

A NEW WILD WEST

Developing Tribal Legislation to Address Sex Trafficking in
Indian Country

Center for the Human Rights of Children

Native Trafficking Project

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THE MINNESOTA AMERICAN INDIAN WOMEN'S RESOURCE CENTER, *Shattered Hearts: The Commercial Sexual Exploitation of American Indian Women and Girls in Minnesota*, (August, 2009), <http://www.indianlaw.org/sites/default/files/shattered%20hearts%20report.pdf>. (A study of Native girls in Minnesota involved in the commercial sex trade; recommendations for legal reforms and culturally sensitive victim services.)

Native Policy and Advocacy Organizations

Minnesota Indian Women's Resource Center, <https://www.miwrc.org/>. (Nonprofit social and educational services organization dedicated to empowering Native women and their families.)
National Indigenous Women's Resource Center, <http://www.niwrc.org/>. (Nonprofit organization led by Native women dedicated to safeguarding Native women and children from violence.)

National Indian Law Library, <http://www.narf.org/nill/>. (Law library devoted to Federal Indian and tribal law with legislative development guides.)

Tribal Law and Policy Institute, *Sex Trafficking Resources for Sexual Assault and Domestic Violence*, Tribal Coalitions, <http://www.tribalcoalitions.org/>. (Comprehensive resource for general tribal code development. Provides sex trafficking resources for legal advocates and victims.)

Model Legislation

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (July, 2013),

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Federal Statutes

Combat Human Trafficking Act of 2015, 42 U.S.C.A. §14044g (2015). (Training of law enforcement officers, prosecutors, and judges.)

Trafficking Victims Protection Act, 18 USC §1591 (2015). (Definition of sex trafficking of children or by force, fraud, or coercion.)

Tribal Trafficking Laws

Sex and Labor Trafficking Laws

Fort Peck Tribes Comprehensive Code of Justice, 7 CCOJ 214-230 (2016), Fort Peck Tribal Court, <http://www.fptc.org/ccoj/ccoj.html>.

MHA Nation, Loren's Law, http://www.mhanation.com/main2/Home_News/Home_News_2014/News_2014_09_September/Human%20Trafficking%20Code%20Final%20Draft.pdf.

Snoqualmie Tribe, SNOQ. TRIBAL CODE § 7.21, http://www.snoqualmi-tribe.us/sites/default/files/criminal_code_7.1_compresses.pdf

Oglala Sioux Tribe, Oglala Sioux TR. Code Ch. 7, § 701-515 (2015).

Adoption Trafficking Laws

Trafficking in Children, Winnebago Tribal Code 3-718, <http://www.winnebago-tribe.com/images/joomlart/corporate/tribe/court/tribalcode/2014-WTN->

TITLE3-Criminal-Code.pdf. (Does not cover sex or labor trafficking or adult victims. Prohibits financial or other compensatory incentives to place children for adoption.)

Winnebago Tribe of Nebraska, Winnebago Crim. Code, T. 3, Art. 7 § 3-718 (2015) – Trafficking in children; penalty,

<http://www.winnebago-tribe.com/images/joomlart/corporate/tribe/court/tribalcode/2015-WTN-TITLE-3-Criminal-Code.pdf>.

Absentee Shawnee Tribe of Indians of Oklahoma, Tribal Crim. Code, Ch. 5 § 568,

http://www.narf.org/nill/codes/absentee-shawnee/criminal_offenses_ch_5.html.

Prairie Band Potawatomi Nation, Potawatomi Law and Order Code, Ch. 15-5 § 15-5-68:

Trafficking In Children,

<http://www.codepublishing.com/KS/Potawatomi/#!/Potawatomi15/Potawatomi1505.html#15-5-68>.

WHAT IS SEX TRAFFICKING?

- Sex trafficking is controlling a person so that others can engage in sexual activity with that person in exchange for money, drugs, or anything of value.
- Sex trafficking usually involves three parties: The person controlling the transaction (commonly known as a “pimp”), the person performing the sex act, and the person buying sex.



“CONTROLLING A PERSON”

- A controlling dynamic is not always physical. It might include physical restraint, the threat of harm, or another unequal power dynamic, including:
 - The promise of drugs or alcohol
 - Threats to family or loved ones
 - The promise of a job
 - Withholding love or affection
 - “Breaking” – the process by which pimps bring women under total psychological control



MINORS

- Under federal and state law, if a minor is used in prostitution, it is always sex trafficking
 - A minor cannot consent to prostitution and is never criminally responsible for prostitution
 - Even if it appears that the minor actively or independently agreed to sell sex, it is still sex trafficking



“ANYTHING OF VALUE”

- Sex acts may be performed in exchange for anything, not just money. This includes:
 - Satisfaction of a debt
 - Food
 - Shelter
 - Drugs/alcohol
 - Transportation
 - Safety



HISTORY AND PRESENT OF NATIVE TRAFFICKING

- Most studies and reports on the trafficking of Native people (focused on women) have come out of Minnesota (Duluth and Minneapolis)
- Video: “Native American Trafficking”
 - <https://www.youtube.com/watch?v=VjeDTTw8tco>
- Attention has been concentrated on areas where there are federally recognized tribes
- “Garden of Truth” and “Shattered Hearts” Reports
- See our Bibliography for all relevant U.S. Studies on Native Trafficking



RISK FACTORS

- Poverty
- Lack of opportunity (educational and occupational)
- Past history of abuse and exploitation (such as child abuse, domestic violence, or sexual assault)
- Child welfare system involvement
- Substance abuse or mental health issues
- Distrust of law enforcement, a criminal record, and/or prior adversarial experiences with law enforcement
- Another family member who has been trafficked



VULNERABILITY OF NATIVE POPULATIONS

- Native populations experience higher rates of these risk factors due to failed federal policies, intergenerational trauma, conditions in Indian Country, persistent poverty, and other social harms



HIGHER RATES OF NATIVE VICTIMIZATION (AND CRIMINALIZATION)

- “24% of women on probation for prostitution in North Minneapolis are Native women—more than ten times the proportion of American Indians living in the city (2.2%).” –Andrea L. Johnson, *A Perfect Storm: The U.S. Anti-Trafficking Regime’s Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 *Colum. Hum. Rts. L. Rev.*, 621 (2012)
- The numbers are similarly high in other cities. Alaska Natives constitute 8% of the Anchorage population, but account for 33% of the city’s trafficked and prostituted women



LAWS THAT CONTROL SEX TRAFFICKING

- Federal
 - Trafficking Victims Protection Act
 - 18 USC 1591 (reauthorized 2015)
- State
 - Montana House Bill 89 (enacted 2015)
 - S.D. Codified Laws 22-49-1 (2016)
- Tribal
 - Fort Peck Tribes, 7 CCOJ 214-218
 - MHA Nation, “Loren’s Law”
 - Snoqualmie Tribe, SNOQ. TRIBAL CODE 7.21
 - Oglala Sioux Tribe, Oglala Sioux TR. Code Ch. 7, 701-515 (2015).



A SEX TRAFFICKING LAW SHOULD

- Clearly define trafficking, to facilitate identification of cases, data collection on the scope of the problem, and enable an appropriate law enforcement response.
- This includes
 - Decriminalizing the most visible person in prostitution, the person who is prostituted, while imposing liability on the other actors;
 - Targeting the directors and facilitators of trafficking;
 - Providing for robust civil liability in trafficking, to attack the significant illicit assets that result from the crime;
 - And incorporating local culture and conditions into the law.



STEP ONE: INVESTIGATE (AND LISTEN)

- Talk to your most valuable source of information: victims, survivors, and victim's advocates
- Hold listening circles and ensure that everyone feels included and respected
- Talk to law enforcement (including Tribal Police, city police, county, state, and FBI/BIA)
 - What do they understand trafficking to be? How do they deal with prostitution?
- Review cases of trafficking in your local and federal courts
 - Talk to prosecutors and public defenders about their concerns
- Review existing studies and reports on trafficking and best practices for addressing trafficking



FORT PECK: WHERE THE BUFFALO ROAM



Over 50% of Native children on the Reservation live in poverty
High rates of trauma, substance abuse, mental illness, and childhood abuse
High rates of child welfare system involvement

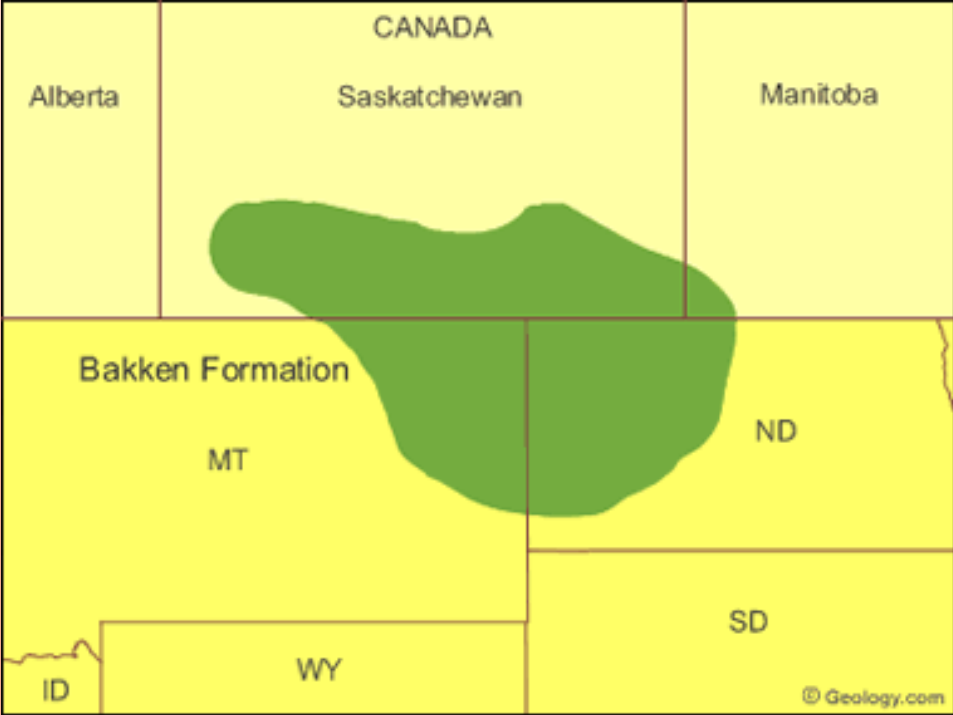


THE HIGH PLAINS

Fort Peck Reservation



The Bakken Shale Formation



THE ROAD TO THE BAKKEN



MAN CAMPS AND OIL TRAFFIC



CHALLENGE: LIMITED CRIMINAL JURISDICTION

- Tribal courts have only misdemeanor jurisdiction (1 year/\$5k fine per felony)
- Jurisdiction over Indian offenders only



JURISDICTIONAL MAZE

Jurisdiction for crimes committed in Indian Country

It will not always be clear at the outset of a criminal investigation where jurisdiction ultimately lies for prosecution, but once the status of the defendant, victim and land has been determined, here's who's in charge of what:

■ **Indian**
 ■ **Non-Indian**
 Victimless crime (such as prostitution, illicit drug use)

						
TRIBE	The tribe has jurisdiction for all offenses	The tribe has jurisdiction for all offenses	No jurisdiction*	No jurisdiction	The tribe has primary jurisdiction	No jurisdiction
STATE	No jurisdiction	No jurisdiction	No jurisdiction	Has jurisdiction for all offenses committed on the reservation	No jurisdiction	Jurisdiction primarily belongs to the state
FEDERAL	For most major felonies, but not misdemeanors	Felony and misdemeanor crimes, unless the tribe has already punished the defendant	Felony and misdemeanor crimes	No jurisdiction	Jurisdiction in some cases	Concurrent federal jurisdiction

* For the first time, this year some tribes are allowed to prosecute certain crimes of domestic violence committed by non-Indians in Indian Country.

Source: Federal law enforcement officials



PUBLIC LAW 280 EXCEPTIONS

Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin are “mandatory” PL 280 states, meaning the federal government:

- extended state criminal jurisdiction and the application of state criminal laws onto Indian reservations in those states and
- eliminated special federal criminal jurisdiction over reservation areas in the affected states



REZ JUSTICE



THE IMPORTANCE OF CROSS- JURISDICTIONAL COLLABORATION

- Information-sharing is critical
 - when working within the Indian Country “jurisdictional maze”
 - because sex trafficking cases often cross reservation, county, and state lines
 - different pieces of sex trafficking operations occur in different places (i.e., the sexual encounter is at a motel on the Reservation while the drug/sex trafficking cartel is run from another city)



CHALLENGE: EXISTING TRIBAL LAW

- Do you have a prostitution law on the books?
- Who is criminally liable under that law?



FORMER FORT PECK TRIBAL LAW





VICTIMS SERVICES AND TRAINING

- What services would you like to offer to victims?
- Would you guarantee these services in your law?
- Would you require that a victim advocate be on the scene if law enforcement respond to a situation of suspected trafficking?
- Would you set up an interdisciplinary or interjurisdictional task force with the law?
- Would you require training?



CHALLENGE: SCARCE RESOURCES

- Does the tribe actually have the resources to offer victim's services?
- Are there traditional approaches to justice or healing that you would like to incorporate from tribal culture?
 - "Restorative Justice" Practices?
 - Talking Circles?
 - Council of Elders?
 - Sweats?
- How many different tribal cultures are represented within your reservation? Do they share these same values and practices?



[Redacted]

[Redacted]

[Redacted]





CHALLENGE: LIMITED TRIBAL CIVIL AUTHORITY UNDER ICRA AND *DOLLAR GENERAL*

- Civil forfeiture in criminal cases limited to \$5k?
 - Case law is not authoritative on this issue
- *Dollar General* case currently before the U.S. Supreme Court imperils tribal authority and governance





SPECIAL VAWA JURISDICTION

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

- (1) Domestic violence and dating violence.—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
- (2) Violations of protection orders.—An act that—
 - (A) occurs in the Indian country of the participating tribe; and
 - (B) violates the portion of a protection order



CHALLENGE: IMPLEMENTATION

- Must train
 - all law enforcement who are responsible for the reservation
 - tribal prosecutors and judges
 - community to recognize signs of trafficking
 - Teachers and young people
- Task Force?
 - Representation from
 - Victims services
 - Each law enforcement
 - Each prosecutor's office
 - Child welfare agency
 - Medical and mental health services
- Must make the federal government pay attention!



CHALLENGE: THE SCHOOL SYSTEM

- Youth who are pushed out of school are far more likely to be trafficked
- Many Reservation and “border town” schools discriminate against Native children or impose unnecessarily harsh discipline, resulting in undereducation and alienation of those students



THE LAWYER'S ROLE

- Individual Direct Representation
- Class Actions:
 - State Constitutional Right to Education?
 - Fiscal Inequality Challenges
 - “Different Treatment” Discrimination Claims
 - DOJ Civil Rights Division will pursue “disparate impact” claims



HOW CAN WE CHANGE POLICY?

- Legislation
 - Strengthen due process protections for students
 - School funding equality
- Reduce classroom sizes
- Promote evidence-based school practices
 - Teacher training in cultural competence and trauma-informed approaches
 - Restorative Justice
 - Positive Behavior Interventions and Supports (PBIS)
 - Mentoring
 - Counseling
 - Culturally appropriate curricula and disciplinary approaches
- Recruit Tribal Staff and Administrators
- Tribal-run schools?

