

!

!

! !  
" # \$ % & ' ( ! \* ) + & ( ) ! , ( - ! . / & ) & ' !  
. / & ) & ' ( ! , \$ 0 ( ! 1 + 2 ' ( 3 & 4 ) ! 5 % 4 0 % ( # !  
" # \$ % & ' ( ! ) \* + & \* ! , - . ! / . 0 - 1 \* ! 2 + ' % ! 3 ! 4 5 4 ! 6 / 7 !  
7 # + . 8 % 8 8 ! / # . # 8 \* 8 # ! : 5 ; 5 < = 5 4 5 > !  
6 7 6 8 9 : ; 8 < 7 < : ! 3 ! : 5 ; ? 4 < @ ? 4 A : B ! C \* D !  
[E E E ? 1 # . # 8 \\* 8 # ? % 8 + F . \\* E !](#)

---

**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

## TABLE OF CONTENTS

INTRODUCTION .....	3
II. SEX TRAFFICKING, NATIVE WOMEN, AND THE BAKKEN OIL BOOM.....	4
III. OBSTACLES TO CRIMINAL ENFORCEMENT IN INDIAN COUNTRY .....	8
A. CRIMINAL JURISDICTION IN INDIAN COUNTRY .....	8
IV. TOWARD A SOLUTION.....	17
A. LEGAL REMEDIES.....	17
B. COMPREHENSIVE SOLUTIONS .....	30
C. CORPORATE ENGAGEMENT.....	32
V. CONCLUSION .....	41

## 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

0.20m BT 50 0 0 50 00

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

added).

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

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

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,



In their earliest interactions,t

power with whom the United States may

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

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.

In the early 1950s,

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.

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



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 libeot



## 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 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> Congre6 cm BT 5 -0.5 (o) 50 0 0 Tm /TT1 1 T

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







criminal jurisdiction and enable cooperation with other

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

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. -1 1 Tf ( ) TjET Q q 0.24 0 0 E 0.2 /TT129195 557.28cm BT 50 0





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

trafficking prevention.<sup>238</sup> Notably, about \$750,000 will go to western North Dakota specifically due to the rise in commercial sex



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

Significantly, sex trafficking is in VAWA, but does not provide the Tribe with jurisdiction in regard to sex trafficking. However, VAWA does

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

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







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.



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



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

- " 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



" Job Opportunities and Training. Several companies have