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

Kathleen Finn

American Indian Law Clinic, University of Colorado Law School

Erica Gadjia

American Indian Law Clinic, University of Colorado Law School

Thomas Perin

American Indian Law Clinic, University of Colorado Law School

Carla Fredericks

University of Colorado Law School

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**RESPONSIBLE RESOURCE DEVELOPMENT AND
PREVENTION OF SEX TRAFFICKING:
SAFEGUARDING NATIVE WOMEN
AND CHILDREN ON THE
FORT BERTHOLD RESERVATION**

KATHLEEN FINN, ERICA GAJDA, THOMAS PERIN,
AND CARLA FREDERICKS
AMERICAN INDIAN LAW CLINIC
UNIVERSITY OF COLORADO LAW SCHOOL

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I. INTRODUCTION¹

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. Fort Berthold is 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 to 1.1 million barrels of oil a day, making North Dakota the number two oil-producing state in the United States.² 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.³ However, rapid oil and gas development have brought an unprecedented rise of violent crime on and near the Fort Berthold reservation.⁴ 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.⁵ There has been a dramatic increase in sexual violence

¹ 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.

² Sari Horwitz, *Dark Side of the Boom*, WASH. POST (Sept. 28, 2014), <http://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/> [<https://perma.cc/9S6D-WLCL>]; see also *North Dakota Annual Oil Production*, N.D. OIL & GAS DIV., <https://www.dmr.nd.gov/oilgas/stats/annualprod.pdf> [<https://perma.cc/8JSR-29FM>].

³ See Kasia Klimasinka, *No Kids, No Booze, No Pets: Inside North Dakota’s Largest Man Camp*, BLOOMBERG BUSINESS (Feb. 2, 2013), <http://www.bloomberg.com/news/articles/2013-02-12/no-kids-no-booze-no-pets-inside-north-dakota-s-largest-man-camp> [<https://perma.cc/97L8-2YK3>].

⁴ Nikke Alex, *Dark Side of Oil Development: Bakken Oil Boom Pumping Sexual Violence into Fort Berthold Reservation* (unpublished paper) (available at Nikke Alex, *Dark Side of Oil Development: Bakken Oil Boom Pumping Sexual Violence into Fort Berthold Reservation*, LAST REAL INDIANS, <http://lastrealindians.com/dark-side-of-oil-development-bakken-oil-boom-pumping-sexual-violence-into-fort-berthold-reservation-by-nikke-alex> [<https://perma.cc/FF9L-66W4>]).

⁵ See Amy Dalrymple and Katherine Lynn, *Native American Populations ‘Hugely at Risk’ to Sex Trafficking*, BISMARCK TRIBUNE (Jan. 5, 2015), http://bismarcktribune.com/bakken/native-american-populations-hugely-at-risk-to-sex-trafficking/article_46511e48-92c5-11e4-b040-c7db843de94f.html [<https://perma.cc/UQU7-NCLS>]. 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 (May 26, 2015), <https://lakotalawproject.wordpress.com/2015/05/26/sexual-violence-on-oil-field-man-camps-brought-to-united-nations-attention> [<http://perma.cc/S89A-NW64>]; see also Alex, *supra* note 4; Katie Cheney, *Rape, Sex Trafficking, and the Bottom Line: Corporations’ Complicity in Violence Against Women*, FIRST PEOPLES WORLDWIDE (March 5, 2015), <http://firstpeoples.org/wp/rape-sex-trafficking-and-the-bottom-line-corporations-complicity-in-violence-against-women> [<https://perma.cc/468J-LA2U>].

against women and children and, according to the same report, sexual assaults on males on the Fort Berthold reservation have increased by 75%.⁶ This increase comes at a time when Native women are already more than twice as likely to experience violent crimes as women as a whole in the United States.⁷

The social risks of oil development on American Indian reservations like Fort Berthold are distinct from those of development in other areas in the United States.⁸ The complex and shifting nature of federal Indian law presents legal and practical challenges to law enforcement in civil and criminal contexts.⁹ 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.¹⁰ 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 presents 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 crimes on the Fort Berthold reservation.¹¹ Finally, the paper will examine strategies to address this complex issue, including corporate engagement of relevant companies, tribal capacity and coalition building, cross deputization, and civil considerations and remedies contained in the Violence Against Women Act of 2014 and the Tribal Law and Order Act of

⁶ See Damon Buckley, *Firsthand Account of Man Camp in North Dakota from Local Tribal Cop*, LAKOTA COUNTRY TIMES (May 22, 2014), http://www.lakotacountrytimes.com/news/2014-05-22/Front_Page/Firsthand_Account_Of_Man_Camp_In_North_Dakota_From.html [https://perma.cc/PM6Z-G26B].

⁷ See STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002 IV, v (2004); cf. NCAI POLICY RESEARCH CENTER, STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 2 (2013), http://www.ncai.org/attachments/PolicyPaper_tWAjznFslemhAffZgNGzHUqIWMRPkCDjpFt xeKEUVKjubxfpGYK_Policy%20Insights%20Brief_VAWA_020613.pdf [https://perma.cc/DMN8-HS2E] (American Indians and Alaska Natives are 2.5 times as likely to be victims of violent crimes, and 2 times more likely to be victims of rape or sexual assault crimes compared to all other races).

⁸ 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, 538 (2011).

⁹ See *id.* at 547.

¹⁰ See *id.*; see also Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act of 2010*, FBI LAW ENFORCEMENT BULLETIN (2012), <https://leb.fbi.gov/2012/may/indian-country-and-the-tribal-law-and-order-act-of-2010> [https://perma.cc/SQC5-5HRA].

¹¹ This paper does not provide an exhaustive account of all civil and criminal remedies available to the MHA Nation.

2010. 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 eliminate sex trafficking of Native women and children decisively.

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

The United States government defines sex trafficking in the Trafficking Victims Protection Act of 2000 (“TVPA”).¹² Under the TVPA, “severe forms of trafficking in persons” are defined as the acts of “recruit[ing], harboring, transport[ing], provi[ding], or obtaining of a person for labor or services, *through the use of force, fraud, or coercion* for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery,” or “sex trafficking in which a commercial sex act [e.g. prostitution¹³] *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.*”¹⁴ This definition tracks closely with that used in the Palermo Protocols, notably the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which the United States ratified in 2001.¹⁵ Because of the interplay of psychological, physical, and emotional abuse, trafficking is often referred to as modern slavery.¹⁶

Under the TVPA, trafficking does not require transporting the victims from one location to another.¹⁷ Victims can be recruited and sold in one location, or they can be transported to another location.¹⁸ The key aspect of trafficking is the traffickers’ goal to exploit the victim and gain financially at their expense by using coercive practices such as deception and intimidation.¹⁹ Traffickers sometimes require victims to pay off their “debts” that are purportedly incurred during their work, locking victims in an inescapable

¹² See Pub. L. No. 106–386, 114 Stat. 1464 (codified at 22 U.S.C. §§ 7102 (2012)).

¹³ N.D. Cent. Code. § 12.1-29-03 (2015) (“An adult is guilty of prostitution . . . if the adult: [i]s an inmate of a house of prostitution or is otherwise engaged in sexual activity as a business; [s]olicits another person with the intention of being hired to engage in sexual activity; or [a]grees 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) (discussing Safe Harbor laws regarding prostitution).

¹⁴ 22 U.S.C. § 7102(8) (2012) (emphasis added).

¹⁵ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, Art. 3(a), 12 Nov. 2000, <http://www.refworld.org/docid/4720706c0.html> [<https://perma.cc/8THK-UU6M>].

¹⁶ See, e.g., *Letter from Secretary Kerr: Trafficking in Persons Report*, U.S. DEP’T. OF STATE (2013), <http://www.state.gov/j/tip/rls/tiprpt/2013/210540.htm> [<https://perma.cc/AM47-HSES>].

¹⁷ See U.S. DEP’T. OF STATE, *TRAFFICKING IN PERSONS REPORT 8* (2013), <http://www.state.gov/j/tip/rls/tiprpt/2013/210543.htm> [<https://perma.cc/KWZ3-AWL9>].

¹⁸ See *id.*

¹⁹ See *id.* at 29.

cycle of debt and repayment controlled by the trafficker.²⁰ Importantly, a victim held through psychological manipulation or physical force is still considered a victim of sex trafficking regardless of whether he or she initially consented to engaging in a commercial sex act.²¹

Native victims of sex trafficking often have several overlapping risk factors, including exposure to domestic violence, sexual assault, and poverty.²² Many times those who are trafficked are already victims of sexual, racial, and economic exploitation.²³ According to a report completed in 1999, the rate of sexual assault and rape of Native American women was seven per one thousand women versus two for white women and three for African American women.²⁴ 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.²⁵ This generational and historical trauma along with high incidences of poverty, depression, homelessness, and substance abuse in Native communities make Native women and children²⁶ extremely vulnerable to trafficking.²⁷ Where socioeconomic inequality is a major facilitator of entry into the sex trade,²⁸ it is no surprise that the rapid increase of wealth near the relatively poorer communities on the Fort Berthold reservation has

²⁰ See *id.*

²¹ See *id.*

²² See MELISSA FARLEY ET AL., MINNESOTA INDIAN WOMEN'S SEXUAL ASSAULT COAL. & PROSTITUTION RESEARCH & EDUC. CTR., GARDEN OF TRUTH: THE PROSTITUTION AND TRAFFICKING OF NATIVE WOMEN IN MINNESOTA 3 (2011), http://www.prostitutionresearch.com/pdfs/Garden_of_Truth_Final_Project_WEB.pdf [<https://perma.cc/3RAK-9Y7Z>].

²³ See *id.* at 4.

²⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 173386, AMERICAN INDIANS AND CRIME 3 (1999), <https://www.bjs.gov/content/pub/pdf/aic.pdf> [<https://perma.cc/MBU6-PHGN>].

²⁵ See generally, e.g., Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 622–26 (2010) (discussing the history of sex trafficking of Native Americans in colonial America and its lasting effects); Benjamin Thomas Greer, *Hiding Behind Tribal Sovereignty: Rooting Out Human Trafficking in Indian Country*, 16 J. GENDER RACE & JUST. 453 (2013) (examining the characteristics of Native American culture and history in California that make Native Americans particularly vulnerable to human trafficking); *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 70–75 (2011) (statement of Professor Sarah Deer) (asserting that systemic abuse throughout US history has led to many of the problems Native Americans experience today).

²⁶ While the effect of trafficking on child welfare is the subject of further inquiry, see Farley, et al., *supra* note 22, at 39 (describing the high rate of drug use among Native women being trafficked to manipulate them to continue to be prostituted, and the high rate of childhood sexual abuse among trafficking survivors).

²⁷ See generally Farley, et al., *supra* note 22.

²⁸ See generally ALEXANDRA PIERCE, SHATTERED HEARTS: THE COMMERCIAL SEXUAL EXPLOITATION OF AMERICAN INDIAN WOMEN AND GIRLS IN MINNESOTA, MINNESOTA INDIAN WOMEN'S RESOURCE CENTER (2009), <https://www.miwrc.org/graphics/reports/Shattered-Hearts-Full.pdf> [<https://perma.cc/LLP7-TU3T>] (describing economically coercive methods of convincing women to enter the sex trade and reporting statistics of women exchanging sex for shelter, food, or transportation).

created a dangerous situation ripe for exploitation of the Native women and children living there for economic gain.

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.²⁹ 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.³⁰ Traffickers often "groom" victims, posing as intimate partners, and use incentives such as emotional intimacy and promises of financial independence to gain trust.³¹ 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 has only recently been recognized. More data needs to be developed around the impact of resource development on local criminal justice departments. As a result of missing or incomplete crime data, investigators use alternative methods to research crime.³² These methods may include surveys, focus groups, and interviews of community members, police officers, other service providers, and representatives of oil and gas companies.³³ The U.S. State Department recently published a report stating that the influx of industry workers creates a higher demand for the commercial sex industry.³⁴ The report notes that, "[a]ny discovery of raw materials will necessarily lead to a large influx of workers and other individ-

²⁹ See generally Farley et al., *supra* note 22 (using conversations with women at a women's shelter to understand the impacts of historical trauma, racism, addiction, and other risk factors that contribute to the high rates of trafficking of Native women).

³⁰ See Farley et al., *supra* note 22, at 27 (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 T BACHMAN ET AL., U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 38 (2008) (noting that 67% of Native women victims of rape or sexual assault describe the offender as non-Native). This is a disturbing pattern of trafficking that bears on the MHA Nation's ability to enforce its laws strongly against both Native and non-Native perpetrators.

³¹ See U.S. DEP'T. OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2013), *supra* note 17, at 9.

³² See Rick Ruddell, Dheeshana S. Jaysundara, Roni Mayzer & Thomasine Heitkamp, *Drilling Down: An Examination of the Boom-Crime Relationship in Resource Based Boom Counties*, 15 WESTERN CRIMINOLOGY REV. 3, 11 (2014).

³³ See *id.*

³⁴ See U.S. DEP'T OF STATE, THE LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING (2015), <https://www.state.gov/documents/organization/245377.pdf> [<https://perma.cc/FL5Q-CHR6>].

uals, some of whom will create a demand for the commercial sex industry.”³⁵ The report specifically notes exploitation of Native women in the Bakken region and decries the fact that, “sex trafficking related to extractive industries often occurs with impunity.”³⁶

A. *The Intersection of Sex Trafficking and the Extractive Industries on the Fort Berthold Reservation*

Fort Berthold encompasses nearly one million acres and is home to over 4000 people.³⁷ The reservation is divided into six segments, where each segment elects a representative to the Tribal Business Council.³⁸ 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.³⁹ 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.⁴⁰ Notably, the Tribal Business Council passed a resolution in December of 2014 to prevent human trafficking and to approve the tribal Human Trafficking Code, called Loren’s Law.⁴¹ Furthermore, the Council called for a panel on public safety during the Indigenous Nations

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Fort Berthold Agency*, U.S. DEP’T OF THE INTERIOR, INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/RegionalOffices/GreatPlains/WeAre/Agencies/FortBerthold/index.htm> [https://perma.cc/B87N-44H8].

³⁸ *MHA Nation Elected Officials*, MHA NATION, http://www.mhanation.com/main2/elected_officials.html [https://perma.cc/2QM4-5S6Y].

³⁹ The Business Council’s authority is noted at the beginning of all Resolutions and states, “Whereas, Article II of the Constitution of the Three Affiliated Tribes provides that the Tribal Business Council is the governing body of the Tribes; and, Whereas, the Constitution of the Three Affiliated Tribes authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof. . . .” *See, e.g.*, Res. No. 16-001-LKH, http://www.mhanation.com/main2/elected_officials/elected_officials_resolutions/resolutions_2016/01-14-19-2016_Resolutions_16-001-LKH-16-020-LKH.pdf [https://perma.cc/5R7Y-MWZG].

⁴⁰ MHA Nation Tribal Business Council Res. No. 16-207-LKH, http://www.mhanation.com/main2/elected_officials/elected_officials_resolutions/resolutions_2016/09-22-2016_Resolutions_16-206-LKH-16-240-LKH.pdf [https://perma.cc/73SD-Z7VT] (approving the process to receive bids to improve a road impacted by energy development); *see also* MHA Energy Division Resolutions, MHA NATION, http://www.mhanation.com/main2/departments/mha_energy_division/mhaenergydivision_resolutions.html [https://perma.cc/ND7Y-4UW9] (providing a list of Business Council Resolutions relevant to energy regulation on Fort Berthold).

⁴¹ *See Loren’s Laws*, MHA NATION, http://www.mhanation.com/main2/Home_News/Home_News_2014/News_2014_09_September/Human%20Trafficking%20Code%20Final%20Draft.pdf [http://perma.cc/Z7D8-QEY6]; *see also* THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL, REGULAR MEETING NO. 14-02-MF 15 (2014), http://www.mhanation.com/main2/elected_officials/December%2005,%202014%20Meeting.pdf [https://perma.cc/E7YM-PVDK] (noting the passage of the Resolution instituting Loren’s Law).

Economic Development Summit on November 16, 2015 to discuss violent crime related to oil and gas drilling.⁴²

A study focused on 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.⁴³ Most rural communities do not have the infrastructure, leadership capacity, or expertise to respond to the rapid social changes and population growth.⁴⁴ 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 an insufficient capacity to meet those demands.”⁴⁵ Further, 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.⁴⁶ This crime rate is almost double the number of criminal defendants charged in 2011.⁴⁷

Although there is no publicly available comprehensive data collection process in place on the reservation as of this publication, people on the Fort Berthold reservation report feeling unsafe given the rise in violent crime. Recently, the tribe posted a news release alerting the community that four men had attempted to abduct an eighteen-year-old girl while she was running on the track of a local elementary school.⁴⁸ 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. Another 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.⁴⁹ The MHA Nation’s drug

⁴² See INDIGENOUS NATIONS ECONOMIC DEVELOPMENT SUMMIT, NURTURING, PROTECTING, AND SAFEGUARDING OUR RESOURCES (2015), http://www.mhanation.com/main/2/Home_Events/Events_2015/11_November%202015/Indigenous%20Nations%20Economic%20Development%20Summit%20Nov%2016-17.pdf [https://perma.cc/4BW5-YUL8] (noting that Blue Campaign, a collaborative effort of federal agencies led by the U.S. Department of Homeland Security to combat trafficking, presented during a session on public safety).

⁴³ See Ruddell, Jaysundara, Mayzer & Heitkamp, *supra* note 32, at 4.

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ See *id.* at 5 (citing Mike Nowatzi, *Criminal Defendants in Fed Court Up 3 Percent in Western N.D. in 2013*, WDAY NEWS (2014), <http://legacy.wday.com/event/article/id/92257/> [https://perma.cc/SC4Z-7FFC]).

⁴⁷ See *id.*

⁴⁸ Mandan, Hidatsa, and Arikara Nation Tribal Business Council, COMMUNITY ALERT, NOV. 18, 2015, as seen on Facebook at Fort Berthold Safety Watch, <https://www.facebook.com/MandareeSafetyWatch/photos/a.551866541532439.1073741824.415311128521315/1001679843217771/?type=3&theater> [https://perma.cc/4HHN-NQM7].

⁴⁹ Marshall Helmberger & Jodi Summit, *North Dakota Nightmare*, TIMBERJAY (May 3, 2015), http://timberjay.com/detail.html?sub_id=12122 [http://perma.cc/6JW2-77ML]; see also Zoe Sullivan, *Crimes Against Native American Women Raise Questions About Police Response*, GUARDIAN (Jan. 19, 2016), <http://www.theguardian.com/us-news/2016/jan/19/minnesota-native-american-women-trafficking-police> [https://perma.cc/2YP6-5LVZ] (referencing Edith Chavez).

treatment center is “overwhelmed by calls” and does not have the capacity to treat the influx of people who want and need help.⁵⁰ Senator Heitkamp believes the increase in substance abuse on the MHA Nation is directly associated with the rise of the extractive industries in the Bakken.⁵¹ Studies involving the police and human service agents in the Bakken region discovered that the number of cases of domestic violence was growing.⁵² Thirty-three percent of police officers interviewed in the Bakken region reported that community members changed their behavior because they were fearful of crime.⁵³ For these reasons, 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.

At the most basic level, there are not enough officers to police effectively the vast stretches of the reservation. In 2014, the MHA nation had fewer than twenty tribal officers to cover the nearly one million acres of rural land.⁵⁴ These statistics demonstrate that, even now, MHA law enforcement does not have the jurisdiction or capacity to address this burgeoning problem, along with the traffic violations and regulatory issues that have increased with development. Further complicating this issue, even with increased training and awareness among law enforcement, trafficking “thrives on secrecy and operates in the shadows.”⁵⁵ 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.⁵⁶ Traffickers have increasingly turned to the Internet to sell women and children and to connect to “johns” without being caught.⁵⁷ Thus with the combination of economic hardship, an influx of temporary workers, historical violence against Native women, a lack of law enforcement resources, and increased oil and gas development, Fort Berthold has become the perfect place for this heinous crime.

While the MHA Nation desires to protect its community by preventing trafficking and holding offenders accountable, the limits imposed by federal

⁵⁰ Caroline Grueskin, *Heitkamp Tours Treatment Center in MHA Nation*, BISMARCK TRIBUNE (May 5, 2016), http://bismarcktribune.com/news/state-and-regional/heitkamp-tours-treatment-center-in-mha-nation/article_1bbfe329-3e20-59f3-9e5a-5fa877e339de.html [https://perma.cc/QLZ7-KSSB].

⁵¹ *Id.*

⁵² See Ruddell, Jaysundara, Mayzer & Heitkamp, *supra* note 32, at 5.

⁵³ *See id.*

⁵⁴ See Horwitz, *supra* note 2.

⁵⁵ Greer, *supra* note 25, at 481.

⁵⁶ *See id.* at 477–78.

⁵⁷ Cf. Press Release, U.S. Senator Claire McCaskill, Highlighting Impact on Missouri, McCaskill Targets Sex Trafficking & Demands Answers from Backpage.com in Bipartisan Investigative Hearing (Nov. 19, 2015), <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> [https://perma.cc/R5XZ-G2U7] (describing Senate subcommittee hearing documenting presence of trafficking ads on Backpage.com, calling for increased regulation to police this and similar sites, and noting that the “majority of children who are sold for sex in the United States” are trafficked through Backpage.com).

Indian law restrain its ability to act decisively and effectively. It is also constrained by funding and other practical considerations, including the need to retain the economic benefits of on-reservation development. Section II of this paper canvasses 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 III 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*

Indian tribes were strong, independent sovereign communities prior to the erosion of their powers through legal and political conflict with the United States.⁵⁸ Through treaties with various tribes, the United States once acknowledged tribal authority to punish non-Indians for their conduct on Indian land.⁵⁹ 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.⁶⁰ 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.⁶¹ In his foundational opinion, Justice Marshall wrote,

The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’ The [C]onstitution, 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.⁶²

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.⁶³

⁵⁸ See Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 790 (2006).

⁵⁹ See Treaty of Greenville, U.S.-Wyandot, art. 6, Aug. 3, 1795, 7 Stat. 49.

⁶⁰ See Washburn, *supra* note 58, at 785, 791–94.

⁶¹ See, e.g., Cherokee Nation v. Georgia, 30 U.S. 1, 13 (1831).

⁶² Worcester v. Georgia, 31 U.S. 515, 559 (1832).

⁶³ See discussion *infra* Section III (A)(I).

1. *The Indian Country Crimes Act*

In their earliest interactions after the establishment of the United States, the federal government engaged with the tribes as sovereign powers, entering into formal treaties that established how the two sovereign governments would interact.⁶⁴ But as time progressed, aggressive settlers encroached on Native landholdings, and the federal government was swayed by settlers' increasing political power.⁶⁵ Congress then passed the Indian Country Crimes Act of 1834 ("ICCA").⁶⁶ The ICCA extended federal jurisdiction over crimes between Indians and non-Indians in Indian country.⁶⁷ Indian country, defined under 18 U.S.C. § 1151, includes: (a) "all land within the . . . reservation under the jurisdiction of the United States Government," (b) all "dependent Indian communities," and (c) "all Indian allotments, the Indian titles to which have not been extinguished."⁶⁸ The law was limited in that it left the tribes with some control over their members.⁶⁹ It allowed 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.⁷⁰ The federal government, by exempting Indian offenders whom the tribal government had tried and punished, ensured that the tribes retained concurrent jurisdiction over crimes committed by Indians.⁷¹ But even within this context, the federal government indicated a lack of trust in tribes to prosecute fairly non-Indians who committed criminal violations on their lands.⁷² The exercise of federal jurisdiction was dependent upon the interracial nature of the crime because prosecution turned on whether the perpetrator and/or victim were Indian or non-Indian.⁷³ Even today, unless the crime falls within another federal statute, such as the Major Crimes Act, crimes between an Indian defendant and Indian victim remain within the exclusive control of the tribal government and may not be tried in federal

⁶⁴ See Washburn, *supra* note 58, at 791.

⁶⁵ See *id.* at 794.

⁶⁶ See *id.* at 793.

⁶⁷ See 18 U.S.C. § 1152 (2012); see also Washburn, *supra* note 58, at 792–93 (describing that the ICCA expanded federal jurisdiction to prosecute Indians who committed crimes against non-Indians on Indian lands, where previously tribes were able to punish any offender who committed a crime on their lands.)

⁶⁸ *Id.* § 1151; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.02[1][b], 731–32 (2005).

⁶⁹ See *id.* § 1152.

⁷⁰ See *id.*

⁷¹ See N.D. LEG. COUNCIL STAFF, BUDGET COMM. ON HUMAN SERVS., INDIAN JURISDICTIONAL ISSUES 1 (2004), <http://www.legis.nd.gov/files/resource/committee-memorandum/59215.pdf> [<https://perma.cc/Q7J3-AD9H>].

⁷² See generally Bethany R. Berger, Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems, 37 ARIZ. ST. L.J. 1047 (2004) (noting that the U.S. government's historic lack of trust of tribal courts to fairly prosecute non-Indian offenders is based on the erroneous assumption that the tribal court will necessarily be unfair to outsiders).

⁷³ See COHEN, *supra* note 68, at § 9.02[1][c], 743.

court.⁷⁴ A crime between a non-Indian defendant and a non-Indian victim is also excluded from federal coverage because, as decided through common law, a completely non-Indian crime falls under state jurisdiction.⁷⁵

2. *The Major Crimes Act*

As expansion continued throughout the 1800s, settlers and states began to encroach on Indian country and desired more control therein.⁷⁶ United States policy shifted to removal of Indians from their ancestral lands to reservations west of the Mississippi.⁷⁷ 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 jurisdiction over their lands.⁷⁸ 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 acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”⁷⁹ 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.⁸⁰

The Supreme Court did not adopt such a radical, limiting policy and in fact, in 1883, ruled 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.⁸¹ The Court referred explicitly to the provisions of ICCA.⁸² 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, Congress enacted the Major Crimes Act (“MCA”) in 1885.⁸³ The MCA “federalized prosecutions of serious crimes between Indi-

⁷⁴ See *id.*

⁷⁵ See *id.* at § 9.02[2][b]–[c], 743–44; see also *United States v. McBratney*, 104 U.S. 621, 624 (1881).

⁷⁶ See Washburn, *supra* note 58, at 794; see also 40 ANNALS OF CONG. 682–83 (1823) (detailing ideals of Manifest Destiny and expansion of U.S. territory to the Pacific); cf. H.R. Doc. No. 19-213 at 6, 9–10 (1826) (describing in a report to Congress military ventures to mark the settlement of the Pacific Northwest).

⁷⁷ See Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 164–66 (2002).

⁷⁸ See *id.* at 169–70.

⁷⁹ Act of March 3, 1871, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (2012)); see also Clinton, *supra* note 77, at 167–70 (describing historical underpinnings and impacts of federal policy changes leading to the passage of the 1871 Act).

⁸⁰ Cf. Clinton, *supra* note 77, at 179 (noting the General Allotment Act of 1887 and the development of the Bureau of Indian Affairs and missionary boarding schools as “the two most important federal initiatives developed during this period to undermine tribal existence and to forcibly and involuntarily assimilate Indians into American society”).

⁸¹ See *Ex Parte Kan-Gi-Shun-Ca* (otherwise known as *Crow Dog*), 109 U.S. 556, 571 (1883).

⁸² See *id.*

⁸³ See Washburn, *supra* note 58, at 803.

ans on reservations,” a subject that had previously been considered an exclusive matter for internal tribal governance.⁸⁴ 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.⁸⁵ The MCA 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.⁸⁶ In order for the MCA to apply, four fundamental elements must exist.⁸⁷ The MCA applies when (1) “an Indian . . . commit[s],” (2) “against the person or property of another Indian or other person,” (3) “any of the [enumerated] offenses,” (4) “within the Indian country.”⁸⁸ Although the MCA “created 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.⁸⁹ As a result, if both the defendant and victim were Indian, both the tribal government and the U.S. federal government would have jurisdiction over the particular list of crimes. 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.⁹⁰ 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,” made without consent and without any sort of democratic engagement with the tribes.⁹¹ 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.⁹²

In addition to the MCA, the Assimilative Crimes Act, now codified as 18 U.S.C. § 13, provides that “[w]hoever . . . 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.”⁹³ The effect of the MCA and the Assimilative Crimes Act was to extend federal jurisdiction to almost all crimes

⁸⁴ *Id.* at 783.

⁸⁵ See FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND AMERICAN INDIANS* VOL. II 679 (1984).

⁸⁶ See 18 U.S.C. § 1153 (2012).

⁸⁷ COHEN, *supra* note 68, at § 9.02[2][b].

⁸⁸ *Id.*

⁸⁹ N.D. LEG. COUNCIL STAFF, *supra* note 71, at 1.

⁹⁰ See Washburn, *supra* note 58, at 795–96.

⁹¹ *Id.* at 809.

⁹² *United States v. Kagama*, 118 U.S. 375, 384 (1886).

⁹³ 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); 18 U.S.C. § 13 (2012).

committed in Indian Country, with the exception of a few judicial carve-outs.⁹⁴ 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.⁹⁵ As a result, the policies of assimilation worked to weaken tribal government by placing the most serious crimes under federal jurisdiction.⁹⁶

With the 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 1887.⁹⁷ 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.⁹⁸ There was no provision for tribal consent,⁹⁹ and tribes ceased to hold the large tracts of land they had been promised by the federal government.¹⁰⁰ The Act provided that the trust relationship between the individual Indian landowners and federal government expired after twenty-five years.¹⁰¹ The effect of the Allotment Act, which some have referred to as the “most disastrous piece of Indian legislation in United States history,”¹⁰² 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.¹⁰³ This checker-boarded land ownership created a convoluted jurisdiction scheme between federal, state, and tribal governments that continues to trouble Indian country to this day.¹⁰⁴

By 1934, Congress had moved away from allotment policies and introduced the Indian Reorganization Act (“IRA”).¹⁰⁵ 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 of the Inte-

⁹⁴ Hart, *supra* note 93.

⁹⁵ See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 (1995); see also Washburn, *supra* note 58, at 804–05 (describing that a key motive in enacting the MCA was the federal policy of assimilation of Indian individuals into majority society).

⁹⁶ See Washburn, *supra* note 58, at 798.

⁹⁷ See Carla F. Fredericks, *Plenary Energy*, 118 W. VA. L. REV., 789, 791–92 (2015) (citing D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 506 (Francis Paul Prucha ed., 1973)).

⁹⁸ See Royster, *supra* note 95, at 9.

⁹⁹ William Canby, *American Indian Law in a Nutshell* 22 (5th ed. 2009).

¹⁰⁰ See OTIS, *supra* note 97, at 13.

¹⁰¹ See 25 U.S.C. § 348 (2012); see also 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, 981 (2000).

¹⁰² CANBY, *supra* note 99, at 21–24.

¹⁰³ *Id.* at 24; cf. Royster, *supra* note 95, at 13 (discussing the purposes and effects of the Allotment Act).

¹⁰⁴ See generally Royster, *supra* note 95 (discussing the role played by the Allotment Act in the history of Indian law jurisdiction and its lasting impact).

¹⁰⁵ See Act of June 18, 1934, 28 Stat. 985 (codified as amended at 25 U.S.C. §§ 461–494 (2012)); see also Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 806 (2014).

rior—and restructure their governments.¹⁰⁶ By providing structure, the IRA ultimately strengthened tribal institutions, including tribal courts.¹⁰⁷ While this supported tribal governments' ability to engage with the U.S., it complicated internal matters by encouraging tribes to create governments that left behind traditional cultural institutions and values.¹⁰⁸

3. *Public Law 280*

Due to the U.S. federal government and BIA mismanagement in the 1930s and 40s, numerous reservations had horrible living conditions and many tribes lived in extreme poverty.¹⁰⁹ The U.S. federal government believed some tribes were ready to be assimilated into American society and would be better off independent of the BIA.¹¹⁰ Consequently, Congress began its termination policy in the early 1950s, under which it formally revoked federal recognition of certain tribes.¹¹¹ In effect, “[w]hen Congress ‘terminated’ the federal relationship with a tribe, the federal government lost federal criminal authority, and jurisdiction over the affected Indian people devolved to the states.”¹¹² In the early 1950s Congress believed law enforcement and judicial services in Indian country to be inadequate.¹¹³ To help resolve this perceived problem, Congress unilaterally and without tribal consent passed Public Law 280 (PL-280) in 1953.¹¹⁴ This “hallmark” Act of the termination era drastically altered criminal jurisdiction in some states and transferred jurisdiction from federal governments to certain state governments.¹¹⁵ Conforming with the general policy of termination, PL-280 decreased federal criminal jurisdiction in Indian country.¹¹⁶ Significantly, PL-280 granted states greater authority than what the federal government had enjoyed.¹¹⁷ The statute provided:

“Each of the States or Territories listed . . . shall have jurisdiction over offenses committed by or against Indians in the areas of In-

¹⁰⁶ See Singel, *supra* note 105, at 806–07.

¹⁰⁷ See *id.* at 816–17.

¹⁰⁸ David H. Getches, Charles F. Wilkinson, Robert A. Williams Jr. and Matthew L.M. Fletcher, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 196 (6th ed, 2011).

¹⁰⁹ Cf. *History and Culture: Termination Policy – 1953–1968*, AMERICAN INDIAN RELIEF COUNCIL, http://www.nrcprograms.org/site/PageServer?pagename=airc_hist_terminationpolicy [<https://perma.cc/2UCW-Q4XH>] (noting that a 1943 survey found Indian reservation living conditions to be “horrific” and in “extreme poverty”).

¹¹⁰ See Washburn, *supra* note 58, at 811–12.

¹¹¹ *Id.*

¹¹² *Id.* at 812.

¹¹³ See N.D. LEG. COUNCIL STAFF, *supra* note 71, at 1.

¹¹⁴ See Washburn, *supra* note 58, at 813–14.

¹¹⁵ See generally CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997) (discussing the impact of Public Law 280 on tribal powers, and how that legacy continues today).

¹¹⁶ See *id.* at 48.

¹¹⁷ See Washburn, *supra* note 58, at 813.

dian country . . . 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.”¹¹⁸

Under this Act, states could “enforce virtually all of their criminal laws, including misdemeanors.”¹¹⁹ Consequently, PL-280 proved to be “an even more aggressive encroachment on tribal sovereignty than . . . the existing federal system” had been.¹²⁰ In effect, Congress required six states to assume criminal and civil jurisdiction over Indian country.¹²¹ Furthermore it provided that the ICCA and the MCA did not apply within those areas of Indian country.¹²² Congress “also authorized other states to voluntarily opt to assume criminal and civil jurisdiction over Indian country.”¹²³ In states that voluntarily opted in, the federal and state governments would share concurrent jurisdiction, and where applicable, tribes might have concurrent jurisdiction as well.¹²⁴ As states took over many of the functions formerly performed by the federal government, many adverse consequences appeared.¹²⁵ The affected states were required to provide services without funding from the federal government, and so states began to see the Acts as “unfunded mandates.”¹²⁶ Termination and PL-280 left Native people “poorly served” and the Act caused civil rights issues to flare.¹²⁷

North Dakota was one of the states that voluntarily opted into the PL-280 regime.¹²⁸ However, a later state amendment required tribal consent for the state to assume jurisdiction over Indian country land in the state.¹²⁹ As a result of this amendment, North Dakota is no longer a Public Law 280 state.¹³⁰

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 tribal members.¹³¹ As the self-determination era began, one of the critical issues was the lack of quality federal law

¹¹⁸ 18 U.S.C. § 1162 (2012).

¹¹⁹ Washburn, *supra* note 58, at 813.

¹²⁰ *Id.*

¹²¹ See N.D. LEG. COUNCIL STAFF, *supra* note 71, at 1.

¹²² See *id.*

¹²³ *Id.*

¹²⁴ See 18 U.S.C. § 1162.

¹²⁵ See Washburn, *supra* note 58, at 815.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See N.D. LEGISLATIVE COUNCIL STAFF FOR THE BUDGET COMM. ON HUMAN SERVS., *supra* note 71, at 1–2.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See Washburn, *supra* note 58, at 816.

enforcement and criminal justice on Indian land—issues brought to the attention of the government by tribes.¹³² In fact, “U.S. Attorneys, unlike state prosecutors, typically decline[d] to prosecute in a far greater percentage of cases. . . . [This resulted] in the underenforcement of criminal laws in Indian Country.”¹³³ As a result, self-determination policies “bolstered the role of tribes as integral participants in the nation’s federal system.”¹³⁴ Ushering in the self-determination era was an act that “gave voice to concerns of civil rights activists.”¹³⁵

The Indian Civil Rights Act (“ICRA”), passed in 1968, provided Indians with protections similar to those listed in the Bill of Rights.¹³⁶ Despite the fact that the adoption of the ICRA was a clear rejection of termination and endorsement of “the continued existence of tribal governments,” it was also a significant imposition.¹³⁷ When passing the ICRA in 1968, Congress included restrictions that prevented tribes from imposing long sentences or large fines.¹³⁸ Showing a distrust of tribal courts, the ICRA limited tribal court sentences to “six months of imprisonment and a \$500 fine.”¹³⁹ In 1986 those limits were raised to one year of imprisonment and a fine of up to \$5000.¹⁴⁰

The ICRA was again amended in 2010 to extend sentencing abilities of tribes.¹⁴¹ As amended, the ICRA provides that tribes may sentence a defendant to imprisonment for up to three years for any one offense and fine them up to \$15,000.¹⁴² 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
- (2) Is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.”¹⁴³

Importantly, the ICRA was amended in 2010 by passage of the Tribal Law and Order Act (“TLOA”), which requires tribes to take several steps to en-

¹³² *See id.* at 818.

¹³³ Peter Nicolas, *American-Style Justice in No Man’s Land*, 36 GA. L. REV. 895, 963 (2002).

¹³⁴ Singel, *supra* note 105, at 816. The Indian Reorganization Act (“IRA”), Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5144 (2012)), is one example of legislation that provided opportunities for Tribes to re-establish tribal government and exert leadership over tribal affairs.

¹³⁵ Washburn, *supra* note 58, at 816.

¹³⁶ *See* 25 U.S.C. §§ 1302–1304 (2012).

¹³⁷ Washburn, *supra* note 58, at 817.

¹³⁸ *See* 25 U.S.C. § 1302.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

hance their capacity before implementing enhanced sentencing.¹⁴⁴ Without these enhanced measures, Congress effectively limited the jurisdiction of tribal courts to petty misdemeanors and made felony jurisdiction under the MCA exclusive to the federal government.¹⁴⁵

At the same time, the ICRA incorporated a majority of criminal procedural rights found in the Bill of Rights.¹⁴⁶ These rights include 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.¹⁴⁷ Furthermore, to meet the requirements of the Act, the tribe must guarantee access to licensed defense counsel, provide a judge with legal training and a license to practice law, and make its criminal laws publicly available.¹⁴⁸ In theory, the ICRA was intended 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.¹⁴⁹ Further, the ICRA confers a federal habeas right to defendants who claim their rights have been violated.¹⁵⁰

If the federal interest in restricting tribal criminal jurisdiction and sentencing is to ensure that defendants have a fair trial, the rights provided through the ICRA substantially alleviate such concerns.¹⁵¹ Although the ICRA provides defendants with additional protection, the prevalence of on-reservation crime, and the lack of federal enforcement, often leaves non-member defendants unpunished¹⁵² and tribal defendants with sentences that may be disproportionately light.¹⁵³ Functionally, the sentencing limits in the ICRA have impeded tribal ability to effectively address serious crimes, including crimes such as sexual assault and sex trafficking.¹⁵⁴ In effect, the

¹⁴⁴ See Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISC. 88, 90–91 (2013).

¹⁴⁵ See Soo C. Song & Vanessa J. Jiménez, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1654–55 (1998) (noting that the limits placed on tribal judicial systems by the jurisdictional scheme impedes tribal self-government in their efforts to maintain safe and peaceful communities).

¹⁴⁶ See Washburn, *supra* note 58, at 816.

¹⁴⁷ See 25 U.S.C. § 1302 (2012).

¹⁴⁸ *Id.*

¹⁴⁹ See *id.*

¹⁵⁰ See Washburn, *supra* note 58, at 817.

¹⁵¹ See Alex Tallchief Skibine, *Constitutionalism, Federal Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 123 (2014).

¹⁵² See Timothy Williams, *Higher Crimes, Fewer Charges on Indian Land*, NEW YORK TIMES (Feb. 20, 2012) <http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html> [<https://perma.cc/L8G2-QBYJ>] (reporting the low rate of federal prosecutions of major crimes occurring on Indian reservations).

¹⁵³ See Fortin, *supra* note 144, at 92.

¹⁵⁴ See *id.*

ICRA has forced the tribes to ask Congress for federal authority over crimes in Indian Country.¹⁵⁵

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.¹⁵⁶

In 1978, the Supreme Court further limited tribal jurisdiction by holding that tribes did not have criminal jurisdiction over non-Indian defendants.¹⁵⁷ 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.¹⁵⁸ 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 counties 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.¹⁵⁹

The Supreme Court abandoned this reasoning. The Court held that Indian tribes do not have inherent sovereignty to try non-Indian criminal defendants.¹⁶⁰ Rather than adhering to long-established principles of Indian law, the Court reasoned that historically the legislative and executive branches and lower courts had presumed that Indian tribes did not have authority over non-Indians who committed offenses within Indian country.¹⁶¹ The Court as-

¹⁵⁵ See Washburn, *supra* note 58, at 826.

¹⁵⁶ See, e.g., *Duro v. Reina*, 495 U.S. 676, 688 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

¹⁵⁷ See *Oliphant*, 435 U.S. at 212.

¹⁵⁸ *Id.* at 194–95.

¹⁵⁹ *Oliphant v. Schlie*, 544 F.2d 1013, 1013–14 (9th Cir. 1976).

¹⁶⁰ See *Oliphant*, 435 U.S. at 195–99; see also SMITH, *supra* note 153.

¹⁶¹ *Oliphant*, 435 U.S. at 202–06.

serted that, as domestic dependent nations, Indian tribes necessarily give up their power to try non-Indian citizens except in a manner explicitly authorized by Congress.¹⁶² In a criminal case, tribal power was in 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.¹⁶³

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-Indians falls exclusively within federal jurisdiction.¹⁶⁴ Therefore, the federal government has an obligation to protect the tribes because they have been subjected to the overriding regime of the United States.¹⁶⁵ By limiting the ability of the tribe to prosecute non-Indian offenders, *Oliphant* removes tribal authority to act decisively regarding non-Indian offenders in the movement to end trafficking and 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.¹⁶⁶ Duro was a Native man residing on the Salt River Indian Reservation who was accused of killing a 14-year-old boy.¹⁶⁷ He was charged in federal court but the case was dismissed.¹⁶⁸ Duro was then tried in tribal court and filed a writ of habeas corpus in the U.S. District Court for the District of Arizona.¹⁶⁹ The district court reasoned that Duro could not be tried in tribal court because the tribe did not possess the authority to exercise criminal jurisdiction over non-member Indian offenders.¹⁷⁰ Ultimately, the Supreme Court agreed, stating that in the absence of special legislation, “Indians like other citizens are embraced within our Nation’s great solicitude that its citizens be protected. . . from unwarranted intrusions on their personal liberty.”¹⁷¹ The court expressed concern over foisting tribal courts’ “unique customs,” “unspoken practices and norms,” and a politically subordinate court on nonmember Indians.¹⁷² Like the Court in *Oliphant*, 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

¹⁶² See *id.* at 209–11; see generally SMITH, *supra* note 153 (describing the jurisdiction of tribes over non-tribal members, and the tribes’ jurisdictional relationship with the federal government).

¹⁶³ See *Oliphant*, 435 U.S. at 209–10; see also Skibine, *supra* note 151, at 90.

¹⁶⁴ See *Oliphant*, 435 U.S. at 208.

¹⁶⁵ See *id.* at 207.

¹⁶⁶ See *Duro v. Reina*, 495 U.S. 676, 688 (1990).

¹⁶⁷ See *id.* at 676–77.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ *Id.* at 677.

¹⁷¹ *Id.* at 692.

¹⁷² *Id.* at 693.

basis for power within our constitutional system.”¹⁷³ 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.¹⁷⁴ In fact, common law has subjugated tribes through the implications of the Constitution, to which they did not consent to be bound.¹⁷⁵

IV. TOWARD A SOLUTION

Though the ability of the tribe to criminally prosecute sex traffickers on the reservation is limited, there are several other available means that the Tribe may explore to address the problem. This section will canvas both criminal and civil remedies available to the tribe as well as other opportunities to build strong partnerships in order to combat trafficking. Specifically, this section will address tribal capacity and coalition building, cross deputization, and remedies contained in VAWA and TOLA. 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. This section will address the possibilities of shareholder engagement as well as changing corporate policies to help prevent sex trafficking.

A. *Legal Remedies*

In 1991, as a fix to *Duro v. Reina*, Congress passed an amendment to the ICRA that stated that, “‘powers of self government’ include ‘the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdictions over all Indians.’”¹⁷⁶ Congress defined an “Indian” as “any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18”¹⁷⁷ 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.¹⁷⁸ 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 reserva-

¹⁷³ *Id.* at 694.

¹⁷⁴ *See id.* at 678.

¹⁷⁵ *See* Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329, 356–57 (2008).

¹⁷⁶ SMITH, *supra* note 153, at 4.

¹⁷⁷ 25 U.S.C. § 1301 (2012); *see also* SMITH, *supra* note 153, at 4.

¹⁷⁸ *See* Washburn, *supra* note 58, at 779–80.

tions has remained an exclusive federal function, and a highly ineffective enterprise, according to critics, because the crime rate is worse for American Indians than any other ethnic group.¹⁷⁹ 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 tribes as broken, dependent, as poor as ever, and in need of tremendous federal assistance.”¹⁸⁰ While the federal government has occasionally taken interest, adding thirty FBI agents to federal crime in 1997 and twenty-seven new positions in the FBI’s Indian country unit in 2004, the problem has only worsened.¹⁸¹ 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 that try them.¹⁸² Further, the vast cultural difference between the federal courts and the Indian people complicates interaction and enforcement.¹⁸³

Indian law and federal policy regarding relations with tribes and American Indian individuals have 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.¹⁸⁴ But because the U.S. 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.”¹⁸⁵ 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.”¹⁸⁶

The preeminent Indian law scholar, Felix Cohen, articulated three fundamental principles on the nature of Indian tribal powers.¹⁸⁷ 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, thereby giving Congress plenary power over Indian affairs.¹⁸⁸

The federal government has thus used its power to limit tribal jurisdiction over non-members—especially in the area of criminal law. These limi-

¹⁷⁹ *Id.* at 779.

¹⁸⁰ *Id.* at 811.

¹⁸¹ *See id.* at 789.

¹⁸² *Id.* at 781.

¹⁸³ *See id.* at 782.

¹⁸⁴ *See, e.g.,* Cherokee Nation v. Georgia, 30 U.S. 1, 16–17 (1831).

¹⁸⁵ Thorington, *supra* note 101, at 980; *see also* Cherokee Nation, 30 U.S. at 16–17.

¹⁸⁶ Thorington, *supra* note 101, at 980.

¹⁸⁷ *See* COHEN, *supra* note 68, at 2.

¹⁸⁸ *See id.*

tations stem from beliefs that tribes will unfairly implement their laws as to non-members, thereby violating rights of non-members while allowing members to go unpunished.¹⁸⁹ Through its plenary power Congress has passed legislation limiting the jurisdiction of tribal governments over non-members and over certain crimes, even 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. 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.”¹⁹⁰ The imposition of this jurisdictional system illustrates a “unilateral imposition, by an external authority, of substantive criminal norms on separate and independent communities without their consent and often against their will.”¹⁹¹

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*.¹⁹² However, the “‘complex patchwork of federal, state and tribal law’ and criminal jurisdiction . . . allows many perpetrators—particularly non-Indians—to go unprosecuted.”¹⁹³ 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 tribes 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.¹⁹⁴

By 2010, U.S. policy clearly encouraged tribal self-determination and self-governance,¹⁹⁵ but felony criminal justice on Indian reservations remained an exclusively federal function.¹⁹⁶ In 2010, Congress passed TLOA in response to incredibly high rates of gang violence and high rates of sexual

¹⁸⁹ See *Ex Parte Kan-Gi-Shun-Ca*, 109 U.S. 556, 571 (1883).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 782.

¹⁹² See *id.* at 822–26.

¹⁹³ Hart, *supra* note 93, at 149 (quoting *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990)).

¹⁹⁴ See 25 U.S.C. §§ 1302–1304 (2012).

¹⁹⁵ See Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, tit. II, 108 Stat. 4250 (1994).

¹⁹⁶ See Washburn, *supra* note 58, at 834.

violence against Indian women.¹⁹⁷ The main goals of TLOA were to bolster tribal law enforcement agencies, increase coordination between tribes and federal law enforcement agencies, and increase federal accountability in Indian country.¹⁹⁸ TLOA “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 country”; “reduce[s] prevalence of violent crime in Indian country and to combat sexual and domestic violence”; and “increase[s] and standardize[s] the collection of criminal data.”¹⁹⁹

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.”²⁰⁰ In addition to this obligation, Congress further acknowledged, “[T]ribal law enforcement officers are often the first responders to crimes on Indian reservations; and tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country.”²⁰¹ 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.²⁰² 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”²⁰³ Congress also considered that “domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions”²⁰⁴ Furthermore, “Crime data is a fundamental tool of law enforcement, but for decades the Bureau of Indian Affairs and the Department of Justice have not been able to coordinate or consistently report crime and prosecution rates in tribal communities.”²⁰⁵

¹⁹⁷ See Hart, *supra* note 93, at 159–63, 175.

¹⁹⁸ *Id.*

¹⁹⁹ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202, 124 Stat. 2258, 2262–2263.

²⁰⁰ *Id.* § 202(a)(1).

²⁰¹ *Id.* § 202(a)(2).

²⁰² *Id.* § 202(a)(3).

²⁰³ *Id.* § 202(a)(4)(A)–(C).

²⁰⁴ *Id.* § 202(5)(A).

²⁰⁵ *Id.* § 202(7).

2. *The Tribal Law and Order Act*

TLOA includes provisions for Indian law enforcement, law enforcement authority, and assistance by other agencies and jurisdictions.²⁰⁶ As to jurisdiction, the statute provides that “the secretary shall have investigative jurisdiction over offenses against the criminal laws of the United States in Indian country subject to agreement between the Secretary [of Interior] and the Attorney General.”²⁰⁷ Furthermore, it articulates that the BIA shall cooperate with the law enforcement agency having primary investigative jurisdiction.²⁰⁸ Finally, the Act “does not invalidate or diminish any law enforcement commission or delegation” and prior authority is to be unaffected.²⁰⁹ The Act also considers state, tribal, and local law enforcement cooperation, including cross-deputization agreements,²¹⁰ in order to improve law enforcement effectiveness and reduce crime in Indian country.²¹¹

TLOA also offers enhanced sentencing options for tribes.²¹² The Act allows tribes to address crime in tribal communities and focuses on decreasing violence against American Indian women.²¹³ The Department of Justice represents that:

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

²⁰⁶ See 25 U.S.C. §§ 2802–2806 (2012).

²⁰⁷ *Id.* § 2806.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See *Tribal Law Enforcement*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=75> [https://perma.cc/VX6D-5MWK] (Cross deputization agreements “[a]llow law enforcement personnel from state and tribal entities to cross jurisdictions in criminal cases. Cross deputization agreements have been used to enhance law enforcement capabilities in areas where state and tribal lands were contiguous and intermingled. Under some agreements, federal state, county/local and/or tribal law enforcement officers have the power to arrest Indian and non-Indian wrongdoers wherever the violation of law occurs.”).

²¹¹ See 25 U.S.C. § 2815 (2012).

²¹² See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 Sec. 234; see generally U.S. DEP’T OF JUSTICE, ENHANCED SENTENCING IN TRIBAL COURT (2015), <https://www.bja.gov/Publications/TLOA-TribalCtsSentencing.pdf> [https://perma.cc/J35V-SQU5] (describing changes from the Tribal Law and Order Act that allow for increased sentences for certain crimes, and how those changes should be implemented).

²¹³ See Tribal Law and Order Act, U.S. DEP’T OF JUSTICE (last updated Dec. 3, 2015), <https://www.justice.gov/tribal/tribal-law-and-order-act> [https://perma.cc/MYN9-YA84].

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.²¹⁴

TLOA also specifically requires that tribes ensure defendants have access to competent and effective assistance of counsel.²¹⁵ Tribes must also provide judges who have significant legal training and are licensed to practice law.²¹⁶ Each tribe must make its criminal laws, rules of evidence, and rules of criminal procedure publicly available.²¹⁷ Finally, tribes must maintain records of criminal proceedings.²¹⁸

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 around increasing federal involvement.²¹⁹ 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.”²²⁰ This act acknowledges the tension between the interests of tribal sovereignty and the responsibility of the federal government regarding the trust responsibility.²²¹ In the long term, more authority granted to tribal police and tribal courts will be necessary.²²² Currently, tribes must opt in to the Act to utilize its enhanced sentencing provisions.²²³

The MHA Nation has yet to adopt the necessary laws and provisions to opt in to TLOA.²²⁴ As such, the Tribe’s laws on sexual assault and sex trafficking do not include enhanced sentencing. However, adopting TLOA may help the MHA Nation combat trafficking. TLOA would provide the MHA Nation more authority in criminal jurisdiction and enable cooperation with other government and law enforcement agencies that share jurisdiction. Because of increased coordination and tribal prosecution, less information would be lost and more offenders could be prosecuted.

3. *The Violence Against Women Act Re-authorization of 2013*

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 ac-

²¹⁴ *Id.*

²¹⁵ 25 U.S.C. § 1302(c) (2012).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Hart, *supra* note 93, at 141.

²²⁰ *Id.*

²²¹ *See id.*

²²² *See id.*

²²³ U.S. DEP’T OF JUSTICE, ENHANCED SENTENCING PROVISIONS, *supra* note 212.

²²⁴ A list of Tribes that have implemented laws to opt in to TLOA can be found at *Tribes Executing Enhanced Sentencing*, NAT’L CONG. OF AM. INDIANS, <http://tloa.ncai.org/tribesexercisingTLOA.cfm> [https://perma.cc/9GXW-S3ES].

countable for their crimes.²²⁵ 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.²²⁶ Further, VAWA clarifies that tribal courts have full civil jurisdiction to both issue and enforce protection orders involving any person, Indian or non-Indian.²²⁷ 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.²²⁸ However, like the 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.²²⁹

Tribes are free to choose whether or not they want to implement VAWA. To date, the MHA Nation has not yet implemented VAWA. The Act does not revoke the authority of U.S. attorneys and state/local prosecutors, where they have jurisdiction, to prosecute offenders.²³⁰ Should a tribe choose to implement the Act, it only extends that tribe's criminal jurisdiction over non-Indians to include domestic violence, dating violence, and criminal violations of protection orders.²³¹ VAWA's special domestic violence criminal jurisdiction restores a tribe's criminal jurisdiction only over this limited subset of crimes.

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.²³² Additionally, the Act'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.²³³

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

²²⁵ 25 U.S.C. § 1304 (2012); *Indian Country Accomplishments of the Justice Department*, U.S. DEP'T OF JUSTICE (July 2, 2015), <http://justice.gov/tribal/accomplishments> [<https://perma.cc/3AQV-AQDS>].

²²⁶ 25 U.S.C. § 1304.

²²⁷ *Id.*

²²⁸ U.S. DEP'T OF JUSTICE, VAWA 2013 AND TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE (June 14, 2013), <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf> [<https://perma.cc/F6SC-2JFQ>].

²²⁹ 25 U.S.C. § 1304.

²³⁰ U.S. DEP'T OF JUSTICE, VAWA 2013, *supra* note 228.

²³¹ *Id.*

²³² 25 U.S.C. § 1304.

²³³ *Id.*

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 does not have jurisdiction and the federal government retains jurisdiction.²³⁴ 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.

Significantly, sex trafficking is included in VAWA in various ways including by providing funding for improved victim services for minor victims of human trafficking, ensuring specialized training of law enforcement in identifying and serving minor victims, and expanding funds to provide law enforcement with tools to adequately investigate these crimes.²³⁵ However, the Act does not provide Tribes with jurisdiction over sex trafficking crimes that occur on their lands, though VAWA does contemplate funding for coordination and training of local and state police.²³⁶

Further limiting VAWA as a solution are the statutory prerequisites for implementation.²³⁷ 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 the 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. The TLOA, towards which the MHA Nation is already working, only provides for extended sentencing. VAWA, with many of the same requirements, allows for special domestic violence criminal jurisdiction over non-Indians.

4. *Other Federal Statutes on Sex Trafficking and Sexual Assault on Fort Berthold*

The intersection of sex trafficking with federal Indian law raises several questions as to jurisdiction. The Mann Act of 1910 outlaws sex trafficking activities that involve travel in “interstate or foreign commerce.”²³⁸ Although The Mann Act was originally intended to combat prostitution, debauchery and immorality, it has been amended so that it no longer legislates

²³⁴ *Id.*

²³⁵ 42 U.S.C. § 14044b (2012).

²³⁶ 25 U.S.C. § 1304(f).

²³⁷ 25 U.S.C. § 1304; *see also* DEP’T OF JUSTICE, VAWA 2013, *supra* note 228.

²³⁸ 18 U.S.C. § 2421 (2012).

morality.²³⁹ The Mann Act was amended in 1986 to revise transportation requirements and to replace the terms “debauchery” and “immoral purpose” with the term “sexual activity in which any person can be charged with a criminal offense.”²⁴⁰ In 2015, the Justice for Victims of Trafficking Act amended both the Mann Act and 18 U.S.C. § 1591.²⁴¹ The amendment now permits state, general, and local district attorneys to prosecute cases under the Mann Act, and it requires the federal government to explain why it denied a request from the state to prosecute.²⁴² The purpose of this amendment was to “allow and encourage federal prosecutors to work with state officials to prosecute Mann Act violations while increasing transparency.”²⁴³ 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.”²⁴⁴ 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 punished . . . by imprisoned for any term not less than 15 years (not less than 10 years imprisonment, if the victim is 14 years of age or older and the offender is less than 18 years of age, provided neither force nor deception were used).²⁴⁵

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.²⁴⁶

²³⁹ Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J.L. & PUB. POL. 99, 99 (1996).

²⁴⁰ *Id.* at 116–17.

²⁴¹ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227.

²⁴² Press Release, U.S. Senator Dan Sullivan, Sullivan’s Amendment to Human Trafficking Bill Passes Senate (Apr. 22, 2015), <http://www.sullivan.senate.gov/newsroom/press-releases/sullivan-s-amendment-to-human-trafficking-bill-passes-senate> [<https://perma.cc/SH7K-7MRU>].

²⁴³ *Id.*

²⁴⁴ CHARLES DOYLE, CONG. RES. SERV., R43597, SEX TRAFFICKING: AN OVERVIEW OF FEDERAL CRIMINAL LAW I (2015).

²⁴⁵ *Id.* at 1–2.

²⁴⁶ U.S. Const. art. I, § 8, cl. 10.

In 2000, Congress passed the Trafficking Victims Protection Act (“TVPA”).²⁴⁷ 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.”²⁴⁸ The TVPA was the first comprehensive federal law to address human trafficking.²⁴⁹ 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.”²⁵⁰ The TVPA was reauthorized in 2003, 2005, and 2008 as the Trafficking Victims Protection Reauthorization Act (“TVPRA”).²⁵¹ Through the TVPRA the US government is able to fund law enforcement as well as services for survivors.²⁵² The TVPRA seeks to combat both national and international trafficking in persons.²⁵³ The TVPRA defines the penalties for trafficking and promotes interagency cooperation. By reauthorizing this legislation Congress has renewed its commitment to identifying human trafficking, punishing those perpetrating the crimes, and helping the survivors move beyond their victimization.²⁵⁴

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.²⁵⁵

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,²⁵⁶ the International Covenant on Civil and Political Rights (“ICCPR”),²⁵⁷ and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Per-

²⁴⁷ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101–7113 (2012)).

²⁴⁸ 22 U.S.C. § 7101(a).

²⁴⁹ *Id.* § 7101(b)(14).

²⁵⁰ *Trafficking Victims Protection Act (TVPA): Fact Sheet*, POLARIS PROJECT, <http://files.meetup.com/1337582/Polaris%20TVPA%20Fact%20Sheet.pdf> [<https://perma.cc/UH3N-DKA8>].

²⁵¹ *Current Federal Laws*, POLARIS PROJECT, <https://polarisproject.org/current-federal-laws> [<https://perma.cc/N2N2-27YP>].

²⁵² Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Current Federal Laws*, *supra* note 251.

²⁵⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, 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.

²⁵⁷ International Covenant on Civil and Political Rights, arts. 8, 24, 50, Dec. 16, 1966, 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.

sons, especially Women and Children.²⁵⁸ 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's 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.²⁵⁹ These laws are vitally important for protecting the Bakken region, as some victims of human and sex trafficking are taken through reservations before moving across state lines.

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. Thus, 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 on American Indian reservations.²⁶⁰ 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.²⁶¹

Further, because tribal jurisdiction is limited, the Tribe is not able to prosecute non-Indian offenders for the crimes they have committed. Native women hesitate to report to federal agents because of their lack of cultural education and lack of action.²⁶² The federal government is unable to provide awareness and accountability in a culturally relevant way.²⁶³ In many cases

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."

²⁵⁸ G.A. Res. 55.25, United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 5 (Nov 15, 2000). This U.N. 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.

²⁵⁹ 18 U.S.C. § 2421 (2012); *id.* § 1591.

²⁶⁰ See Washburn, *supra* note 58, at 786.

²⁶¹ See *id.* at 827.

²⁶² AMNESTY INT'L, MAZE OF INJUSTICE 1, 4 (2007), <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf> [<https://perma.cc/Q94V-R5QD>].

²⁶³ Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 128 (2004).

victims and witnesses are unwilling to come forward because of this barrier and the high likelihood that no action will be taken to investigate or prosecute their case.²⁶⁴ Such lack of action may come from a federal prosecutor's lack of experience prosecuting this type of case, a lack of resources to investigate, police, and prosecute these types of crimes on Native reservations, or the federal prosecutor may just decline to prosecute.²⁶⁵ 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."²⁶⁶

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.²⁶⁷ In the case of an Indian defendant and an Indian victim, the federal government has jurisdiction through the MCA.²⁶⁸ The Tribe would also have concurrent jurisdiction with the MCA but would be limited with sentencing by the ICRA.²⁶⁹ If the Tribe were to meet the prerequisites of TLOA, they would have extended sentencing possibility.²⁷⁰ 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.²⁷¹ If there were an Indian defendant and a non-Indian victim, the federal government would have jurisdiction through the ICCA, the MCA and *Oliphant*.²⁷² Again, in this case, the tribes would have limited concurrent jurisdiction and could prosecute and sentence the Indian defendant according to the ICRA.²⁷³ Similarly, the Tribe would have special domestic jurisdiction if they became a VAWA tribe.²⁷⁴ Finally, if there were a non-Indian defendant and an Indian victim the federal government would have jurisdiction through *Oliphant* and the ICCA.²⁷⁵ The only way the Tribe could exercise any type of jurisdiction over the non-Indian would be through a limited special domestic jurisdiction under VAWA.²⁷⁶ Jurisdiction over sex trafficking crimes involving a non-Indian defendant and a non-Indian victim on the reservation would depend

²⁶⁴ Cynthia Castillo, Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA, 39 AM. INDIAN L. REV. 311, 315 (2015).

²⁶⁵ *Id.*

²⁶⁶ Greer, *supra* note 25, at 478–79.

²⁶⁷ See United States v. McBratney, 104 U.S. 621, 624 (1881).

²⁶⁸ 18 U.S.C. § 1153 (2012).

²⁶⁹ *Id.*

²⁷⁰ 25 U.S.C. § 2801 (2012).

²⁷¹ *Id.* § 1304; DEP'T OF JUSTICE, VAWA 2013, *supra* note 228.

²⁷² 18 U.S.C. § 1153; *id.* § 1152; see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209–11 (1978).

²⁷³ 25 U.S.C. §§ 1302, 2801.

²⁷⁴ *Id.* § 1304.

²⁷⁵ 18 U.S.C. § 1152; see *Oliphant*, 435 U.S. at 209–11.

²⁷⁶ 25 U.S.C. § 1304; DEP'T OF JUSTICE, VAWA 2013, *supra* note 228.

on whether the trafficking implicated interstate trafficking.²⁷⁷ An Indian defendant and an Indian victim would give the federal government jurisdiction under the MCA.²⁷⁸ The Tribe would maintain limited concurrent jurisdiction with the sentencing restrictions of ICRA.²⁷⁹

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.²⁸⁰ In a case involving a non-Indian defendant and an Indian victim the federal government would have jurisdiction through the MCA, the ICCA and *Oliphant*.²⁸¹ Disturbingly, the Tribe would not have jurisdiction in such a case even if it were to implement VAWA.²⁸²

5. *State Remedies*

Though the state of North Dakota has limited criminal jurisdiction on the Fort Berthold reservation, the state is taking steps to include the tribes in North Dakota in their effort to combat sex trafficking. 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.²⁸³ The law includes federally recognized Indian tribes in the definition of "state," thereby explicitly extending the law's jurisdiction into the Fort Berthold reservation.²⁸⁴

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.²⁸⁵ Listed crimes triggering these remedies include trafficking, forced labor, sexual servitude, patronizing a victim of sexual servitude, and patronizing a minor, among others.²⁸⁶ All are felonies.²⁸⁷ Business entities can be prosecuted for listed offenses in a very limited set of circumstances.²⁸⁸ 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 and for the benefit of the entity, which the entity knew was occurring and

²⁷⁷ See *United States v. McBratney*, 104 U.S. 621, 624 (1881).

²⁷⁸ 18 U.S.C. § 1153.

²⁷⁹ 25 U.S.C. § 2801.

²⁸⁰ 18 U.S.C. §§ 1152–1153.

²⁸¹ *Id.*; see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209–11 (1978).

²⁸² 25 U.S.C. § 1304; DEP'T OF JUSTICE, VAWA 2013, *supra* note 228.

²⁸³ N.D. Cent. Code §§ 12.1-41-01 to 21 (2012).

²⁸⁴ *Id.* § 12.1-41-01(11).

²⁸⁵ *Id.* § 12.1-41-15(1).

²⁸⁶ *Id.* § 12.1-41-02 to 06.

²⁸⁷ *Id.*

²⁸⁸ *Id.* § 12.1-41-07.

failed to take effective action to stop.²⁸⁹ Finally, this legislation creates a statewide Human Trafficking Commission that is tasked with distributing \$1.25 million allocated to victim services.²⁹⁰ 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 trafficking prevention.²⁹¹ 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.²⁹²

6. *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 and sex trafficking, particularly of minors.²⁹³ Importantly, the scope of the resolution only extends to members of a tribe, both perpetrators and victims.²⁹⁴ 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—a familiar dynamic in trafficking scenarios. If convicted, the perpetrator can be imprisoned for up to 365 days but not fewer than 150 days.²⁹⁵ 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.²⁹⁶ Finally, Loren's Law explicitly notes that violators of the listed provisions can be subject to prosecution under both tribal and federal law.²⁹⁷

²⁸⁹ *Id.* § 12.1-41-07(1).

²⁹⁰ See Mike Nowatzki, *North Dakota's Human Trafficking Commission Holds Inaugural Meeting*, DICKINSON PRESS (Aug. 31, 2015), <http://www.thedickinsonpress.com/news/north-dakota/3829099-north-dakotas-human-trafficking-commission-holds-inaugural-meeting> [https://perma.cc/TQ9Y-VXKU].

²⁹¹ See *id.*

²⁹² Amy Dalrymple, *Laws Cracking Down on Human Trafficking in North Dakota Take Effect Saturday*, GRAND FORKS HERALD (Aug. 1, 2015), <http://www.grandforksher-ald.com/news/crime-and-courts/3808896-laws-cracking-down-human-trafficking-north-dakota-take-effect-saturday> [https://perma.cc/6BGF-PFJW].

²⁹³ Resolution No. 14-195-VJB, *supra* note 41.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

The tribe has also established a Sex Offender Registry program, modeled directly after the Adam Walsh Protection Act.²⁹⁸ 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."²⁹⁹ 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,³⁰⁰ 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.

7. *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.³⁰¹ 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.*"³⁰² 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).³⁰³ 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."³⁰⁴

²⁹⁸ *Three Affiliated Tribes Sex Offender Registry*, MHA NATION, <http://mhanation.nsopw.gov/> [<https://perma.cc/AM4F-4DEJ>].

²⁹⁹ *Id.*

³⁰⁰ Archie Ingersoll, *FBI's Role Stays the Same as North Dakota Footprint Grows With Williston Office*, THE DICKINSON PRESS, Aug. 9, 2015, http://bismarcktribune.com/news/state-and-regional/fbi-s-role-stays-the-same-as-footprint-grows-in/article_c7d13527-6eba-5f5d-a078-78331d0785eb.html [<https://perma.cc/6JKS-2DSA>].

³⁰¹ 25 U.S.C. §§ 2101–2108 (2012).

³⁰² *Id.* § 2103(b) (emphasis added).

³⁰³ *Id.*

³⁰⁴ *Id.* § 2103(e).

While the IMDA grants tribes and Indian individuals greater control of mineral development on their lands than existed 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 reserve the right to issue a notice of noncompliance or cancellation with the tribe.³⁰⁵ 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 have considered the possibility and implemented protective measures to promote safety and prevent harm. To the extent that the Secretary did not consider the full impacts of mineral development that led to the burgeoning increase in drug and sex trafficking, that failure may effect tribal communities on Fort Berthold for generations to come.

The 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.

8. *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. *Dark Side of Oil Development* provides an overview of strategies ranging from local implementation of laws to advocates for increased utilization of international instruments under the United Nations.³⁰⁶ 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.³⁰⁷ 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

³⁰⁵ See 25 C.F.R. § 225.36.

³⁰⁶ See Alex, *supra* note 4, at 11–23.

³⁰⁷ *Id.* at 11–15.

drilling.³⁰⁸ 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.³⁰⁹ 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.³¹⁰ 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."³¹¹

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 become a TLOA tribe. If the MHA Nation were to opt into the TLOA, they could extend sentencing of Indian defendants.³¹² In so doing, the MHA Nation could revise Loren's Law to increase the sanctions up to the limits in the TLOA.

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.³¹³ Just as the Fort Berthold reservation could benefit from receiving a portion of the funds the law allocates for victim services, it would also bene-

³⁰⁸ *Id.* at 15–18.

³⁰⁹ *See* Cross, *supra* note 8, at 550–55.

³¹⁰ *Id.*

³¹¹ *See* Cheney, *supra* note 5.

³¹² 25 U.S.C. § 2801 (2012).

³¹³ N.D. Cent. Code § 54-12-33.

fit 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.³¹⁴ Tribal law enforcement agencies 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.³¹⁵

Recently, the Oglala Sioux tribe's attorney general was cross-deputized as a deputy state attorney in Bennett County, South Dakota.³¹⁶ Her dual roles will increase the tribe's ability to meaningfully participate in cases that are ultimately prosecuted in state court.³¹⁷ 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.³¹⁸ 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,³¹⁹ 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

³¹⁴ HANNAH BOBEE ET AL., CRIMINAL JURISDICTION IN INDIAN COUNTRY: THE SOLUTION OF CROSS DEPUTIZATION 11–12 (2008), <http://www.law.msu.edu/indigenous/papers/2008-01.pdf> [<https://perma.cc/68YU-XPU7>].

³¹⁵ *Id.* at 12.

³¹⁶ *Tribal Prosecutor Deputized in State Court*, RED LAKE NATION NEWS (Dec. 3, 2015), <http://www.redlakenationnews.com/story/2015/12/03/news/tribal-prosecutor-deputized-in-state-court/41739.html> [<https://perma.cc/RQ5-RWYT>].

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ N.D. Cent. Code § 12.1-41-01.

certain terms, such as sovereign immunity, personnel, indemnification, liability, and severability and termination.³²⁰

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.³²¹ 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 whose work takes place within the jurisdiction of the reservation.³²² The TERO Office was created specifically to forward the Nation's sovereignty by requiring employers that operate on the Fort Berthold reservation to institute Indian hiring preferences.³²³ 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.³²⁴ 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 consensual relationships with the tribe or its members," and over nonmembers whose activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."³²⁵ 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.

³²⁰ Paul Stenzel, *MOUs and MOAs: A Cooperative Approach to Law Enforcement on the Reservation*, at 3–4 (Nov. 5, 2005), <http://www.paulstenzel.com/multi-j-110305.pdf> [<https://perma.cc/4D5Q-F49N>].

³²¹ *About MHA Energy Division*, MHA NATION, http://www.mhanation.com/main2/departments/mha_energy_division/mhaenergydivision_about.html [<https://perma.cc/635S-NDVD>].

³²² *TERO Ordinance and Regulations of the Three Affiliated Tribes; Mandan, Hidatsa and Arikara* § 301 (May 8, 2012), http://www.mhatero.com/wp-content/uploads/2016/06/AXT_2_1ZF10.pdf [<https://perma.cc/KL9X-8BSA>].

³²³ *What is TERO?*, MHA TERO, <http://www.mhatero.com/what-is-tero/> [<https://perma.cc/AS4C-V3YS>].

³²⁴ *TERO Ordinance*, *supra* note 322, at § 202.

³²⁵ *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

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.³²⁶ 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 a clear need to address it. Existing data indicates a rise in crime that is clearly tied to the sharp increase in population as well-paid oil workers have moved into the region.³²⁷ Efforts to combat the rise of human trafficking and sexual assault in Fort Berthold must not be limited to the reservation but must also address oil and gas operations in the region as a whole.

Corporate responsibility arises from not only each company's involvement in the problem, but also from each company's obligations to its shareholders and to local communities.³²⁸ Those obligations include a duty to invest and operate with fiscal responsibility and avoid 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.

³²⁶ See Alex, *supra* note 4, at 14–15.

³²⁷ Horwitz, *supra* note 2.

³²⁸ Cf. 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: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 13–15, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (building up the Framework to ensure that businesses and States protect human rights in relation to all business enterprises) (hereinafter "UN Guiding Principles on Business and Human Rights").

The *Indigenous Rights Risk Report*, produced by First Peoples Worldwide (“FPW”), assesses some of the financial, social, and legal risks associated with extractive industries operating on and near indigenous lands.³²⁹ Assessing 330 projects across fifty-two US-based companies, FPW found that 35% of the projects had high-risk exposure to community opposition for violating Indigenous rights, 54% had medium risk exposure, and only 11% had low risk exposure.³³⁰ 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.³³¹ The report includes assessments of twelve projects in the North Dakota Bakken. Of those twelve projects, ten were high risk (Hess, WPX, Continental, EOG, Marathon, Newfield, Occidental, QEP, SM, and Whiting) and two were medium risk (ExxonMobil and ConocoPhillips).³³²

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.³³³ 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 those companies operating off-reservation face significant risks. In addition to damaging their public image, they risk 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, and consumer protection. 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 infla-

³²⁹ See REBECCA ADAMSON & NICK PELOSI, FIRST PEOPLES WORLDWIDE, INDIGENOUS RIGHTS RISK REPORT (2014), [http://www.firstpeoples.org/images/uploads/Indigenous%20Rights%20Risk%20Report\(1\).pdf](http://www.firstpeoples.org/images/uploads/Indigenous%20Rights%20Risk%20Report(1).pdf) [https://perma.cc/J4U8-ZT67].

³³⁰ *Id.* at 24.

³³¹ *Id.* at 28.

³³² *Id.* at 35–36. For a list of companies currently operating in the Bakken see Bakken Shale Companies and Active Operators, BAKKEN SHALE, <https://bspmigrate-216.space.com/companies> [https://perma.cc/SX5L-QCDN].

³³³ *Id.* at 29.

tion.”³³⁴ Additionally, “[a]nalysis by Environmental Resources Management 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 percent of project delays were due to ‘above-ground’ or non-technical risk, including stakeholder resistance.”³³⁵ 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 with which 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.³³⁶ 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 regarding trafficking.³³⁷ These meetings serve to make the company aware of both the issue itself and the fact that investors are making decisions with that issue in mind. This alone may be sufficient to prompt a company to assess its policies and the effects of its presence 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 will likely reference the small percentage of the regional population increase for which they are responsible. 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

³³⁴ Michael Connor, *Business and Human Rights: Interview with John Ruggie*, BUS. ETHICS (Oct. 30, 2011), <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/> [<https://perma.cc/VD33-YSQ9>].

³³⁵ Michael Hackenbruch, & Jessica Davis Pluess, *Business for Social Responsibility, Commercial Value From Sustainable Local Benefits in the Extractive Industries: Local Content 2* (2011), http://www.bsr.org/reports/BSR_LocalContent_March2011.pdf [<https://perma.cc/6T7J-FXV5>].

³³⁶ See, e.g., *Corporate Dialogues*, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY, <http://www.iccr.org/our-approach/shareholder-engagement-101/corporate-dialogues> [<https://perma.cc/2Q33-2HMD>].

³³⁷ See *id.*

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.³³⁸

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.³³⁹ In this case, shareholders would likely ask the corporation to disclose or 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 the country or province in which each corporation is headquartered, but it generally follows a set pattern. For companies based in the U.S., a resolution must first be drafted. Resolutions must be clear in asking for specific actions by the corporation.³⁴⁰ 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.³⁴¹ 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.³⁴² 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.³⁴³ The ordinary business exclusion allows companies to exclude resolutions that go to the day-to-day management of the company in order to avoid micromanagement by shareholders.³⁴⁴ 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 com-

³³⁸ See *Roundtables*, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY, <http://www.iccr.org/our-approach/shareholder-engagement-101/roundtables> [<https://perma.cc/SQ94-3DMM>].

³³⁹ 17 C.F.R. § 240.14a-8 (2011).

³⁴⁰ *Id.* § 8(a).

³⁴¹ *Id.* § 8(b).

³⁴² William A. Klein, J. Mark Ramseyer & Stephen M. Bainbridge, *Business Associations* 530 (2015).

³⁴³ See 17 C.F.R. § 240.14a-8(i).

³⁴⁴ *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 341-42 (3rd Cir. 2015).

pany's response to each resolution.³⁴⁵ 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.³⁴⁶

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.³⁴⁷ 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 fossil fuel industry, certain key institutional investors have already fully divested from their holdings in the sector.³⁴⁸ Investor concerns about long-term profitability of oil, especially when prices are already falling steadily,³⁴⁹ could also provide a strong incentive for companies to engage with investors as to their concerns, including concerns over impacts related to trafficking.

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 in which they operate. In dialogue with corporations, or through Shareholder Resolutions, investors can ask other companies to adopt similar policies on interaction with indigenous peoples, on human trafficking, and on human rights more generally. When requesting that a corporation adopt these policies, investors can look to policies developed 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

³⁴⁵ 17 C.F.R. § 240.14a-8(m).

³⁴⁶ *Id.* § 8(i)(12).

³⁴⁷ See generally *Shareholder Advocacy 101: A Primer on Active Ownership*, INTER-FAITH CTR. ON CORP. RESPONSIBILITY, <http://www.iccr.org/our-approach/shareholder-engagement-101> [<https://perma.cc/QKZ7-YLTV>] (noting that investors may choose to divest as a last step of protest against an institution).

³⁴⁸ See, e.g., *Divestment Statement*, ROCKEFELLER BROS. FUND (2014), http://www.rbf.org/sites/default/files/rbf-divestment_statement-2016-03-march.pdf [<https://perma.cc/77ZZ-CS79>].

³⁴⁹ *Oil Price Steadies After Falling Below \$28 a Barrel*, BBC NEWS (Jan. 18, 2016), <http://www.bbc.com/news/business-35340893> [<https://perma.cc/P878-2XTJ>].

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.³⁵⁰ However, adoption of the UDHR is, at minimum, a recognition of the 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.³⁵¹ UNDRIP’s provisions enumerate tribal rights to participate in decision-making 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”³⁵² and to prompt, “just, and fair resolution of conflicts and disputes.”³⁵³ Corporate adoption of UNDRIP’s principles both commits to respecting state policies protecting indigenous groups and suggests that even 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.

The International Labor Organization’s Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (“ILO 169”) is a binding international convention.³⁵⁴ Like UNDRIP, ILO 169 focuses prima-

³⁵⁰ See Universal Declaration of Human Rights, *supra* note 256.

³⁵¹ G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2008). The portions of UNDRIP relevant to the situation in Fort Berthold are: Article 18, which provides, “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights”; Article 26(2), which provides, “Indigenous peoples have the right to . . . control the lands, territories and resources that they possess”; Article 32(2), which provides, “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), which provides, “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”; and Article 40, which provides, “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 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.”

³⁵² *Id.* at Art. 32(2).

³⁵³ *Id.* at Art. 40.

³⁵⁴ INT’L LABOR ORG., INDIGENOUS AND TRIBAL PEOPLES CONVENTION, C169, (June 27, 1989), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314 [https://perma.cc/SV5Y-FA2U]. The portions of ILO 169 relevant to the situation in Fort Berthold are: Article 4(1), which provides, “Special

rily 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"³⁵⁵ 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."³⁵⁶

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 indigenous groups that also requires companies to formulate an action plan to "avoid, minimize, mitigate, or compensate for" the adverse effects of their operations.³⁵⁷

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 a plan to address identified risks, and ongoing consultation with affected indigenous groups throughout the entire project.³⁵⁸ Additionally, Performance Standard 7 requires companies conducting operations directly on tribal land

measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned"; Article 5, which provides, "In applying the provisions of this Convention:(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised 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"; and Article 7(3), which provides, "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."

³⁵⁵ *Id.* at Art. 5(c).

³⁵⁶ *The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> [<https://perma.cc/LSS7-3Q4H>].

³⁵⁷ WORLD BANK, OPERATIONAL MANUAL § 4.10 (2013).

³⁵⁸ INTERNATIONAL FINANCE CORPORATION, PERFORMANCE STANDARD 7-8 (2012).

to engage with the tribe through a system of free, prior, and informed consent.³⁵⁹

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.³⁶⁰ Companies that have adopted the UN Guiding Principles take on the responsibility to “address adverse human rights impacts with which they are involved.”³⁶¹ 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 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

³⁵⁹ *Id.*

³⁶⁰ *Guiding Principles on Business and Human Rights, supra* note 328. The portions of the UN Guiding Principles relevant to the situation in Fort Berthold are: Principle 13, which provides, “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; (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”; Principle 15, which provides: “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; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute”; Principle 17, which provides, “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”; and Principle 21, which provides, “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.”

³⁶¹ *Id.* at Art. 17

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 to concerned shareholders and stakeholders and to affected communities how they manage those risks. 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 that companies reduce the impact of their operations and protect and aid victims through implementation of best practices. Suggestions for best practices to address 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 whom 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.³⁶²
- 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.³⁶³ Increasing (or establishing) oversight could encourage implementation of preventive policies, rather than relying only on after-the-fact damage control.
- 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 sub-contractors and suppliers seeking a business partnership.³⁶⁴
- 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.³⁶⁵
- 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.³⁶⁶

³⁶² HAQ CENTRE FOR CHILD RIGHTS, COMPENDIUM OF BEST PRACTICES ON ANTI HUMAN TRAFFICKING BY NON GOVERNMENTAL ORGANIZATIONS 21 (2008), https://www.unodc.org/documents/human-trafficking/India_Training_material/Compendium_of_Best_Practices_by_NGOs.pdf [<https://perma.cc/4YUC-92V9>].

³⁶³ ADAMSON & PELOSI, *supra* note 329, at 31.

³⁶⁴ *See, e.g.*, THE PROTECTION PROJECT, 100 BEST PRACTICES IN COMBATING TRAFFICKING IN PERSONS 25 (2012), <http://www.ungift.org/doc/knowledgehub/resource-centre/CSOs/100-Best-Practices-in-Combating-TIP.pdf> [<https://perma.cc/YMP9-V758>].

³⁶⁵ *See, e.g., id.* at 58, 61.

³⁶⁶ *See, e.g., id.* at 65.

- 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.
- 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.³⁶⁷
- 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 remain 4.4 to 11 billion barrels of technologically recoverable oil in the Bakken and the nearby Three Forks Formations.³⁶⁸ 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.³⁶⁹ 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.

³⁶⁷ See, e.g., *id.* at 62–64.

³⁶⁸ 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 4 (2013), <http://pubs.usgs.gov/fs/2013/3013/fs2013-3013.pdf> [<https://perma.cc/M4VQ-WRBW>].

³⁶⁹ U.S. DEP'T OF THE INTERIOR, *supra* note 37.

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 for 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.

