

THE ROLE OF ENVIRONMENTAL LAW IN ADDRESSING THE VIOLENT EFFECTS OF RESOURCE EXTRACTION ON NATIVE WOMEN

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Native women face increased levels of sexual assault, sex trafficking, and other gender-based violence when resource extraction projects are located near Native communities. Recently, organizations have begun raising claims concerning the safety of Native women and children when challenging projects like the Keystone XL pipeline. However, these claims are often raised as auxiliary arguments or in amicus briefs. Although no court has yet had the opportunity to fully rule on the issue, there is growing momentum to use environmental law to address violent effects on Native women from resource extraction projects.

Laws such as the National Environmental Policy Act (“NEPA”), and the environmental review process that it mandates, can play a role in addressing these violent effects. This Note argues that federal agencies have a legal obligation under NEPA to evaluate the violent impacts of certain resource extraction projects on Native women. This obligation is triggered so long as a project has underlying environmental impacts. In 2020, the Bureau of Land Management (“BLM”) published the first federal environmental review that acknowledged violence against Native women as a potential impact of a proposed oil and gas project. Although BLM’s analysis was cursory and inadequate, it provides an example that future environmental reviews can improve upon.

Scholars have suggested using the NEPA review process to address the violence that Native women and children experience as a result of resource extraction projects. However, none have provided an in-depth analysis of the legal foundations underpinning these claims. In addition to describing the obligations under NEPA, this Note provides an assessment of how advocates can raise these claims in the administrative process.

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INTRODUCTION

Following the influx of transient oil field workers during peak oil production in North Dakota, tribal victim service workers reported a tripling of rape victimization.¹ Increasing levels of violence caused local domestic violence shelters to fill beyond their capacity and scramble to provide more beds.² Many opponents of resource extraction projects have focused on the negative environmental consequences of those projects, including impacts on air quality, drinking water, and climate change. Meanwhile, supporters point to the local economic opportunities that a project will bring to an area.³ Lost in these competing narratives are the violent consequences for Native women and children⁴ resulting from the arrival of mostly male industry workers.⁵ Multiple agencies,⁶

1. Gareth Bleir & Anya Zoledziowski, *Murdered and Missing Native American Women Challenge Police and Courts*, CTR. FOR PUB. INTEGRITY (Aug. 27, 2018), <https://perma.cc/R6JG-YDSQ>.

2. See Jack Healy, *As Oil Floods Plains Towns, Crime Pours In*, N.Y. TIMES (Nov. 30, 2013), <https://perma.cc/4LZA-HXVN>.

3. See, e.g., Northern Arapaho Natural Resource Office, Comment Letter on Aethon (Moneta Divide) Proposed Discharge Permit (June 27, 2019), <https://perma.cc/2TBE-EV8X>; Tom Morton, *Casper Mayor to Speak In Favor of Moneta Divide Project*, K2RADIO (Nov. 19, 2019), <https://perma.cc/ETL5-BAH5>.

4. For the remainder of this Note I will abbreviate “Native women and children” to “Native women,” which refers collectively to American Indian and Alaskan Native women and children. For accounts of industry workers harming children in addition to women, see Damon Buckley, *Firsthand Account of Man Camp In North Dakota From Local Tribal Cop*, LAKOTA TIMES (May 22, 2014), <https://perma.cc/7CA5-A999>.

5. See *infra* Part I.

researchers,⁷ and advocates⁸ have documented increases in sex trafficking, sexual assault, and other violence that accompany resource extraction projects. This violence disproportionately affects tribal communities, where rates of gender-based violence are already elevated and limits on criminal jurisdiction prevent tribes from prosecuting non-Native offenders.⁹

The National Environmental Policy Act (“NEPA”) and the environmental review process that it mandates could play a role in bringing attention to and mitigating the impacts that resource extraction projects have on Native women. NEPA is one of the most impactful environmental statutes in the U.S. because it requires federal agencies to evaluate major actions before reaching a final decision.¹⁰ Furthermore, if a major action will have significant environmental impacts, agencies are required to consider the related socioeconomic impacts of the project.¹¹ Because crime is already an established socioeconomic impact,¹² NEPA’s mandate clearly encompasses an evaluation of increased rates of sexual assault and sex trafficking. Many resource extraction projects have significant environmental impacts,¹³ and therefore the agencies reviewing those projects should assess any violent consequences for surrounding communities. Addi-

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6. *E.g.*, KIMBERLY MARTIN ET AL., *VIOLENT VICTIMIZATION KNOWN TO LAW ENFORCEMENT IN THE BAKKEN OIL-PRODUCING REGION OF MONTANA AND NORTH DAKOTA, 2006–2012*, (2019), <https://perma.cc/Q8ND-LKZN>; U.S. DEP’T JUST., OFF. ON VIOLENCE AGAINST WOMEN, *2013 TRIBAL CONSULTATION REPORT*, 3 n.2 (2013), <https://perma.cc/6P9M-TCCR>.
 7. *E.g.*, Rick Ruddell et al., *Drilling Down: An Examination of the Boom-Crime Relationship in Resource Based Boom Counties*, 15 *W. CRIMINOLOGY REV.* 3, 11 (2014).
 8. *E.g.*, WOMEN’S EARTH ALL. & NATIVE YOUTH SEXUAL HEALTH NETWORK, *VIOLENCE ON THE LAND, VIOLENCE ON OUR BODIES* (2016), <https://perma.cc/FB36-JQE5>; ZUYA WINYAN WICAYU’ONIHAN, *HONORING WARRIOR WOMEN: A STUDY ON MISSING & MURDERED INDIGENOUS WOMEN AND GIRLS IN STATES IMPACTED BY THE KEYSTONE XL PIPELINE* (2019), <https://perma.cc/X2DR-BZ4T>; Honor The Earth, *Fossil Fuel Extraction Dangers: Native American and Women’s Organizations Request UN Help on Sexual Violence*, *INDIAN COUNTRY TODAY* (May 12, 2015), <https://perma.cc/HWJ5-2W99>.
 9. *See generally* ZUYA WINYAN WICAYU’ONIHAN, *supra* note 8.
 10. 42 U.S.C. § 4332.
 11. *See* *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 106–07 (1983) (holding “NEPA requires an EIS to disclose the significant health, socioeconomic, and cumulative consequences of the environmental impact of a proposed action”).
 12. *See infra* Part II.
 13. *See generally, e.g.*, BUREAU OF INDIAN AFF., *FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE MANDAN, HIDATSA, AND ARIKARA NATION’S PROPOSED CLEAN FUEL REFINERY PROJECT* (2009), <https://perma.cc/XR87-ATEK>; BUREAU OF LAND MGMT., *MONETA DIVIDE NATURAL GAS AND OIL DEVELOPMENT PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT* (2020), <https://perma.cc/ET8V-QK2H> [hereinafter *Moneta Divide FEIS*].

tionally, agencies have the authority to evaluate a project's impacts on Native women through an environmental justice framework.¹⁴

While some scholars have suggested this strategy, none have provided an in-depth assessment.¹⁵ Raising this issue through the NEPA process can enable agencies to more completely evaluate the impacts that a project will have on surrounding communities, especially on Native women. If concerns are raised through the tribal consultation or public comment period of the process, this will push an agency to undertake the work of quantifying and describing the violence that a project is likely to cause.¹⁶ Therefore, engaging with the NEPA process could be a useful tool for communities that are entirely opposed to a project because it can highlight and expose the likely harms. Additionally, the process can facilitate a discussion between agencies and impacted communities about mitigation measures that may prevent some of the violence.¹⁷ Therefore, the process can also be used by communities that are in favor of the project but seek to prevent as many of the harmful impacts as possible. Additional advocates who may seek to raise these issues through the administrative process include nonprofit organizations, other government agencies, and private individuals.

This Note argues that federal agencies have a legal obligation under NEPA to evaluate the violent impacts accompanying certain resource extraction projects on Native women. That obligation is triggered so long as a project has underlying environmental impacts. In 2020, the Bureau of Land Management ("BLM") published the first federal environmental review that acknowledged violence against Native women as a potential impact of a proposed oil and gas project.¹⁸ Although BLM's analysis was cursory and inadequate, it provides an example that future environmental reviews can improve upon. By analyzing the legal framework and the process that led to BLM including an acknowledgment, this Note assesses how advocates can raise these claims in future administrative proceedings.

This Note proceeds in four Parts. Part I discusses why resource extraction projects lead to increased levels of violence experienced by Native women. It also provides a brief overview of other proposed responses for addressing this

14. See COUNCIL ON ENV'T QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 8–9 (1997), <https://perma.cc/65D8-CL8K>.

15. See Lily Grisafi, *Living in the Blast Zone: Sexual Violence Piped onto Native Land by Extractive Industries*, 53 COLUM. J.L. & SOC. PROBS. 509, 535 (2020); Angela E. Washington, *Booming Impacts: Analyzing Bureau of Land Management Authority in Oil and Gas Leasing Amid the Missing and Murdered Indigenous Women's Crisis*, 72 ADMIN. L. REV. 719, 748–49 (2020).

16. See *infra* Part III.

17. See *infra* Part IV.

18. See Heather Richards, *BLM Tells Oil Firm to Protect Native American Women*, E&E NEWS (March 6, 2020), <https://perma.cc/MU7B-LCKK>.

violence. Part II describes the legal framework that determines which type of projects require an evaluation of gender-based violence during the NEPA review process. This Part also discusses agencies' authority to use an environmental justice analysis to evaluate how this violence disproportionately affects Native women. Part III examines the administrative record from two oil and gas projects. From the two records, this Part draws lessons on how to advocate for legally adequate NEPA review of future projects. Part IV proposes additional mechanisms for addressing this issue within state administrative agencies.

I. THE RELATIONSHIP BETWEEN EXTRACTIVE INDUSTRIES AND VIOLENCE TOWARDS NATIVE WOMEN

Scholars,¹⁹ advocates,²⁰ journalists,²¹ and government agencies²² have already documented the violent impacts that resource extraction projects have on Native women. Resource extraction frequently occurs near Native communities because Indian Country²³ overlays an estimated 20% of the oil and gas reserves, over half of the uranium deposits, and one-third of western low-sulfur coal in the United States.²⁴ While this Note focuses on the contemporary practices of extractive industries, the relationship between resource exploitation and violence against Native women has a long history that predates any oil and gas drilling.²⁵ This history frames both the current mechanisms enabling violence and the breadth of solutions required to address it.²⁶

19. *E.g.*, Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. GENDER & L. 31 (2018); Kathleen Finn et al., *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J. L. & GENDER 1 (2017); Victoria Sweet, *Extracting More Than Resources: Human Security and Arctic Indigenous Women*, 37 SEATTLE U. L. REV. 1157 (2014); Sarah Deer & Mary Kathryn Nagle, *The Rapidly Increasing Extraction of Oil, and Native Women, in North Dakota*, 64 FED. LAW. 34 (2017); Grisafi, *supra* note 15, at 535; Washington, *supra* note 15, at 748–49.

20. *See* ZUYA WINYAN WICAYU'ONIHAN *supra* note 8.

21. *E.g.*, Michelle Fox, *Dark side of ND Oil Boom: Sex trafficking*, CNBC (Mar. 12, 2015), <https://perma.cc/W5MJ-2AGY>; Georgianne Nienaber, *Man Camp and Predator Economics Threaten Heartland Native Communities*, HUFFINGTON POST (Dec. 6, 2017), <https://perma.cc/8T65-ETVQ>.

22. *See* U.S. DEP'T OF JUSTICE, OFF. ON VIOLENCE AGAINST WOMEN, *supra* note 6.

23. The term "Indian country" is a legal term of art that refers to 18 U.S.C. § 1151.

24. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1481 (1994).

25. *See* SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* 66–68 (2015); Deer & Nagle, *supra* note 19, at 36; Ana Condes, *Man Camps and Bad Men: Litigating Violence Against American Indian Women*, 116 NW. U. L. REV. 515, 524–27 (2021).

26. *Id.*

Section A describes how modern resource extraction projects lead to increased levels of violence in tribal communities. Those communities already have elevated rates of gender-based violence but limited options to hold non-Native offenders accountable. Section B provides an overview of reforms that scholars have proposed to address this violence. Leveraging the NEPA review process is an additional strategy that advocates can use, in addition to these reforms, as a way to highlight the potential violent impacts of a project and the mitigation mechanisms for those impacts.

A. Mechanisms Leading to Increased Violence Against Native Women

This Section briefly describes the mechanisms and factors driving increased levels of violence in Native communities near resource extraction projects. Such a summary of scholarship is useful for enabling advocates to raise the issue in administrative proceedings and judicial challenges. However, I recognize that the consolidation of violent stories into statistics can be harmful and may hide the realities of what individuals and communities experience.²⁷

Resource extraction projects lead to increases in violence because they require an influx of workers. Those workers are mostly male and have no ties to the communities they are joining.²⁸ Often resource extraction projects need so many workers that they construct temporary housing for workers to live in so called “man camps.”²⁹ Large communities of men living far away from their families with stressful and high paying jobs causes increases in levels of sex trafficking and crime more broadly.³⁰ A former tribal police chief recounted that on pay days she would find caravans of men with cash stuffed in their pockets which enabled them to buy “prostitutes and hardcore drugs.”³¹ She also found vans of women heading to the man camps.³² During the oil boom in the Bakken region of North Dakota and Montana, arrests were up 565 percent in one city.³³ The rate of serious violent victimization³⁴ increased by 38% in the

27. See generally, Roderic Crooks & Morgan Currie, *Numbers Will Not Save Us: Agnostic Data Practices*, 37 THE INFO. SOC'Y 201 (2021).

28. See, e.g., Ruddell et al., *supra* note 7, at 3.

29. See, e.g., Condes, *supra* note 25, at 515.

30. See Buckley, *supra* note 4; Condes, *supra* note 25, at 529; Ruddell, *supra* note 7, at 3–5; Grisafi, *supra* note 15, at 511.

31. Buckley, *supra* note 4.

32. *Id.*

33. Healy, *supra* note 2.

34. Serious violent victimization is a combined measure of homicide, sexual assault, aggravated assault, and robbery.

Bakken region.³⁵ Meanwhile the counties surrounding the Bakken region saw a 4% decrease during the same period.³⁶

Additionally, because companies have difficulty hiring enough workers, they are more likely to hire people with a history of sexual violence.³⁷ In order to hire the necessary quantity of workers, resource extraction companies often have minimal background check requirements.³⁸ Without employee screening, people on sex offender registries may be attracted to extractive industries because they are excluded from other jobs.³⁹ For example, a tribal police officer reported that one man camp that was next to a tribal casino had thirteen sex offenders.⁴⁰

The need to house substantial numbers of impermanent workers also contributes to a community's inability to respond to increased levels of violence. Not all workers live in man camps, and the rapid influx of workers leads to housing shortages and increases in housing prices.⁴¹ Therefore, women trying to escape domestic abuse have more difficulty affording new housing, and they may even face challenges finding an available hotel room for temporary shelter.⁴² Additionally, some man camps and makeshift trailer parks have no permanent address.⁴³ This presents challenges for law enforcement if they attempt to serve people with temporary restraining orders.⁴⁴

35. MARTIN, *supra* note 6, at 2. This study defined the Bakken region as “counties in Montana and North Dakota that contain the Bakken shale formation.” *Id.* at 1.

36. *Id.* at 2. The non-Bakken region included counties in North Dakota, South Dakota and Montana that do not contain the Bakken shale formation. *Id.* at 5.

37. *See, e.g.*, Joel Berger & Jon P. Beckmann, *Sexual Predators, Energy Development, and Conservation in Greater Yellowstone*, 24 CONSERVATION BIOLOGY 891, 894 (2010) (determining that the number of registered sex offenders “grew about two to three times faster in counties dependent on oil and gas extraction relative to those dependent on recreation or agriculture”).

38. *See, e.g.*, Grisafi, *supra* note 15, at 512.

39. While outside the scope of this Note, criminalization broadly and sex offender registries specifically have a disproportionate impact on Native communities and other marginalized populations. For example, in Alaska, Alaska Native people are 3.47 times more likely to be included on a sex offender registry than white people. Alissa R. Ackerman & Meghan Sacks, *Disproportionate Minority Presence on U.S. Sex Offender Registries*, 16 JUST. POL'Y J. 1, 11 (2018).

40. Buckley, *supra* note 4.

41. *See, e.g.*, Healy, *supra* note 2.

42. *See* Hilary Beaumont, *Sexual Violence Along Pipeline Route Follows Indigenous Women's Warnings*, GUARDIAN (June 4, 2021), <https://perma.cc/U594-E2NV>.

43. *See* Brief for Amicus Curiae the Nat'l Indigenous Women's Res. Center in Support of Plaintiff-Appellees and Intervenors for Plaintiff-Appellees for Affirmance at 20, *Standing Rock Sioux Tribe et al. v. U. S. Army Corps of Eng'rs*, 985 F.3d 1032 (D.C. Cir. 2021) (Nos. 20-5197, 20-5201), <https://perma.cc/7RJ5-2RAR> [Hereinafter NIWRC Brief]; U.S. DEP'T OF JUSTICE, OFF. ON VIOLENCE AGAINST WOMEN, *supra* note 6, at 3 n.2.

44. NIWRC Brief, *supra* note 43, at 20.

Man camps and industry workers located near Indian Country can have especially harmful impacts because the federal government has severely limited tribal governments' ability to respond to violence. The Supreme Court and Congress have restricted tribal criminal jurisdiction to the point where tribes often have no jurisdiction over non-Native people who commit crimes within Indian Country.⁴⁵ This means that the federal government has exclusive jurisdiction to prosecute non-Native people in some states. Public Law 280 transferred criminal jurisdiction to six states and created a pathway for additional states to gain jurisdiction.⁴⁶ In 2022, the Court upended principles of Indian law and held that, even without congressional authorization, states have criminal jurisdiction over non-Indian people in Indian country.⁴⁷ Advocacy groups fear that this jurisdictional grant could lead to a decrease in prosecution of violent crimes committed against Native people.⁴⁸ This complex, overlapping, and changing jurisdictional landscape can lead to confusion for victims and "buck-passing between enforcers."⁴⁹ State and federal law enforcement agencies that do have jurisdiction over these crimes often provide a grossly inadequate response.⁵⁰ This leads to situations where non-Native men know that they can harm Native women with impunity.⁵¹ Some perpetrators go so far as to publicly taunt their victims.⁵² Without criminal jurisdiction or an ability to regulate projects near Indian Country, tribes are limited in their ability to address violence that occurs in their own community.

Impacts from resource extraction projects exacerbate a reality where Native women already experience elevated rates of gender-based violence. The Policy Research Center of the National Congress of American Indians reported that Native women are twice as likely to experience sexual assault as compared to

45. See, e.g., Condes, *supra* note 25, at 532–36.

46. *Id.* at 533.

47. Matthew L.M. Fletcher, *In 5–4 Ruling, Court Dramatically Expands the Power of States to Prosecute Crimes on Reservations*, SCOTUSBLOG (June 29, 2022), <https://perma.cc/ZBP2-RCKL>; *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504 (2022).

48. *NIWRC Concerned with SCOTUS Castro-Huerta Ruling Expanding State Criminal Jurisdiction in Indian Country*, NAT'L INDIGENOUS WOMEN'S RES. CTR. (June 29, 2022), <https://perma.cc/QF74-V8A2>.

49. Condes, *supra* note 25, at 533.

50. See Condes, *supra* note 25, at 536–37; DEER, *supra* note 25, at xii (writing that some federal and state officials "simply ignored calls for help or put in little effort to follow through with investigations").

51. Condes, *supra* note 25, at 530–31 (writing that Annita Lucchesi, a Southern Cheyenne woman who works for the National Indigenous Women's Resource Council, reported a conversation that she overheard between oil workers in North Dakota: "They were saying . . . 'in North Dakota you can take whatever pretty little Indian girl that you like and you can do whatever you want and police don't give a fuck about it.'").

52. See DEER, *supra* note 25, at xii.

other women.⁵³ Much of this violence comes from outside of tribal communities. Over 40% of Native women who report a sexual assault were attacked by a stranger.⁵⁴ Furthermore, Native women report that the majority of their attackers were white.⁵⁵ This is in comparison to women of other races who are more likely to be attacked by someone of the same race.⁵⁶ Because Native women experience elevated levels of violence, any increase in violence caused by the arrival of extractive industries is also likely to disproportionately impact Native women.

There is a substantial body of literature and agency reports that document the increase of gender-based violence associated with extractive industries. The Bakken oil fields in North Dakota is one resource area that has gathered considerable attention for its resulting violence.⁵⁷ In 2013 the U.S. Department of Justice's Office on Violence Against Women wrote in a report to Congress:

Because of recent oil development, the [Bakken] region faces a massive influx of itinerant workers and local law enforcement and victim advocates report a sharp increase in sexual assaults, domestic violence, sexual trafficking, drug use, theft, and other crimes, coupled with difficulty in providing law enforcement and emergency services in the many remote and sometimes unmapped “man camps” of workers.⁵⁸

Additional government institutions that have acknowledged this issue include the Montana Board of Crime Control,⁵⁹ the U.S. Department of State,⁶⁰ the U.S. Bureau of Justice Statistics,⁶¹ the Canadian Government,⁶² and the United

53. NCAI POL'Y RSCH. CTR., POLICY INSIGHTS BRIEF: STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 2 (2013), <https://perma.cc/UP9U-NAKS>.

54. Condes, *supra* note 25, at 521–22.

55. *Id.*

56. *Id.*

57. *See, e.g.*, Ruddell et al., *supra* note 7, at 8; Finn, *supra* note 19; Deer & Nagle, *supra* note 19; Fox, *supra* note 21.

58. U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, *supra* note 6, at 3 n.2.

59. MONT. BD. OF CRIME CONTROL STAT. ANALYSIS CTR., CRIME IN MONTANA 2013–2014 REPORT 95 (2015), <https://perma.cc/7GCV-XY2Y> (finding that the four Montana counties nearest the Bakken oil patch reported higher crime increases than their surrounding counties).

60. U.S. DEP'T OF STATE, THE LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING (June 2017), <https://perma.cc/9PAW-XV3R>.

61. Martin, *supra* note 6, at 9 (finding that “serious stranger violence—murder, rape, sexual assault, aggravated assault, and robbery—increased by 47%.”).

62. NAT'L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, RECLAIMING POWER AND PLACE: THE FINAL REPORT OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS VOL. 1A, 521 (2019), <https://perma.cc/EN7C-22TL>.

Nations.⁶³ Many peer-reviewed studies also document the relationship between extractive industries and increased levels of violence.⁶⁴ Additionally, these impacts occur not only near oil fields but also near projects such as mines⁶⁵ and pipelines.⁶⁶ Advocates can cite these studies and reports to demonstrate that increases in violence are reasonably foreseeable and therefore must be evaluated during the NEPA process.

B. Proposed Reforms

This Section provides an overview of solutions and reforms that scholars have already proposed to address the violence against Native women caused by extractive industries. Combating this violence will require tribal governments and the federal government to adopt sets of strategies because no one reform will resolve the number of factors that contribute to the violence. The proposals are briefly mentioned here to give a sense for the breadth of strategies that should be used in conjunction with the NEPA review process that is discussed more in depth in this Note.

With regard to strategies that tribal governments can implement, scholars focus on how tribes can affect the way that corporations and law enforcement agencies work. For example, tribes could adopt regulations that make their permitting process contingent on companies adopting anti-trafficking measures.⁶⁷ Such regulations would only affect projects that occur within Indian Country. To expand their reach to projects that are close or adjacent to Indian Country, tribes could bring civil suits against resource extraction companies for negligent hiring practices that fail to screen employees properly.⁶⁸ These types of suits can provide both monetary damages and an incentive for companies to implement mitigation strategies to prevent violence caused by their workers. Additionally, tribal and state police could enter into cross-deputization agreements to enable

63. James Anaya, *Statement of the UN Special Rapporteur on the Rights of Indigenous Peoples Before the International Expert Group Meeting on the theme: Sexual health and reproductive rights* (Jan. 15, 2014), <https://perma.cc/B265-99WM>.

64. *See, e.g.*, Ruddell et al., *supra* note 7; MONETA DIVIDE FEIS, *supra* note 13, at 3-128.

65. *See, e.g.*, JANIS SHANDRO ET AL., COMMUNITY HEALTH AND SAFETY IN THE NAK'AL BUN/STUART LAKE REGION DURING THE CONSTRUCTION PHASE OF THE MOUNT MILIGAN MINE 5 (2014), <https://perma.cc/E72Y-MDUS>; KARINA CZYZEWSKI ET AL., THE IMPACT OF RESOURCE EXTRACTION ON INUIT WOMEN AND FAMILIES IN QAMANITUAQ, NUNAVUT TERRITORY (2016), <https://perma.cc/V85C-TQNZ>.

66. *See, e.g.*, Beaumont, *supra* note 42 (reporting on impacts from the Keystone XL pipeline); THE FIRELIGHT GROUP ET AL., INDIGENOUS COMMUNITIES AND INDUSTRIAL CAMPS: PROMOTING HEALTHY COMMUNITIES IN SETTINGS OF INDUSTRIAL CHANGE (2017), <https://perma.cc/8E93-ZGMQ>.

67. Finn et al., *supra* note 19, at 40.

68. *See* Grisafi, *supra* note 15, at 536-38 (noting that such suits could also be brought in tribal courts).

tribal police to enforce laws against non-Native offenders.⁶⁹ The steps that tribes can take are limited without further action by the federal government.

With regard to strategies that the federal government can implement, scholars focus on returning powers to tribes that the federal government removed. For example, Professors Sarah Deer and Elizabeth Ann Kronk Warner have suggested broad proposals to remove federal oversight and increase self-determination related to development within Indian Country.⁷⁰ They note that “[t]ribes acting as decision makers are exercising their sovereignty, which is tied to the overall likelihood of tribal economic success.”⁷¹ Removals of federal “conditions” would allow tribes to make their own decisions about which extraction projects would be allowed and what conditions those projects would need to meet. Other scholars have proposed a list of thirteen “best practices” for companies engaged in resource extraction near Indian Country.⁷² Those practices include expanding the use of background checks, supporting data collection efforts, and financially supporting victim services.⁷³

Other examples of reforms include Congress returning criminal jurisdiction to tribes over non-Native people who commit crimes in Indian Country.⁷⁴ If Congress will not return jurisdiction, tribes could also attempt to increase engagement from federal law enforcement by suing the federal government for violating treaty rights.⁷⁵

One additional strategy involving the federal government is to require federal agencies to include an analysis of the violent impacts of resource extraction projects during the NEPA review process. Some advocates have recently started pushing agencies to evaluate the impacts on Native women through the administrative process,⁷⁶ and others are bringing legal challenges when agencies fail to meet this obligation.⁷⁷ While some scholars have suggested this strategy,⁷⁸ none have provided an in-depth assessment.

The following Parts of this Note attempt to fill that gap by detailing what NEPA mandates from an environmental review, and how advocates can raise these claims with administrative agencies and courts. Advocates seek to use the

69. Finn et al., *supra* note 19, at 38.

70. See Deer & Warner, *supra* note 19, at 82–84.

71. *Id.* at 83.

72. See Finn et al., *supra* note 19, at 48–50.

73. *Id.*

74. See e.g., Grisafi, *supra* note 15, at 529–30; Deer & Warner, *supra* note 19, at 91.

75. See Condes, *supra* note 25, at 519–20.

76. See, e.g., Western Watersheds Project, Comment Letters on Moneta Divide Natural Gas and Oil Development Project Draft Environmental Impact Statement (DOI-BLM-WY-R050-2013-0008-EIS) (July 18, 2019), <https://perma.cc/L5ZR-VMKL>.

77. See, e.g., NIWRC Brief, *supra* note 43; First Amended Compl. for Declaratory and Inj. Relief at 30–34, *Rosebud Sioux Tribe. v. Trump*, 495 F. Supp. 3d 968 (D. Mont. 2020) (No. 4:18-cv-00118-BMM), <https://perma.cc/GYY6-YS7J>.

78. See Grisafi, *supra* note 15, at 535; Washington, *supra* note 15, at 748–49.

NEPA review process because it can highlight the potentially violent impacts of a project before an agency reaches a decision about project approval. The process can also enable the identification of mitigation strategies specifically sought by impacted communities if the agency does approve a project.

II. OBLIGATIONS UNDER NEPA TO EVALUATE IMPACTS ON NATIVE WOMEN

This Part proceeds in three sections. First, Section A provides an overview of NEPA and the standards that courts use to determine if an agency has fulfilled its obligations. Sections B and C discuss two avenues through which agencies can evaluate the risks to Native women who live near resource extraction projects. The disproportionate increase in violence experienced by Native women is clearly an issue of environmental justice. However, as discussed below, agencies lack a statutory obligation to include a comprehensive evaluation of environmental justice during a NEPA review. Crucially, this does not relieve agencies of all duty to evaluate impacts that have environmental justice implications.⁷⁹ Because the statutory language focuses on the “health and welfare of man”⁸⁰ agencies are still required to cover many of the same impacts, albeit under a different banner.⁸¹ The statutory avenue discussed in Section B, therefore, provides more opportunity for judicial challenges to a NEPA review.

Section B describes how crimes such as sexual assault are a socioeconomic impact and how NEPA’s statutory framework mandates an evaluation of socioeconomic impacts if an agency is already producing an Environmental Impact Statement (“EIS”). Subsection 1 explains why impacts such as increased levels of violence do not obligate an agency to prepare an EIS if there are no underlying environmental impacts. Therefore, courts are unlikely to rule in favor of advocates who want an agency to produce an EIS exclusively because it did not evaluate the risk to Native women caused by an influx of industry workers. Subsection 2 describes how agencies already preparing an EIS are obligated to assess a project’s impact on crime if a significant increase is “reasonably foreseeable.”⁸² The many peer-reviewed studies and government reports cited in Part I demonstrate that the violent impacts on Native women meet that reasonably foreseeable standard. Therefore, the violent impacts of resource extraction projects experienced by Native women fit squarely within NEPA’s mandate. Consequently, if an agency completes an insufficient analysis, advocates can bring a suit because the agency did not meet its statutory obligation.

79. See Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENV'T L. REV. 601, 607 (2006).

80. 42 U.S.C. § 4321.

81. See *id.*

82. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453, 23470 (Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502, 1507, 1508).

Finally, Section C describes how agencies can voluntarily evaluate violence that disproportionately affects Native women through an environmental justice analysis. Because the authority to include an environmental justice analysis comes from an executive order, agencies have the discretion to exclude this section, and such an exclusion cannot be challenged in court.⁸³ However, if an agency does include an environmental justice section, advocates then have the opportunity to challenge its sufficiency.

A. NEPA Overview

NEPA is a transformative environmental statute because it requires federal agencies to assess impacts before taking major action.⁸⁴ Specifically, NEPA requires an EIS for “major Federal actions significantly affecting the quality of the human environment.”⁸⁵ Major federal actions include the issuance of easements for pipelines or permits for oil and gas wells.⁸⁶ When evaluating those actions, an EIS must consider reasonable alternatives⁸⁷ and mitigation measures.⁸⁸ However, the required evaluation of a project’s impacts carries no accompanying mandate that the agency choose a specific course of action. In other words, Congress requires agencies to “look before they leap,” but it does not require that an agency leap in the direction that is least harmful to the environment.⁸⁹ Even without a substantive mandate, the obligation under NEPA to evaluate impacts and assess alternatives has caused many resource extraction projects to be abandoned or significantly altered.⁹⁰

In the case of projects near tribal communities, the NEPA process could enable agencies to work with tribal governments to identify measures to mitigate the risk of violent impacts on Native women. NEPA regulations explicitly require consultation with tribal governments,⁹¹ although scholars question how meaningful this consultation process has been.⁹² As discussed more fully in Sec-

83. See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

84. See, e.g., NEPA ENVIRONMENTAL REVIEW REQUIREMENTS, HARVARD LAW SCHOOL ENV’T & ENERGY L. PROGRAM, <https://perma.cc/YR5L-C4SS> [hereinafter EELP].

85. 42 U.S.C. § 4332(2)(c).

86. See William H. Rodgers Jr. & Elizabeth Burleson, *National Environmental Policy Act (NEPA)—Whether an EIS is Required—Federal Actions and Inactions*, ENV’T L. IN INDIAN COUNTRY, § 1:20 (2021).

87. 42 U.S.C. § 4332(2)(c)(iii).

88. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–52 (1989).

89. See EELP, *supra* note 84.

90. See, e.g., *N. Cheyenne Tribe v. Lujan*, 804 F. Supp. 1281, 1285 (D. Mont. 1991) (describing companies seeking to void their coal leases and abandon plans to develop a mine because of litigation over the deficiencies of an EIS); Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NRDC (Feb. 1, 2015), <https://perma.cc/3UBQ-GLKJ>.

91. 40 CFR §§ 1501.2(4)(ii), 1501.5(e) (2022).

92. See, e.g., Matthew J. Rowe et. al., *Accountability or Merely “Good Words”? An Analysis of Tribal Consultation Under the National Environmental Policy Act and the National Historic Preserva-*

tion III, the first stage of producing an EIS is a scoping process where the public can submit comments that influence the range of issues to be addressed in an EIS.⁹³ The public then has an additional opportunity to provide feedback by submitting comments on an agency's draft EIS ("DEIS").⁹⁴

Once an agency completes a NEPA review, if advocates question its sufficiency, they can bring a judicial challenge under the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA"). When ruling on an APA claim, courts determine if an agency took a "hard look" at the issue in question.⁹⁵ For an EIS, a "hard look" requires that "the adverse environmental effects of the proposed action are adequately identified and evaluated."⁹⁶ Both judicial common law and agency regulations determine if an agency has fulfilled its obligations under NEPA.⁹⁷ The Council on Environmental Quality ("CEQ") issues NEPA implementing regulations, and then each agency adopts its own procedures for complying with those regulations.⁹⁸

In 2020, for the first time since 1978, the Trump administration finalized a new version of NEPA's implementing regulations.⁹⁹ The Trump regulations were more hostile to public comments than the previous regulations.¹⁰⁰ However, the Biden administration promptly acted to undo those changes and restored much of the 1978 language in its regulations finalized in April 2022.¹⁰¹ CEQ further promised to issue a second set of changes to NEPA regulations that go beyond this initial restoration and focus on environmental justice.¹⁰² While environmental justice focused regulations may enhance advocates' ability to challenge violent impacts on Native women in the future, the proposed rulemaking has yet to materialize.¹⁰³ Even so, the current NEPA language already allows for consideration of social, economic and environmental justice impacts.

tion Act, 8 ARIZ. J. ENV'T L. & POL'Y 1 (2018); Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation*, 95 DENV. L. REV. 593, 603 (2018).

93. 43 C.F.R. § 46.235 (2022); *National Environmental Policy Act Review Process*, ENV'T PROTECTION AGENCY (2022), <https://perma.cc/FQ2D-UZ8Z>.

94. ENV'T PROTECTION AGENCY, *supra* note 93.

95. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

96. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 322, 350 (1989).

97. *See J.B. Ruhl, NEPA and Climate Change in the Courts*, 36 NAT. RES. & ENV'T 52 (2021).

98. EELP, *supra* note 84.

99. Niina Fara & Lesley Clark, *New Biden NEPA Regs Won't Stop Legal War Over Trump Overhaul*, E&E NEWS (Apr. 20, 2022), <https://perma.cc/8YXR-HE8X>.

100. Hannah Perls, *Deconstructing Environmental Deregulation Under the Trump Administration*, 45 VT. L. REV. 591, 608–09 (2021).

101. Fara & Clark, *supra* note 99.

102. *Id.*

103. EELP, *supra* note 84.

Although NEPA is fundamentally a statute about *environmental* impacts, it also includes an obligation to evaluate related socioeconomic effects on the “human environment.”¹⁰⁴ The statute specifically notes that the purpose of NEPA is to promote “the overall welfare and development of man” and avoid “risk to health or safety.”¹⁰⁵ However, as detailed in Subsection B below, socioeconomic impacts must be related to a project’s environmental impacts.

B. Evaluating Violence Caused by Extractive Industries Under NEPA’s Statutory Framework

1. Does an Impact Trigger an EIS?

Agencies first determine if a project has the type of impacts that trigger the preparation of an EIS. To answer this question, an agency conducts an environmental assessment (“EA”) to determine if its action will “significantly [affect] the quality of the human environment.”¹⁰⁶ If it does, the EIS obligation is triggered. Considerable litigation has occurred over whether an agency is required to produce an EIS.¹⁰⁷ For the purposes of this Note, the discussion is limited to whether impacts that are not primarily environmental can trigger an EIS.

A key limitation on NEPA’s obligation is that agencies are only required to assess socioeconomic impacts if the federal action has underlying environmental impacts.¹⁰⁸ Courts have denied petitioners’ claims that an agency erred in failing to produce an EIS because they should have considered the risk of increased crime from a project. For example, in *Como-Falcon Community Coalition, Inc. v. U.S. Department of Labor*, residents challenged the failure of the agency to consider the potential socioeconomic impacts, including crime, that would come from renovating an existing building and turning it into a job center.¹⁰⁹ The court held that “when the threshold requirement of a primary impact on the physical environment is missing, socioeconomic effects are insufficient to trigger an agency’s obligation to prepare an EIS.”¹¹⁰ Because the building already existed and was merely being renovated, there was no “primary” environmental impact. Other circuit courts have similarly held that the

104. See 42 U.S.C. § 4332.

105. 42 U.S.C. § 4331.

106. 42 U.S.C. § 4332(2)(c)(iii).

107. Jesse Hevia, *NEPA and Gentrification: Using Federal Environmental Review to Combat Urban Displacement*, 70 EMORY L.J. 711, 717 (2021).

108. *E.g.*, *Como-Falcon Cmty. Coal., Inc. v. U.S. Dep’t of Lab.*, 609 F.2d 345 (8th Cir. 1979); *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978).

109. *Como-Falcon*, 609 F.2d at 342.

110. *Id.* at 345 (quoting *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978)).

risk of increased crime does not compel an agency to produce an EIS where there are otherwise no impacts on the environment.¹¹¹ Therefore, crimes, including gender-based violence, are not sufficient to trigger an EIS.

The CEQ's 1978 regulations codify the importance of connecting socioeconomic impacts to a project's environmental impacts. The regulations state that an EIS is not required where there are no environmental impacts.¹¹² Furthermore, any socioeconomic impacts to be evaluated in an EIS must be "inter-related" with environmental impacts.¹¹³ The recent Trump and Biden CEQ regulations both left this language in place.¹¹⁴ Therefore, it is well settled that an agency is only required to consider socioeconomic impacts if primary environmental impacts trigger an EIS. Consequently, advocates cannot solely use the violent impacts of a resource extraction project to challenge an agency's decision not to produce an EIS.

2. Which Impacts Must be Evaluated in an EIS?

Once an agency determines that it must produce an EIS, the agency next determines which impacts it must evaluate. The CEQ regulations define impacts and effects to include "aesthetic, historic, cultural, economic, social, or health" impacts.¹¹⁵ These types of impacts include expected loss of employment,¹¹⁶ the potential for "urban decay and blight,"¹¹⁷ and changes to traffic.¹¹⁸ While there is no definitive list of what counts as a socioeconomic impact, there is some limit to what a court will accept.¹¹⁹

Of particular note for the impacts caused by industry workers is the threshold at which a socioeconomic effect becomes too attenuated from the underlying environmental effects. CEQ regulations define "impacts" to include "[i]ndirect effects, which are caused by the action and are later in time or far-

111. *See, e.g.*, *Olmsted Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 205 (8th Cir. 1986); *First Nat'l Bank of Chi. v. Richardson*, 484 F.2d 1369, 1381 (7th Cir. 1973); *Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1092 (D.C. Cir. 1984).

112. 40 C.F.R. § 1502.16 (2022).

113. *Id.*

114. *Id.* (Biden regulations); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020) (Trump regulations).

115. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453, 23470 (Apr. 20, 2022).

116. *See Lake Erie All. for Prot. of Coastal Corridor v. U.S. Army Corps of Eng'rs*, 486 F. Supp. 707 (W.D. Pa. 1980).

117. *Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 973 (2d Cir. 1976).

118. *See Trinity Episcopal Sch. Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975).

119. *See Hevia, supra* note 107, at 722.

ther removed in distance, but are still reasonably foreseeable.”¹²⁰ In a leading case from 1983, petitioners wanted an EIS to consider their “severe psychological health damage” from the fear of a meltdown of a nuclear reactor.¹²¹ The reactor had been shut down for a safety assessment after a major accident at a nearby facility operated by the same owner.¹²² Justice Rehnquist reasoned that this fear of a nuclear catastrophe was too attenuated to qualify as a “reasonably close causal relationship” with the physical environment.¹²³ Specifically, he wrote that the “element of risk lengthens the causal chain beyond the reach of NEPA.”¹²⁴ This reasonably foreseeable standard means that it is crucial for advocates to reference studies that demonstrate that resource extraction projects lead to an increase in violence, not merely a fear of violence.

An EIS must include an assessment of the violence caused by a project because crime is a socioeconomic impact that NEPA obligates agencies to consider. A pair of Second Circuit cases from the early 1970’s held that an agency is required to assess crime as a socioeconomic impact.¹²⁵ In *Hanly v. Mitchell* local residents challenged an Agency’s failure to consider the socioeconomic impacts of a detention facility proposed for downtown Manhattan.¹²⁶ Challenges to the detention facility arrived in the Second Circuit twice, and both times the court held that the potential increase in crime was a socioeconomic impact that NEPA mandated an agency to assess.¹²⁷ Three years later, the Second Circuit again noted that NEPA required an Agency to consider an increase in crime.¹²⁸ Other circuits do not dispute that crime is a socioeconomic impact that should be addressed in an EIS, though they have denied relief to petitioners because the increase in crime was not linked to a primarily environmental impact.¹²⁹

120. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453, 23469–70 (Apr. 20, 2022).

121. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 768 (1983).

122. *Id.*

123. *Id.* at 774.

124. *Id.* at 775.

125. See *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972); *Hanly v. Kleindienst*, 471 F.2d 823, 835–36 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

126. See *Hanly v. Mitchell*, 460 F.2d at 640.

127. See *id.* at 647; *Kleindienst*, 471 F.2d at 836.

128. See *Chelsea Neighborhood Ass’ns v. U.S. Postal Serv.*, 516 F.2d 378, 388 (2d Cir. 1975).

129. *Olmsted Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 205 (8th Cir. 1986) (holding that conversion of former state mental hospital into a federal prison hospital will not have significant environmental impacts and will therefore not require an EIS); *First Nat’l. Bank of Chi. v. Richardson*, 484 F.2d 1369, 1381 (7th Cir. 1973) (upholding an agency’s finding that a pretrial detention center would not significantly impact surrounding residents); *Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1092 (D.C. Cir. 1984) (holding that the potential for tampering of plastic bottles of alcohol was not an environmental impact for the purposes of NEPA).

In cases where a court has denied the need to include an assessment of crime at all, it is because petitions provided no support for their claims that a project would cause an increase in the crime rate. For example, in one case from the Southern District of New York, the court wrote that it “is surely not self-evident that subway stations, even air-conditioned ones, breed crime in the surrounding community.”¹³⁰ Additionally, in two cases challenging plans to build low-income housing, courts refused to agree with petitioners’ assumptions that tenants of public housing were more likely to engage in criminal behavior.¹³¹

A 2016 district court case exemplifies what analysis a court deems as a sufficient assessment of a project’s impacts on crime.¹³² Plaintiffs challenged the Department of the Interior for determining that an off-reservation tribal casino would not have a significant impact on crime.¹³³ However, the Agency had surveyed the impacts on crime from five other casinos, contacted local law enforcement agencies near those casinos, reviewed historical crime statistics, and reviewed the literature on the link between casinos and crime.¹³⁴ The court held that this was a thorough enough analysis to satisfy the “hard look” requirement.¹³⁵ Although this ruling does not provide a clear line defining a sufficient assessment of a project’s impact on crime, the Agency’s analysis demonstrates that agencies are capable of undertaking more than a cursory assessment.

In addition to crime, an agency should also consider many of the other impacts caused by an influx of industry workers. For example, impacts such as increased housing prices and increased demand on local government services are recognized socioeconomic impacts.¹³⁶ In *Northern Cheyenne Tribe v. Hodel*, the Tribe brought a suit challenging an agency’s failure to consider the socioeconomic impacts of issuing coal mining leases near its reservation.¹³⁷ The District Court ruled in favor of the Tribe, holding that:

It is clear that the physical disturbance, here the mining of the coal sold at the lease sale, is the proximate cause of the expected socioeconomic impacts in the affected area. A substantial increase in regional coal mining will cause . . . indirect socioeconomic impacts including the social disruption caused by increased numbers of miners, their

130. See E. 63rd St. Ass’n v. Coleman, 414 F.Supp. 1318, 1327 (S.D.N.Y. 1976).

131. See Nucleus of Chi. Homeowners Ass’n v. Lynn, 372 F.Supp. 147, 150 (N.D. Ill. 1973), *aff’d*, 524 F.2d 225 (7th Cir. 1975); Trinity Episcopal Sch. Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975).

132. See Stand Up for Cal! v. U.S. Dep’t of the Interior, 204 F. Supp. 3d 212, 313–15 (D.D.C. 2016), *aff’d sub nom.*, Stand Up for Cal! v. U. S. Dep’t of Interior, 879 F.3d 1177 (D.C. Cir. 2018).

133. *Id.*

134. *Id.* at 314.

135. *Id.* at 315.

136. See Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. 3065, 3067–68 (D. Mont. 1985).

137. *Id.*

families, and others who will provide services, the increased demand for schools, housing, water and sewer services, and the increased strain on local governments. This indirect and direct social and economic disruption is not a risk; it flows inevitably from mining of federal coal in the region.¹³⁸

The leaseholders appealed the ruling to the Ninth Circuit over the remedies ordered by the district court, but the lower court rulings regarding the deficiencies under NEPA were not disturbed.¹³⁹ Although the *Northern Cheyenne* case did not consider the impacts of gender-based violence specifically, the court made clear that socioeconomic impacts caused by an influx of industry workers must be assessed in an EIS.

C. *Evaluating Impacts on Native Women Through an Environmental Justice Framework*

In addition to the statutory pathway presented through socioeconomic impacts, agencies have the authority to voluntarily address disproportionate impacts on Native women under an environmental justice assessment. Environmental justice does not have one concise definition,¹⁴⁰ but as Dr. Robert Bullard wrote, an “environmental justice framework rests on an ethical analysis of strategies to eliminate unfair, unjust, and inequitable conditions and decisions.”¹⁴¹ In 1994, President Clinton issued Executive Order 12,898, which instructed agencies to “make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations.”¹⁴² In 1997, CEQ then published a guidance document for federal agencies on how they should incorporate environmental justice into their NEPA assessments.¹⁴³

One important caveat is that the Executive Order and Guidance explicitly deny any opportunity for judicial review.¹⁴⁴ Therefore, although agencies have the authority to include an environmental justice analysis, there is no judicially enforceable mechanism to require them to include one.¹⁴⁵ For example, a 2005

138. *Id.*

139. *Northern Cheyenne Tribe v. Lujan*, 804 F. Supp. 1281, 1285 (D. Mont. 1991).

140. NINA M. HART & LINDA TSANG, CONG. RSCH. SERV., LSB10590, ADDRESSING ENVIRONMENTAL JUSTICE THROUGH NEPA 4 (2021).

141. Robert D. Bullard, *Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 454 (1999).

142. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

143. COUNCIL ON ENV'T QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), <https://perma.cc/B22A-Y7KZ>.

144. *Id.* at 21; Exec. Order No. 12898, 59 Fed. Reg. 7629, 7632–33 (Feb. 16, 1994).

145. See HART & TSANG, *supra* note 140, at 4.

study found that less than half of the EISs prepared since the 1994 Executive Order included any consideration of environmental justice.¹⁴⁶ This highlights the value of advocates explicitly raising issues of environmental justice in the earlier scoping phase public comment period¹⁴⁷ or framing the issues as a socio-economic impact.¹⁴⁸

Regardless, if an agency voluntarily includes an environmental justice analysis, advocates can challenge the sufficiency of the analysis in court. In 2004, the D.C. Circuit explained that the “arbitrary and capricious” standard applies to all sections of an EIS, even those that an agency had discretion to include.¹⁴⁹ Following this rule, courts in multiple circuits have held that an agency’s environmental justice analysis was subject to review under the APA.¹⁵⁰ This “standard is narrow and a court is not to substitute its judgment for that of the agency.”¹⁵¹ Therefore, even though courts have found jurisdiction to review an agency’s environmental justice analysis, most of those courts have determined that the analysis was sufficient.¹⁵²

Because of the limit on judicial review, there have been relatively few challenges to environmental justice assessments in an agency NEPA review.¹⁵³ Therefore, the caselaw defining the boundaries of what qualifies as a sufficient analysis is limited. Only the D.C. Circuit¹⁵⁴ and district courts in D.C.,¹⁵⁵

146. See Marissa Tripolsky, *A New NEPA to Take a Bite Out of Environmental Injustice*, 23 B.U. PUB. INT. L.J. 313, 332–33 (2014).

147. See ENV’T PROTECTION AGENCY, *supra* note 93.

148. Part III, *infra*, includes further discussion on how to advocate for an agency to conduct a sufficient review of environmental justice issues.

149. *Cmtys. Against Runway Expansion v. Fed. Aviation Admin.*, 355 F.3d 678, 689 (D.C. Cir. 2004).

150. See, e.g., HART & TSANG, *supra* note 140 at 4; *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 230 (5th Cir. 2006). *But see City of Dallas v. Hall*, 2007 WL 3125311, at *6 (N.D. Tex. Oct. 24, 2007), *aff’d*, 562 F.3d 712 (5th Cir. 2009) (holding that compliance with executive orders is not subject to APA review); *Citizens Concerned About Jet Noise v. Dalton*, 48 F. Supp. 2d 582, 604 (E.D. Va. 1999), *aff’d*, 217 F.3d 838 (4th Cir. 2000).

151. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983).

152. See, e.g., *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017); HART & TSANG, *supra* note 140 at 4.

153. HART & TSANG, *supra* note 140 at 4.

154. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021).

155. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 137–40 (D.D.C. 2017).

Idaho,¹⁵⁶ and California¹⁵⁷ have ruled that an agency's environmental justice analysis failed to meet the "arbitrary and capricious" standard under the APA.¹⁵⁸

The D.C. Circuit focused on the Federal Energy Regulatory Commission's ("FERC") failure to assess impacts on entire populations due to arbitrary geographic determinations.¹⁵⁹ In this case, petitioners challenged FERC's NEPA review for the construction and operation of three liquified natural gas export terminals and two associated pipelines.¹⁶⁰ The court held that it was arbitrary for the Agency to only evaluate communities within two miles of the facility when the Agency had determined that environmental impacts would extend beyond two miles.¹⁶¹ For example, the facilities would impact air quality extending as far as 31 miles.¹⁶²

The District of D.C. has also highlighted issues about geographic demarcation and additionally emphasized an agency's use of unsupported conclusions.¹⁶³ In a 2017 case, the Judge ruled that the U.S. Army Corps of Engineers' analysis was insufficient because it limited the evaluation to communities within 0.5 miles of the Dakota Access Pipeline crossing of Lake Oahe.¹⁶⁴ This demarcation left out the reservation of the Standing Rock Sioux Tribe which began 0.55 miles downstream of the crossing.¹⁶⁵ Although the Agency included a separate section discussing the environmental justice impacts on the Tribe, the Agency only addressed issues from construction, not from a potential spill.¹⁶⁶ The court faulted the Agency for its unsupported "bare-bones conclusion" that the Tribe would not be disproportionately affected by a spill.¹⁶⁷ Similarly, a district court judge in Idaho ruled that the Agency's "consideration of environmental justice impacts [was] too cursory,"¹⁶⁸ and a district court Judge

156. *Hausrath v. United States Dep't of the Air Force*, 491 F. Supp. 3d 770, 795–96 (D. Idaho 2020), *appeal dismissed sub nom.* *Hausrath v. United States Air Force*, No. 20-36036, 2021 WL 2207189 (9th Cir. Jan. 28, 2021).

157. *California v. Bernhardt*, 472 F. Supp. 3d 573, 622 (N.D. Cal. 2020).

158. HART & TSANG, *supra* note 140, at 5.

159. *See Vecinos*, 6 F.4th at 1330.

160. *Id.* at 1325.

161. *Id.* at 1330.

162. *Id.*

163. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 137–40 (D.D.C. 2017).

164. *Id.*

165. *Id.* at 137.

166. *Id.* at 139.

167. *Id.* at 140.

168. *Hausrath v. United States Dep't of the Air Force*, 491 F. Supp. 3d 770, 795 (D. Idaho 2020), *appeal dismissed sub nom.* *Hausrath v. United States Air Force*, No. 20-36036, 2021 WL 2207189 (9th Cir. Jan. 28, 2021) (plaintiffs brought a challenge over the potential impacts to minority and low-income residents living under proposed air space for air force training).

from California ruled against an agency for asserting conclusions “absent a comprehensive analysis.”¹⁶⁹

These recent successful challenges raise the prospects for advocates to bring similar judicial claims when an environmental justice section of an EIS fails to sufficiently assess the impacts on Native women. Although agencies have discretion to exclude an environmental justice section, if they do include one, it must meet the standards set out under the APA. While the chances of winning a case on the merits are less clear, the four recent cases discussed in this Section demonstrate that it is possible. If an agency entirely excludes a discussion of environmental justice, petitioners may have more success using the statutory avenue provided by a socioeconomic impacts assessment.

III. PUTTING OBLIGATION INTO PRACTICE: LESSONS FROM THE NEPA REVIEW OF TWO OIL AND GAS PROJECTS

Given the legal avenues available to advocates seeking judicial review of an agency’s EIS, examining the administrative record of the NEPA review process of two resource extraction projects can shed light on how to best frame these claims. Courts have not yet ruled on an agency’s obligation under NEPA to evaluate the violent impacts on Native women. Therefore, advocates have an opportunity to engage in the administrative process so that the record provides the strongest case for raising a judicial challenge.

Section A provides a brief overview of the administrative process for producing an EIS. Section B highlights the administrative process for Moneta Divide Natural Gas and Oil Development Project (“Moneta Divide project”) because it is the first project where a Federal Agency acknowledged the violent impacts on Native women in an EIS. Despite the acknowledgment, the Agency failed to complete any assessment of the potential impacts caused by the Moneta Divide project specifically. Section C briefly describes the administrative process undertaken for the Keystone XL pipeline and why the Agency did not include an assessment of the potential for gender-based violence. Finally, Section D distills lessons from both projects and summarizes how advocates can push agencies to provide legally adequate assessments of the impacts from future proposed projects.

A. The Administrative Process of Producing an EIS for a NEPA Review

The specific process required by NEPA dictates how advocates can pressure agencies to conduct a legally sufficient analysis. Once an agency determines

169. *California v. Bernhardt*, 472 F. Supp. 3d 573, 622 (N.D. Cal. 2020) (plaintiffs challenged the rescission of a rule about flaring and venting waste methane at oil and gas extraction sites. Plaintiffs claimed that the rule would disproportionately affect Native Americans living in low-income communities).

that it must produce an EIS, it is required to go through a scoping process,¹⁷⁰ which includes engagement with impacted tribal governments.¹⁷¹ Next, an agency begins to work on a DEIS, which can often take years to produce.¹⁷² Additionally, NEPA “requires that federal agencies consult with other agencies whose area of expertise is superior to their own.”¹⁷³ After publishing the DEIS, the public has an opportunity to comment on inadequacies of the analysis or any impacts that the EIS should have included.¹⁷⁴ The agency then responds to the substantive comments it receives, makes any changes that it deems necessary and publishes a final EIS (“FEIS”).¹⁷⁵ Following the FEIS, an agency releases its Record of Decision announcing which alternative in the FEIS it decided on.¹⁷⁶

Once the agency releases an FEIS, parties can bring litigation challenging the adequacy of the environmental review. However, in order to challenge an agency over insufficient reasoning in response to a comment, that comment must first have been submitted during the appropriate commenting period.¹⁷⁷ Therefore, in order to influence the NEPA process for a specific project, advocates are best positioned if they participate in the comment process.

B. *The Moneta Divide Project*

When BLM released the FEIS for the Moneta Divide project in February of 2020, it was the first time a Federal Agency acknowledged the violent impacts Native women could face from a resource extraction project. There are a number of factors that likely contributed to the Agency’s acknowledgment, including the project’s location near Native communities, clarity that an EIS was necessary, and comments raising the concern by an organization with legal expertise. Although this Note argues that the analysis provided by BLM was inadequate, it provides a foundation to enable advocates to raise future claims.

The Moneta Divide project is a proposal to allow Aethon Energy Operation LLC and its partner, Burlington Resources Oil and Gas Company, LP (“the Companies”) to drill up to 4,250 oil and gas wells in Fremont County, Wyoming.¹⁷⁸ The project area is predominantly on land administered by BLM,

170. ENV’T PROTECTION AGENCY, *supra* note 93.

171. *See* 40 C.F.R. § 1501.9(b) (2022).

172. COUNCIL ON ENV’T QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010–2018) 1 (2020), <https://perma.cc/DB7N-ARSN>.

173. *See* *Save the Bay, Inc. v. United States Corps of Eng’rs*, 610 F.2d 322, 325 (5th Cir. 1980); 42 U.S.C. § 4332(2)(c).

174. *See* ENV’T PROTECTION AGENCY, *supra* note 93.

175. *Id.*

176. *Id.*

177. JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 19–20 (2016).

178. MONETA DIVIDE FEIS, *supra* note 13, at 1–4.

but the State administers 10% of the area.¹⁷⁹ The Companies have oil and gas leases issued by BLM, in addition to leases from the State of Wyoming and private landowners.¹⁸⁰ Some of the potentially significant environmental impacts include water pollution and threats to the endangered sage grouse.¹⁸¹ Therefore, BLM conducted a programmatic EIS¹⁸² for the proposed project. The EIS does not discuss permits for each specific well, but when the Companies start seeking those permits, they will be covered under the EIS.¹⁸³

The risk to Native women from this project is evident from the location and plans of the Moneta Divide project. The project area is close to the Wind River Indian Reservation where the Eastern Shoshone and Northern Arapaho Tribes live.¹⁸⁴ Sixty-six percent of the population of Fremont County reside on the Reservation.¹⁸⁵ The Companies expect an influx of industry workers and plan to construct a 700-person man camp.¹⁸⁶ However, the man camp will only house 75% of their projected 935 workers during peak production.¹⁸⁷ This would effectively be an 8% increase of the local population.¹⁸⁸ Therefore, in addition to the risks of violence, an influx of workers is also likely to drive up housing prices. As discussed in Section I, a housing market that is suddenly more expensive can create barriers for women seeking to escape domestic violence.

In 2013, BLM announced its plan to prepare an EIS and initiated the scoping phase of the process.¹⁸⁹ As part of this phase, the Agency had a public

179. BUREAU OF LAND MGMT., PLAN OF DEVELOPMENT MONETA DIVIDE GAS AND OIL DEVELOPMENT PROJECT 4 (2012), <https://perma.cc/72J4-4R3G>.

180. MONETA DIVIDE FEIS, *supra* note 13, at ES-1.

181. *Id.* at ES-7.

182. “CEQ regulations implicitly provide for three different types of EISs: project-specific, programmatic, and legislative. Whereas a project-specific EIS is prepared for a discrete, specific activity (such as a construction project), a programmatic EIS . . . may also be appropriate ‘when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography.’ This area-wide or overview EIS provides a means of analyzing a proposal that encompasses a linked set of actions in the same general location”. Beth C. Bryant, *NEPA Compliance in Fisheries Management: The Programmatic Supplemental Environmental Impact Statement on Alaskan Groundfish Fisheries and Implications for NEPA Reform*, 30 HARV. ENVTL. L. REV. 441, 446 (2006).

183. MONETA DIVIDE FEIS, *supra* note 13, at ES-7.

184. *Id.* at 3-126.

185. *Id.*

186. Western Watersheds Project, Comment Letter on Moneta Divide Natural Gas and Oil Development Project Draft Environmental Impact Statement (DOI-BLM-WY-R050-2013-0008-EIS) 28 (July 18, 2019), <https://perma.cc/B8QG-Y23J>.

187. *Id.*

188. *Id.*

189. See U.S. DEP’T OF THE INTERIOR BUREAU OF LAND MGMT., MONETA DIVIDE NATURAL GAS AND OIL DEVELOPMENT PROJECT ENVIRONMENTAL IMPACT STATEMENT SCOPING REPORT 1 (2013), <https://perma.cc/9HGM-CBNS>.

comment period and held three public meetings.¹⁹⁰ BLM also sent cooperating agency invitation letters to relevant agencies and tribal governments.¹⁹¹ However, the scoping materials included no mention of impacts on Native women or increased crime more broadly. Of the 106 scoping comments that BLM received, one mentioned crime, but only to refute the perception that oil field workers will lead to more crime.¹⁹² In 2019, BLM released a DEIS which also made no mention of the impacts that the project could have on Native women.

BLM received 75 comments on the DEIS,¹⁹³ including one comment that detailed why the DEIS should have evaluated the risks the project brought to Native women.¹⁹⁴ The comment was submitted by Western Watersheds Project, WildEarth Guardians, and the Center for Biological Diversity, environmental advocacy organizations that are well versed in how to engage with a federal agency during an administrative proceeding.¹⁹⁵ The section of their comment covering the impacts on Native women focused on evidence demonstrating that resource extraction projects lead to increased levels of violence for Native women.¹⁹⁶ However, it did not include any recommendations for mitigation strategies. The comment framed the analysis of these impacts as “NEPA obligations related to environmental justice” and did not mention socio-economic impacts.¹⁹⁷

One principle of environmental justice is that communities should speak for themselves.¹⁹⁸ It is therefore worth noting that no tribal entity wrote a comment raising concerns about the safety of Native women. The Standing Rock Sioux Tribe was the only tribal entity to submit a written comment, and they challenged the NEPA process for failing to fully evaluate the impact on Tribal resources protected by Treaty.¹⁹⁹ However, the Tribe did not raise the issue of impacts on Native women and girls in their comments. The Northern Arapaho Tribe did not submit comments to BLM, but they did participate in the State permitting process for the Moneta Divide project’s anticipated wastewater discharge.²⁰⁰ The Tribe’s comment expressed concern about the proposed permit

190. *Id.* at 6.

191. *Id.* at 5.

192. *Id.* at D-28.

193. See MONETA DIVIDE FEIS, *supra* note 13, at X-1.

194. See Western Watersheds Project Comment, *supra* note 186.

195. See *id.*

196. See *id.* at 27–28.

197. *Id.* at 29.

198. See Roger Lin, *Foreword*, 46 Ecology L.Q. 911, 911 (2019).

199. See MONETA DIVIDE FEIS, *supra* note 13, at X-34.

200. In addition to the federal approval from BLM, the Companies will also need to dispose of the wastewater that its drilling operations create. The Companies seek to discharge this wastewater into creeks upstream of the Wind River, and therefore needed a permit from the Wyoming State Department of Environmental Quality (“DEQ”). DEQ received over 450 comments on this permit process including one from the Northern Arapaho Natural Re-

because of its potential to pollute the Wind River.²⁰¹ However, because of the potential economic opportunities the Tribe's comment was generally in favor of the oil and gas development, as long as environmental impacts were mitigated.²⁰²

In the FEIS, under the framework of an environmental justice analysis, BLM acknowledged that "the correlation between the influx of non-local oil and gas workers and significant increases in property and violent crimes is well documented."²⁰³ It further acknowledged that "adverse impacts to quality of life factors, like crime, are likely to disproportionately affect tribal communities."²⁰⁴

However, when it came to the impacts of the Moneta Divide project specifically, BLM was much more cautious in its pronouncement. The Agency accepted the possibility of negative impacts on local Native women, but also claimed that there was no evidence that violence would occur from this particular project. BLM wrote,

Based on the studies cited above and statistics from the Bureau of Justice Statistics, it is possible that tribal members, especially women, may experience increased violent crime due to the influx of non-local oil and gas workers. However, there is no information available at this time to indicate that this would occur as a result of development within the Moneta Divide Project Area.²⁰⁵

In essence, BLM acknowledged this as a potential impact, but failed to do any analysis.

This sort of conclusion, which is unsupported by any reasoning, could be challenged in court for failing to meet the "hard look" standard. As the D.C. Circuit has explained, "[s]imple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA."²⁰⁶ Similarly, the rulings discussed in Section II.C. find that a "cursory"²⁰⁷ or "bare-bones"²⁰⁸ conclusion regarding environmental justice impacts are not sufficient to meet the statutory

source Office. See Chris Aadland, *Tribe Opposes Company's Plan to Dump Oil Field Wastewater Upstream of Wind River*, CASPER STAR TRIBUNE (July 29, 2019), <https://perma.cc/3NRJ-7SGC>.

201. Northern Arapaho Natural Resource Office, *supra* note 3.

202. *See id.*

203. MONETA DIVIDE FEIS, *supra* note 13, at 3-128.

204. *Id.*

205. *Id.*

206. Delaware Riverkeeper Network v. FERC, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (quoting Found. On Econ. Trends v. Heckler, 756 F.2d 143, 154 (D.C. Cir. 1985)); *see also* Ocean Advocs. v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005) (holding that an agency's "conclusory assertions" did not meet the required "hard look" standard).

207. Hausrath v. United States Dep't of the Air Force, 491 F. Supp. 3d 770, 795 (D. Idaho 2020), *appeal dismissed sub nom.* Hausrath v. United States Air Force, No. 20-36036, 2021 WL 2207189 (9th Cir. Jan. 28, 2021).

requirements under the APA. The Moneta Divide Project FEIS failed to provide any evidence to support its conclusion. The FEIS cited multiple sources documenting the increases in violence associated with resource extraction projects,²⁰⁹ but provided no evidence that would explain why the Moneta Divide Project would not lead to an increase in violence. Therefore, the FEIS is vulnerable to judicial review under the APA because the Agency did not provide a reasoned analysis.

Furthermore, BLM did not propose any mitigation strategies that were specific to the Moneta Divide project or the nearby communities. BLM suggested as a mitigating factor that the Companies adopt the best practices from the United Nations Guiding Principles on Business and Human Rights.²¹⁰ While this may be a reasonable starting point, it is not specific to the particular needs of the local tribal communities. No commenters mentioned the United Nations' guidelines, so it is unclear how BLM settled on them as the sole mitigating factor. This highlights the importance of including appropriate mitigation factors in the comments so that an agency is at least encouraged to explain why they choose some mitigation strategies over others.

BLM could have provided tribal communities with a more meaningful opportunity to engage with the Agency if they had included impacts on Native women earlier than the FEIS. Because the Agency did not include a discussion of these impacts in scoping documents or the DEIS, communities may not have been aware that this is an issue that a NEPA analysis can cover. Tribes that are in favor of resource development can still provide input on appropriate mitigation measures to limit harm to Native women. If agencies affirmatively raised a project's potential impacts on Native women during the scoping phase, this would provide tribal communities an opportunity to offer relevant feedback.

C. *The Keystone XL Pipeline*

In contrast to the Moneta Divide Project, the State Department explicitly declined to assess if the Keystone XL Pipeline would cause any increase in violence. The Keystone XL Pipeline was a proposed 875 mile extension of an existing pipeline from Montana to Nebraska.²¹¹ The history of the administrative process for the Keystone XL pipeline is complex for a variety of reasons

208. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017).

209. *MONETA DIVIDE FEIS*, *supra* note 13, at 3-128.

210. *MONETA DIVIDE FEIS*, *supra* note 13, at 4-299.

211. U.S. DEP'T OF STATE BUREAU OF OCEANS AND INT'L ENV'T AND SCI. AFFAIRS, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEystone XL PROJECT ES-1 (Jan. 2014), <https://perma.cc/PK6G-3H47> [hereinafter 2014 KEystone XL FSEIS].

including its national political significance, a change in proposed route, and the number of legal challenges to the environmental review process.²¹² Of particular relevance is that the State Department released a first FEIS in 2014,²¹³ and then went through a second environmental review and released a second FEIS in 2019.²¹⁴ In responding to comments on both FEISs the State Department wrote that it was not required to assess the impacts of an influx of industry workers.²¹⁵

For the first FEIS, a few comments raised the issue of gender-based violence, but neither the commenters nor the Agency recognized that Native women would disproportionately experience this impact. During the DEIS comment period in 2013, one commenter mentioned “rape” as a concern,²¹⁶ a second commenter mentioned “sex trafficking”²¹⁷ and a third mentioned “escort services.”²¹⁸ The comments did not go into any detail on these concerns and were not written by organizations that might be setting up a future legal challenge. In responding to comments about “[impacts] that disproportionately affect women,” the State Department said that it did not need to consider the disproportionate impact on women because those impacts were associated with longer term boomtowns, and construction of the pipeline would only last for six to eight months.²¹⁹ Therefore, the State Department concluded that it did not need to assess the potential for any violent impacts in the FEIS.²²⁰

The second FEIS acknowledged that Native women experience high rates of violence generally, but it maintained that short-term pipeline construction did not require an assessment of impacts on Native women.²²¹ Because commenters on the second FEIS raised concerns specifically about impacts to tribal communities, the State Department noted national level efforts to address the

212. See *Keystone XL Pipeline*, HARVARD LAW SCHOOL ENV'T & ENERGY L. PROGRAM, <https://perma.cc/6EAQ-D8BC>.

213. 2014 KEYSTONE XL FSEIS, *supra* note 211.

214. U.S. DEP'T OF STATE BUREAU OF OCEANS AND INT'L ENV'T AND SCI. AFFAIRS, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT VOL. I (Dec. 2019), <https://perma.cc/UM25-AVKL> [hereinafter 2019 KEYSTONE XL FSEIS VOL. I].

215. See U.S. DEP'T OF STATE BUREAU OF OCEANS AND INT'L ENV'T AND SCI. AFFAIRS, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT VOL. II D-35-D-36 (Dec. 2019), <https://perma.cc/225H-W3Q2> [hereinafter 2019 KEYSTONE XL FSEIS VOL. II]; 2014 KEYSTONE XL FSEIS, *supra* note 211, at PC-121-12.

216. 2014 KEYSTONE XL FSEIS, *supra* note 211, at PC-917.

217. *Id.* at PC-1070.

218. *Id.* at PC-702.

219. *Id.* at PC-121-22.

220. *Id.*

221. 2019 KEYSTONE XL FSEIS VOL. II, *supra* note 215, at D-35-D-36.

“crisis of missing and slain Native American women.”²²² The FEIS also discussed the measures that Keystone promised to take to prevent harm to Native women by establishing a camp Code of Conduct for workers and restricting access to man camps.²²³ Although the second FEIS declined to evaluate the risk of violence from an influx of industry workers, by including a more detailed analysis in comments, advocates had a stronger administrative record to use in a judicial challenge.

Multiple suits challenged the State Department’s NEPA process, which included claims that the EIS should have analyzed the impacts on Native women.²²⁴ The Biden administration revoked the permit to the pipeline before a judge had an opportunity to issue a full ruling on the Agency’s obligations under NEPA.²²⁵ Therefore, there have not yet been any court rulings discussing the obligations under NEPA to evaluate the risk of increased gender-based violence caused by resource extraction projects.

D. Recommendations for Advocating Through the Administrative Process

Building upon BLM’s acknowledgment of the risk to Native women from resource extraction projects, advocates can now begin pushing agencies to take the next steps towards a legally sufficient analysis for future projects. Applicable resource extraction projects are those that have a primary environmental impact triggering an EIS, involve a foreseeable influx of workers, and are near a tribal community. There were multiple lessons from both the Moneta Divide Project and the Keystone XL pipeline that advocates can apply when engaging in NEPA review processes.

Advocates should specify in their comments what they expect from a legally sufficient analysis of the impacts of a project on Native women. BLM proclaimed that there is “no information available” to determine if violence is a risk for these communities but provided no support to back up that conclusion.²²⁶ Commenters can provide, or suggest that BLM provide, an analysis of local crime rates, the capacity of law enforcement, or the availability of victim

222. *Id.* at D-36.

223. *Id.*

224. *See, e.g.*, First Amended Compl. for Declaratory and Inj. Relief, *supra* note 77; Plaintiffs’ Compl. for Declaratory and Injunctive Relief at 53–54, *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. U.S. Dep’t of the Interior et al.* (D. Mont. May 29, 2020) (No 4:20-cv-00044-BMM-JTJ), <https://perma.cc/LRW6-8NJJ>.

225. HARVARD LAW SCHOOL ENV’T & ENERGY L. PROGRAM, *supra* note 212. Although a district court judge denied a request for preliminary injunction based on the risk to Native women that pipeline construction would have, the legal standards required for a preliminary injunction are distinct. *See Indigenous Env’t Network v. Trump*, No. 4:19-CV-00028-BMM, 2022 WL 742469 (D. Mont. Mar. 11, 2022).

226. MONETA DIVIDE FEIS, *supra* note 13, at 3-128.

services. This could include reviewing data from local law enforcement agencies, tribal clinics, tribal governments, and victim service programs.

Additionally, advocates should include a discussion of mitigation factors in their comments. Commenters can begin by encouraging an agency to consult with local communities that will be impacted to ensure that any mitigation strategies will address the specific needs of that community. Additionally, commenters can draw on scholars who have suggested mitigation measures for companies engaged in resource extraction near reservations.²²⁷ For example, advocates could draw on the list of thirteen “best practices” discussed in Section I.²²⁸

If an agency fails to conduct an adequate analysis of a project’s impacts on Native women, advocates can bring a judicial challenge claiming that the EIS did not meet the “hard look” requirement. As discussed in Part II *infra*, if an agency has already included a section on environmental justice, advocates can frame their claims under the mandates from the EO and Guidance. However, even if an agency does not include an environmental justice analysis, advocates can still argue that an agency is required to include an assessment of a project’s socioeconomic impacts, which includes a reasonably foreseeable increase in crime.²²⁹ Although no court has yet to rule on the exact issues of resource extraction projects causing increased levels of violence, analogous cases provide precedents that will bolster such a legal challenge.²³⁰

Advocates can also distill lessons from the State Department’s decision declining to include an analysis of these impacts in the Keystone XL FEISs. For example, advocates should clearly explain in comments that Native women will disproportionately experience the violent impacts from resource extraction projects. Without this specificity, the State Department did not identify the environmental justice concern on its own. Furthermore, advocates should attempt to reference studies about impacts from projects as similar to the proposed project as possible. For example, if commenters had cited studies noting the violent impacts from pipelines, the State Department may not have been able to dismiss the impacts as only occurring in “boomtowns.”²³¹

Together, these two projects highlight the value of having legal advocacy organizations involved during the commenting stage of the administrative process. Because there are not yet legal precedents or regulations that directly tell an agency how to evaluate violent impacts on Native women, advocates will have the most success if they can bring these claims at the earliest possible NEPA comment period. Otherwise, agencies are likely to leave out this analysis

227. See Finn et al., *supra* note 19, at 48–50; Washington, *supra* note 15, at 746–47. Sweet, *supra* note 19, at 1175–77.

228. Finn et al., *supra* note 19, at 48–50.

229. See *supra* Part II.B.1.

230. See *supra* Part II.B.–C.

231. 2014 KEYSTONE XL FSEIS, *supra* note 211, at PC-121–22.

or include something unexpected that advocates may wish to provide further feedback on. For example, the legal advocacy organizations that submitted comments during the Moneta Divide project NEPA process were able to frame these claims in a way that the Agency could not easily dismiss. Although the purpose of a public comment period should be to enable people who are not legal experts to provide relevant feedback, in reality, the process clearly advantages advocates who have the resources to engage lawyers.²³²

IV. STATE ENVIRONMENTAL POLICY ACTS

It is worth noting that the future of NEPA obligations may change given the current composition of the court. From a textualist perspective, evaluating crime seems to be firmly grounded in the statutory language about “safety.”²³³ However, the status of environmental laws remains unpredictable. As Justice Kagan noted in her *West Virginia v. EPA* dissent, the usual expectations may not apply to the “bogyman of environmental regulation.”²³⁴ Therefore, it is advisable to consider methods of addressing violence from resource extraction projects that do not depend on federal law.

Even if the current Supreme Court puts up roadblocks to using the federal environmental review process, advocates can also use state environmental laws to raise claims with state agencies and courts. Sixteen states, the District of Columbia, and Puerto Rico have enacted state environmental policy acts (“SEPAs”) which often mirror NEPA and require state agencies to undergo a similar environmental review process.²³⁵ The specific obligations of an EIS produced by a state agency will vary depending on each state’s SEPA and related judicial interpretation.²³⁶ Under SEPAs, state agencies are beginning to acknowledge the violent impacts of resource extraction projects through the environmental review process.²³⁷

For example, an EIS produced by a Minnesota state agency acknowledged that the Line 3 Pipeline Replacement project (“Line 3”) would increase the risk of sex trafficking and sexual abuse for Native women.²³⁸ Line 3, proposed by

232. See Anthony Moffa, *Strength in Numbers (of Words): Empirical Analysis of Preambles and Public Comments*, 22 NEV. L.J. 99, 115–16 (2021).

233. 42 U.S.C. § 4331(b)(3).

234. *West Virginia v. EPA*, 142 S. Ct. 2587, 2630 (2022).

235. CLIFFORD VILLA ET AL., ENVIRONMENTAL JUSTICE LAW, POLICY & REGULATION 411 (3rd ed. 2020).

236. *Id.* at 412.

237. See, e.g., MINN. DEP’T OF COM., LINE 3 PROJECT FINAL ENV’T IMPACT STATEMENT CHAPTER 11 at 11-21–11-22 (Feb. 2018), <https://perma.cc/D9U9-QR8C> [hereinafter LINE 3 FEIS]; WIS. DEP’T OF NAT. RES., DRAFT ENVIRONMENTAL IMPACT STATEMENT: PROPOSED ENBRIDGE LINE 5 RELOCATION PROJECT 311 (Dec. 2021), <https://perma.cc/42GM-528F> [hereinafter LINE 5 DEIS].

238. LINE 3 FEIS, *supra* note 237, at 11-20–11-21.

Enbridge Energy, Limited Partnership (“Enbridge”), is a 340-mile pipeline that crosses several reservations.²³⁹ Similar to NEPA, the Minnesota Environmental Policy Act requires an EIS if “there is potential for significant environmental effects resulting from a major governmental action.”²⁴⁰ The resulting Line 3 EIS included a Tribal Impacts section in the Environmental Justice chapter which stated that the “addition of a temporary, cash-rich workforce increases the likelihood that sex trafficking or sexual abuse will occur. Additionally, rural areas often do not have the resources necessary to detect and prevent these activities.”²⁴¹ As mitigation measures, the FEIS proposed that Enbridge implement an awareness campaign and provide funding to local and tribal law enforcement.²⁴² The Minnesota Public Utilities Commission then approved the Line 3 permits, but only on the condition that Enbridge create a public safety escrow fund “to help existing law enforcement and social service agencies along the route in combatting drug and human trafficking during pipeline construction.”²⁴³

The Wisconsin Department of Natural Resources (“DNR”) included a similar evaluation in the DEIS for the Line 5 Project proposal.²⁴⁴ The proposal is for the construction of 41 miles of an oil and gas pipeline to replace an existing segment of the Line 5 pipeline that passes through the Bad River Reservation of the Bad River Band of Lake Superior Chippewa.²⁴⁵ After receiving over 32,000 comments on the DEIS, the DNR has not yet released an FEIS.²⁴⁶

These state EISs demonstrate both the limitations and the benefits of an agency’s environmental review process. EISs are only one piece of a greater effort to address violence. Since beginning construction on the Line 3 pipeline, police have charged industry workers for sex trafficking,²⁴⁷ and victim services organizations have aided multiple women allegedly assaulted by Line 3 workers.²⁴⁸ Those victim services organizations were able to apply for reimbursements from the public safety escrow account.²⁴⁹ The continued evidence of trafficking and assault demonstrate that an environmental assessment can only be one part of addressing violence. Nevertheless, the EIS process is a tool for

239. MINN. DEP’T OF COM., LINE 3 PROJECT FINAL ENV’T IMPACT STATEMENT CHAPTER 1 1-1 (Feb. 2018), <https://perma.cc/695X-V3XX>.

240. *Id.* at 1-1.

241. LINE 3 FEIS, *supra* note 237, at 11-21.

242. *Id.* at 11-23.

243. Jimmy Lovrien and Izabel Johnson, *Law Enforcement Reimbursed from Enbridge-Funded Account, Angering Pipeline Protesters*, DULUTH NEWS TRIBUNE (Jan. 21, 2021), <https://perma.cc/TLP7-KAUU>.

244. *See* LINE 5 DEIS, *supra* note 237, at 311-12.

245. *Id.* at 2.

246. *Enbridge Pipeline Projects in Wisconsin*, WIS. DEP’T OF NAT. RES., <https://perma.cc/P9VU-XDL4>.

247. *See* LINE 5 DEIS, *supra* note 237, at 312.

248. Beaumont, *supra* note 42.

249. *Id.*

raising awareness of the impacts from industry workers, and Enbridge's reimbursement fund might not exist without it.

CONCLUSION

Despite the rhetoric around resource extraction projects bringing economic opportunities to nearby communities, extractive industries also bring a darker reality. Native women and children are especially at risk for the violence that accompanies an influx of industry workers. Meanwhile, tribal governments have limited options for responding to violent individuals. Many strategies should be employed to address this violence. One of them is requiring federal agencies to evaluate the violence caused by resource extraction projects during the NEPA review process. A comprehensive assessment can both bring attention to impacts and enable meaningful consultation that identifies effective mitigation strategies. Now that BLM published the first EIS acknowledging this impact, advocates can build upon this example by demanding that agencies engage in a full assessment and not a mere acknowledgment. If agencies fail to complete a full assessment, advocates can take their challenges to the courts.

