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. Increasing levels of violence caused local domestic violence shelters to fill beyond their capacity and scramble to provide more beds. 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. Lost in these competing narratives are the violent consequences for Native women and children resulting from the arrival of mostly male industry workers. Multiple agencies,  

2. See Jack Healy, As Oil Floods Plains Towns, Crime Pours In, N.Y. TIMES (Nov. 30, 2013), https://perma.cc/4LZ4-HXVN.  
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 advocates\(^8\) 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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9. See generally ZUYA WINYAN WICAY’ONIHAN, supra note 8.


11. See infra Part II.

tionally, agencies have the authority to evaluate a project’s impacts on Native women through an environmental justice framework.\textsuperscript{14}

While some scholars have suggested this strategy, none have provided an in-depth assessment.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{16} See infra Part III.

\textsuperscript{17} See infra Part IV.

\textsuperscript{18} See Heather Richards, BLM Tells Oil Firm to Protect Native American Women, E&E News (March 6, 2020), https://perma.cc/MU7B-LCKK.
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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, advocates, journalists, and government agencies have already documented the violent impacts that resource extraction projects have on Native women. Resource extraction frequently occurs near Native communities because Indian Country 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. 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. This history frames both the current mechanisms enabling violence and the breadth of solutions required to address it.


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.


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 victimization increased by 38% in the

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.
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Bakken region. Meanwhile the counties surrounding the Bakken region saw a 4% decrease during the same period. Additionally, because companies have difficulty hiring enough workers, they are more likely to hire people with a history of sexual violence. In order to hire the necessary quantity of workers, resource extraction companies often have minimal background check requirements. Without employee screening, people on sex offender registries may be attracted to extractive industries because they are excluded from other jobs. For example, a tribal police officer reported that one man camp that was next to a tribal casino had thirteen sex offenders.

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. 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. Additionally, some man camps and makeshift trailer parks have no permanent address. This presents challenges for law enforcement if they attempt to serve people with temporary restraining orders.

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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.


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.
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.\textsuperscript{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.\textsuperscript{54} Furthermore, Native women report that the majority of their attackers were white.\textsuperscript{55} This is in comparison to women of other races who are more likely to be attacked by someone of the same race.\textsuperscript{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.\textsuperscript{57} In 2013 the U.S. Department of Justice’s Office on Violence Against Women wrote in a report to Congress:

\begin{quote}
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.\textsuperscript{58}
\end{quote}

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

\begin{footnotesize}
\begin{enumerate}
\item NCAI POLICY RSCH. CTR., POLICY INSIGHTS BRIEF: STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 2 (2013), https://perma.cc/UP9U-NAKS.
\item Condes, supra note 25, at 521–22.
\item Id.
\item Id.
\item See, e.g., Ruddell et al., supra note 7, at 8; Finn, supra note 19; Deer & Nagle, supra note 19; Fox, supra note 21.
\item U.S. DEPT OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, supra note 6, at 3 n.2.
\item 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).
\item U.S. DEPT OF STATE, THE LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING (June 2017), https://perma.cc/9P4W-XV3R.
\item Martin, supra note 6, at 9 (finding that “serious stranger violence—murder, rape, sexual assault, aggravated assault, and robbery—increased by 47%.”).
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\end{footnotesize}
Nations. Many peer-reviewed studies also document the relationship between extractive industries and increased levels of violence. Additionally, these impacts occur not only near oil fields but also near projects such as mines and pipelines. 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. 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. 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


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


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. 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. They note that “[t]ribes acting as decision makers are exercising their sovereignty, which is tied to the overall likelihood of tribal economic success.” They note that “[t]ribes acting as decision makers are exercising their sovereignty, which is tied to the overall likelihood of tribal economic success.” 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. Those practices include expanding the use of background checks, supporting data collection efforts, and financially supporting victim services.

Other examples of reforms include Congress returning criminal jurisdiction to tribes over non-Native people who commit crimes in Indian Country. 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.

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, and others are bringing legal challenges when agencies fail to meet this obligation. While some scholars have suggested this strategy, 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

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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.
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. Because the statutory language focuses on the "health and welfare of man" agencies are still required to cover many of the same impacts, albeit under a different banner. 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." 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.

81. See id.
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. 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. Specifically, NEPA requires an EIS for “major Federal actions significantly affecting the quality of the human environment.” Major federal actions include the issuance of easements for pipelines or permits for oil and gas wells. When evaluating those actions, an EIS must consider reasonable alternatives and mitigation measures. 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. 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.

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, although scholars question how meaningful this consultation process has been. As discussed more fully in Sec-

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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(c) (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 Preserv-
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. The public then has an additional opportunity to provide feedback by submitting comments on an agency’s draft EIS (“DEIS”).

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. For an EIS, a “hard look” requires that “the adverse environmental effects of the proposed action are adequately identified and evaluated.” Both judicial common law and agency regulations determine if an agency has fulfilled its obligations under NEPA. The Council on Environmental Quality (“CEQ”) issues NEPA implementing regulations, and then each agency adopts its own procedures for complying with those regulations.

In 2020, for the first time since 1978, the Trump administration finalized a new version of NEPA’s implementing regulations. The Trump regulations were more hostile to public comments than the previous regulations. However, the Biden administration promptly acted to undo those changes and restored much of the 1978 language in its regulations finalized in April 2022. CEQ further promised to issue a second set of changes to NEPA regulations that go beyond this initial restoration and focus on environmental justice.

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. Even so, the current NEPA language already allows for consideration of social, economic and environmental justice impacts.

94. ENV’T PROTECTION AGENCY, supra note 93.
96. See J.B. Ruhl, NEPA and Climate Change in the Courts, 36 NAT. RES. & ENV’T 52 (2021).
97. See supra note 84.
100. Fara & Clark, supra note 99.
101. Id.
102. 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.” 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.” 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.” If it does, the EIS obligation is triggered. Considerable litigation has occurred over whether an agency is required to produce an EIS. 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. Courts have denied petitioner’s 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. 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.” Because the building already existed and was merely being renovated, there was no “primary” environmental impact. Other circuit courts have similarly held that the

105. 42 U.S.C. § 4331.
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.\textsuperscript{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.\textsuperscript{112} Furthermore, any socioeconomic impacts to be evaluated in an EIS must be "interrelated" with environmental impacts.\textsuperscript{113} The recent Trump and Biden CEQ regulations both left this language in place.\textsuperscript{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.\textsuperscript{115} These types of impacts include expected loss of employment,\textsuperscript{116} the potential for "urban decay and blight,"\textsuperscript{117} and changes to traffic.\textsuperscript{118} While there is no definitive list of what counts as a socioeconomic impact, there is some limit to what a court will accept.\textsuperscript{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 "[i]ndirect effects, which are caused by the action and are later in time or far-

\textsuperscript{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).

\textsuperscript{112} 40 C.F.R. § 1502.16 (2022).

\textsuperscript{113} Id.

\textsuperscript{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).


\textsuperscript{117} Rochester v. U.S. Postal Serv., 541 F.2d 967, 973 (2d Cir. 1976).

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

\textsuperscript{119} See Hevia, supra note 107, at 722.
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ther removed in distance, but are still reasonably foreseeable.” 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. The reactor had been shut down for a safety assessment after a major accident at a nearby facility operated by the same owner. 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. Specifically, he wrote that the “element of risk lengthens the causal chain beyond the reach of NEPA.” 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. In Hanly v. Mitchell local residents challenged an Agency’s failure to consider the socioeconomic impacts of a detention facility proposed for downtown Manhattan. 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. Three years later, the Second Circuit again noted that NEPA required an Agency to consider an increase in crime. 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.

122. Id.
123. Id. at 774.
124. Id. at 775.
126. See Hanly v. Mitchell, 460 F.2d at 640.
127. See id. at 647; Kleindienst, 471 F.2d at 836.
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.”\textsuperscript{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.\textsuperscript{131}

A 2016 district court case exemplifies what analysis a court deems as a sufficient assessment of a project’s impacts on crime.\textsuperscript{132} Plaintiffs challenged the Department of the Interior for determining that an off-reservation tribal casino would not have a significant impact on crime.\textsuperscript{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.\textsuperscript{134} The court held that this was a thorough enough analysis to satisfy the “hard look” requirement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 314.
\textsuperscript{135} Id. at 315.
\textsuperscript{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.
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. This highlights the value of advocates explicitly raising issues of environmental justice in the earlier scoping phase public comment period or framing the issues as a socio-economic impact.

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. Following this rule, courts in multiple circuits have held that an agency’s environmental justice analysis was subject to review under the APA. This “standard is narrow and a court is not to substitute its judgment for that of the agency.” 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.

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


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.


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.


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Idaho, and California have ruled that an agency’s environmental justice analysis failed to meet the “arbitrary and capricious” standard under the APA.

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. 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. 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. For example, the facilities would impact air quality extending as far as 31 miles.

The District of D.C. has also highlighted issues about geographic demarcation and additionally emphasized an agency’s use of unsupported conclusions. 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. This demarcation left out the reservation of the Standing Rock Sioux Tribe which began 0.55 miles downstream of the crossing. 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. The court faulted the Agency for its unsupported “bare-bones conclusion” that the Tribe would not be disproportionately affected by a spill. Similarly, a district court judge in Idaho ruled that the Agency’s “consideration of environmental justice impacts [was] too cursory,” and a district court Judge

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.
164. Id.
165. Id. at 137.
166. Id. at 139.
167. Id. at 140.
from California ruled against an agency for asserting conclusions “absent a comprehensive analysis.”

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,\textsuperscript{170} which includes engagement with impacted tribal governments.\textsuperscript{171} Next, an agency begins to work on a DEIS, which can often take years to produce.\textsuperscript{172} Additionally, NEPA “requires that federal agencies consult with other agencies whose area of expertise is superior to their own.”\textsuperscript{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.\textsuperscript{174} The agency then responds to the substantive comments it receives, makes any changes that it deems necessary and publishes a final EIS (“FEIS”).\textsuperscript{175} Following the FEIS, an agency releases its Record of Decision announcing which alternative in the FEIS it decided on.\textsuperscript{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.\textsuperscript{177} Therefore, in order to influence the NEPA process for a specific project, advocates are best positioned if they participate in the comment process.

\textit{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.\textsuperscript{178} The project area is predominantly on land administered by BLM,\textsuperscript{170} \textsuperscript{171} \textsuperscript{172} \textsuperscript{173} \textsuperscript{174} \textsuperscript{175} \textsuperscript{176} \textsuperscript{177} \textsuperscript{178}
but the State administers 10% of the area. The Companies have oil and gas leases issued by BLM, in addition to leases from the State of Wyoming and private landowners. Some of the potentially significant environmental impacts include water pollution and threats to the endangered sage grouse. Therefore, BLM conducted a programmatic EIS 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.

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. Sixty-six percent of the population of Fremont County reside on the Reservation. The Companies expect an influx of industry workers and plan to construct a 700-person man camp. However, the man camp will only house 75% of their projected 935 workers during peak production. This would effectively be an 8% increase of the local population. 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. As part of this phase, the Agency had a public

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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).
184. *Id.* at 3-126.
185. *Id.*
187. *Id.*
188. *Id.*
comment period and held three public meetings. BLM also sent cooperating agency invitation letters to relevant agencies and tribal governments. 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. 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, including one comment that detailed why the DEIS should have evaluated the risks the project brought to Native women. 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. 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. 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.

One principle of environmental justice is that communities should speak for themselves. 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. 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. The Tribe’s comment expressed concern about the proposed permit.
because of its potential to pollute the Wind River. 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.

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.” It further acknowledged that “adverse impacts to quality of life factors, like crime, are likely to disproportionately affect tribal communities.”

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.

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.” Similarly, the rulings discussed in Section II.C. find that a “cursory” or “bare-bones” 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 Waste-water 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.
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, 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. 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. The history of the administrative process for the Keystone XL pipeline is complex for a variety of reasons.


209. Moneta Divide FEIS, supra note 13, at 3-128.

210. Moneta Divide FEIS, supra note 13, at 4-299.

including its national political significance, a change in proposed route, and the number of legal challenges to the environmental review process. Of particular relevance is that the State Department released a first FEIS in 2014, and then went through a second environmental review and released a second FEIS in 2019. 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.

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, a second commenter mentioned “sex trafficking” and a third mentioned “escort services.” 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. Therefore, the State Department concluded that it did not need to assess the potential for any violent impacts in the FEIS.

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. 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.


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.

“crisis of missing and slain Native American women.” 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. 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. 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. 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. 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.
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. For example, advocates could draw on the list of thirteen “best practices” discussed in Section I.

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. 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.

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.”

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.


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." 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 "bogeyman of environmental regulation." 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. The specific obligations of an EIS produced by a state agency will vary depending on each state’s SEPA and related judicial interpretation. Under SEPAs, state agencies are beginning to acknowledge the violent impacts of resource extraction projects through the environmental review process.

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. Line 3, proposed by

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236. *Id.* at 412.


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. MN. 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.
244. See LINE 5 DEIS, supra note 237, at 311–12.
245. Id. at 2.
247. See LINE 5 DEIS, supra note 237, at 312.
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.