role of drugs in trafficking and the effect of trafficking on child welfare are the subject of further inquiry.

<sup>23</sup> Pierce & Koeplinger, *New language, old problem* at 2, *supra* note 20; Farley, et al., *Garden of Truth* at 10, *supra* note 19.

major facilitator of entry into the sex trade,<sup>24</sup> it is no surprise that the rapid increase of wealth on and near the Fort Berthold reservation has created a dangerous situation ripe for exploitation of Native women and children living there.

Though general awareness is growing, there has been very little empirical work done specifically regarding trafficking of Native women and children in the United States from which to build prevention efforts. Reports completed with Native survivors of trafficking and sexual violence in Minnesota and Alaska provide some insight into the unique nature of Native women's experiences being trafficked for sex.<sup>25</sup> The exact identity of traffickers and those paying for services is not well known, but several reports indicate that in the majority of cases, sexual violence against Native women is by non-Native perpetrators.<sup>26</sup> Traffickers often "groom" victims, posing as intimate partners, and use incentives such as emotional intimacy and promises of financial independence to gain trust. They then use that relationship to engage victims in commercial sex work. Thus, while more data is needed, it is clear that the women and children on the Fort Berthold reservation are at a higher risk of exploitation by relatively well-paid oil and gas workers who are only temporary residents in this community.

Importantly, the link between violence against indigenous women and the entrance of the extractive industries is only recently being recognized. There is a significant lack of information about the criminal and justice system in many of counties affected by natural resource development. As a result of missing or incomplete crime data, investigators use alternative methods to research crime.<sup>27</sup> These methods may include: surveys, focus groups, interviews of community members, police officers, other service providers and representatives of oil and gas companies.<sup>28</sup> The U.S. State Department recently published a report noting that the influx of industry workers creates a higher demand for the commercial sex industry.<sup>29</sup> The report specifically notes the Bakken region and decries the fact that, "sex trafficking related to extractive industries often occurs with impunity."<sup>30</sup> Although there is no publicly available comprehensive data collection process in place on the reservation as of this publication, people on the reservation report feeling unsafe given the rise in violent crime. A study focused on

---

<sup>24</sup> ALEXANDRA PIERCE, *SHATTERED HEARTS: THE COMMERCIAL SEXUAL EXPLOITATION OF AMERICAN INDIAN WOMEN AND GIRLS IN MINNESOTA* 101 (Minnesota Indian Women's Resource Center 2009), available at <http://www.miwrc.org/wp-content/uploads/2013/12/Shattered-Hearts-Full.pdf>.

<sup>25</sup> See Farley et al., *Garden of Truth*, *supra* note 19; See generally Pierce, *SHATTERED HEARTS*, *supra* note 24.

<sup>26</sup> Farley et al., *Garden of Truth* at 27, *supra* note 19, noting that Native survivors reported that the majority of men who bought them were "White European-American (78%) or African American (65%) but also Latino (44%), Native American (24%), or ... Asian (9%)."; RONE BACHMAN ET AL., U.S. DEPT. OF JUSTICE, *VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN*, 38 (Aug. 2008), noting that 67% of Native women victims of rape or sexual assault describe the offender as non-Native. See also, Pierce, *SHATTERED HEARTS*, at 51, *supra* note 24, notes that many trafficking survivors report that they were first sold by friends or family. This is a disturbing pattern of trafficking that bears on the MHA's nations ability to enforce its laws strongly against both Native and non-Native perpetrators.

<sup>27</sup> See Ruddell, Rick, Dheeshana S. Jaysundara, Roni Mayzer and Thomasine Heitkamp, *Drilling Down: An Examination of the Boom-Crime Relationship in Resource Based Boom Counties*, *WESTERN CRIMINOLOGY REVIEW* 15(1):4 (2014), available at <http://www.westerncriminology.org/documents/WCR/v15n1/Ruddell.pdf>.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> U.S. DEPT OF STATE, *THE LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING*, (July 2015) available at <http://www.state.gov/documents/organization/245377.pdf>.

<sup>30</sup> *Id.*

counties in Montana and North Dakota noted that many law enforcement agencies in “resource based boom communities” face challenges in responding to an increased number of calls for service.<sup>31</sup> Most rural communities do not have the infrastructure, leadership capacity or expertise to respond to the rapid social changes and population growth.<sup>32</sup> Consequently, local resources are drained dealing with: “crime, substance abuse, health problems and the stress placed on human service organizations and public services due to increased demand for services and insufficient capacity to meet those demands.”<sup>33</sup> Crime rates in the Bakken are still rising and the number of people charged in federal court in Western North Dakota rose 31% in 2013 alone.<sup>34</sup> This crime rate is almost double the number of criminal defendants charged in 2011.<sup>35</sup> Recently, the tribe posted a news release alerting the community that four men had attempted to abduct an 18-year-old girl while she was running on the track of a local elementary school. She reported that two men followed her on foot, while two more followed in a van. It was only after she reached her uncle’s house that the men left. Studies involving the police and human service agents in the Bakken region discovered that cases of domestic violence were growing.<sup>36</sup> Thirty-three percent of police officers interviewed in the Bakken region reported that community members changed their behavior because they were fearful of crime.<sup>37</sup> A recent news article describes the plight of a Native American domestic violence victim left in Valley City, N.D. who was then abducted and transported to the Bakken oil patch as part of a human trafficking operation.<sup>38</sup> To these ends, the MHA Nation, the federal and state governments, and the oil and gas industry must work cooperatively to protect Native women and children on and near the Fort Berthold reservation.

Fort Berthold encompasses nearly 1 million acres and is home to over 4,000 people.<sup>39</sup> The reservation is divided into six segments, where each segment elects a representative to the Tribal Business Council.<sup>40</sup> The Business Council, overseen by the Chairman, governs all aspects of the reservation pursuant to their power under the Constitution and by-laws of the Three Affiliated Tribes. The Business Council has overseen all aspects of oil and gas development on the reservation, including its side effects such as the increased need for road maintenance, long-term planning, and increased regulatory oversight over leasing. Notably, the Tribal Business Council passed a resolution in December of 2014 to prevent human trafficking and to approve the tribal

---

<sup>31</sup> See Ruddell, *Drilling Down* at 4, *supra* note 27.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.*

<sup>36</sup> See Ruddell, *Drilling Down* at 4, *supra* note 27. A recent news article describes the plight of a Native American domestic violence victim left in Valley City, N.D. who was then abducted and transported to the Bakken oil patch as part of a human trafficking operation. See Marshall Helmberger & Jodi Summit, *North Dakota nightmare*, TIMBERJAY (May 3, 2015), available at [http://timberjay.com/detail.html?sub\\_id=12122](http://timberjay.com/detail.html?sub_id=12122). ; see also Zoe Sullivan *Crimes against Native American women raise questions about police response*, THE GUARDIAN (January 19, 2016) available at <http://www.theguardian.com/us-news/2016/jan/19/minnesota-native-american-women-trafficking-police> (last visited January 27, 2016).

<sup>37</sup> See Ruddell, *Drilling Down* at 4, *supra* note 27.

<sup>38</sup> Sullivan, *Crimes against Native*, *supra* note 36.

<sup>39</sup> U.S. Dept. of the Interior, Indian Affairs, Fort Berthold Agency (Updated Dec. 4, 2015), <http://www.bia.gov/WhoWeAre/RegionalOffices/GreatPlains/WeAre/Agencies/FortBerthold/index.htm>.

<sup>40</sup> *MHA Nation Elected Officials*, MHA NATION, [http://www.mhanation.com/main2/elected\\_officials.html](http://www.mhanation.com/main2/elected_officials.html) (last visited Jan. 24, 2015).

Human Trafficking Code, called Loren’s Law.<sup>41</sup> Furthermore, the Council called for a panel on public safety during the Indigenous Nations Economic Development Summit on November 16, 2015 to specifically discuss sex trafficking and violent crime related to oil and gas drilling.<sup>42</sup>

MHA Nation law enforcement does not currently have the jurisdiction or capacity to address this burgeoning problem, along with the traffic violations and regulatory issues that have increased with development. At the most basic level, there are not enough officers to effectively police the vast stretches of the reservation. More complicating, trafficking occurs in the shadows.<sup>43</sup> Traffickers seek out vulnerable individuals and locate their operations where they know they are least likely to be caught and most likely to make a profit.<sup>44</sup> Traffickers increasingly turn to the internet to sell women and children and connect to “johns” without being caught.<sup>45</sup> Thus, Fort Berthold has become the perfect place for this heinous crime in the wake of increased oil and gas development.

While the MHA Nation desires to protect their community by preventing trafficking and holding offenders accountable, the limits imposed by federal Indian law restrain their ability to act decisively and effectively. They are also constrained by funding and other practical considerations, including the need to retain the economic benefits of on-reservation development. Section III of this paper canvases the bounds and limits on the MHA Nation under federal Indian law. It also discusses the capacity of the tribe to work on this issue. Section IV then turns to the various opportunities available to all stakeholders to eliminate sex trafficking of Native women and children on the Fort Berthold reservation.

### III. OBSTACLES TO CRIMINAL ENFORCEMENT IN INDIAN COUNTRY

#### A. CRIMINAL JURISDICTION IN INDIAN COUNTRY

Tribal authority to impose and enforce criminal laws has steadily eroded across the course of U.S. history, largely due to the fluctuating policy positions taken by Congress. And while Congress has, in recent years, passed laws to restore limited power to the tribes, the tribes remain largely powerless to prosecute most criminal activity committed by non-Indians on their lands.

##### 1. *The Indian Country Crimes Act*

---

<sup>41</sup> Resolution No. 14-195-VJB Law.

<sup>42</sup> The Indigenous Nations Economic Development Summit, agenda *available at* [http://www.mhanation.com/main2/Home\\_Events/Events\\_2015/11\\_November%202015/Indigenous%20Nations%20Economic%20Development%20Summit%20Nov%2016-17.pdf](http://www.mhanation.com/main2/Home_Events/Events_2015/11_November%202015/Indigenous%20Nations%20Economic%20Development%20Summit%20Nov%2016-17.pdf) (last visited Jan. 24, 2016).

<sup>43</sup> Greer, *Hiding Behind Tribal Sovereignty* at 48, *supra* note 21.

<sup>44</sup> See Pierce, SHATTERED HEARTS, *supra* note 24; See Greer, *Hiding Behind Tribal Sovereignty*, *supra* note 21.

<sup>45</sup> *Highlighting Impact on Missouri, McCaskill Targets Sex Trafficking & Demands Answers from Backpage.com in Bipartisan Investigative Hearing*, (Nov. 19, 2015), *available at* <http://www.mccaskill.senate.gov/media-center/news-releases/highlighting-impact-on-missouri-mccaskill-targets-sex-trafficking-and-demands-answers-from-backpagecom-in-bipartisan-investigative-hearing>. A Senate subcommittee held a hearing noting the presence of trafficking ads on Backpage.com and calling for increased regulation to police this and similar sites.



In their earliest interactions, the federal government engaged with the tribes as sovereign powers, entering into formal treaties that established how the two sovereign governments would interact. But as time progressed, conflict grew between settlers and Natives as to their land holdings and the federal government interceded to stem the increasing violence. In response, Congress passed the Indian Country Crimes Act (“ICCA”) of 1834 extending federal, but not state, jurisdiction over crimes between Indians and non-Indians in Indian country.<sup>46</sup> Indian Country, defined under 18 U.S.C. §1151, includes: 1) “all land within the reservation under the jurisdiction of the United States government,” 2) “dependent Indian communities, and” 3) “all Indian allotments, the Indian titles to which have not been extinguished.”<sup>47</sup> The law was limited in that it left the tribes with some control over their members, allowing tribes to punish Indians who committed crimes against other Indians on Indian lands, or where a treaty had otherwise given the particular tribe exclusive jurisdiction.<sup>48</sup> The federal government, by excepting Indian offenders whom the tribal government had tried and punished, ensured that the tribes retained concurrent jurisdiction over crimes committed by Indians.<sup>49</sup> But even within this context, the federal government indicated a distrust of tribes to fairly prosecute nonmembers who committed criminal violations on their lands.<sup>50</sup>

The exercise of federal jurisdiction was dependent upon the “interracial character of the crime.”<sup>51</sup> This introduced the concept of separating Indians from non-Indians under the law. In effect, unless the crime falls within another federal statute, such as the Major Crimes Act, crimes between and Indian defendant and Indian victim remain within the exclusive control of the tribal government and may not be tried in federal court.<sup>52</sup> A Non-Indian defendant with a Non-Indian victim is also excluded from federal coverage because, as decided through common law, a completely non-Native crime falls under state jurisdiction.<sup>53</sup>

## 2. *The Major Crimes Act*

As expansion continued throughout the 1800s, settlers and states began to encroach on Indian Country and were desirous of more control therein.<sup>54</sup> United States policy shifted to removal of Indians from their ancestral lands to reservations west of the Mississippi. Although many tribes lost a significant amount of their population due to strenuous travel and sickness, they remained governed by their traditional leadership structures and had near-exclusive control of their lands. In 1871 Congress actualized a major policy change and declared that, “no Indian nation or tribe within the territory of the United States shall be recognized as an independent nation, tribe, or

---

<sup>46</sup> 18 U.S.C. §1152.

<sup>47</sup> FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 9.02 at 1-9 (2005).

<sup>48</sup> 18 U.S.C. §1152.

<sup>49</sup> Staff of the Budget Comm. on Human Services, N.D., N.D. CONG., *Indian Jurisdiction Issues* (Comm, Print 2004).

<sup>50</sup> See generally Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Non-Members in Tribal Legal Systems*, 37 ARIZ. ST. L. J. 1037 (2004).

<sup>51</sup> Cohen at 1-9, *supra* note 47.

<sup>52</sup> *Id.*

<sup>53</sup> Cohen at 1-9, *supra* note 47; See also *United States v. McBratney*, 104 U.S. 621 (1882).

<sup>54</sup> See H.R. DOC. NO. 19-213 AT 5-6, 8-12 (1<sup>st</sup> Sess. 1826). ANNALS OF CONG. 682-83 (1823); 37 ANNALS OF CONG. 679 (1820); II AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES: FOREIGN RELATIONS 662-65.

power with whom the United States may contract by treaty.”<sup>55</sup> Congress, often viewing the tribes as uncivilized, and with few real checks on its power, freely enacted legislation designed to destroy tribes and to assimilate Native individuals into American society.

The Supreme Court did not adopt such a radical policy and ruled in 1883 in *Ex Parte Crow Dog* that the United States did not have jurisdiction to prosecute an Indian for the on-reservation murder of another Indian.<sup>56</sup> The Court referred explicitly to the provisions of the ICCA.<sup>57</sup> This preserved tribes’ ability to maintain order over their lands as to their members, though the tribes’ success was short lived.

Fearful that tribes would fail to prosecute crimes or to impose substantial punishments and fall into a never-ending cycle of violence, Congress enacted the Major Crimes Act (“MCA”) in 1885.<sup>58</sup> The MCA “federalized prosecutions of serious crimes between Indians on reservations,” a subject that had therefore been considered an exclusive matter for internal tribal governance.<sup>59</sup> In effect, this Act greatly infringed on the sovereign powers of Indian tribal governments and was an incredible expansion of federal authority over Indian tribes and people.<sup>60</sup> The Major Crimes Act did not strip the tribes of jurisdiction over crimes between members, but gave the federal government concurrent jurisdiction over a specific list of enumerated violent crimes, including: manslaughter, kidnapping, maiming, incest, assault against those under 16 years of age, and felony child abuse or neglect, among others.<sup>61</sup> In order for the MCA to apply, four fundamental elements must exist.<sup>62</sup> The MCA applies when (1) an Indian commits, (2) against a person or property of another Indian or person, (3) one of the enumerated offenses, (4) within Indian country.<sup>63</sup> Although the MCA provided for federal jurisdiction over certain enumerated serious felonies by Indians, it did not revoke the tribes’ authority to punish Indians for crimes listed in the MCA.<sup>64</sup>

Though the MCA confers federal jurisdiction for prosecution and punishment for certain heinous crimes, it was effectuated at a time of large land cessions by tribes and subsequent increased dependence on the federal government for goods and services.<sup>65</sup> The MCA was an extension of federal authority “over a subjugated people at the time of their greatest weakness and political dependence on the United States.”<sup>66</sup> Without consent and without any sort of democratic

---

<sup>55</sup> Act of March 3, 1871, 16 Stat. 566 (codified as amended at 25 U.S.C. 71.).

<sup>56</sup> *Ex Parte Kan-gi-shun-ca* (otherwise known as *Crow Dog*), 109 U.S. 556 (1883).

<sup>57</sup> *Id.*

<sup>58</sup> Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 CAROLINA L. REV. 779, 5 (April 2006).

<sup>59</sup> *Id.*

<sup>60</sup> See Francis Paul Prucha, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND AMERICAN INDIANS*, 679 (1984).

<sup>61</sup> See 18 U.S.C. §1153.

<sup>62</sup> Cohen at 1-9, *supra* note 47; See also University of Arizona, *Major Crimes Act*, UA Native Net. (Oct 11, 2015), <http://www.uanativenet.com/topicitem/Topics%20In%20Brief/455>.

<sup>63</sup> Cohen at 1-9, *supra* note 47.

<sup>64</sup> Budget Comm, *Jurisdiction Issues*, *supra* note 49.

<sup>65</sup> Washburn, *Federal Criminal Law* at 19, *supra* note 58.

<sup>66</sup> *Id.* at 27.

engagement with the tribes, Congress expanded federal jurisdiction over Indian Country.<sup>67</sup> In upholding this authority over the tribes, the Supreme Court “recognized that the United States has a duty of protection toward the Indians and from this duty arises the power to exercise criminal jurisdiction.”<sup>68</sup>

In addition to the MCA, “[t]he Assimilative Crimes Act, now codified at 18 U.S.C. § 13, provides that whoever is —guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District . . . shall be guilty of a like offense and subject to a like punishment.”<sup>69</sup> The effect of the MCA and the Assimilative Crimes Act was to extend federal jurisdiction to almost all crimes committed in Indian Country, with the exception of a few judicial carve-outs.<sup>70</sup> Again, the explicit policy of the federal government was to assimilate individuals, and eliminate tribes, while still accepting, to a limited degree, their responsibility as trustee. As a result, the policies of assimilation worked to weaken tribal government and to place most serious crimes under federal jurisdiction.

With the outward hope that homesteading and farming would speed Native people to adopting the agrarian ideal enforced in U.S. policy, Congress passed the General Allotment Act of 1887. The Allotment Act assigned portions of the reservation land to individual Indians and allowed the surplus land from the former reservations to be opened for non-Indian settlement. There was no provision for tribal consent, and tribes ceased to hold the large tracts of land they had been promised by the federal government. The Act provided that the trust relationship between the individual Indian landowners and federal government expired after 25 years.<sup>71</sup> The effects of the Allotment Act, which some have referred to as the “most disastrous piece of Indian legislation in United States history”<sup>72</sup> was to divest tribes of their land base, and allow significant land holdings by non-Indians in Indian Country. The Allotment Act resulted in a “checkerboard pattern” of land ownership.<sup>73</sup> This checker-boarded land ownership created a convoluted jurisdiction scheme between federal, state and tribal governments that continues to trouble Indian country.<sup>74</sup>

By 1934, Congress had moved away from allotment policies and introduced the Indian Reorganization Act (“IRA”).<sup>75</sup> The IRA put an end to the allotment and assimilation policies and encouraged tribes to adopt formal constitutions—subject to review and approval by the Secretary

---

<sup>67</sup> *Id.*

<sup>68</sup> *United States v. Kagama* 118 U.S. 375 (1886); Washburn, *Federal Criminal Law*, *supra* note 58.

<sup>69</sup> Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 151 (2011).

<sup>70</sup> *See Id.*

<sup>71</sup> 25 U.S.C. §348; Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 980 (2000).

<sup>72</sup> WILLIAM CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 21-24 (5<sup>th</sup> ed., 2009).

<sup>73</sup> *See* Judith V. Royster, *the Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 1 (1995).

<sup>74</sup> *Id.*

<sup>75</sup> Act of June 18, 1934, 28 Stat 985. *See also* Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014).

of the Interior—and restructure their governments.<sup>76</sup> By providing structure, the IRA ultimately strengthened tribal institutions, including tribal courts.<sup>77</sup> While this supported tribal governments' ability to engage with the US, it complicated internal matters by encouraging tribes to pattern themselves after the unfamiliar democratic-republic system of the U.S. government that did not always mesh with tribal institutions and values.

### 3. *Public Law 280*

In the early 1950s, Congress began its termination policy, under which it formally revoked federal recognition of certain tribes.<sup>78</sup> In effect, “[w]hen Congress terminated the federal relationship with a tribe, the federal government lost federal criminal authority; jurisdiction over the affected Indian people devolved to the states.”<sup>79</sup> In the early 1950’s Congress believed law enforcement and judicial services in Indian country to be inadequate.<sup>80</sup> To help resolve this perceived problem, Congress, unilaterally and without tribal consent, passed Public Law 280 (PL-280) in 1953. This “hallmark” Act of the termination era drastically altered criminal jurisdiction in certain states and transferred jurisdiction from federal governments to certain state governments.<sup>81</sup> Conforming with the general policy of termination, PL-280 decreased federal criminal jurisdiction in Indian country.<sup>82</sup> Significantly, PL-280 granted states greater authority than what the federal government had enjoyed.<sup>83</sup> The statute provided:

“[e]ach of the States or Territories listed ... shall have jurisdiction over offenses committed by or against Indians in the areas of Indian ... to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.”<sup>84</sup>

Under this Act, states could “enforce virtually all of their criminal laws, including misdemeanors.”<sup>85</sup> Consequently, PL-280 proved to be “even more aggressive encroachment on tribal sovereignty than the existing federal system” had been.<sup>86</sup> Congress, in effect, required six states to assume criminal and civil jurisdiction over Indian country. Furthermore it provided that the ICCA and MCA did not apply within those areas of Indian country.<sup>87</sup> Congress also authorized other states to voluntarily opt to assume criminal and civil jurisdiction over Indian country.<sup>88</sup> In states that voluntarily opted in, the federal and state governments would share

---

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Washburn, *Federal Criminal Law* at 31, *supra* note 58.

<sup>79</sup> *Id.* at 30.

<sup>80</sup> See Budget Comm, *Jurisdiction Issues*, *supra* note 49.

<sup>81</sup> See CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997).

<sup>82</sup> Cohen at 1-9, *supra* note 47.

<sup>83</sup> Washburn, *Federal Criminal Law* at 31, *supra* note 58.

<sup>84</sup> 18 U.S.C. § 1162.

<sup>85</sup> Washburn, *Federal Criminal Law* at 31, *supra* note 58.

<sup>86</sup> *Id.*

<sup>87</sup> Budget Comm, *Jurisdiction Issues*, *supra* note 49.

<sup>88</sup> *Id.*

concurrent jurisdiction, and where applicable, tribes might have concurrent jurisdiction as well.<sup>89</sup> As states took over many of the functions formerly performed by the federal government, many adverse consequences appeared.<sup>90</sup> States began to see the Acts as “unfunded mandates.” The affected states were required to provide services without funding from the federal government. Termination and PL-280 left Native people “poorly served” and the Act caused civil rights issues to flare.”<sup>91</sup>

North Dakota was one of the states that voluntarily opted into the PL-280 regime.<sup>92</sup> However, a later state amendment requires tribal consent for the state to assume jurisdiction over Indian country land in the state.<sup>93</sup> As a result of this amendment, North Dakota is no longer a Public Law 280 state.<sup>94</sup>

#### 4. *The Indian Civil Rights Act*

At the close of the termination era, Indian activists took highly visible stands for the rights of tribes and tribe members.<sup>95</sup> As the self-determination era began, one of the critical issues was the lack of quality federal law enforcement and criminal justice on Indian land—issues brought to the attention of the government by tribes.<sup>96</sup> In fact, “United States attorneys, unlike state prosecutors, typically decline[d] to prosecute in a far greater percent of cases, [resulting] in the underenforcement of criminal laws in Indian Country.”<sup>97</sup> As a result, self-determination policies “bolstered the role of tribes as integral participants.”<sup>98</sup> Ushering in the self-determination era was an act that “gave voice to the concerns of civil rights activists.”<sup>99</sup>

The Indian Civil Rights Act (“ICRA”), passed in 1968, provided Indians with protections similar to those listed in the Bill of Rights.<sup>100</sup> Despite the fact that the adoption of ICRA was a clear rejection of termination and endorsement of “the continued existence of tribal governments,” it was also a significant imposition.<sup>101</sup> When passing the ICRA in 1968, Congress included restrictions that prevented tribes from imposing long sentences or large fines.<sup>102</sup> Showing a distrust of tribal courts, the ICRA limited tribal court sentences to “six months of imprisonment and a \$500 fine.”<sup>103</sup> In 1988 those limits were raised to 1 year of imprisonment and a fine of up to \$5,000.<sup>104</sup>

---

<sup>89</sup> 18 U.S.C. § 1162.

<sup>90</sup> Washburn, *Federal Criminal Law* at 32, *supra* note 58.

<sup>91</sup> *Id.*

<sup>92</sup> See Budget Comm, *Jurisdiction Issues*, *supra* note 49.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Washburn, *Federal Criminal Law* at 32, *supra* note 58.

<sup>96</sup> *Id.*

<sup>97</sup> Peter Nicolas, *American Style Justice in No Man’s Land*, 36 GA. L. REV. 895, 963 (2002).

<sup>98</sup> Act of June 18, 1934, 28 Stat 985; See also Singel, *The First Federalists*, *supra* note 75.

<sup>99</sup> Washburn, *Federal Criminal Law*, *supra* note 58.

<sup>100</sup> 25 U.S.C. §§ 1302-1304.

<sup>101</sup> Washburn, *Federal Criminal Law* at 32, *supra* note 58.

<sup>102</sup> Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

ICRA was again amended in 2010 to extend sentencing abilities of tribes. As amended, ICRA provides that tribes may sentence a defendant to imprisonment for up to 3 years for any 1 offense and fine them up to \$15,000.<sup>105</sup> This extended sentencing applies to a defendant who

1. has been previously convicted of the same or a comparable offense by any jurisdiction of the US or<sup>106</sup>
2. is being prosecuted for an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the US or one of the States<sup>107</sup>

Importantly, tribes are only able to implement the extended sentencing, as provided for by the 2010 amendments of the ICRA, by meeting the requirements of the later Tribal Law and Order Act (“TLOA”). By passing ICRA, Congress effectively limited the jurisdiction of tribal courts to petty misdemeanors and made felony jurisdiction under the MCA exclusive to the federal government.<sup>108</sup>

At the same time, ICRA incorporated a majority of criminal procedural rights found in the Bill of Rights.<sup>109</sup> These rights included warrant requirements and the protection against unreasonable searches and seizures, prohibition of double jeopardy, prohibition of compelled self-incrimination, and the prohibition of deprivations of life, liberty or property without due process.<sup>110</sup> Furthermore, to meet the requirements of the Act, the tribe must guarantee access to licensed defense counsel, effective counsel, provide a judge with legal training and licensed to practice law, and make its criminal laws publicly available.<sup>111</sup> In theory, ICRA was to address concerns that defendants would face trial without basic due process rights, by extending certain basic procedural rights to anyone tried in tribal court.<sup>112</sup> Further, ICRA confers a federal habeas right to defendants who claim their rights have been violated.<sup>113</sup>

If the federal interest in restricting tribal criminal jurisdiction and sentencing is to ensure that defendants have a fair trial, the rights provided through ICRA substantially alleviate such concerns.<sup>114</sup> Although ICRA provides defendants with additional protection, the prevalence of on-reservation crime, and the lack of federal enforcement, often leaves non-member defendants unpunished and tribal defendants with sentences that may be proportionally light.<sup>115</sup>

---

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See generally Soo C. Song and Vanessa J. Jimenez, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998).

<sup>109</sup> Washburn, *Federal Criminal Law* at 34, *supra* note 58.

<sup>110</sup> 25 U.S.C. §§ 1302-1304.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Washburn, *Federal Criminal Law* at 34, *supra* note 58.

<sup>114</sup> Alex Tallchief Skibine, *Constitutionalism, Federal Law, and the Inherent Powers of Indian Tribes*, 39, 37 AMER. IND. L. REV. 77 (2014).

<sup>115</sup> JANE M. SMITH, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE, R43324, TRIBAL JURISDICTION OVER NON-MEMBERS: A LEGAL OVERVIEW (2013).

Functionally, the sentencing limits in ICRA have impeded tribal ability and obstructed efforts to address the serious offenses of sexual assault and sex trafficking. In effect, ICRA has forced the tribes to ask Congress to extend the MCA.<sup>116</sup>

### 5. *Judicial Decisions Further Restricting Tribal Criminal Jurisdiction*

Even with the substantial gains for tribal courts and tribes in the self-determination era, the Supreme Court issued several decisions limiting tribal authority to punish non-Indian offenders for on-reservation crimes.<sup>117</sup>

In 1978, the Supreme Court further limited tribal jurisdiction by holding that tribes did not have criminal jurisdiction over non-Indian defendants.<sup>118</sup> In *Oliphant v. Suquamish*, the question was whether the tribe had the authority to prosecute a non-Indian who had committed a crime against an Indian on the reservation.<sup>119</sup> Initially, the Ninth Circuit upheld the exercise of tribal criminal jurisdiction over nonmembers, reasoning that:

Federal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated\*\*\*. Prosecutors in countries adjoining Indian reservations are reluctant to prosecute non-Indians for minor offenses where limitations on state process within Indian country may make witnesses difficult to obtain, where the jurisdiction division between federal, state and tribal governments over the offense is not clear and where the peace and dignity of the government affected is not his own but that of the Indian tribe. Traffic offenses, trespasses, violations of hunting and fishing regulations, disorderly conduct and even petty larcenies and simple assaults committed by non-Indians go unpunished. The dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency towards lawless behavior necessarily follows.<sup>120</sup>

The Supreme Court abandoned this reasoning. The Court held, “Indian tribes do not have inherent sovereignty to try non-Indian criminal defendants.”<sup>121</sup> Rather than adhering to long-established principles of Indian law, the Court reasoned, “[h]istorically the legislative and executive branches and lower courts presumed that Indian tribes did not have authority over non-Indians who committed offenses within Indian country.”<sup>122</sup> The Court asserted that, as domestic dependent nations, Indian tribes necessarily give up their power to try non-Indian citizens except in a manner that Congress explicitly authorizes.<sup>123</sup> In a criminal case, “tribal power was in

---

<sup>116</sup> Washburn, *Federal Criminal Law*, *supra* note 58.

<sup>117</sup> See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); See also *Duro v. Reina*, 485 U.S. 676, 688 (1990).

<sup>118</sup> *Oliphant* 435 U.S. 191.

<sup>119</sup> *Oliphant* 435 U.S. 191; Skibine, *Constitutionalism*, *supra* note 114.

<sup>120</sup> *Oliphant v. Schlie*, 544 F.2d 1013-14, 1013 (9th Cir. 1976).

<sup>121</sup> *Oliphant* 435 U.S. 191, 195-99; See also Smith, TRIBAL JURISDICTION OVER NON-MEMBERS, *supra* note 115.

<sup>122</sup> *Oliphant* 435 U.S. 191, 202-06.

<sup>123</sup> See *Oliphant*, 435 U.S. 191, 209-11; See also Smith, TRIBAL JURISDICTION OVER NON-MEMBERS, *supra* note 115.

conflict with the overriding sovereign interests of the United States, because, since the Bill of Rights was not applicable to tribal prosecution, such prosecution could result in “unwarranted intrusions” on the personal liberty of non-Indians.”<sup>124</sup>

*Oliphant v. Suquamish* greatly limits a tribe’s ability to protect its members. Tribes, including the MHA Nation, now have little control over non-Indian criminal offenders on their lands. *Oliphant* made clear that felony criminal jurisdiction over non-members falls exclusively within federal jurisdiction. Therefore, the federal government has an obligation to protect the tribes because they have been subjected to the overriding regime of the United States.<sup>125</sup> By limiting the ability of the tribe to prosecute non-Indian offenders, *Oliphant* removes tribal authority to act decisively regarding non-Indian offenders in this moment to end trafficking or sexual assault.

In 1990, the Supreme Court further restricted tribal jurisdiction by holding in *Duro v. Reina* that a tribe’s retained sovereignty did not include the authority to assert criminal jurisdiction over an Indian who was not a tribal member.<sup>126</sup> *Duro* was a Native man residing on the Salt River Indian Reservation who was accused of killing of 14-year-old boy.<sup>127</sup> He was charged in federal court but the case was dismissed.<sup>128</sup> He was then tried in tribal court and filed a writ of habeas corpus in the United States District Court.<sup>129</sup> The District Court reasoned that he could not be tried in tribal court because the tribe did not possess the authority to exercise criminal jurisdiction over non-member Indian offenders.<sup>130</sup> Ultimately the Supreme Court agreed, stating “[i]n absence of special legislation, Indians, like other citizens, are embraced by protection against unwarranted intrusion on personal liberty.”<sup>131</sup> The court expressed concern over foisting tribal courts “unique customs,” “unspoken practices and norms” and a politically subordinate court on nonmember Indians.<sup>132</sup> Further, the Court reiterated the same rationale voiced in *Oliphant*.<sup>133</sup> Justice Kennedy stated that the inability to apply the bill of rights protections was, “...all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.”<sup>134</sup> Although Kennedy expressed concern about non-members being “subjected to cultural standards” to which they are not accustomed as justification for this limit of tribal authority over non-members, he did not address the fact that this is also how the federal government limits tribal governments.<sup>135</sup> In fact, common law has “subjugated” tribes through the implications of the Constitution, to which they did not consent to be bound.<sup>136</sup>

---

<sup>124</sup> Skibine, *Constitutionalism* at 9, *supra* note 114.

<sup>125</sup> *Oliphant* 435 U.S. 191, 207.

<sup>126</sup> *See Duro* 485 U.S. 676, 688.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Duro* 485 U.S. 676, 689; *See also* Smith, TRIBAL JURISDICTION OVER NON-MEMBERS, *supra* note 115.

<sup>131</sup> *Duro* 485 U.S. 676, 688.

<sup>132</sup> *Id.*

<sup>133</sup> *See Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *See* Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX REV. L. & POL. 329,356-57 (2008).



## IV. TOWARD A SOLUTION

Though the ability of the tribe to criminally prosecute sex traffickers on the reservation is limited, there are several other means the Tribe may explore available to address the problem. This section will canvas both criminal and civil remedies available to the tribe as well as some of the opportunities available to build strong partnerships to combat trafficking. Finally, this section will look at the opportunities available for corporate engagement to ensure that the corporations working on the reservation are doing so responsibly and in consideration of this issue.

### A. LEGAL REMEDIES

In 1991, as a fix to *Duro v. Reina*, Congress passed an amendment to the ICRA that stated, “[p]owers of self government include the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdictions over all Indians.”<sup>137</sup> Congress defined an “Indian” as “any person who would be subject to the jurisdiction of the US as an Indian under section 1153 of title 18...”<sup>138</sup> This amendment extends tribal jurisdiction over non-member Indians. Even with the expansion of jurisdiction, the federal government retains concurrent jurisdiction, and nearly exclusive criminal jurisdiction over felonies under the MCA. The MHA nation would be able to extend concurrent jurisdiction only to the limits of sentencing.

Even with the adoption of self-determination as the federal policy in interacting with tribal nations, “felony criminal justice on Indian reservations has remained an exclusive federal function and a highly ineffective enterprise, according to critics, because crime is worse for American Indians than any other group.”<sup>139</sup> It has been argued that the federal government has not followed the general policy in criminal jurisdiction because “[i]t is doubtful that relinquishment of federal criminal jurisdiction seemed viable to federal officials who viewed the tribe as broken, dependent, as poor as ever, and in need of federal assistance.”<sup>140</sup> While the federal government has occasionally taken interest, adding twenty eight assistant US attorneys to Indian country issues in 1990, 30 FBI agents to federal crime in 1997, twenty eight assistant US attorneys to Indian country issues in 1990, and 27 new positions in the FBI’s Indian country unit in 2004, the problem has only worsened.<sup>141</sup> These efforts at improvement are hampered by the separation of the “mostly rural Indian communities where these federal crimes occur from the urban federal courts.”<sup>142</sup> Further, the vast cultural difference between the federal courts and the Indian people complicate interaction and enforcement.<sup>143</sup>

Indian law and federal policy as to relations with tribes and American Indian individuals has fluctuated enormously over time. Early Supreme Court decisions spoke of the unique legal status of Indian tribes and a special relationship with the federal government.<sup>144</sup> But because the U.S.

---

<sup>137</sup> Smith, TRIBAL JURISDICTION OVER NON-MEMBERS, *supra* note 115.

<sup>138</sup> 25 U.S.C. §§ 1302-1304; Smith, TRIBAL JURISDICTION OVER NON-MEMBERS, *supra* note 115.

<sup>139</sup> Washburn, *Federal Criminal Law* at 1, *supra* note 58.

<sup>140</sup> *Id.* at 29.

<sup>141</sup> *Id.* at 11.

<sup>142</sup> *Id.* at 3.

<sup>143</sup> *Id.* at 4.

<sup>144</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831).

Constitution does not clearly delineate every circumstance that can arise in the relationship, it has been left to Congress and the Supreme Court to define it. In one of the first Supreme Court decisions on Indian affairs the Court held that, “the federal government has a duty to protect the interest of tribes.”<sup>145</sup> This duty became known as the trust responsibility and, pursuant to this responsibility, “the federal government owes a fiduciary duty to the tribes to protect their interests.”<sup>146</sup>

Indian tribes were strong independent sovereign communities prior to the erosion of their powers through conflict, legal and political, with the United States.<sup>147</sup> Through treaties with various tribes, the United States once acknowledged tribal authority to punish non-Indians for their conduct on Indian land.<sup>148</sup> As the United States expanded west, conflict between settlers, land speculators, and tribes led to a string of court decisions and legislation that restricted that power.<sup>149</sup> Early court decisions labeled the tribes “domestic dependent nations” subject to the authority of the federal government, while still affirming the status of the tribes as sovereign nations.<sup>150</sup> In his foundational opinion, Justice Marshall wrote,

The very term nation so generally applied to them means a people distinct from others. The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties.<sup>151</sup>

The preeminent Indian law scholar, Felix Cohen, articulated three fundamental principles on the nature of Indian tribal powers.<sup>152</sup> First, an Indian tribe possesses all the powers of any sovereign state. Second, conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of the sovereignty of the tribe, but does not by itself affect the internal sovereignty of the tribe, i.e. its powers of local self-government. Third, these powers are subject to quantification by treaties and by express legislation of Congress,<sup>153</sup> thereby giving Congress plenary power over Indian affairs.

The federal government has thus used its power to limit tribal jurisdiction over nonmembers—especially in the area of criminal law. These limitations stem from beliefs that tribes will unfairly implement their laws as to non-members, thereby violating rights of nonmembers while allowing members to go unpunished.<sup>154</sup> Through its plenary power Congress has passed legislation limiting the jurisdiction of tribal governments over non-members and over certain crimes, even

---

<sup>145</sup> Thorington, *Civil and Criminal Jurisdiction*, *supra* note 71; *See also Cherokee Nation* 30 U.S. 1, 16-17.

<sup>146</sup> *Id.*

<sup>147</sup> Washburn, *Federal Criminal Law* at 12, *supra* note 58.

<sup>148</sup> Treaty of Greenville, U.S.- Wyandot, Aug 3, 1795, 7 Stat. 49.

<sup>149</sup> Washburn, *Federal Criminal Law* at 13-14, *supra* note 58.

<sup>150</sup> *Cherokee Nation* 30 U.S. 1.

<sup>151</sup> *Id.*

<sup>152</sup> Cohen, *supra* 47.

<sup>153</sup> *Id.*

<sup>154</sup> *Ex Parte KAN-GI-SHUN-CA*, 109 U.S. 556.

in regards to their own members. As a result of “making felony criminal jurisdiction in Indian country a federal responsibility, the United States undertook an important responsibility that it has never effectively discharged.”<sup>155</sup> Simultaneously, it has left “tribal governments, and consequently tribal communities, with little or no involvement in the felony criminal justice systems on their own reservations.”<sup>156</sup> The imposition of this jurisdictional system illustrates a “unilateral imposition, by an external authority, of substantial criminal norms on separate and independent communities without consent and often against their will.”<sup>157</sup>

Over time, the federal government has divested the Indian tribes of their powers of criminal enforcement, *and in doing so has taken on a responsibility to see that laws are enforced and violations prosecuted on reservations.*<sup>158</sup> However, the “complex patchwork of federal, state and tribal law and criminal jurisdiction... allows many perpetrators—particularly non-Indians—to go unprosecuted.”<sup>159</sup> This very problem is currently exemplified on the Fort Berthold reservation where, as the rates of sexual assault and sex trafficking have risen, the federal government has not adequately met its criminal enforcement responsibility.

### *1. Congressional Restoration of Tribal Jurisdiction*

In recent years, Congress has passed two remedial acts that restore tribal governments jurisdiction, allowing them to regain limited criminal jurisdiction in specific circumstances and to expand sentences, though with significant restrictions. The Tribal Law and Order Act of 2010 (“TLOA”) allows certain tribes to impose longer sentences, and the 2013 Amendment to the Violence Against Women Act (“VAWA”) authorizes tribes to investigate, arrest, and prosecute non-members who engage in a very limited set of domestic and dating violence crimes.<sup>160</sup>

By 2010, U.S. policy clearly encouraged tribal self-determination and self-governance, but felony criminal justice on Indian reservations remained an exclusively federal function.<sup>161</sup> In 2010, Congress passed TLOA in response to incredibly high rates of gang violence and high rates of sexual violence against Indian women.<sup>162</sup> The main goals of the Act were to bolster tribal law enforcement agencies, increase coordination between tribes and federal law enforcement agencies, and increase federal accountability in Indian country.<sup>163</sup> The Act: “clarif[ies] the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country,” “increase[s] coordination and communication among Federal, State, tribal and local law enforcement agencies,” “empower[s] tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian

---

<sup>155</sup> Washburn, *Federal Criminal Law* at 40, *supra* note 58.

<sup>156</sup> *Id.* at 69.

<sup>157</sup> *Id.* at 4.

<sup>158</sup> *Id.* at 69.

<sup>159</sup> Hart, *Crisis in Indian Country*, *supra* note 69.

<sup>160</sup> See 25 U.S.C. §§ 1302-1304; See also 25 U.S.C. §1304.

<sup>161</sup> See Tribal Self-Governance Act of 1994, PUB. L. NO. 103-413, tit. II, 108 Stat. 4250 (1994); Washburn, *Federal Criminal Law*, *supra* note 58.

<sup>162</sup> See Hart, *Crisis in Indian Country* at 159-63, *supra* note 69.

<sup>163</sup> *Id.*

country,” “reduce[s] prevalence of violent crime in Indian country and to combat sexual and domestic violence...,” and “increase[s] and standardize the collection of criminal data.”<sup>164</sup>

In passing the law, Congress explained that the “United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country.”<sup>165</sup> In addition to this obligation, Congress further acknowledged, “tribal law enforcement officers are often the first to responders to crimes on Indian reservations; and tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country.” Despite this fact, most of Indian country has less than half of the law enforcement that is present in similar rural communities around the country.<sup>166</sup> Congress recognized that “the complicated jurisdictional scheme that exists in Indian country has a significant negative impact on the ability to provide public safety to Indian communities; has been increasingly exploited by criminals; and requires a high degree of commitment and cooperation among tribal, Federal and State law enforcement officials...”<sup>167</sup> Congress also considered that “...domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions...”<sup>168</sup> Furthermore, “[c]rime data is a fundamental tool of law enforcement, but for decades the BIA and the Department of Justice have not been able to coordinate or consistently report crime and prosecution rates in Indian country.”<sup>169</sup>

TLOA includes provisions for Indian law enforcement, law enforcement authority, assistance by other agencies and jurisdiction.<sup>170</sup> As to jurisdiction, the statute provides that, “the secretary shall have investigative jurisdiction over offenses against the criminal laws of the US in Indian country subject to agreement between Secretary of Interior and Attorney General.”<sup>171</sup> Furthermore, it articulates that the BIA shall cooperate with the law enforcement agency having primary investigative jurisdiction.<sup>172</sup> Finally, the “act does not invalidate or diminish any other enforcement commission or delegation” and prior authority is to be unaffected.<sup>173</sup> The Act also considers State Tribal and Local law enforcement cooperation, including cross-deputization agreements, in order to improve law enforcement effectiveness, and reduce crime in Indian country.<sup>174</sup>

TLOA also offers enhanced sentencing options for tribes.<sup>175</sup> The Act allows tribes to address crime in tribal communities and focuses on decreasing violence against American Indian women.<sup>176</sup> The Department of Justice represents that:

---

<sup>164</sup> Pub. L. No. 111-211, Sec. 201, § 202, 124 Stat. 2258 (2010).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> 25 U.S.C. §§ 2802-06

<sup>171</sup> 25 U.S.C. § 2806.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> 25 U.S.C. § 2815.

<sup>175</sup> 25 U.S.C. § 2801.

<sup>176</sup> U.S. Dept. of Justice, *Tribal Law and Order Act*, Tribal Justice and Safety. (Oct 11, 2015). <http://www.justice.gov/tribal/tribal-law-and-order-act>.

The Act encourages the hiring of more law enforcement officers for Indian lands and provides additional tools to address critical public safety needs. Specifically, the law enhances tribes' authority to prosecute and punish criminals; expands efforts to recruit, train and keep Bureau of Indian Affairs (BIA) and Tribal police officers; and provides BIA and Tribal police officers with greater access to criminal information sharing databases. It authorizes new guidelines for handling sexual assault and domestic violence crimes, from training for law enforcement and court officers, to boosting conviction rates through better evidence collection, to providing better and more comprehensive services to victims. It also encourages development of more effective prevention programs to combat alcohol and drug abuse among at-risk youth.<sup>177</sup>

Specifically, TLOA requires tribes ensure defendants have access to competent and effective assistance of counsel.<sup>178</sup> Tribes must also provide judges that have significant legal training and are licensed to practice law.<sup>179</sup> Each tribe must make its criminal laws, rules of evidence, and rules of criminal procedure publicly available.<sup>180</sup> Finally, tribes must maintain records of criminal proceedings.<sup>181</sup>

TLOA is not a complete solution. Although it has the potential to greatly improve law enforcement in Indian country, much of the Act is centered in increasing federal involvement.<sup>182</sup> TLOA does not “retool criminal law in Indian country; instead, it addresses particular areas of concern and attempts to develop short term solutions to them.”<sup>183</sup> This act acknowledges the tension between the interests of tribal sovereignty and the responsibility of the federal government regarding the trust responsibility.<sup>184</sup> In the long term, more authority granted to tribal police and tribal courts will be necessary.<sup>185</sup> Currently, tribes must opt in to the Act to utilize its enhanced sentencing provisions.<sup>186</sup> The MHA Nation has adopted the necessary laws and provisions and opted in to TLOA.<sup>187</sup> As a result, Ft. Berthold has seen a 70% rise in case reporting recorded from 2009-2011.<sup>188</sup> However, the Tribe’s laws on sexual assault and sex trafficking do not yet include the enhanced sentencing guidelines.<sup>189</sup> Adopting TLOA may help the MHA Nation combat trafficking. TLOA would provide the MHA Nation more authority in

---

<sup>177</sup> *Id.*

<sup>178</sup> 25 U.S.C. §§ 1302-1304.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Hart, *Crisis in Indian Country* at 141, *supra* note 69.

<sup>183</sup> *See Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Dept. of Justice, *Tribal Law and Order Act*, *supra* note 176.

<sup>187</sup> National Congress of American Indians, Tribal Law & Order Resource Center. (Nov. 28, 2015), <http://tloa.ncai.org/tribesexercisingTLOA.cfm>.

<sup>188</sup> Crane-Murdoch, Sierra, *On Indian Land, Criminals Can Get Away with Almost Anything*, THE ATLANTIC, Feb 22, 2013, <http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/>.

<sup>189</sup> Cohen at 1-9, *supra* note 47.

criminal jurisdiction and enable cooperation with other government and law enforcement agencies that share jurisdiction. Because of increased coordination and tribal prosecution, less information will be lost and more offenders may be prosecuted.

The 2013 reauthorization of VAWA includes provisions that significantly improve the safety of Native women and allow federal and tribal law enforcement agencies to hold more perpetrators of domestic violence accountable for their crimes.<sup>190</sup> VAWA grants certain tribes power to exercise concurrent criminal jurisdiction over domestic violence cases, dating violence, and criminal violations of protection orders regardless of whether the defendant is Indian or non-Indian.<sup>191</sup> Further, VAWA clarifies that tribal courts have full civil jurisdiction to both issue and enforce protection orders involving any person, Indian or non-Indian.<sup>192</sup> The 2013 reauthorization of VAWA created new federal statutes to address crimes of violence committed against a spouse or intimate partner and provided more robust federal sentences for certain acts of domestic violence in Indian Country.<sup>193</sup> However, like TLOA, VAWA requires tribes to commit to a lengthy process subject to federal approval to provide certain enumerated due process protections before they can enforce its provisions.<sup>194</sup>

Tribes are free to choose whether or not they want to implement VAWA. Additionally, VAWA does not revoke the authority of US attorneys and state/local prosecutors, where they have jurisdiction, to prosecute offenders.<sup>195</sup> Should a tribe choose to implement VAWA, it only extends that tribe's criminal jurisdiction over non-Indians to include domestic violence, dating violence, and criminal violations of protection orders.<sup>196</sup> VAWA's domestic violence criminal jurisdiction restores a tribe's criminal jurisdiction over these crimes, but does not restore the tribe's sentencing authority.

Unfortunately, VAWA's restoration of jurisdiction is limited. The tribal provisions of VAWA do not cover sex trafficking outside of a dating or domestic relationship, crimes committed outside of Indian Country, crimes between two non-Indians, crimes between two strangers (including sexual assaults), or crimes committed by a person who lacks "sufficient ties" to the tribe.<sup>197</sup> Additionally, VAWA's narrow focus extends only to partner violence, and does not authorize prosecution for destruction of a partner's property, violence against a partner's parents, children, or other relatives, or other acts of violence or intimidation.<sup>198</sup> To date, the MHA Tribe has not yet implemented VAWA.

## 2. Other Federal Statutes on Sex Trafficking and Sexual Assault on Fort Berthold

---

<sup>190</sup> 25 U.S.C. §1304; U.S. Dept. of Justice, *Indian Country Accomplishments of the Justice Department*, (July 2, 2015), <http://justice.gov/tribal/accomplishments>.

<sup>191</sup> 25 U.S.C. §§ 1302-1304.

<sup>192</sup> 25 U.S.C. §§ 1302-1304; Dept. of Justice, *Indian Country Accomplishments*, *supra* note 190.

<sup>193</sup> Dept. of Justice, *Indian Country Accomplishments*, *supra* note 190.

<sup>194</sup> 25 U.S.C 1304.

<sup>195</sup> Dept. of Justice, *Indian Country Accomplishments*, *supra* note 190.

<sup>196</sup> *Id.*

<sup>197</sup> 25 U.S.C. § 1304.

<sup>198</sup> *Id.*

The intersection of sex trafficking with federal Indian law and sex trafficking raises several questions as to jurisdiction. The Mann Act of 1910 outlaws sex trafficking activities that involve “travel in interstate or foreign commerce.”<sup>199</sup> In 2015, the Justice for Victims of Trafficking Act amended both the Mann Act and 18 U.S.C. §1591.<sup>200</sup> Though sex trafficking is generally a state crime, under 18 U.S.C. § 1591, it “is also a federal crime when it involves conducting the activities of a sex trafficking enterprise in a way that affects interstate or foreign commerce.”<sup>201</sup> 18 U.S.C. § 1591 provides:

[w]hoever knowingly in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion ... , or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be imprisoned not less than 15 years (not less than 10 years, if the victim is 14 years of age or older and the offender is less than 18 years of age).<sup>202</sup>

Both the Mann Act and 18 U.S.C. §1591 create federal jurisdiction and sentencing guidelines for sex and human trafficking within the power of the Commerce Clause.<sup>203</sup>

In 2000, Congress passed the Trafficking Victims Protection Act. The purpose of the act was to fight trafficking, described as a “contemporary manifestation of slavery, whose victims are predominantly women and children, to ensure just and effective punishment of traffickers and to protect their victims.”<sup>204</sup> The TVPA was the first comprehensive federal law to address human trafficking. The law created a “three pronged approach: prevention through public awareness programs overseas, and a state department led monitoring and sanctions program; protection through new T-visa services for foreign national victims; and prosecution through new federal crimes.”<sup>205</sup> The TVPA was reauthorized in 2003, 2005, and 2008 as TVPRA. Through the TVPRA the US government is able to fund law enforcement as well as services for survivors. The TVPRA combats both national and international trafficking in persons.<sup>206</sup> The TVPRA defines the penalties for trafficking and promotes interagency cooperation. By reauthorizing this

---

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> CHARLES DOYLE, CONG. RES. SERV., R43597, SEX TRAFFICKING: AN OVERVIEW OF FEDERAL CRIMINAL LAW, (2015).

<sup>202</sup> *Id.*

<sup>203</sup> U.S. Const. art. I § 8

<sup>204</sup> 22 U.S.C. §§7101-7113.

<sup>205</sup> Polaris Project. *Trafficking Victims Protection Act (TVPA): Fact Sheet.*

[http://www.rescue.org/sites/default/files/resource-file/trafficking%20victims%20protection%20act%20fact%20sheet\\_0.pdf](http://www.rescue.org/sites/default/files/resource-file/trafficking%20victims%20protection%20act%20fact%20sheet_0.pdf) (last visited Oct. 11, 2015).

<sup>206</sup> *Trafficked Victims Protection Reauthorization Act Passed*, NOT FOR SALE, Jan. 28, 2013, <http://notforsalecampaign.org/stories/2013/02/28/breaking-news-violence-against-women-act-passed/>.

legislation Congress has renewed its commitment to identifying human trafficking, punishing those perpetrating the crimes, and helping the survivors move beyond their victimization.<sup>207</sup>

Together, The Mann act, the TVPA, treaties, and 18 U.S.C. §1591 increased federal jurisdiction and federal protection of trafficking victims, and provide avenues for the federal government to gain jurisdiction over sex trafficking in the Bakken region.<sup>208</sup>

Fort Berthold's proximity to Canada exacerbates trafficking of indigenous women between Canada and the United States. The United States is a signatory to several international treaties that decry trafficking of women and girls—notably, the Universal Declaration of Human Rights,<sup>209</sup> the International Covenant on Civil and Political Rights,<sup>210</sup> and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.<sup>211</sup> As a result of these treaties, the United States has an obligation to police, enforce and prosecute the crimes of trafficking. Further, the TVPA strengthens the United States commitment to protecting trafficking victims and ensuring their punishment. Second, the federal government is afforded jurisdiction under the Mann Act and 18 U.S.C. §1591 for trafficking that affects or crosses into interstate commerce. Although trafficking across reservation lines is not considered trafficking across state lines, some human and sex trafficking victims are being trafficked in trucks, or in other ways both in and out of the Bakken region.

Because of the complex nature of federal Indian law, determining criminal jurisdiction for on-reservation crimes requires a factual analysis considering the identity and tribal status of all parties involved. Generally the state has jurisdiction over crimes between two non-Indians, the tribe has jurisdiction over crimes between two Indians, and the federal government has jurisdiction over crimes between a non-Indian and an Indian, and between two Indians where the crime falls under the Major Crimes Act or the Assimilative Crimes Act. So, the ability of the MHA Nation to prosecute non-indigenous criminal offenders on the Fort Berthold reservation remains significantly limited, even though the tribe has opted into the TLOA regime.

There is a practical jurisdictional vacuum concerning sex trafficking and sexual assault on Indian reservations. Specifically, the federal government has an unfulfilled obligation to police reservations, prosecute perpetrators or enforce laws regarding sexual assault and sex trafficking

---

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/RES/217(III) at 71 (Dec. 10, 1948). (“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” Trafficking is included in the definition of contemporary slavery.)

<sup>210</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. (The ICCPR prohibits slavery, the slave trade, servitude and forced labor in Article 8. Under Article 24 the U.S. has a special obligation to protect children. Finally, Article 50 states that, “The provisions of the present Covenant shall extend to all parts of the federal States without any limitations or exceptions.”)

<sup>211</sup> G.A. Res. 55.25, Art. 5, U.N. Doc. A/RES/55/25 (Nov 15, 2000). (The Protocol calls for a comprehensive approach to combat trafficking by preventing trafficking, punishing offenders, and protecting victims. Article 5 requires States to criminalize trafficking, attempted trafficking, and participation and organization of an organization scheme.)



on American Indian reservations.<sup>212</sup> Significantly, though these crimes tend to be local and primarily affect the people on the reservation, if the crimes are prosecuted as a felony, they must be adjudicated in the federal court system.<sup>213</sup>

Further, because tribal jurisdiction is limited, the Tribe is not able to prosecute non-Indian offenders for the crimes they have committed. Additionally, Native women hesitate to report to federal agents because of their lack of cultural education and lack of action.<sup>214</sup> Unfortunately, it is still true that “Non-Indian perpetrators are well aware of the lack of Tribal jurisdiction over them, the vulnerability of the Indian women, and the unlikelihood of being prosecuted by the federal government or state government in Public Law 280 states for their actions.”<sup>215</sup>

Another impediment is the difficulty in determining which entity has jurisdiction in a given case. The state of North Dakota has jurisdiction over the crime of sexual assault on the reservation, in the case of a non-Indian defendant and a non-Indian victim.<sup>216</sup> In the case of an Indian defendant and an Indian victim the federal government has jurisdiction through the MCA.<sup>217</sup> The Tribe would also have concurrent jurisdiction with the MCA but would be limited with sentencing by the ICRA.<sup>218</sup> Because the Tribe has met the prerequisites of TLOA, they have extended sentencing possibility.<sup>219</sup> Although the Tribe has not yet adopted the necessary protection to enforce VAWA, through it the Tribe could have limited special domestic jurisdiction over sexual assaults that met the criteria of the statute.<sup>220</sup> If there was an Indian defendant and a non-Indian victim, the federal government would have jurisdiction through the ICCA, the MCA and *Oliphant*.<sup>221</sup> Again, in this case, the tribes would have limited concurrent jurisdiction and could prosecute and sentence the Indian defendant according to the ICRA and TOLA.<sup>222</sup> Similarly, the Tribe would have special domestic jurisdiction if they became a VAWA tribe. Finally, if there were a non-Indian defendant and an Indian victim the federal government would have jurisdiction through *Oliphant* and the ICCA.<sup>223</sup> The only way the Tribe could exercise any type of jurisdiction over the non-Indian would be a limited special domestic jurisdiction under VAWA.<sup>224</sup> Jurisdiction over sex trafficking crimes involving a non-Indian defendant and a non-Indian victim on the reservation will depend on whether the trafficking affected or was interstate trafficking.<sup>225</sup> An Indian defendant and an Indian victim, would give the federal government

---

<sup>212</sup> See generally Washburn, *Federal Criminal Law*, supra note 58.

<sup>213</sup> *Id.*

<sup>214</sup> AMNESTY INTL, AMR 51/057/2007, MAZE OF INJUSTICE, 1 (2007).

<sup>215</sup> Greer, *Hiding Behind Tribal Sovereignty*, supra note 21.

<sup>216</sup> See *McBratney*, 104 U.S. 621.

<sup>217</sup> 18 U.S.C. § 1153; 25 U.S.C.S. § 1302.

<sup>218</sup> 18 U.S.C. § 1153.

<sup>219</sup> 25 U.S.C. § 2801.

<sup>220</sup> 25 U.S.C. § 1304; Dept. of Justice, *Indian Country Accomplishments*, supra note 190.

<sup>221</sup> 18 U.S.C. § 1153; 18 U.S.C. § 1152; See *Oliphant* 435 U.S. 191, 209-11.

<sup>222</sup> 25 U.S.C. § 1302; 25 U.S.C. § 2801.

<sup>223</sup> 18 U.S.C. § 1152; See *Oliphant* 435 U.S. 191, 209-11.

<sup>224</sup> 25 U.S.C. § 1304; Dept. of Justice, *Indian Country Accomplishments*, supra note 190.

<sup>225</sup> See *McBratney*, 104 U.S. 621.

jurisdiction under the MCA.<sup>226</sup> The Tribe would maintain limited concurrent jurisdiction with the sentencing restrictions of TOLA.<sup>227</sup>

The Tribe's passage of Loren's Law allows it to prosecute sex traffickers only to a limited extent. A case involving an Indian defendant and a non-Indian victim would have federal jurisdiction under the MCA and the ICCA, though the Tribe would retain concurrent jurisdiction to apply Loren's Law.<sup>228</sup> In a case involving a non-Indian defendant and an Indian victim the federal government would jurisdiction through the MCA, the ICCA and *Oliphant*.<sup>229</sup> Disturbingly, the Tribe would not have jurisdiction in such a case even if it were to implement VAWA.<sup>230</sup>

## 2. State remedies

Though the state of North Dakota has limited criminal jurisdiction on the Fort Berthold reservation, the state is taking steps to combat sex trafficking that specifically includes the tribes and reservations in North Dakota. The *Uniform Act on Prevention of and Remedies for Human Trafficking* is codified as part of the North Dakota Criminal Code and includes: safe harbor laws for minors, increased protections for victims; funding for law enforcement training; and stronger penalties for convicted traffickers.<sup>231</sup> The law includes federally recognized Indian tribes in the definition of "state" thereby explicitly extending the law's jurisdiction onto the Fort Berthold reservation.<sup>232</sup>

The law gives rise to several civil actions including allowing a victim to bring an action for compensatory damages, exemplary or punitive damages, injunctive relief and other forms of appropriate relief.<sup>233</sup> Listed crimes triggering these remedies include: trafficking, forced labor, sexual servitude, patronizing a victim of sexual servitude and patronizing a minor, among others.<sup>234</sup> All are felonies.<sup>235</sup> Business entities can be prosecuted for listed offenses in a very limited set of circumstances.<sup>236</sup> The business entity must "knowingly engage in conduct that constitutes human trafficking and the conduct [must] be part of a pattern of activity in violation [of this legislation] for the benefit of the entity, which the entity knew was occurring and failed to take effective action to stop."<sup>237</sup> Finally, this legislation creates a statewide Human Trafficking Commission that is tasked with distributing \$1.25 million allocated to victim services. The Commission must also develop a plan for delivering victim services, collect data, raise public awareness about trafficking, and coordinate trainings for state and local employees regarding

---

<sup>226</sup> 18 U.S.C. § 1153.

<sup>227</sup> 25 U.S.C. § 2801.

<sup>228</sup> 18 U.S.C. § 1153; 18 U.S.C.A §1152.

<sup>229</sup> *Id.*; See also *Oliphant* 435 U.S. 191, 209-11.

<sup>230</sup> 25 U.S.C. §1304; Dept. of Justice, *Indian Country Accomplishments*), *supra* note 190.

<sup>231</sup> The *Uniform Act on Prevention of and Remedies for Human Trafficking* is codified at N.D. Cent. Code § 12.1-41, available at <http://www.legis.nd.gov/cencode/t12-1c41.pdf?20150804164130> (last visited Oct. 26, 2015).

<sup>232</sup> N.D. Cent. Code § 12.1-41- 01

<sup>233</sup> N.D. Cent. Code § 12.1-41-14(1)

<sup>234</sup> N.D. Cent. Code § 12.1-41-02 to 06.

<sup>235</sup> *Id.*

<sup>236</sup> N.D. Cent. Code § 12.1-41-07

<sup>237</sup> N.D. Cent. Code § 12.1-41-07(1)

trafficking prevention.<sup>238</sup> Notably, about \$750,000 will go to western North Dakota specifically due to the rise in commercial sex ads in oil-producing areas, including Fort Berthold.<sup>239</sup>

### 3. Tribal remedies

Though the tribe is constrained in its ability to exercise criminal jurisdiction over non-Native perpetrators that commit crimes on the reservation, the tribal government has invoked its sovereign authority over MHA Nation members living on the reservation. The Tribe's Loren's Law applies to the whole territory of the Fort Berthold reservation and outlaws labor trafficking, labor trafficking of minors, sex trafficking and sex trafficking of minors. Importantly, the scope of the resolution only extends to members of the tribe, both perpetrators and victims. While this does not approach the issue of non-indigenous perpetrators, it can apply when the trafficker is Native American and a member of the victim's family, and familiar dynamic in trafficking scenarios. If convicted, the perpetrator can be imprisoned for up to 365 days but not less than 150 days.<sup>240</sup> Additionally the perpetrator can be fined a maximum of \$5,000 and face banishment from the reservation. Other sanctions can include: probation, loss of firearm privileges, substance abuse treatment, restraining orders, loss of a business license, restitution paid out to the victim or a victim services organization, diversion of per capita payments, and/or mandatory registration as a sex offender.<sup>241</sup> Finally, Loren's Law explicitly notes that violators of the listed provisions can be subject to prosecution under both tribal and federal law.<sup>242</sup>

The tribe has also established a Sex Offender Registry program, modeled directly after the Adam Walsh Protection Act.<sup>243</sup> Per the tribe's directive, "... any convicted sex offender who lives, works, or attends school within the exterior boundaries of the Three Affiliated Tribes, must register as a Sex Offender with the Three Affiliated Tribes, in addition to any other state, territory, or tribal registration."<sup>244</sup> Additionally, community members may sign up to receive notifications based on a registrant's name, or based on an area code. However, there is currently no established mechanism to ensure that workers living temporarily in the area are registered.

Unfortunately, the gaps in legal jurisdiction have created real safety concerns for Native women and children on the Fort Berthold reservation. While the FBI recently installed a new outpost in Williston to respond to the increase in violent crime, there exists a real need for enhanced coordination between law enforcement agencies to meet the practical realities of policing a crime that is as hidden and complex as sex trafficking on an Indian reservation.

---

<sup>238</sup> Mike Nowatzki, *North Dakota's Human Trafficking Commission holds inaugural meeting*, THE DICKINSON PRESS (Aug. 31, 2015), available at <http://www.thedickinsonpress.com/news/north-dakota/3829099-north-dakotas-human-trafficking-commission-holds-inaugural-meeting>.

<sup>239</sup> Amy Dalrymple, *Laws cracking down on human trafficking in North Dakota take effect Saturday*, GRAND FORKS HERALD (Aug. 1, 2015), available at <http://www.grandforksherald.com/news/crime-and-courts/3808896-laws-cracking-down-human-trafficking-north-dakota-take-effect-saturday>.

<sup>240</sup> Resolution No. 14-195-VJB

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> See Three Affiliated Tribes Sex Offender Registry, <http://mhanation.nsopw.gov/>.

<sup>244</sup> *Id.*

#### 4. *Civil Considerations*

The Indian Mineral Development Act of 1982 (“IMDA”) authorizes Indian tribes and allottees to enter into leases, ventures and other agreements for the purposes of mining subject to secretarial approval.<sup>245</sup> The IMDA states that the Secretary of the Interior must determine whether the minerals agreement is “*in the best interest of the Indian tribe or of any individual Indian who may be party to such an agreement.*”<sup>246</sup> (emphasis added). Among other considerations, the Secretary must ensure that the potential “*environmental, social and cultural effects*” of the agreement do not outweigh the expected benefits under the lease (emphasis added).<sup>247</sup> The responsibilities of the Secretary are pursuant to the greater trust responsibility that the federal government owes to Indian Nations, and the trust relationship is explicit in the statute: “nothing in this chapter shall absolve the United States from any responsibility to Indians, including those which derive from the trust relationship and from any treaties, Executive orders, or agreement between the United States and any Indian tribe.”

While the IMDA grants tribes and Indian individuals greater control of mineral development on their lands than under previous regulatory regimes, including the ability to negotiate leases with parties at the outset and reap more of the financial benefit, tribal control is reduced in subsequent phases of the mineral development process. Tribal control is greatly limited by Department of Interior regulations that note, “the right to issue a notice of noncompliance or cancellation rests with the Secretary rather than with the tribe.” Generally, the Secretary may cancel a minerals agreement unilaterally for violations, but the Tribe must seek judicial relief for breach of the agreement.

As such, the Secretary of the Interior has a fiduciary responsibility to minimize the adverse cultural and social impacts from mineral development when approving the leases per the IMDA. The United States, under IMDA, must adequately consider the specific cultural and social effects attendant to development on the Fort Berthold reservation, as an Indian reservation. Since there is a link between sex trafficking and the extractive industries, the United States should especially consider the possibility and implemented protective measures to promote safety and prevent harm.

IMDA addresses the root issue that is fueling sex trafficking, and, as such, confers upon federal government a duty to fulfill trust obligations not only as to the economic aspects of the reservation, but also to the social and cultural effects of development as well.

#### 5. *Tribal Mechanisms*

There are several mechanisms that the MHA Nation itself can employ to work towards a solution to this ongoing issue. In fact, several authors have offered both legal and non-legal options to assist the tribe in these endeavors. The *Dark Side of Oil Development* provides an overview of strategies ranging from local implementation of laws to advocates for increased utilization of

---

<sup>245</sup> 25 U.S.C. §§ 2101-2108.

<sup>246</sup> 25 U.S.C. § 2103(b).

<sup>247</sup> *Id.*

international instruments under the United Nations.<sup>248</sup> Importantly that paper advocates for the Tribe to increase taxes to cover the cost of law enforcement; to increase civil regulations as to trespass, assault and traffic torts; to cross-deputize state and MHA Nation law enforcement; and to utilize the tribe's power to exclude, among other strategies.<sup>249</sup> The paper also notes the need for national solutions, including amending VAWA, increasing funding for tribal law enforcement and requiring the Environmental Protection Agency to more fully assess social and cultural impacts of oil and gas drilling.<sup>250</sup> Raymond Cross, a tribal member and law professor at University of Montana, highlights the need for creating a stronger regulatory regime given the distinct social effects of oil and gas drilling on the Fort Berthold reservation.<sup>251</sup> He notes the need for the tribe to conduct a thorough overview of their existing oil and gas laws, and then amend the environmental laws with stronger social and cultural safeguards.<sup>252</sup> Finally, First Peoples Worldwide, an organization dedicated to indigenous peoples' economic self-determination, advocates for increased corporate social responsibility by the companies that are actively drilling in the Bakken in recognition of the oil "workers' collusion in the growing sex trade."<sup>253</sup>

As noted earlier, the tribe possesses civil and regulatory authority that can cover much of the activity contemplated in this paper. The tribal Business Council already enacted Loren's Law to address trafficking on the reservation. However, the scope of the resolution was limited to apply to only indigenous actors and the sanctions were relatively light in the face of the crime of trafficking. One additional step the tribe could take would be to revise Loren's Law to increase the sanctions up to the limits in the Tribal Law and Order Act.

Another option would for the tribe to apply for the limited grant of jurisdiction over non-Indian offenders through VAWA. Although becoming a VAWA tribe would increase the scope of the Tribe's criminal jurisdiction, the Act would not be a complete solution to the problem of sexual assault and sex trafficking. The tribal provisions within VAWA will not apply to all sexual assaults on the reservation because the perpetrator may not have the relationship to the victim that is necessary in the statute. At issue is the inability to prosecute, convict or sentence crimes between two strangers, including sexual assaults; and crimes committed by a person who lacks sufficient ties to the tribe, such as living or working on the reservation. Without the necessary relationship, the Tribe would not have jurisdiction and the federal government would retain jurisdiction.<sup>254</sup> Unless the definition of "intimate partner" could be expanded to include a single intimate encounter, the adoption of the tribal provisions within VAWA would only complicate jurisdiction, requiring analysis not just of where the crime occurred and who was involved, but also the (easily disputed) relationship between the victim and the defendant.

---

<sup>248</sup> See Alex, *Dark Side of Oil Development*, *Supra* note 3.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> See Cross, *Development's Victim*, *supra* note 7.

<sup>252</sup> *Id.*

<sup>253</sup> See Cheney, *Sex Trafficking and the Bottom Line*, *supra* note 4.

<sup>254</sup> 25 U.S.C. § 1304.

Significantly, sex trafficking is in VAWA, but does not provide the Tribe with jurisdiction in regard to sex trafficking. However, VAWA does contemplate funding for coordination and training of local and state police.<sup>255</sup>

Further limiting VAWA as a solution are the statutory prerequisites for implementation. Instituting the necessary laws and systems would require a significant investment of both time and money. The Tribe may need to update its code to ensure defendants' rights are respected. Finally, the Tribe would have to have the capacity to police and prosecute the crimes listed in VAWA.

Although TLOA and VAWA have limitations, the MHA Nation will have the authority and ability to protect the public safety of the reservation if the requirements of both Acts are adopted and implemented. TLOA, which the MHA Nation is already working towards, only provides for extended sentencing. VAWA with many of the same requirements does not have extended sentencing but does allow for special domestic violence criminal jurisdiction over non-Indians.

## B. COMPREHENSIVE SOLUTIONS

In addition to asserting regulatory jurisdiction, the tribe could also engage with the many entities, public and private, that are implicated in trafficking. Since the issue of sex trafficking coincident with oil and gas development on the large Fort Berthold reservation is so complex, these opportunities should be engaged as soon as possible to provide a comprehensive solution. Two key predicates for a successful dialogue and partnership between stakeholders are 1) compiling hard data on sex trafficking, and 2) building tribal capacity to engage and implement affirmative solutions. Structuring strong coalitions with various partners will build awareness and strength to effectively reach the root of the problem – the influx of workers with money and without bonds to the community.

North Dakota's new anti-trafficking legislation establishes a Human Trafficking Commission that specifically creates seats for tribal participation.<sup>256</sup> Just as the Fort Berthold reservation could benefit from receiving a portion of the funds the law allocates for victim services, it would also benefit from this critical connection to state politics, interested non-profit organizations, and other organizations that could provide expertise and assistance.

### 1. *Cross-Deputization*

Another collaborative strategy to approach the jurisdictional barriers in identifying trafficking and arresting perpetrators would be to cross-deputize tribal and state police. Cross-deputization agreements allow tribal, federal, state or local law enforcement officers to enforce laws outside their jurisdiction regardless of the identity of the perpetrator.<sup>257</sup> Tribal law enforcement agencies

---

<sup>255</sup> *Id.*

<sup>256</sup> N.D. Cent. Code § 54-12-33

<sup>257</sup> HANNAH BOBEE, ALLISON BOISVENU, ANDERSON DUFF, KATHRYN E. FORT, AND WENONA T. SINGEL, CRIMINAL JURISDICTION IN INDIAN COUNTRY: THE SOLUTION OF CROSS DEPUTIZATION, 11-12 (July 2008), *available at* <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.

enter cross-deputization agreements for any number of reasons, and the scope of jurisdiction and enforcement also varies widely. Some agreements allow cross-deputization only as to natural resources enforcement, and some agreements give state and local police enforcement wide arrest powers on reservation lands. However, the common goal of all of these agreements is to allow different agencies to work together cooperatively to enhance public safety for those living in Indian Country.<sup>258</sup>

Recently, the Oglala Sioux tribe's attorney general was cross-deputized as a deputy state attorney in Bennett County, South Dakota.<sup>259</sup> Her dual roles will increase the tribe's ability to meaningfully participate in cases that are ultimately prosecuted in state court.<sup>260</sup> This innovative procedure is meant to cut through the jurisdictional hurdles present in Indian Country so that non-Native perpetrators are effectively held accountable for their actions.<sup>261</sup> The MHA Nation and the state of North Dakota could explore this type of agreement in order to ensure that perpetrators that move on and off the reservation are brought to justice, and that trafficking victims can access appropriate social services.

Cross-deputization between the MHA police and state and local police may also be utilized to enforce existing laws regarding trafficking. For example, the new North Dakota Uniform Law extends jurisdiction over the reservation, but there may be a gap in enforcing the new laws. Negotiating an appropriate agreement between sovereigns will not only clarify the reach of the laws, but assist officers in their work to identify traffickers and detain them properly. Cross-deputization agreements will require negotiation of certain terms, such as sovereign immunity, personnel, indemnification, liability, and severability and termination.<sup>262</sup>

## 2. Tribal Regulation

The Tribe can exercise its regulatory authority over companies on the reservation. Both the MHA Energy Division and the TERO Office work with oil and gas entities operating on the reservation. The MHA Energy Division is tasked primarily with responsible management of natural resources on the reservation, and one of the department's stated values is social responsibility.<sup>263</sup> The office manages certain aspects of tribal lease permitting, and could provide a definitive list of the companies operating on and near Fort Berthold. Similarly, the Tribal Employment Rights Office ("TERO Office") regulates employers who are awarded contracts or subcontracts that total \$5,000 or more and the work takes place within the jurisdiction of the reservation.<sup>264</sup> The TERO Office was created specifically to forward the Nation's sovereignty by

---

<sup>258</sup> *Id.* at 12.

<sup>259</sup> *Tribal prosecutor deputized in state court*, KOTA TERRITORY NEWS, (Dec. 1, 2015), available at <http://www.kotatv.com/news/south-dakota-news/Tribal-prosecutor-deputized-in-state-court/36741346>

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> Paul Stenzel, *MOUs and MOAs: A Cooperative Approach to Law Enforcement on the Reservation*, 17th Annual Multi-Jurisdictional Conference, November 5 2005 available at <http://www.paulstenzel.com/multi-j-110305.pdf>.

<sup>263</sup> See Energy Division,

[http://www.mhanation.com/main2/departments/mha\\_energy\\_division/mhaenergydivision\\_about.html](http://www.mhanation.com/main2/departments/mha_energy_division/mhaenergydivision_about.html) (last visited Jan. 26, 2016).

<sup>264</sup> *TERO Ordinance and Regulations of the Three Affiliated Tribes; Mandan, Hidatsa and Arikara* (May 8, 2012), available at [http://www.mhatero.com/attachment/cms/AXT\\_2\\_1ZF10.pdf](http://www.mhatero.com/attachment/cms/AXT_2_1ZF10.pdf).

requiring employers that operate on the Fort Berthold reservation to institute Indian hiring preferences.<sup>265</sup> Notably, contracts involving oil and gas exploration require the outside entities to first contract with businesses that are 100% owned and controlled by an enrolled member.<sup>266</sup> This provides an economic benefit to member-owned businesses, and may provide an important mechanism for possible engagement with these companies.

Enforcement of permits and contracts through both the TERO office and the MHA Energy Division occur through the regulatory and civil authority of the Tribe. The leading case on tribal assertion of civil jurisdiction, *Montana v. U.S.*, provides that an Indian tribe has civil jurisdiction over “nonmembers who enter into consensual relationships with the tribe or its members” and over nonmembers who threaten or “have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>267</sup> The MHA Nation creates, through the Energy Division and the TERO office, the type of consensual relationship required by *Montana* to hold non-Indian entities accountable on the reservation.

The Tribe could make adherence to provisions that bolster anti-trafficking measures one aspect of the permitting criteria for outside oil and gas entities, either through the permitting process in the MHA Energy Division or through the TERO office.<sup>268</sup> The Tribe could also integrate this type of social responsibility into their business code. Then, if companies and/or their workers were found to be participating in, or allowing, sex trafficking, those companies could be held accountable and/or be subject to licenses suspension. In creating remedial measures, the Tribe must conform with federal law, but by integrating this type of remedy, the tribe would be more able to hold businesses and their workers accountable for the social and cultural effects attendant to oil and gas development.

## C. CORPORATE ENGAGEMENT

### 1. Corporate Responsibility

While the problem of sexual assault and human trafficking in Fort Berthold is exacerbated by the jurisdictional tangle that has stripped the tribes of criminal jurisdiction over nonmembers without creating effective systems to fill that vacuum, the various governments are not the only parties with an interest in the problem. The oil and gas corporations operating on the Fort Berthold reservation and in the greater Bakken region are exposed to significant financial, legal, and reputational risk. They have a direct interest in the problem and clear need to address it. Existing data indicates a rise in crime is clearly tied to the sharp increase in population as well-paid oil workers have moved into the region.<sup>269</sup> Efforts to combat the rise of human trafficking and sexual assault in Fort Berthold must not be limited to the reservation but address oil and gas operations in the region as a whole.

---

<sup>265</sup> MHA TERO, *General Information*, <http://www.mhatero.com/axUserInformation.php> (last visited Jan 26, 2016).

<sup>266</sup> *Id.* at Part 3, Sec. 3.2.

<sup>267</sup> *Montana v. U.S.*, 450 U.S. 565-566 (1981).

<sup>268</sup> See also Alex, *Dark Side of Oil Development*, *supra* note 3.

<sup>269</sup> Horwitz, *Dark side of the boom*, *supra* note 2.



Corporate responsibility arises from not only each company's involvement in the problem, but also each company's obligations to its shareholders and to local communities. Those obligations include a duty to invest and operate with fiscal responsibility, avoiding undue risk, as well as an obligation to operate within both legally imposed and self-determined standards of operation. Every company has a fiduciary obligation to maintain its image, maintain its profitability, and avoid legal risk.

The *Indigenous Rights Risk Report*, produced by First Peoples Worldwide ("FPW"), assesses some of these risks associated with extractive industries operating on and near indigenous and lands.<sup>270</sup> Assessing 330 projects across fifty-two US-based companies, FPW found that 35% of the projects had high risk exposure to financial losses for violating Indigenous rights, 54% had medium risk exposure, and only 11% had low risk exposure.<sup>271</sup> FPW found that this negative attention to projects impacting indigenous peoples has been increasing steadily, and attributes that rise to the growing use of social media campaigns to draw attention to social harms.<sup>272</sup> The report includes assessments of 12 projects in the North Dakota Bakken. Of those 12 projects, 10 were high risk (Hess, WPX, Continental, EOG, Marathon, Newfield, Occidental, QEP, SM, and Whiting) and 2 were medium risk (ExxonMobil and ConocoPhillips).<sup>273</sup>

The Risk Report specifically assigns a high community risk score to Fort Berthold operations because of socioeconomic and environmental degradation that could limit corporations' ability to operate.<sup>274</sup> As described above, the MHA Nation and its members have several avenues that could be used to regulate a company's ability to operate on the reservation, including modifying its regulatory laws. Even companies operating off-reservation could face damages to their public image or potential civil or criminal litigation rooted in their relationship to trafficking crimes committed on their properties or leaseholds or by their employees.

Companies have a fiduciary obligation to act in accordance with their stated policies, including policies on social and environmental responsibility. Many shareholders are committed to social investing principles, using their money to invest in and support companies that have positive impacts on issues like human rights, environmental stewardship, consumer protection, and human rights. This commitment can arise from both moral and financial concerns, as opposition to harmful projects can create delays and significant cost overruns. John Ruggie, who led the development of the UN Guiding Principles on Business and Human Rights, told *Business Ethics* that "for a world-class mining operation...there's a cost somewhere between \$20 million to \$30 million a week for operational disruptions by communities" and that the time it takes to bring oil and gas projects online has "doubled over the course of the previous decade, creating substantial cost inflation."<sup>275</sup> Additionally, "analysis by Environmental Resources Management

---

<sup>270</sup> REBECCA ADAMSON & NICK PELOSI, *INDIGENOUS RIGHTS RISK REPORT* (First Peoples Worldwide, Inc., 2014).

<sup>271</sup> *Id.* at 27.

<sup>272</sup> *Id.* at 28.

<sup>273</sup> *Id.* at 35-36.

<sup>274</sup> *Id.* at 29.

<sup>275</sup> Michael Connor, *Business and Human Rights: Interview with John Ruggie* (Oct. 30, 2011), *BUSINESS ETHICS*, available at <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>; see Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights*:

of delays associated with a sample of 190 of the world's largest oil and gas projects (as ranked by Goldman Sachs) found that 73% of project delays were due to “above-ground” or non-technical risk, including stakeholder resistance.<sup>276</sup> Concerned shareholders, through their investment, have a voice to improve corporate operations. And when shareholders feel that their investment is contributing to activities that work against their interests, they can exercise that voice.

## 2. Shareholder Action

Shareholders have several direct avenues to influence corporate activities and corporate policy. Holding shares in a corporation confers rights of ownership, and allows shareholders access to contacts, information, and remedies not available to others. The simplest form of engagement available to shareholders is initiating dialogue.<sup>277</sup> Investors, especially groups holding non-negligible stakes in the company, may be able to arrange formal meetings with representatives or members of corporate leadership, along with other interested parties, to discuss investor concerns as to trafficking.<sup>278</sup> These meetings serve to make the company aware of both the issue itself and the fact that investors are making decisions with the issue in mind. This alone may be sufficient to prompt a company to assess its policies and the effects of its activities on criminal activity in the Bakken region.

Approaching individual companies comes with challenges. An individual company may be reluctant to take on responsibilities in the region when it appears, as it does in Fort Berthold, that the negative impacts on the reservation are the result of the cumulative activities (and inactivity) of many different groups. Companies will deny responsibility for the off-the-clock activities of their employees, and likely reference the small percentage of the regional population increase that they are responsible for. An individual company might believe that there are significant risks that could follow from taking on responsibilities for mitigating the effects of its operations if their own individual impact is negligible or cannot be readily quantified and if there is no guarantee that other companies will step in to share the burden. To avoid this, discussions can be convened between multiple companies, trade associations and other invested and interested parties to make industry-wide adoption of requested practices more likely.<sup>279</sup>

Where companies are non-responsive to dialogue or requests for dialogue, investors can file Shareholder Resolutions. Shareholder Resolutions are proposals that ask a corporation to take a specific action.<sup>280</sup> In this case, shareholders would likely ask the corporation to disclose or

---

Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

<sup>276</sup> Michael Hackenbruch, & Jessica Davis Pluess, *Commercial Value From Sustainable Local Benefits in the Extractive Industries: Local Content*, BUSINESS FOR SOCIAL RESPONSIBILITY (Mar. 2011), available at [http://www.bsr.org/reports/BSR\\_LocalContent\\_March2011.pdf](http://www.bsr.org/reports/BSR_LocalContent_March2011.pdf).

<sup>277</sup> Corporate Dialogues, Interfaith Center on Corporate Responsibility, <http://www.iccr.org/our-approach/shareholder-engagement-101/corporate-dialogues> (last visited Jan 27, 2016).

<sup>278</sup> *Id.*

<sup>279</sup> Roundtables, Interfaith Center on Corporate Responsibility, available at <http://www.iccr.org/our-approach/shareholder-engagement101/roundtables> (last visited January 27, 2016).

<sup>280</sup> Shareholder Proposals, 17 C.F.R. § 240.14a-8 (2011).

measure the impacts of its operations or to adopt practices to mitigate known impacts. The process for filing and voting on shareholder resolutions may vary based on what country or province each corporation is headquartered in, but it generally follows a set pattern. For companies based in the U.S., first, a resolution must be drafted. Resolutions must be clear in asking for specific actions by the corporation.<sup>281</sup> Once drafted, a shareholder with a sufficient holding (\$2000 or 1% of the company in the U.S.) may file the resolution with the company.<sup>282</sup> When a resolution is filed, a corporation may: accept it and allow the resolution to go to a vote; implement the requested action immediately and have the resolution withdrawn; or file a no action request with the SEC or other appropriate governing body.<sup>283</sup> Common reasons for a no action request are that the resolution: asks the company to violate the law; contains false or misleading information; relates to projects worth less than 5% of the company's assets; asks the company to do something it has already done or does not have the authority to do; conflicts with a proposal that has already been filed; or fits the ordinary business exclusion.<sup>284</sup> The ordinary business exclusion allows companies to exclude resolutions that go to the day-to-day management of the company and avoid micromanagement by shareholders.<sup>285</sup> Because the issue of human trafficking and sexual assault surrounding a company's operations in the Bakken region creates potential legal and financial risk, as well as considerable potential for reputational harm, this issue is well outside of ordinary business operations. Additionally, combating human trafficking and sexual assault is likely well outside of the expertise of corporate managers, making it unlikely that concerns relating to it could fall within ordinary business operations.

If accepted, a Shareholder Resolution will appear on the proxy statements distributed to shareholders before a company's annual meeting. These proxy statements will also include supporting documentation and the company's response to each resolution.<sup>286</sup> At this point, shareholders have the opportunity to lobby for support for (or opposition to) proposals, and then to vote. Because accepted Shareholder Resolutions are made public and distributed to shareholders, simply introducing a proposal may be sufficient to entice a company to enter or reenter dialogue with concerned investors and ask that the Shareholder Resolution be withdrawn. If the resolution goes to a shareholder vote and passes, a company is obligated to implement it. Resolutions that do not pass may be resubmitted in following years if they receive at least 3% of votes in their first year, 6% in their second, and 10% in all years following.<sup>287</sup>

Where dialogue and resolutions have failed, a final option is divestment. Because severing investor ties to a corporation limits the possibility of later dialogue, divestment is viewed as a tool of last resort.<sup>288</sup> If used, it can serve to demonstrate resolve on an issue, to discourage other companies from engaging in similar practices, and to create negative publicity and added pressure to solve the problem. Significantly, owing to ongoing concerns about the impacts of the

---

<sup>281</sup> Shareholder Proposals, 17 C.F.R. § 240.14a-8(a) (2011).

<sup>282</sup> Shareholder Proposals, 17 C.F.R. § 240.14a-8(b) (2011).

<sup>283</sup> William A. Klein, J. Mark Ramseyer, Stephen M. Bainbridge, *BUSINESS ASSOCIATIONS* (9<sup>th</sup> Ed.), 530.

<sup>284</sup> Shareholder Proposals, 17 C.F.R. § 240.14a-8(i) (2011).

<sup>285</sup> *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 341 (3rd Cir. 2015).

<sup>286</sup> Shareholder Proposals, 17 C.F.R. § 240.14a-8(m) (2011).

<sup>287</sup> Shareholder Proposals, 17 C.F.R. § 240.14a-8(i)(12) (2011).

<sup>288</sup> Shareholder Advocacy 101: A Primer on Active Ownership, <http://www.iccr.org/our-approach/shareholder-engagement-101> (last visited Jan 27, 2016).

fossil fuel industry, certain key institutional investors have already fully divested from their holdings in the sector.<sup>289</sup> Investor concerns about long-term profitability as to oil also provide a strong incentive for companies to engage with investors as to their concerns, including concerns over impacts related to trafficking.<sup>290</sup>

### 3. Corporate Policies

Many of the companies operating in the Bakken region have adopted and incorporated policies that address how they engage with indigenous peoples or, more generally, the communities they operate in. In dialogue with corporations, or through Shareholder Resolutions, investors can ask other companies to adopt similar general policies on interaction with indigenous peoples, on human trafficking, and on human rights more generally. When requesting a corporation adopt these policies, investors can look to policies adopted by other corporations in the same industry, and to international declarations, agreements, and standards that address the issues of human trafficking and indigenous rights. The following are a selection of excerpted policies and standards that have been adopted by some of the companies operating in the region.

Several companies operating in the Bakken region have incorporated the Universal Declaration of Human Rights (“UDHR”). The UDHR primarily addresses governmental responsibilities towards the rights of citizens and does not clearly create any responsibilities for businesses.<sup>291</sup> However, adoption of the UDHR is, at minimum, a recognition of rights to liberty and security of person that may be impacted by the activities of corporate employees.

The UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) focuses primarily on member state obligations. However, its principles can be applied to corporate interaction with communities.<sup>292</sup> UNDRIP’s provisions enumerate tribal rights to participate in decision-making

---

<sup>289</sup> *Divestment Statement*, ROCKEFELLER BROS. FUND, (Sept. 2014), <http://www.rbf.org/about/divestment>.

<sup>290</sup> *Oil Price Steadies after Falling Below \$28 a Barrel*, BBC NEWS, (18 Jan., 2016), <http://www.bbc.com/news/business-35340893>.

<sup>291</sup> Universal Declaration of Human Rights, *supra* note 211.

<sup>292</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2008). The portions of UNDRIP relevant to the situation in Fort Berthold are:

- Article 18: Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights...
- Article 26 (2): Indigenous peoples have the right to... control the lands, territories, and resources that they possess...
- Article 32 (2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
- Article 32 (3): States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
- Article 40: Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective

that affects their rights, lands, territories, and resources. UNDRIP also includes rights to compensation for activities that impact “their lands... particularly in connection with the development, utilization, or exploitation of mineral... resources” and to prompt, “just, and fair resolution of conflicts and disputes.” Corporate adoption of UNDRIP’s principles both commits to respecting state policies protecting indigenous groups and suggests that where indigenous rights and interests are not sufficiently preserved by the state, the company does not have free rein to ignore instances where their activities enable or result in human rights violations.

International Labor Organization’s Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (“ILO 169”) is a binding international convention.<sup>293</sup> Like UNDRIP, ILO 169 focuses primarily on government obligations to respect and preserve indigenous rights. The principles of ILO 169 illustrate the risks that development poses to indigenous groups’ social, cultural, religious and spiritual values and practices. Ultimately, ILO 169 requires signatories to take special measures to safeguard indigenous interests, both by assessing risks through preliminary studies on the impact of planned development and by adopting policies “aimed at mitigating the difficulties experienced” by those groups as a result of that development.

The United Nations Global Compact (“the Compact”) is an initiative that encourages companies to act strategically and responsibly to support the people and communities in which they operate and to report annually on those efforts. Specifically relating to the issues of human trafficking and indigenous rights, the principles of the Compact state that “Businesses should support and respect the protection of internationally proclaimed human rights” and “make sure that they are not complicit in human rights abuses.”<sup>294</sup>

Companies that have incorporated World Bank’s Operational Policy and Bank Procedure on Indigenous Peoples commit to a system of Free, Prior, and Informed Consultation with

---

rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

<sup>293</sup> International Labor Organization, Indigenous and Tribal Peoples Convention, C169, (1989). The portions of ILO 169 relevant to the situation in Fort Berthold are:

- Article 4 (1) : Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
- Article 5 : In applying the provisions of this Convention:
  - (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
  - (b) the integrity of the values, practices and institutions of these peoples shall be respected;
  - (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.
- Article 7 (3) : Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

<sup>294</sup> United Nations Global Compact, The Ten Principles of the UN Global Compact, *available at* <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Jan. 27, 2016)

indigenous Groups and requires companies to formulate an action plan to “avoid, minimize, mitigate, or compensate for” the adverse effects of their operations.<sup>295</sup>

The International Finance Corporation’s Performance Standard 7 directly addresses indigenous peoples’ right to the land. However, within that area, Performance Standard 7 requires risk assessment, development of plan to address identified risks, and ongoing consultation with affected indigenous groups throughout the entire project.<sup>296</sup> Additionally, Performance Standard 7 requires companies conducting operations directly on tribal land to engage with the tribe through a system of free, prior, and informed consent.<sup>297</sup>

The United Nations Guiding Principles on Business and Human Rights (“the UN Guiding Principles”) create what may be the clearest set of specific duties that companies have with respect to human rights.<sup>298</sup> Companies that have adopted the UN Guiding Principles take on the responsibility to “address adverse human rights impacts with which they are involved.” In addressing violations, the UN Guiding Principles lay out a clear path for corporations to follow, first assessing and identifying the human rights risks created both by their own operations and by

---

<sup>295</sup> World Bank, *Operational Manual 4.10* (2013).

<sup>296</sup> International Finance Corporation, *Performance Standard 7* (2012).

<sup>297</sup> *Id.*

<sup>298</sup> Guiding Principles on Business and Human Rights, *supra* note 281. The portions of the UN Guiding principles relevant to the situation in Fort Berthold are:

13: The responsibility to respect human rights requires that business enterprises: (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships, even if they have not contributed to those impacts.

15: In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights; and (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

17: In order to identify, prevent, mitigate, and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence: (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.

21: In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should: (a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences; (b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved; (c) In turn not pose risks to affected stakeholders, personnel, or to legitimate requirements of commercial confidentiality.

other parties linked to them through business relationships, then creating and executing a plan to minimize or mitigate those risks. The UN Guiding Principles would necessarily encompass the trafficking problem on Fort Berthold and require companies to address harmful activities by individuals, including employees and contractors, and require review of the policies of business partners operating at other points in that corporation's supply chain.

Adoption of appropriate company policies is only a first step. Policies create a framework in which companies can develop a clearer understanding of the effects of their operations on the surrounding communities, but the framework is only useful insofar as companies commit to actual implementation. Within the context of development on or near tribal land, indigenous groups have more information on how projects will affect their members, and creating a system to engage with tribes will help in responding to or preempting any problems that may arise. Further, company policies create clear standards for assessing and reporting operational risks to cultural, social, environmental, and other interests. Companies that both adopt and follow their own policies will be better able to anticipate and prevent the negative impacts of their operations and clearly articulate how they manage those risks to concerned shareholders and stakeholders, and to affected communities. The assessment and reporting requirements of these standards also act as an information-gathering mechanism that would allow companies, investors, and concerned parties to craft more targeted policy suggestions to combat human rights violations linked to, incidental to, or simply happening in the region of corporate projects.

#### 4. *Best Practices*

While adoption of appropriate policies may express corporate recognition of rights and a general commitment to avoiding their violation, they do not directly translate into practices that preserve those rights. The specific problem of human trafficking and sexual assault in the Bakken region necessitates companies reduce the impact of their operations and protect and aid victims through implementation of best practices. Suggestions for best practices to address to the problem of trafficking and sexual assault include:

- Background Checks. Corporations should expand their use of background checks within the hiring process. While there is a lack of data with respect to the Fort Berthold reservation, reports to Congress have indicated that the Fort Peck reservation has seen the number of registered sex offenders in the area increase from forty eight in 2012 to over six hundred in 2013. Companies could play a significant role both by controlling who they hire and by requiring employees to comply with local *and* Tribal laws on registration and disclosure.
- Employee Housing. Because of the rapid influx of new residents, makeshift housing sites, often called "man camps," have been established for industry workers. Some camps are simply collections of trailers that do not have addresses, do not appear on maps, do not have connections to phone, internet, or cell services, and are not easily accessible to emergency services. Corporations must take a more active role in ensuring employees have access to proper housing on arrival in the region. Additionally, they should help to ensure access to emergency services by requiring employees to provide and maintain documentation of their current address.

- Law Enforcement Coordination. Engaging in, and maintaining regular dialogue with local law enforcement would allow companies to better understand the impact of their activities on the community. Companies should seek input as to whether local agencies have the capacity to keep pace with increases in population and crime, and incorporate that information into their risk assessments and risk management.<sup>299</sup>
- Expanded Impact Assessments. When performing Social and Environmental Impact Assessments, corporations should expand their inquiry beyond their own activities and consider the cumulative impact of their operations, alongside other development in the area, on health and safety in the community.
- Board Oversight of Existing Policies. Of the fifty-two companies surveyed in its Indigenous Rights Risk Report, First Peoples Worldwide found that only four had board oversight of community relations, human rights, or social performance. Increasing (or establishing) oversight could encourage implementation of preventive policies, rather than after-the-fact damage control.<sup>300</sup>
- Corporate Partner and Contractor Compliance. Corporations should adopt specific policies on human rights and human trafficking, and include compliance with those policies as a requirement for all subcontractors and suppliers seeking a business partnership.<sup>301</sup>
- Internal Policing. Corporations should act to deter criminal conduct by their employees with the adoption of policies on community responsibility and employee conduct, along with strict enforcement of those policies. While criminal enforcement is limited, corporations have the ability to reprimand or terminate employees who engage in conduct that reflects poorly on the company.
- Employee Training. Following the example of groups like Truckers Against Trafficking, corporations in the Bakken region should provide employee education and training on human trafficking and sexual assault, enabling their employees to better identify and report illegal activity.<sup>302</sup>
- Coordination with Other Groups. Providing avenues for individuals, business partners, or local aid groups to report suspicious or illegal activity could allow corporations to better identify and respond to issues or gaps within their human rights or human trafficking policies.<sup>303</sup>
- Victim Services. Companies should provide financial support to victim services, women's shelters or community foundations that can provide aid and assist in developing long term solutions to the problem of human trafficking in the area.
- Data Collection. Companies should support efforts to gather information on the problem, both by providing financial assistance and by sharing what information they are able to gather independently, enabling the development of more precise, targeted solutions to the region.

---

<sup>299</sup> HAQ CENTRE FOR CHILD RIGHTS, COMPENDIUM OF BEST PRACTICES ON ANTI HUMAN TRAFFICKING BY NON GOVERNMENTAL ORGANIZATIONS, 21 (2008), *available at* [https://www.unodc.org/documents/human-trafficking/India\\_Training\\_material/Compendium\\_of\\_Best\\_Practices\\_by\\_NGOs.pdf](https://www.unodc.org/documents/human-trafficking/India_Training_material/Compendium_of_Best_Practices_by_NGOs.pdf)

<sup>300</sup> Adamson, INDIGENOUS RIGHTS RISK REPORT, *supra* note 276.

<sup>301</sup> THE PROTECTION PROJECT. 100 BEST PRACTICES IN COMBATING TRAFFICKING IN PERSONS, 25 (2012), *available at* <http://www.ungift.org/doc/knowledgehub/resource-centre/CSOs/100-Best-Practices-in-Combating-TIP.pdf>.

<sup>302</sup> *Id.* at 58, 61.

<sup>303</sup> *Id.* at 65.



- Job Opportunities and Training. Several companies have sought to combat trafficking by providing job training and job opportunities to victims of human trafficking, removing the financial need that can make re-victimization more likely.<sup>304</sup>
- Lobbying for Government Action. Recognizing the complexity of criminal jurisdiction in Indian country and its contribution to the problem of human trafficking and sexual assault in Fort Berthold and other reservations, companies should support groups working to expand tribal criminal jurisdiction or to secure enforcement by the federal government. Recognizing the complexity of Indian law in the US, the far-reaching consequences of any changes in tribal criminal jurisdiction, and its distance from corporate interests and knowledge, companies should support the tribes in this matter and not lobby for action independently.

Adopting these practices is a minor investment for company stakeholders that would not only considerably reduce investor risk, but also help move toward a solution to the serious problem of human trafficking and sexual assault on the Fort Berthold reservation.

## V. CONCLUSION

In April 2013 the United States Geological Survey estimated that there remains 4.4 to 11 billion barrels of technologically recoverable oil in the Bakken and the nearby Three Forks Formations.<sup>305</sup> The Bureau of Indian Affairs at Fort Berthold estimates that another 1,000 wells will be drilled on the reservation in the next ten years.<sup>306</sup> These statistics signal the importance of developing a comprehensive approach to end sex trafficking coincident with oil and gas development in a timely manner. Without such an approach, the safety and security of Native women and children will remain uncertain. And the trauma of sex trafficking is not limited to the individual; the cultural and social effects of sexual violence will leave a devastating legacy to future generations.

The complex state of criminal jurisdiction on the Fort Berthold reservation increases the likelihood that sex trafficking will continue to be a hidden crime unless all stakeholders – federal, state, tribal, and private – leverage the opportunities available to them to decisively combat sex trafficking. The Tribe has several mechanisms to increase their ability to enact anti-trafficking measures and, with the assistance of federal and state partners, there are opportunities for cross-deputization and partnership to greatly increase the efficacy of law enforcement. Finally, private companies should adopt policies and best practices that adequately address the unique impacts of resource development on Indian lands. Only with a comprehensive approach can the MHA Nation effectively protect Native women and children from sex trafficking, and continue to responsibly develop its resources to the benefit of the Nation.

---

<sup>304</sup> *Id.* at 62-64.

<sup>305</sup> STEPHANIE B. GASWIRTH, ET AL., U.S. GEOLOGICAL SURVEY, ASSESSMENT OF UNDISCOVERED OIL RESOURCES IN THE BAKKEN AND THREE FORKS FORMATIONS, WILLISTON BASIN PROVINCE, MONTANA, NORTH DAKOTA, AND SOUTH DAKOTA (2013).

<sup>306</sup> U.S. Dept. of the Interior, *supra* note 39.