

COMMENTS

BOOMING IMPACTS: ANALYZING BUREAU OF LAND MANAGEMENT AUTHORITY IN OIL AND GAS LEASING AMID THE MISSING AND MURDERED INDIGENOUS WOMEN’S CRISIS

ANGELA E. WASHINGTON*

INTRODUCTION	720
I. CHARGING TOWARD A DIM FUTURE: THE ENERGY DOMINANCE CAMPAIGN COMPROMISES SAFETY TO NATIVE WOMEN	723
A. <i>Extractive Industries and the Marginalization of Native Women</i>	723
B. <i>A Tale of Two Agendas</i>	728
1. <i>The Trump Administration’s Energy and Economic Instigation Priorities</i>	728
2. <i>Political Will to Address the Missing and Murdered Indigenous Women’s Crisis</i>	731
C. <i>Retreating from Responsibility Through Agency Guidance and Orders</i> ...	732
II. DEEP WELLS AND SHALLOW WATERS: THE BLM HAS THE AUTHORITY TO PROTECT NATIVE WOMEN.....	734
A. <i>Environmental Obligations Under the National Environmental Policy Act</i>	734
1. <i>Impacts of Oil and Gas Projects</i>	734
2. <i>The Lease Contract</i>	736
3. <i>Drilling and Development</i>	737

* J.D. Candidate, 2021, American University Washington College of Law; B.A. Political Science, 2010, University of Michigan. My gratitude begins with Professor Barry Breen for his guidance and encouragement during the drafting process. Special thanks to the editors of the *Administrative Law Review*, whose feedback and editorial assistance has been instrumental. Finally, I am deeply thankful for the unwavering support of my family and friends.

B.	<i>Duties to Protect in Oil and Gas Leasing</i>	738
1.	<i>Federal Land Policy and Management Act</i>	738
2.	<i>Mineral Leasing Act</i>	741
3.	<i>Indian Mineral Development Act</i>	741
C.	<i>Discretion in Oil and Gas Leasing</i>	743
III.	RECOMMENDATIONS: HOW TO RESTORE THE HUMAN	
	ENVIRONMENT FOR NATIVE WOMEN.....	744
A.	<i>Contemplate Threats in Oil and Gas Leasing</i>	746
B.	<i>Bolster Environmental Review</i>	747
C.	<i>Incorporate a Social Impacts Analysis</i>	748
	CONCLUSION	750

INTRODUCTION

“States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”

— United Nations Declaration on the Rights of Indigenous Peoples¹

Edith Chavez’s family became concerned when they had not heard from her.² She usually kept in touch with them through Facebook, but when her posts abruptly stopped, her sister, Ladonna, posted on her own Facebook page: “If you’re out there sister, PLEASE CALL.”³

Eleven days later, a friend picked up Edith from a hospital in a remote part of North Dakota, nearly 500 miles from her home on the Lake Vermilion Reservation in Minnesota.⁴ Edith had been abducted from a gas station, drugged, and transported to the Bakken oil patch.⁵ Her memories from the ordeal are hazy, but she suspects that her captors were human traffickers.⁶ Edith managed to escape and wandered for two days—without food or water—until a man, seeing she was injured, brought her to his

1. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 22 (Sept. 13, 2007).

2. Marshall Helmberger & Jodi Summit, *North Dakota Nightmare*, TIMBERJAY (June 3, 2015, 4:37 PM), <http://timberjay.com/stories/north-dakota-nightmare>, 12122.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

residence where members of his family cleaned the dried blood and dirt off of her.⁷ The identities of Edith’s captors are still unknown.⁸

Edith lived to document her ordeal, but many Native women⁹ have not.¹⁰ Sexual violence, kidnappings, and human trafficking have become familiar narratives in the Missing and Murdered Indigenous Women (MMIW) crisis.¹¹ Within this unconscionable anthology are so-called energy “boomtowns”¹² in the United States—areas near energy-rich sites that experience significant population growth and social change in a given timeframe—where tribal communities face a mounting public health crisis.¹³ Only recently has the link between rapid energy development in boomtowns and the victimization of tribal communities become pronounced due to

7. *Id.*

8. *Id.*

9. In this Comment, ‘Native women’ refers collectively to Native American and Alaskan Native women. An individual and a member of a tribe has the right to self-identify. Elizabeth Prine Pauls, *Tribal Nomenclature: American Indian, Native American, and First Nation*, ENCYC. BRITANNICA (Jan. 17, 2008), <https://www.britannica.com/topic/Tribal-Nomenclature-American-Indian-Native-American-and-First-Nation-1386025>.

10. Mary Annette Pember, *Missing and Murdered: No One Knows How Many Native Women Have Disappeared*, REWIRE.NEWS (Apr. 14, 2016, 10:42 AM), <https://rewire.news/article/2016/04/14/missing-murdered-no-one-knows-many-native-women-disappeared/> (quoting a coordinator of the Native Women’s Society: “When Native women go missing, they are very likely to be dead”).

11. See *MMIWG2S*, COALITION TO STOP VIOLENCE AGAINST NATIVE WOMEN, <https://www.csvanw.org/mmiw/> (last visited Nov. 21, 2020). Homicide is the fourth leading cause of death among Native women nineteen years of age and younger. *Leading Causes of Death – Females – Non-Hispanic American Indian or Alaska Native – United States, 2017*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/women/lcod/2017/nonhispanic-native/index.htm> (Nov. 20, 2019).

12. See Carol A. Archbold et al., *Policing “The Patch”: Police Response to Rapid Population Growth in Oil Boomtowns in Western North Dakota*, 17 POLICE Q. 386, 387–88 (2014) (comparing definitions of “boomtown” based on population influxes or local characteristics).

13. A National Institute of Justice-funded study found significant increases in violence in oil-developed crime “hot spots” in North Dakota and Montana. DHEESHANA S. JAYASUNDARA ET AL., EXPLORATORY RESEARCH ON THE IMPACT OF THE GROWING OIL INDUSTRY IN NORTH DAKOTA AND MONTANA ON DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING: A FINAL SUMMARY OVERVIEW 6–8 (2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/250378.pdf> (concluding that increased patterns of crime and victimization in oil-impacted counties were consistent with steep population shifts and demographic changes); see also Rebecca Adamson, *Vulnerabilities of Women in Extractive Industries*, 2 ANTYAJAA: INDIAN J. WOMEN & SOC. CHANGE 24, 25 (2017) (calling sexual violence the “dirty little secret[]” of oil, gas, and mineral booms).

enhanced data collection and the media's reporting of violence against tribal communities.¹⁴

With the advice of tribal leaders, the federal government has begun to address the significance of the MMIW crisis¹⁵ by dedicating substantial resources to improving data collection, conducting federal criminal investigations, and prioritizing outreach.¹⁶ Notwithstanding these commitments, the Trump Administration's "energy dominance" agenda¹⁷ diametrically opposed safeguarding Native women's right to be free from victimization within tribal communities.¹⁸ Central to this tension is the Department of the Interior's (DOI's) Bureau of Land Management's (BLM's) regulatory posture toward the oil and gas leasing process in recent years.¹⁹

14. See Archbold et al., *supra* note 12, at 407–09; see also Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), <https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/> (profiling crimes in North Dakota stemming from the residual effects of oil booms—an influx of workers, a surge of cash flow, and limited jail space).

15. Exec. Order No. 13,898, 84 Fed. Reg. 66,059, 66,059 (Dec. 2, 2019).

16. See Press Release, White House, Statement from the Press Secretary Regarding the Signing of Savanna's Act and the Not Invisible Act (Oct. 10, 2020), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-signing-savannas-act-not-invisible-act/> (announcing the signing of two laws—S. 227, Savanna's Act, and S. 982, the Not Invisible Act of 2019—to address the problem of violent crime in Indian Country); OFF. OF VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., 2019 UPDATE ON THE STATUS OF TRIBAL CONSULTATION RECOMMENDATIONS 4–8 (2019), <https://www.justice.gov/file/1197171/download>.

17. *Fact Sheets: President Donald J. Trump Is Unleashing American Energy Dominance*, WHITE HOUSE (May 14, 2019) [hereinafter *Unleashing American Energy*], <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unleashing-american-energy-dominance/>.

18. This Comment's scope is limited to lands under the Department of the Interior's (DOI's) authority—the public lands on which oil and gas projects occur and the trust lands that recognized federal tribes reside on and near. Under the Indian Reorganization Act, the DOI may accept fee land into "trust" only for the benefit of members of recognized tribes. *Carcieri v. Salazar*, 555 U.S. 379, 387–88 (2009). As such, the United States has a "unique trust responsibility to protect and support Indian tribes and Indians." 25 U.S.C. § 5601(3); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (conceptualizing tribal sovereignty on balance with the United States' inherent role as a guardian); Tribal Law and Order Act of 2010, H.R. 725, 111th Cong. § 202(a)(1) (2010) ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country."); *Fee to Trust*, BUREAU OF INDIAN AFFS., <https://www.bia.gov/bia/ots/fee-to-trust> (last visited Nov. 21, 2020). Some commenters, however, doubt the practical implications of the legal doctrine. See Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENV'T L. 437, 513–14 (2010) (reviewing scholars' skepticism of the trust doctrine as applied to development).

19. See *infra* Part I.C.

This Comment argues that the BLM must anticipate and plan for Native women's safety concerns by analyzing the human environmental²⁰ consequences of extractive projects on federal and Indian lands.²¹ Without these considerations, the BLM's increasingly obsequious leasing process puts Native communities—particularly Native women—at risk.²² Part I of this Comment overviews how rapid energy development projects impact Native women and explores the friction between the Trump Administration's energy dominance agenda and efforts to address the MMIW crisis. Part II argues that the BLM must account for the human environmental impacts stemming from the oil and gas leasing process. Accordingly, Part III recommends that the BLM change its policies and procedures to reflect the potential negative environmental consequences of leasing to extractive industries.

I. CHARGING TOWARD A DIM FUTURE: THE ENERGY DOMINANCE CAMPAIGN COMPROMISES SAFETY TO NATIVE WOMEN

A. *Extractive Industries and the Marginalization of Native Women*

Because law enforcement never apprehended Edith's captors, she continues to relive the trauma from her ordeal.²³ As a starting point, understanding the origins of crimes committed against Native women is prudent in implementing preventative measures to address the MMIW crisis.

Native women experience a disproportionate level of violence compared to non-Natives.²⁴ A 2016 Department of Justice-funded study found that in

20. Council on Environmental Quality (CEQ), 40 C.F.R. § 1508.14 (2019) (defining "human environment" as the relationship of people with their natural and physical environment).

21. Because this Comment analyzes the Bureau of Land Management's (BLM's) administration of lease sales of federal *onshore* resources through the lens of the Missing and Murdered Indigenous Women (MMIW) crisis, it does not discuss the Bureau of Ocean Energy Management's *offshore* resource program in federal waters. See Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701(a)(9); *infra* Part II.C (supplying an overview of the BLM's legal authority to regulate oil and gas leasing).

22. While this Comment primarily focuses on safety risks posed to Native women due to the issues identified in the MMIW crisis, it recognizes that any measures recommended in response to prevent and plan for disruptions from oil and gas firms' projects in mining, drilling, and extraction also implicate the wider tribal community.

23. Helmberger & Summit, *supra* note 2 ("[W]ho knows who else he's done this to . . .").

24. Andre B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT'L INST. JUST. J., Sept. 2016, at 38, 40, <https://www.ncjrs.gov/pdffiles1/nij/249821.pdf>; see also Press Release, U.S. Dep't of Just., Attorney General William P. Barr Launches National Strategy to Address Missing and Murdered Indigenous Persons (Nov. 22, 2019).

the United States, “Native women are 1.2 times as likely as non-Hispanic white women to have experienced violence in their lifetimes.”²⁵ In energy boomtowns, Native women are particularly susceptible to becoming crime victims due to their locations in rural and remote communities.²⁶ Attention must be given not only to the aftermath of these crimes but also to anticipating the setting and community design that breeds them.

Extractive projects fundamentally alter a community’s landscape due to significant—yet poorly anticipated—population shifts. Once the BLM approves an oil and gas lease, workforce growth in the surrounding area increases demand for essential supplies and services.²⁷ Housing and food costs rise.²⁸ Law enforcement agencies are overwhelmed because, while their budgets remain the same, crime increases throughout the vast stretches of reservations and adjacent lands they patrol.²⁹ Public health agencies that provide critical mental health and substance abuse treatment become even more necessary for the community but are suddenly unable to meet the increased demand for their services.³⁰

The nature of rapid energy development is such that the oil and gas firms hire mostly transient male workers who live in temporary, makeshift housing referred to as “man camps” near tribal communities.³¹ The oil and gas

25. Rosay, *supra* note 24.

26. See *supra* notes 13–14 and accompanying text (correlating boomtowns with increased violence); see also 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, 5 (2017) (asserting that the generational and historical trauma of colonial violence, along with economic instability, mental health issues, and substance abuse in Native communities, make Native women and children vulnerable to trafficking); RALPH B. TAYLOR & ADELE V. HARRIS, *PHYSICAL ENVIRONMENT AND CRIME* 17 (1996), <https://www.ncjrs.gov/pdffiles/physenv.pdf> (suggesting that offenders are more likely to commit crimes when they sense a neighborhood’s vulnerability because they are less likely to be detected).

27. See Victoria Sweet, *Extracting More than Resources: Human Security and Arctic Indigenous Women*, 37 SEATTLE U. L. REV. 1157, 1170–71 (2014) (observing that new workers increase the disposable income flowing into the community and drive up prices for “everything from housing to food”).

28. See *id.* (discussing impact of extractive projects on local economies).

29. Finn et al., *supra* note 26, at 9 (citing a statistic that the Three Affiliated Tribes, located on the Fort Berthold Indian Reservation, had fewer than “twenty tribal officers to cover the nearly one million acres of rural land”).

30. *Id.* at 8.

31. Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. GENDER & L. 31, 75–76 (2019).

industry is male-dominated, with male workers reaping the economic benefits while women experience far fewer employment opportunities.³²

In this setting, Native women are particularly susceptible to human trafficking due to their concomitant exposure to risk factors, including domestic violence, sexual assault, economic exploitation, and generational poverty.³³ Energy boomtowns also exacerbate socioeconomic inequalities for Native women living from that land, adding another layer of challenges that tribal communities must confront without adequate legal, health, or social support services.³⁴ Consequently, the imbalanced—and gendered—effects of energy development facilitate a sex work industry.³⁵

While no one root cause exists as to why energy boomtowns have adversely impacted Native women, researchers agree that the rapid growth of male laborers in energy boomtowns directly corresponds with the development of a sex work industry and an increase in sexual assaults against Native women.³⁶ In 2015, a coalition of Native American and women’s organizations sought intervention from the United Nations to raise awareness regarding the sexual violence against Native women in the Bakken oil fields.³⁷ For instance, in a

32. See generally Gretchen Ennis et al., *A Boom for Whom? Exploring the Impacts of a Rapid Increase in the Male Population upon Women’s Services in Darwin, Northern Territory*, 23 VIOLENCE AGAINST WOMEN 535, 547–48 (2017) (evaluating perspectives of women’s support service providers in Australia responding to rapid population change driven by mining).

33. Finn et al., *supra* note 26, at 5–6; see also Alexander Klein, *Update: Tribes Not Relying on Federal Assistance to Safeguard Native Women*, 26 NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION, Mar. 2020, at 1 (noting that nearly half of the 4,000 cases of missing Native women in the Great Plains region of the United States and Canada involved sex trafficking, domestic violence, or sexual assault).

34. Finn et al., *supra* note 26, at 5–6 (“[S]ocioeconomic inequality is a major facilitator of entry into the sex trade . . .”).

35. *Id.*

36. See Archbold et al., *supra* note 12, at 387–91, 407 (reviewing scholarly literature on how rapid population growth in energy boomtowns results in more public demand for law enforcement intervention); Nicholas Thorne, *Missing and Murdered Indigenous Women and Pipelines*, ARCGIS STORYMAPS (May 7, 2020), <https://storymaps.arcgis.com/stories/2e4aa189164a41e282820ac8731be588> (demonstrating the relationship between energy production and MMIW cases in Montana, North Dakota, South Dakota, and Nebraska).

37. *Native American and Women’s Organizations Request UN Help on Sexual Violence*, INDIAN COUNTRY TODAY (May 12, 2015), https://newsmaven.io/indiancountrytoday/archive/native-american-and-women-s-organizations-request-un-help-on-sexual-violence_srxHIWjqEmyrmz9OPMmZw (specifying that the Bakkan oil fields cover North Dakota, Eastern Montana, and the Tar Sands region of Alberta, Canada).

2019 case study on the Bakken oil-producing region, the victimization rate for Native Americans was 2.5 times higher than for white Americans.³⁸

In addition to the gendered socioeconomic imbalances in energy boomtowns, Native communities are geographically positioned in resource-rich areas that support rapid energy development.³⁹ Tribes' locations throughout the United States are swept up in these projects as large plots of tribal land are directly in the paths of planned energy infrastructure projects.⁴⁰ When oil and gas firms move into these areas, they bring transient outsiders who may lack respect for local cultures, customs, or laws due to the absence of a preexisting connection with the community.⁴¹ Tribes have raised concerns about members' health and safety due to a generalized mistrust of these firms entering their communities.⁴² Between planning for rapid energy development and maintaining the geographical integrity of their communities, tribes are uniquely impacted by extractive industries due to their social, cultural, and subsistence-dependent ties to their land.⁴³

38. KIMBERLY MARTIN ET AL., RTI INT'L, VIOLENT VICTIMIZATION KNOWN TO LAW ENFORCEMENT IN THE BAKKEN OIL-PRODUCING REGION OF MONTANA AND NORTH DAKOTA, 2006–2012, at 9–10 (2019), <https://www.ncjrs.gov/pdffiles1/bjs/grants/252619.pdf>.

39. Nadia B. Ahmad, *Trust or Bust: Complications with Tribal Trust Obligations and Environmental Sovereignty*, 41 VT. L. REV. 799, 802 (2017).

40. Sweet, *supra* note 27, at 1167.

41. *Id.* at 1166; *see also* NAT'L CONG. OF AM. INDIANS, RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 1–2 (2018), http://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf (asserting that non-Native perpetrators are most likely to commit violence against Native women).

42. *See* Complaint at 1, *Mandan, Hidatsa, & Arikara Nation v. Zinke*, 358 F. Supp. 3d. 1 (D.D.C. 2019) (No 1:18-CV-01462) (seeking review of the DOI's decision to grant oil and gas permits for a project that threatens tribes' natural, cultural, and recreational resources); Martha Powers et al., *Popular Epidemiology and "Fracking": Citizens' Concerns Regarding the Economic, Environmental, Health and Social Impacts of Unconventional Natural Gas Drilling Operations*, 40 J. CMTY. HEALTH 534, 536–39 (2015) (finding that, of the 215 letters received in response to a community survey of the perceived effects of natural gas drilling, sixty-five related to threats to water, forty-six were concerning changes to the landscape, and 107 were based on socioeconomic inequalities); Rebecca Clarren, *Idle Oil, Gas Wells Threaten Indian Tribes While Energy Companies, Regulators Do Little*, INVESTIGATE W. (Sept. 5, 2018), <https://www.invw.org/2018/09/05/idle-oil-gas-wells-threaten-indian-tribes-while-energy-companies-and-regulators-do-little/> (discussing the environmental concerns with the hundreds of inactive oil and gas wells on tribal lands).

43. UNIV. OF N.M. SCH. OF L. NAT. RES. & ENV'T L. CLINIC, ENERGY DEVELOPMENT IMPACTS ON INDIGENOUS PEOPLES 15 (2017), <https://lawschool.unm.edu/events/united-nations/docs/energy-development-impact-on-indigenous-peoples-final-report.pdf>.

In sum, Native women are a vulnerable population when it comes to energy development near their communities. Historical oppression rooted in colonialism contextualizes Native women's lack of political clout to challenge present-day conditions.⁴⁴ Coupled with the descent of large numbers of outside male workers "with time and money on their hands" upon their communities, the situation is ripe for criminal activity.⁴⁵

The influx of oil or gas workers to energy boomtowns has overwhelmed tribal and state law enforcement agencies.⁴⁶ For tribal governments seeking to protect Native women, resource constraints and jurisdictional limitations prevent them from policing effectively.⁴⁷ Scholars and the courts have grappled with the meaning of the tribes' relationships to the federal government as it relates to land ownership and sovereignty.⁴⁸ Despite conflicting interpretations, three principles reflect why this is the case. First, recognized tribes in the United States hold a unique legal status as inherent sovereigns—self-governing and politically independent.⁴⁹ Second, although tribes can exercise authority over their members, they generally lack jurisdiction over non-Natives on non-Indian land within tribal territory.⁵⁰ In *Oliphant v. Suquamish Indian Tribe*,⁵¹ the Supreme Court held that tribes cannot prosecute non-Indians who commit crimes within tribal territory.⁵² Thus, the jurisdictional reach of state, federal, or tribal law enforcement depends on where the crime took place, the identities of the offender and victim, and

44. Finn et al., *supra* note 26, at 5.

45. Adamson, *supra* note 13, at 25.

46. Crane-Murdoch, *supra* note 14.

47. See Finn et al., *supra* note 26, at 9–10; see also Justice for Native Survivors of Sexual Violence Act, S. 288, 116th Cong. § 2 (2019) (proposing to expand tribal jurisdiction over non-Native defendants accused of a violent crime).

48. Compare *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil."), with 1 COHEN'S HANDBOOK OF FED. INDIAN L. § 4.01(1)(a), Lexis (Neil Jessup Newton et al. eds., database updated June 2019) [hereinafter COHEN'S HANDBOOK] (explaining that although Courts recognize tribes as sovereign, self-governing entities, they are subject to a protectorate relationship with the United States), and Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 157–60 (2006) (reviewing the evolution of implicit divestiture, the doctrine that an Indian tribe's inherent sovereignty can be eroded even absent a treaty or congressional act).

49. COHEN'S HANDBOOK, *supra* note 48.

50. Deer & Warner, *supra* note 31, at 40–42.

51. 435 U.S. 191 (1978).

52. *Id.* at 209 (quoting *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823)) (affirming that tribal governments assent to the authority of the United States and its laws, and are thus constrained in their authority).

whether a federal enclave statute covers the crime.⁵³ Third, the federal government has a fiduciary trust relationship with federally-recognized tribes and, along with its duty to protect tribal interests, may also regulate Indian affairs using its plenary power.⁵⁴

This jurisdictional milieu results in slow responses to cases, stale evidence that leads to dead ends, and reluctance by local law enforcement to open and investigate future cases.⁵⁵ With outsiders exploiting the limits of tribal jurisdiction and the unlikelihood of prosecution for their offenses, Native women become vulnerable targets of crimes with no legal redress.⁵⁶

B. *A Tale of Two Agendas*

1. *The Trump Administration's Energy and Economic Instigation Priorities*

The Trump Administration's early controversial move to withdraw the United States from the Paris Climate Accord was a harbinger of its "energy dominance" campaign.⁵⁷ The Executive's commitment to maximizing wealth through the energy sector has been realized through plans to privatize public and private land.⁵⁸ Executive action has generated the most

53. Federal enclave statutes apply to land within a state that is under the "special maritime and territorial jurisdiction of the United States." 18 U.S.C. §§ 7(3), 13(a); Finn et al., *supra* note 26, at 3.

54. *Mission Statement*, BUREAU OF INDIAN AFFS., <https://www.bia.gov/bia> (last visited Nov. 21, 2020); *see also supra* note 18 and accompanying text (describing nuances of the federal government's authority when it holds lands in trust for the tribes).

55. Nick Martin, *The Connection Between Pipelines and Sexual Violence*, NEW REPUBLIC (Oct. 15, 2019), <https://newrepublic.com/article/155367/connection-pipelines-sexual-violence>.

56. *See* Finn et al., *supra* note 26, at 24 (explaining that Congress recognizes jurisdictional issues as a major factor in violent crime rates against Native women); Crane-Murdoch, *supra* note 14.

57. Press Release, Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/>; Scott Streater, *Trump Admin Plans 2020 Approvals for Major Projects*, E&E NEWS (Jan. 2, 2020), <https://www.eenews.net/stories/1061975241> (listing anticipated solar and wind projects). The overview of administrative actions in this Part is not an exhaustive list of actions that have diminished the pivotal role of federal agencies that are obliged by law to protect the environment. Nadja Popovich et al., *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List*, N.Y. TIMES, <https://nyti.ms/2L3DbcI> (Oct. 15, 2020) (listing rules the Administration has overturned or is in the process of rolling back).

58. Anna M. Phillips, *Trump Fracking Plan Targets over 1 Million Acres in California*, L.A. TIMES (Apr. 25, 2019, 5:12 PM), <https://www.latimes.com/politics/la-na-pol-trump-fracking-oil-gas-california-20190425-story.html>.

enduring policies in this arena and has dramatically influenced the BLM's administration over oil, gas, and mineral permitting and leasing programs.

The BLM has the sole discretion to identify parcels for lease sales and controls the permitting process for industries seeking to operate on them.⁵⁹ In this capacity, the BLM has a duty to take a “hard look”⁶⁰ when analyzing the environmental consequences from extractive projects conducted on public lands.⁶¹ The BLM's involvement in mitigating the impacts of these projects has receded due to the Trump Administration's deregulation policies—effectuated primarily through Executive Order (EO) 13,771 to reduce regulations.⁶²

Following EO 13,771, a series of EOs supported swift energy development to spur economic growth at the expense of meaningful environmental review.⁶³ Two of these EOs set the energy dominance agenda by pressing to prioritize infrastructure projects and related energy production.⁶⁴ First, EO 13,783 directed agencies to identify “all existing regulations, orders, guidance documents, [and] policies” that could “potentially burden” the production

59. See Statement of William Perry Pendley, Deputy Dir. for Program & Pol'y, Bureau of Land Mgmt. 3 (Mar. 10, 2020), in *Examining the Policies and Priorities of the Bureau of Land Management: Hearing Before the H. Subcomm. on Energy & Min. Res. of the H. Comm. on Nat. Res.*, 116th Cong. (2020), <https://docs.house.gov/meetings/II/II06/20200310/110667/HHRG-116-II06-Wstate-PendleyW-20200310.pdf> (characterizing the BLM's role as both a “business partner[]” and an “environmental steward[]”).

60. See *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (demonstrating how an agency's failure to engage in reasoned decisionmaking opens an action up to judicial review).

61. See FLPMA, 43 U.S.C. § 1701(a)(8) (declaring that public land management must consider the environmental and ecological value of that land); see also 43 C.F.R. § 8360.0-5(d) (2018) (defining public lands); *General Oil and Gas Leasing Instructions*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/general-leasing> (last visited Nov. 21, 2020) (explaining that competitive and noncompetitive leases are generally issued for ten years but can be extended).

62. Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Feb. 3, 2017) (“[F]or every one new regulation issued, at least two prior regulations [must] be identified for elimination”); see generally Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA), 85 Fed. Reg. 43,304, 43,362–63, 43,374–75 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1508, 1515–1518) (final rule) (establishing presumptive time limits and barring the scope of effects that might be considered in environmental reviews).

63. See *Unleashing American Energy*, *supra* note 17 (announcing a regulatory plan for energy development).

64. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,093 (Mar. 31, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,463 (Aug. 24, 2017).

of domestic natural resources.⁶⁵ Second, EO 13,807—issued the same year as EO 13,783—explicitly stated that the management of environmental reviews and permit decisions had impeded important infrastructure projects.⁶⁶ EO 13,807 sought to expedite “environmental reviews and authorizations for major infrastructure projects” by condensing federal agencies’ various roles during the environmental review of a single project into one coordinated Environmental Impact Statement (EIS) and a single Record of Decision (ROD).⁶⁷

Critics of this effort argue that agencies would be subjected to demanding—if not impossible—timelines that would dilute environmental review and diminish agencies’ role in the permit process, all for naught.⁶⁸ Conversely, proponents argue that streamlining for purposes of efficiency and assigning timetables with targeted goals aligns appropriately with Congress’s intent in enacting the National Environmental Policy Act (NEPA)—the environmental law mandating that federal agencies conduct an EIS whenever there is a “major [f]ederal action.”⁶⁹

The United States’ withdrawal from the Paris Climate Accord may have dominated the conversation for the first half of the Trump Administration, but the changes to the environmental review process were the focus of the second half. Under EO 13,868, the scope of federal permitting projects—such as pipeline construction—and the conditions that agencies could attach to them became narrower.⁷⁰ Moreover, with the finalization of the Council on Environmental Quality’s NEPA regulations, a host of infrastructure projects could become “non-[f]ederal” and exempt from environmental review if the project lacks minimal government funding or “minimal [f]ederal involvement.”⁷¹ Notwithstanding that federal agencies act while safeguarding

65. Exec. Order No. 13,783, 82 Fed. Reg. at 16,093.

66. Exec. Order No. 13,807, 82 Fed. Reg. at 40,463.

67. *Id.* at 40,466.

68. See Alejandro E. Camacho, *What President Trump’s Infrastructure Agenda Gets Wrong*, REGUL. REV. (May 6, 2019), <https://www.theregreview.org/2019/05/06/camacho-what-president-trumps-infrastructure-agenda-gets-wrong/> (noting that there is no evidence that agencies’ environmental reviews have caused delays in federal permitting).

69. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(C); H.R. REP. NO. 91-765, at 9 (1969) (Conf. Rep.) (suggesting “a time limitation for the receipt of comments from [f]ederal, [s]tate, and local agencies” to “prevent undue delay of [f]ederal proposals”).

70. Exec. Order No. 13,868, 84 Fed. Reg. 15,495, 15,495–96 (Apr. 15, 2019).

71. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA), 85 Fed. Reg. 43,304, 43,345–47 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1508, 1515–1518). The regulations are silent with respect to a specific threshold federal funding amount or the parameters of agency involvement that would be required to trigger the NEPA. *Id.* at 43,347 (“CEQ expects that the agencies will further

the environment in consideration of “public health and safety,” the regulations recede environmental review and pose to have a chilling effect on the NEPA’s mandate.⁷²

2. *Political Will to Address the Missing and Murdered Indigenous Women’s Crisis*

The MMIW crisis has captured the attention of lawmakers, researchers, and advocates as one of the most significant public health epidemics facing tribal communities.⁷³ The Trump Administration acknowledged the failures to address the MMIW crisis.⁷⁴ On November 26, 2019, the Trump Administration issued an EO calling on federal agencies to undertake innovative and aggressive solutions to reduce the historic levels of violence against Native women.⁷⁵ Noticeably absent from the EO, however, is how rapid energy development has contributed to the MMIW crisis, and whether the federal government should act in this space.⁷⁶

Separating an environmental analysis into two spheres—natural and human—may be productive for the practical purposes of collecting data to demonstrate the environmental impacts from a single project.⁷⁷ However, considering the two spheres in isolation risks unintended consequences in both when pursuing policy efforts. The Trump Administration’s myopic commitment to leasing more onshore oil and gas exacerbated Native women’s

define these non-major actions, for which the agency does not exercise sufficient control and responsibility over the outcome of the project, in their agency NEPA procedures.”).

72. *Id.* at 43,360; *see also* NEPA, 42 U.S.C. § 4332(C) (requiring a “detailed statement” explaining “environmental impact,” “adverse environmental effects,” and “alternatives”). *But see* 42 U.S.C. § 4332(B) (requiring federal agencies to “develop methods and procedures” to present environmental considerations “along with economic and technical considerations” in the Environmental Impact Statement (EIS)).

73. *See supra* Part I.A (covering the empirical research correlating extractive industries with threats to Native women’s safety).

74. *Supra* notes 15–16 and accompanying text.

75. *See* Exec. Order No. 13,898, 84 Fed. Reg. 66,059, 66,059 (Dec. 2, 2019) (establishing a task force led by the Departments of Justice and Interior “to enhance the operation of the criminal justice system” with regard to violence against Native women).

76. *See supra* Part I.A.

77. *Cf.* 1 BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, COASTAL PLAIN OIL AND GAS LEASING PROGRAM ENVIRONMENTAL IMPACT STATEMENT 3-24 to 3-25 (2019), https://eplanning.blm.gov/public_projects/nepa/102555/20003762/250004418/Volume_1_ExecSummary_Ch1-3_References_Glossary.pdf (describing how noise and wildlife could impact Native villages located near the proposed project).

vulnerabilities to extractive industries and their workers.⁷⁸ Expedited environmental review—and the imposition of standards that narrow which projects get reviewed—leads to a haphazard leasing process that does not anticipate the adverse impacts on communities from major oil and gas leasing activities.⁷⁹

The BLM can protect tribal communities residing on or near land that private industries use for energy development through its leasing and permitting process. Against the backdrop of the MMIW crisis, however, the Trump Administration’s energy dominance agenda overshadowed any initiatives it undertook elsewhere with Native women’s security in mind. Presently, firms leasing public and tribal land for oil and gas projects have expansive discretion regarding whom they hire and often lack responsibility for the looming presence of their workforce.⁸⁰

C. *Retreating from Responsibility Through Agency Guidance and Orders*

Under the Federal Land Policy and Management Act (FLPMA), there are several types of “formal orders” that may apply to onshore oil and gas program leases, including onshore oil and gas orders and BLM instructional handbooks.⁸¹ EOs are another type of formal order that require federal agencies to act (or not to act) under their existing regulatory framework.⁸² During the Trump Administration, EOs formed the basis for the DOI’s Secretarial Orders (SOs).⁸³ In turn, the SOs have transformed the DOI’s

78. See Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Rep. of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples*, ¶¶ 52–55, U.N. Doc. A/72/186 (July 21, 2017).

79. See *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319, 1332–33, 1335 (D. Idaho 2019) (granting a preliminary injunction and holding that organizations were likely to succeed on their claims that the BLM failed to take a hard look and consider reasonable alternatives and cumulative impacts under the NEPA and the Administrative Procedure Act); Cooper McKim, *BLM Vacates Well Approval Following Pushback*, WYO. PUB. RADIO (Feb. 13, 2020), <https://www.wyomingpublicmedia.org/post/blm-vacates-well-approval-following-pushback#stream/0> (reporting an environmental group’s challenge to a major drilling project, which the BLM unsuccessfully argued did not require an Environmental Assessment (EA) because the project qualified as a categorical exclusion under CEQ regulations).

80. See Crane-Murdoch, *supra* note 14.

81. Bruce M. Pendery, *BLM’s Retained Rights: How Requiring Environmental Protection Fulfills Oil and Gas Lease Obligations*, 40 ENV’T L. 599, 650 (2010).

82. See *supra* Part I.B.1 (explaining how the Trump Administration used Executive Orders to direct agency action to implement its energy agenda).

83. See, e.g., U.S. DEP’T OF THE INTERIOR, ORDER NO. 3354, SUPPORTING AND IMPROVING THE FEDERAL ONSHORE OIL AND GAS LEASING PROGRAM (2017), <https://www.doi.gov/sites/doi.gov/files/uploads/doi-so-3354.pdf> (streamlining permitting applications); Nick Snow, *BLM*

environmental review by modifying the depth of the BLM's and states' jurisdiction over permitting and leasing programs.⁸⁴

The DOI's rollbacks of Obama Administration oversight programs illuminate its support of energy resource expansion at the behest of the Trump Administration.⁸⁵ Under the Obama Administration, the DOI imposed restrictions on extractive industries by pausing their operational programs and requiring additional assessment of the environmental and public health impacts posed by drilling and mining activities.⁸⁶ For instance, SO 3330 stressed the importance of ensuring that energy development was in harmony with conservation practices.⁸⁷ Furthermore, the SO affirmed the DOI's broad review and permitting responsibilities and included—as part of its strategy—regional mitigation plans to assess resource concerns in several areas (biological, ecological, cultural, and scenic, etc.).⁸⁸ The SO also

Discontinues Master Leasing Plans as Part of a Broader Review, OIL & GAS J. (Feb. 2, 2018), <https://www.ogj.com/general-interest/government/article/17297827/blm-discontinues-master-leasing-plans-as-part-of-a-broader-review> (discussing the discontinuance of master leasing plans under Secretarial Order (SO) 3354, which gave additional time in land use planning for environmental review of proposed projects on resource-contested areas).

84. See *infra* notes 85–91 and accompanying text (examining the transformative effect DOI's SOs have on the BLM's authority to conduct environmental reviews during the permitting and leasing process).

85. See U.S. DEP'T OF THE INTERIOR, ORDER NO. 3348, CONCERNING THE FEDERAL COAL MORATORIUM (2017) [hereinafter CONCERNING COAL SO], https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf (halting a federal coal program not in the public's interest); U.S. DEP'T OF THE INTERIOR, ORDER NO. 3349, AMERICAN ENERGY INDEPENDENCE (2017) [hereinafter AMERICAN ENERGY SO], https://www.doi.gov/sites/doi.gov/files/uploads/so_3349_american_energy_independence.pdf (rescinding Mitigation Policies SO).

86. See U.S. DEP'T OF THE INTERIOR, ORDER NO. 3338, DISCRETIONARY PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT TO MODERNIZE THE FEDERAL COAL PROGRAM (2016) [hereinafter DPEIS SO], https://www.doi.gov/sites/doi.gov/files/elips/documents/archived-3338-discretionary_programmatic_environmental_impact_statement_to_modernize_the_federal_coal_program.pdf (pausing certain leasing programs for coal while agencies develop more comprehensive environmental review procedures); Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, 2015 DAILY COMP. PRES. DOC. 780 (Nov. 3, 2015), <https://www.govinfo.gov/content/pkg/DCPD-201500780/pdf/DCPD-201500780.pdf> (directing agencies to develop approaches to minimize and mitigate identified environmental impacts); U.S. DEP'T OF THE INTERIOR, ORDER NO. 3330, IMPROVING MITIGATION POLICIES AND PRACTICES OF THE DEPARTMENT OF THE INTERIOR (2013) [hereinafter MITIGATION POLICIES SO], <https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Secretarial-Order-Mitigation.pdf>.

87. MITIGATION POLICIES SO, *supra* note 86, at 4.

88. *Id.* at 1, 3.

instructed a DOI task force to identify early on—for instance, during the scoping or pre-application phase—the steps to ensure that mitigation opportunities were identified.⁸⁹

Consistent with the Obama Administration’s decision to promote both energy development and conservation values, the SO, “Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program,” instructed the BLM to carefully determine whether its coal leasing program remained compliant with the NEPA and ensured the United States was getting the fair market value for its sales.⁹⁰ That order was based on concerns from stakeholders and the Government Accountability Office asking whether an abundance of a commodity could result in negative environmental and health outcomes.⁹¹ The Trump Administration did not explore this question during its energy dominance campaign.

II. DEEP WELLS AND SHALLOW WATERS: THE BLM HAS THE AUTHORITY TO PROTECT NATIVE WOMEN

A. *Environmental Obligations Under the National Environmental Policy Act*

1. *Impacts of Oil and Gas Projects*

Congress mandated that the BLM manage, develop, and enhance public lands in a way that protects the environment.⁹² In regulating onshore energy resources through leasing and permitting, the BLM must act as a steward for the public lands by reviewing the environmental impacts of proposed projects under the bedrock environmental law, the NEPA. Under the NEPA, the agency must prepare either an Environmental Assessment (EA) (for smaller-scale oil and gas projects) or an EIS for lease auctions or sales.⁹³ The BLM’s actions during the oil and gas leasing process—from identifying parcels for lease sale to exploration and drilling for energy extraction—are considered “major [f]ederal actions significantly affecting

89. *Id.* at 4.

90. DPEIS SO, *supra* note 86, at 6–8.

91. *Id.* at 3.

92. *See* FLPMA, 43 U.S.C. § 1701(a)(8), (a)(11) (requiring that the federal government manage public lands in a manner that safeguards their environmental and natural qualities).

93. *See* NEPA, 42 U.S.C. § 4332(C); *How We Manage*, BUREAU OF LAND MGMT., <https://www.blm.gov/about/how-we-manage> (last visited Nov. 21, 2020) (explaining the BLM’s balanced approach to managing public land with respect to environmental obligations).

the environment,” which triggers preparation of the EIS.⁹⁴ An agency’s review is adequate if it has sufficient information for a court to reasonably understand the anticipated environmental degradation from a “major [f]ederal action” on balance with any derived benefits.⁹⁵

Pursuant to the FLPMA and its applicable land-use planning regulations, the BLM is required to identify public lands that may be leased.⁹⁶ To identify public lands for auction, the BLM develops a Resource Management Plan (RMP)—a type of order that is part of land use planning and requires compliance with the FLPMA and the NEPA.⁹⁷ States have regional field offices that must adhere to these RMPs when preparing land for lease sale and auction.⁹⁸ The BLM must analyze site-specific environmental impacts and assess reasonable alternatives to mitigate any impacts before lease issuance.⁹⁹ Oil and gas leases are subject to the RMP that applies to where the project is taking place, and oil and gas operators must file an Application for Permit to Drill (APD).¹⁰⁰ Once the APD has been filed, the public is notified to ensure that environmental concerns are not only considered but also mitigated according to the particulars of the site.¹⁰¹ The agency

94. 42 U.S.C. § 4332(C); *see also* BUREAU OF LAND MGMT., NO. H-1790-1, NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK 13–16 (2008) [hereinafter NEPA HANDBOOK], https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1790-1.pdf (describing how the NEPA applies to the BLM’s evaluation of proposals it receives from outside entities seeking authorization for the development of resources on lands).

95. CEQ, 40 C.F.R. § 1508.18 (2019) (defining “major [f]ederal action”); *County of Suffolk v. Sec’y of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977).

96. 43 U.S.C. § 1712(a).

97. *See Planning and NEPA in the BLM*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/planning-and-nepa> (last visited Nov. 21, 2020); *see also supra* Part I.C. (covering types of formal orders that the Secretary of Interior can issue).

98. Pendery, *supra* note 81, at 607.

99. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 716–18 (10th Cir. 2009) (holding that the NEPA requires a supplemental qualitative analysis of environmental impacts when a Resource Management Plan (RMP) is modified).

100. 43 C.F.R. § 3162.3-1(c) (2019); *see also Land Use Planning and NEPA Compliance*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/land-use-planning> (last visited Nov. 21, 2020) (explaining that the BLM uses its land planning process to attach stipulations and conditions to leased parcels).

101. *Cf.* BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, SURFACE OPERATING STANDARDS AND GUIDELINES FOR OIL AND GAS EXPLORATION AND DEVELOPMENT 8–9 (4th ed., rev. 2007) [hereinafter SURFACE OPERATING STANDARDS] (reasoning that onsite inspections are required to identify site-specific concerns and the environmental impacts of the proposal).

established “Rules of Conduct” to protect public land, resources, and the public affected by its ROD.¹⁰²

For tribal communities, the BLM must minimize energy development’s adverse effects when approving leases under Tribal Trust Agreements.¹⁰³ In this respect, the Tribal Trust Agreements in the Indian Mineral Development Act (IMDA) modify the agency’s administrative responsibilities. Furthermore, the BLM’s duty to fulfill these trust obligations applies to the economic, social, and cultural effects of development.¹⁰⁴

2. *The Lease Contract*

Leases are contracts between the BLM and the oil or gas firm, which is subject to the terms, conditions, and stipulations in the lease.¹⁰⁵ The BLM’s authorized officer (AO) has considerable discretion in drafting the lease contract.¹⁰⁶ Once the AO approves the contract, she and the firm may proceed to the leasing stage.¹⁰⁷ While lessees enjoy the rights to explore, drill, mine, and extract, they are subject to the AO’s stipulations in the lease contract for the timeframe agreed to by the AO and party.¹⁰⁸

Following lease issuance, the AO ensures compliance with the lease contract, which may be modified as needed.¹⁰⁹ For instance, the AO may modify or waive a preexisting stipulation if the AO determines that an issue

102. 43 C.F.R. § 8365 (2019) (delineating “rules of conduct for the protection of public lands and resources, and for the protection . . . of the public in its use of . . . public lands”).

103. *See* Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. §§ 2101–2108 (providing for tribes to enter into “Mineral Agreements” that are subject to various oversight and review processes by the Secretary of the Interior).

104. *Id.* § 2103(b); *see also* Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 786–88 (9th Cir. 2006) (holding that agencies violated the NEPA and the National Historic Preservation Act by not adequately considering alternatives, including no action, when assessing a project’s environmental impact on an area of cultural and spiritual significance to Native Americans).

105. Pendery, *supra* note 81, at 642 (stating that the BLM can “regulate the time, place, and manner of oil and gas development to a *substantial* degree”) (emphasis added).

106. *See* 43 C.F.R. § 3101.1-3 (2019) (explaining how an authorized officer (AO) may require stipulations before issuing a lease).

107. *See* BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, NO. 3-337, 3120 – COMPETITIVE LEASES (P) § .2 (2013), https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmmanual3120.pdf (summarizing the lease award and issuance process).

108. 43 C.F.R. § 3101.1-2.

109. *See id.* § 3163.1 (enabling the AO to address noncompliance through notices, fees assessments, and—if the operator is afforded time to take corrective action—cancellation); *see also id.* § 3162.1(b) (requiring operators to permit inspection of sites and records without notice).

of public concern has been raised.¹¹⁰ Moreover, the AO retains the authority to create or modify—depending on the progression of the operations and any unforeseen impacts upon the land—stipulations under controlling statutes.¹¹¹ The AO may also take reasonable measures to minimize adverse impacts on natural resources, land uses, and users that were not addressed when the lease was executed.¹¹²

3. *Drilling and Development*

Once it appears that oil and gas deposits in the field are profitable, the firm may transition to the development stage, which often requires that the firm or its contractors drill in the area.¹¹³ Between leasing and development, i.e., “the exploration phase,” the BLM continues to monitor the firm’s progress. The agency issues permits before the firm can proceed to development, dependent upon whether the firm’s drilling activities may “result in adverse effects.”¹¹⁴ The NEPA continues to apply because the project’s progression depends on the BLM’s approval, through a ROD, accompanying the EA or EIS.¹¹⁵ Beyond approval, the BLM may exercise its discretionary authority to identify and rectify unanticipated environmental impacts—including a culturally or socially significant impact—resulting from an oil or gas project’s operations.¹¹⁶

110. *Id.* § 3101.1-4.

111. *Id.* § 3101.1-2.

112. *Id.*

113. *See id.* § 3162.2-1(b) (requiring that leased lands are “properly and timely developed . . . in accordance with good economic operating practices”).

114. *See* BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, RELEASE NO. 3-338, H-3120-1 – COMPETITIVE LEASES (P) Illus. 20, at 2 (2013), https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_h3120.pdf (providing a sample lease attachment where the BLM requires mitigation of impacts on cultural resources); *see also* Pendery, *supra* note 81, at 608 (explaining exploration projects require the BLM to assess potential environmental impacts under the NEPA).

115. *See* Pendery, *supra* note 81, at 608–09 (outlining the exploration and development stages of oil and gas leases); *see also generally* 43 C.F.R. § 3150.1 (stating that noncompliance to the terms of a permit, as well as applicable land use regulations and statutes, subjects it to either revocation or suspension by the authorized officer).

116. *See* 43 C.F.R. § 10010.25 (defining supplemental environmental impact statements); *see also* Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 787 (9th Cir. 2006) (holding that the agency violated the NEPA by not undertaking a comprehensive review before extending leases based on the cultural significance of the landscape and tribal value).

B. Duties to Protect in Oil and Gas Leasing

This Part highlights the BLM's critical duties under its statutory and regulatory framework assumed in the leasing process.¹¹⁷ The BLM must protect the environment and address the impacts of energy development based on the public interest.¹¹⁸ The terms and conditions in the BLM's modern lease agreements flow from these legal obligations.¹¹⁹

1. Federal Land Policy and Management Act

Under the FLPMA and mineral leasing laws, the BLM is the predominant regulator of oil and gas leases,¹²⁰ controlling an estimated 244 million acres of public land and 710 million acres of federal subsurface mineral estate.¹²¹ The FLPMA is also referred to as the "BLM Organic Act" because it provides comprehensive management guidelines and administrative authority to the agency.¹²²

The FLPMA is considered the BLM's charter to manage public lands in a way that safeguards "scientific, scenic, historical, ecological, environmental, . . . atmospheric, . . . and archeological values."¹²³ Moreover, Congress intended that the BLM preserve public lands in their natural condition to ensure they remain intact for outdoor recreation and human use or enjoyment for future generations.¹²⁴ Fundamentally, conservation of the natural environment entails a human-centered approach to analyzing the adverse impacts of drilling and development.¹²⁵ Such an approach would

117. *Supra* Part II.A.

118. *Infra* Part II.B.1 (describing legal precept under federal land management duties).

119. *Electronic Forms*, BUREAU OF LAND MGMT., <https://www.blm.gov/services/electronic-forms> (last visited Nov. 21, 2020).

120. FLPMA, 43 U.S.C. § 1701. The BLM administers hundreds of mineral leasing laws. The few statutes explained, however, are the primary statutes that provide for BLM's general administrative authority over oil, gas, and mineral leasing on public and tribal lands. 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKMAN, PUBLIC NATURAL RESOURCES LAW § 6:16 (2d ed. 2020), Westlaw PUBNRL § 6:16.

121. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 2019, at 2 (2020) [hereinafter PUBLIC LAND STATISTICS], <https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2019.pdf>. As of fiscal year 2019, the western states with the most approved applications for new permits to drill on BLM-managed lands were New Mexico (1,420), Wyoming (733), Colorado (354), North Dakota (299), and California (239). *Id.* at 105.

122. COGGINS & GLICKMAN, *supra* note 120.

123. FLPMA, 43 U.S.C. § 1701(a)(8).

124. *Id.*

125. *See How We Manage*, *supra* note 93.

require a heightened awareness of the security risks posed to Native women during extensive natural resource extraction projects.

Of the values listed, “ecological” and “environmental” hold significance in addressing the nexus between oil and gas leasing programs and the MMIW crisis. The BLM’s responsibility is two-fold: (1) understanding the scope of human environmental impact; and (2) realizing the extent of the BLM’s authority in controlling which operations are permissible under the set lease terms.¹²⁶ With the public in mind, the BLM should act in accordance with environmental conservation principles. Furthermore, the FLPMA’s language demonstrates the expansive control that the BLM has—from “cradle-to-grave”—when entering into contractual agreements with oil and gas firms.¹²⁷

Although the FLPMA defines neither “ecological” nor “environmental,” the definition of “areas of critical environmental concern” explicitly provides for human considerations.¹²⁸ Specifically, “areas of critical environmental concern” include certain designated lands that require special attention to prevent irreparable damage to “historic, cultural, or scenic values, fish, and wildlife resources, . . . or to *protect life and safety* from natural hazards.”¹²⁹

In setting forth its public land management policy, the FLPMA contains similar foundational notions to the BLM’s environmental protectionism duties over federal land from the NEPA, which was enacted six years prior.¹³⁰ Under the NEPA, the BLM must “create and maintain conditions under which man and nature can exist in productive harmony” and “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.”¹³¹ Similarly, the FLPMA provides that the BLM must manage public lands “in a manner that will protect the quality of scientific, . . . ecological, environmental, . . . and archeological values[,] . . . preserve and protect . . . public lands in their natural condition[,] . . . and . . . provide for . . . human occupancy and use.”¹³²

126. See 40 C.F.R. § 1508.14 (2019) (providing that human environmental impacts may be assessed when natural environmental effects and economic or social effects are interrelated); Pendery, *supra* note 81, at 612 (explaining that setting terms in the leasing process allows the BLM to protect the environment).

127. *Examining BLM Public Lands Leasing: Hearing Before the Subcomm. on the Interior of the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. 6 (2016) (statement of Neil Kornze, Director, Bureau of Land Mgmt.), <https://docs.house.gov/meetings/GO/GO28/20160323/104729/HHRG-114-GO28-Transcript-20160323.pdf>; see also Pendery, *supra* note 81, at 612.

128. See FLPMA, 43 U.S.C. § 1702(a) (listing the importance of “cultural, historic, and scenic value[]” of public lands, each of which are distinctly human aesthetic values).

129. *Id.* (emphasis added).

130. See, e.g., *id.* § 1701(a)(8), (a)(11); NEPA, 42 U.S.C. § 4331(a)(3)–(4), (c).

131. 42 U.S.C. § 4331(a), (b)(2).

132. FLPMA, 43 U.S.C. § 1701(a)(8).

The inclusion of “ecological” and “environmental” values in the FLPMA’s policy declaration highlights the legitimacy and importance of the BLM’s environmental mandate with respect to the rest of the Act.¹³³ Stewardship of public lands with accountability for the environment, in light of energy development, is foundational to and guides the BLM’s administration.¹³⁴ The text also impresses that, despite the often narrow construction of “environment” as meaning only the physical, natural, or biological elements of a place, the term encapsulates both physical and social/human concerns.¹³⁵ Humans relate to and coexist with each other and the physical environment.¹³⁶

Several FLPMA sections detail the extent of the BLM’s powers over land use planning.¹³⁷ When initially developing and revising land use plans, the BLM must weigh the long-term and short-term benefits with the public’s interest central to its decisionmaking.¹³⁸ The BLM must also, when practical, include the public (through meetings, comments, or hearings) in land use decisionmaking, particularly when development of land use programs “may have a significant impact on non-[f]ederal lands.”¹³⁹ Complimentary to its consultation mandate, the BLM maintains significant discretion throughout the leasing process, which allows it to carefully manage development through ongoing supervision.¹⁴⁰

133. Cf. Donald H. J. Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIAMI L. REV. 379, 396 (1982) (illustrating that structuralism depends on the premise that unconscious structures guide decisionmaking). But cf. Brian G. Slocum, *No Vehicles on Mars*, in JUSTICE SCALLA: RHETORIC AND THE RULE OF LAW 51 (Brian G. Slocum & Francis J. Mootz III eds., 2019) (describing how nontextualism inappropriately invites judges to apply their preferences to interpretation whereas textualism constrains judicial discretion).

134. 43 U.S.C. § 1701(a)(8).

135. Cf. 4 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.01(e)(ii), Lexis (Matthew Bender ed., database updated Oct. 2020) (cautioning agencies against narrow scopes of environmental assessments).

136. See 40 C.F.R. § 1508.14 (2019) (defining human environment); *Ecological Condition*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/report-environment/ecological-condition> (last visited Nov. 21, 2020) (defining ecological system as “a biological community consisting of all the living organisms . . . in a particular area and the nonliving components[] . . . with which the organisms interact”).

137. Pendery, *supra* note 81, at 626 (noting that the BLM’s regulations and terms and conditions provided in modern leases allow it to retain rights to limit or condition development).

138. 43 U.S.C. § 1712(c)(7).

139. *Id.* § 1712(c)(9).

140. See *id.* § 1718 (stating that conveyances issued shall be subject to terms and conditions necessary “to [e]nsure proper land use and protection of the public interest”).

2. *Mineral Leasing Act*¹⁴¹

While the FLPMA grants the BLM the general authority for administering federal lands on behalf of the public, the Mineral Leasing Act (MLA)¹⁴² and its implementing regulations establish the technical aspects of the leasing process.¹⁴³ However, before and during development, the MLA provisions related to management and care for the environment state that the BLM must include provisions in its lease agreements for “[e]nsuring the exercise of reasonable diligence, skill, and care in the operation of said property.”¹⁴⁴ Moreover, the mandatory “shall” language emphasizes that the BLM *must* set the ground rules for leases with private firms seeking to develop on federal land.¹⁴⁵ The BLM may also revoke or suspend drilling operations and other associated activities involving oil and gas entirely in the pursuit of environmental protectionism.¹⁴⁶

3. *Indian Mineral Development Act*

Extractive industries and their workers are not the only ones who stand to benefit from energy development.¹⁴⁷ For example, in economically disadvantaged tribal communities, recent changes to rights-of-way regulations have eased access to the development of necessary pipelines on Indian land, which increased economic opportunities for the tribes.¹⁴⁸

141. The authority to manage oil and gas resources in the forty-eight contiguous states comes from the Mineral Leasing Act (MLA), 30 U.S.C. §§ 181–287, and the Naval Petroleum Reserves Production Act, 42 U.S.C. §§ 6501–08, and applies to Alaska. The latter will not be discussed due to the unique nature of Alaska’s oil and gas program.

142. 30 U.S.C. §§ 181–287.

143. *See id.* § 189 (charging the DOI with developing rules and regulations).

144. *Id.* § 187.

145. *Id.*

146. *See* Getty Oil Co. v. Clark, 614 F. Supp. 904, 913, 918–20 (D. Wyo. 1985) (holding that under the NEPA, the BLM has discretionary authority to modify or suspend operations upon a determination of “unacceptable impacts on the wilderness characteristics of the area”).

147. *See* Remarks at a Tribal, State, and Local Energy Roundtable Discussion and an Exchange with Reporters, DAILY COMP. PRES. DOC. 435 (June 28, 2017) [hereinafter Energy Roundtable], <https://www.govinfo.gov/content/pkg/DCPD-201700435/pdf/DCPD-201700435.pdf> (calling tribal lands “untapped resources of wealth”).

148. Jessie D. Young, Senior Couns. to the Assistant Sec’y – Indian Affs., U.S. Dep’t of the Interior, Rights-of-Way the Right Way: An Insider’s Guide to Cutting through Red Tape, Presentation at the National Tribal Broadband Summit 7–14 (Sept. 23–24, 2019), <https://www.doi.gov/sites/doi.gov/files/uploads/2.-rights-of-way-the-right-way-an-insiders-guide-to-cutting-through-red-tape.pdf> (explaining how persons or entities can obtain a right-of-way); *see also generally infra* note 159 and accompanying text (discussing, *inter alia*, the rights-of-

The BLM's land management laws only apply to the BLM's management over *federal* lands, as opposed to *tribal* lands, which are governed by the IMDA.¹⁴⁹ In drafting the IMDA, Congress wanted to promote tribal self-determination by affording tribes greater flexibility to negotiate the mineral leasing of tribally-owned lands.¹⁵⁰ Doing so would promote energy development projects on tribal lands to encourage privatization, and tribes would enjoy greater returns on this development.¹⁵¹ Notwithstanding this explicit bargaining power, the final decision to approve or deny any minerals agreement ultimately lies with the DOI.¹⁵² In the progression of mineral development, tribal control becomes more limited.¹⁵³ Thus, the DOI assumes its trust responsibility to tribes.¹⁵⁴

The DOI's Bureau of Indian Affairs coordinates with tribes and the BLM up until the execution of the lease.¹⁵⁵ Specifically, the BLM's role involves analyzing the site-specific impacts of development on tribal lands.¹⁵⁶ When deciding to approve or deny an agreement, the DOI must consider not only the financial returns to the tribe but also any environmental, social, or cultural consequences from mineral resource development on tribal land.¹⁵⁷ The Trump Administration was challenged to balance inherent tribal sovereignty with maintaining the federal-tribal trust relationship under its American energy dominance campaign.¹⁵⁸ Instead, while relaxing regulation and limiting federal government involvement is in the tribes'

way regulation in context with other agency rulemaking and orders). *But see* Ahmad, *supra* note 39, at 816 (noting that although regulations minimized the bureaucracy involved in processing requests from pipeline operators and utility companies, tribal rights on tribal lands were weakened).

149. IMDA, 25 U.S.C. §§ 2101–2108.

150. S. REP. NO. 97-472, at 2–4 (1982).

151. *Id.*

152. 25 U.S.C. § 2103(a).

153. Finn et al., *supra* note 26, at 36.

154. *Compare* S. REP. NO. 97-472, at 4 (declaring that the DOI maintains its role as trustee to “monitor[] agreements for overall fairness and terms”), *with* Indian Trust Asset Reform Act (ITARA), Pub. L. No. 114-178, § 204, 130 Stat. 432, 434–36 (2016) (affording tribes greater latitude over trust asset management of development on tribal lands, and providing tribes avenues to challenge DOI disapproval of proposed plans).

155. *Working on Indian Lands*, BUREAU OF INDIAN AFFS., <https://www.bia.gov/as-ia/iecd/division-energy-and-mineral-development/working-indian-lands> (last visited Nov. 21, 2020).

156. *How We Manage*, *supra* note 93.

157. 25 U.S.C. § 2103(b).

158. *See* Shae Weathersbee, Comment, *How the Trump Administration Can Inform Its Indian Land Policies in Light of Historical Breakdowns*, 42 AM. INDIAN. L. REV. 315, 341–46 (2018) (providing examples of laws that appear to be to tribes' benefit but instead erode self-determination).

economic interests, the Trump Administration made consequential decisions that suspended tribal interests to incentivize energy production.¹⁵⁹

C. Discretion in Oil and Gas Leasing

Within the language of laws are vague notions of how to programmatically execute those preferred policies at the agency level.¹⁶⁰ Federal agencies must fill those gaps left in law through rulemaking, subject to judicial review, as part of their congressional mandate.¹⁶¹ The agency can further fill these gaps through the issuance of policy directives. In the BLM's case, it may flex its authority by regulating the leasing process.

Executive agencies often reflect presidential priorities through rulemaking and issuance of agency "guidance documents," such as policy statements or interpretive rules that are not legally binding.¹⁶² Although the vast swath of guidance documents are not rooted in the law but rather in the Executive Branch's policy *preferences* and *interpretations* of the law, they nonetheless have incredible effects upon the agency's interactions with society and industry.¹⁶³

159. *Compare* Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of 2015 Rule, 82 Fed. Reg. 61,924, 61,926 (Dec. 29, 2017) (to be codified at 43 C.F.R. pt. 3160) (maintaining *discretionary* authority to take protective measures to reduce risks of such operations) (emphasis added), Energy Roundtable, *supra* note 147 (stating that regulations have denied Native Americans "energy and wealth . . . on their own lands"), and Rights-of-Way on Indian Land Rule, 25 C.F.R. § 169.1(a) (2019) (streamlining how the Bureau of Indian Affairs processes applications to obtain rights-of-way on tribal land), with Jeff Brady, *2 Years After Standing Rock Protests, Tensions Remain but Oil Business Booms*, NPR (Nov. 29, 2018, 7:20 AM), <https://www.npr.org/2018/11/29/671701019/2-years-after-standing-rock-protests-north-dakota-oil-business-is-booming> (covering approval of Dakota Access Pipeline and ensuing protests as the oil industry expands in North Dakota), and Jessica A. Knoblauch, *Ignored and Infuriated, Pawnee Stop Illegal Fracking Plans on Tribal Lands*, EARTHJUSTICE (Dec. 7, 2018), <https://earthjustice.org/blog/2018-december/agency-nixes-fracking-leases-on-pawnee-tribal-land> (discussing approval of oil and gas leases on tribal land without the tribes' awareness).

160. *See* ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 71 (3d. ed. 2016).

161. Administrative Procedure Act, 5 U.S.C. §§ 702, 704 (providing the right to judicial review of agency action).

162. A thorny and hotly-contested area in administrative law. *See* Nat'l Org. of Veterans' Advocs. v. Sec'y of Veterans Affs., 260 F.3d 1365, 1374–75 (Fed. Cir. 2001) (distinguishing between substantive rules and interpretive rules); POPPER ET AL., *supra* note 160, at 283–84; *see also, e.g.*, Dismas Charities, Inc. v. U.S. Dep't of Just., 401 F.3d 666, 680, 682 (6th Cir. 2003) (holding that agency memoranda implementing a legal interpretation of a statute were interpretive rules and not subject to notice-and-comment).

163. *See, e.g.*, *Stinson v. United States*, 508 U.S. 36, 44–45 (1993) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (holding that so long as an agency's interpretation

In effect, the BLM's gap-filling has become a concerted effort to expand domestically-produced energy sources, citing efficiency, while over time limiting its critical role in environmental review.¹⁶⁴ For evidence, the DOI's top-down directives to the BLM through SOs advanced the Trump Administration's economic pursuits and ended Programmatic Environmental Impact Statements (PEISs) in the process.¹⁶⁵ In other actions, the DOI directed the BLM to reexamine its mitigation policies and practices to "better balance" the necessity of conservation with "creating jobs."¹⁶⁶

The BLM is considering regulatory changes to the land use plans that its regions depend on for setting goals for development on federal lands.¹⁶⁷ The agency may remove NEPA requirements in their entirety from its planning regulations.¹⁶⁸ Doing so would depreciate the notice-and-comment process and reduce the public's awareness of what environmental consequences might stem from the BLM's manner of leasing public lands in the arena where transparency is needed the most—significant land use planning.

III. RECOMMENDATIONS: HOW TO RESTORE THE HUMAN ENVIRONMENT FOR NATIVE WOMEN

Edith's story illustrates the extensive perils Native women face when residing in the shadows of boomtowns.¹⁶⁹ The tragedy that is the MMIW

of its own regulation "does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation'").

164. See U.S. DEP'T OF THE INTERIOR, ORDER NO. 3355, STREAMLINING NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS AND IMPLEMENTATION OF EXECUTIVE ORDER 13807, "ESTABLISHING DISCIPLINE AND ACCOUNTABILITY IN THE ENVIRONMENTAL REVIEW AND PERMITTING PROCESS FOR INFRASTRUCTURE PROJECTS" § 3 (2017), https://www.doi.gov/sites/doi.gov/files/elips/documents/3355_-_streamlining_national_environmental_policy_reviews_and_implementation_of_executive_order_13807_establishing_discipline_and_accountability_in_the_environmental_review_and_permitting_process_for.pdf (citing efficiency as the reason for streamlining environmental reviews); see also *supra* Part I.C (describing how the Trump Administration's energy agenda has rolled back environmental review).

165. CONCERNING COAL SO, *supra* note 85.

166. AMERICAN ENERGY SO, *supra* note 85.

167. Rebecca Beitsch, *BLM Weighs Cutting Environmental Review When Crafting Public Lands Plans*, HILL (Feb. 4, 2020, 5:10 PM), <https://thehill.com/policy/energy-environment/481477-blm-weighs-cutting-environmental-review-when-crafting-public-lands>.

168. *Id.*

169. See *supra* Part I.A; Expert Mechanism on the Rights of Indigenous Peoples, *Follow-Up Rep. on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, ¶ 37, U.N. Doc. A/HRC/21/55 (Aug. 16, 2012) ("[M]ultinational corporations and extractive industries that operate with impunity on indigenous peoples' territories . . . have a detrimental impact on indigenous women and girls, which manifests itself in sexual assault,

crisis is not a new phenomenon.¹⁷⁰ The past three administrations have sought to exploit extractive resources on federal and tribal lands to generate revenue and outpace foreign competitors.¹⁷¹ With that knowledge, arguments to slow energy development in future administrations are likely futile.¹⁷² Although COVID-19 reduced the global economy's energy demands, leading to plummeting oil prices, some predict that oil and natural gas could rebound as soon as 2022.¹⁷³

At each stage of oil and gas leasing, there are opportunities for the BLM to address the hazards of spurred energy development that often comes at the expense of Native women's livelihoods.¹⁷⁴ First, the BLM should account for security threats to Native women throughout its environmental review process for onshore oil and gas permitting and leasing projects. Second, the DOI must strengthen its enforcement of the NEPA and the FLPMA through its permitting and leasing authority. Third, because the revenue generated from extractive activities can result in net human environmental costs to Native women, interdisciplinary approaches to data collection must become part of the BLM's preparation of an EA or EIS to anticipate these costs in proposed extractive projects. An effective way to standardize the collection of this data is through a social impacts analysis. By repudiating a *check-the-box* approach to environmental review and instead undertaking this three-pronged approach, the BLM can better account for the potential threats against Native women's health and security from development.

sex trafficking, prostitution, bonded [labor], . . . the internal displacement of women[,] and environmental violence.”).

170. Remarks on Signing an Executive Order Establishing the Task Force on Missing and Murdered American Indians and Alaska Natives and an Exchange with Reporters, DAILY COMP. PRES. DOC. 826 (Nov. 26, 2019), <https://www.govinfo.gov/content/pkg/DCPD-201900826/pdf/DCPD-201900826.pdf>.

171. Marcilynn A. Burke, *Streamlining or Steamrolling: Oil and Gas Leasing Reform on Federal Public Lands in the Trump Administration*, 91 U. COLO. L. REV. 453, 454–58 (2020) (comparing how the Bush, Obama, and Trump Administrations approached oil and gas development on federal public lands).

172. *See Oil & Natural Gas: Supporting the Economy, Creating Jobs, Driving American Forward*, AM. PETROLEUM INST., https://www.api.org/~media/Files/Policy/Taxes/DM2018-086_API_Fair_Share_OnePager_FIN3.pdf (last visited Nov. 21, 2020) (citing that the domestic oil and natural gas industry provides 10.3 million jobs and represents 8% of the U.S. Gross Domestic Product).

173. *Can Covid Help Flatten the Climate Curve?*, ECONOMIST (May 21, 2020), <https://www.economist.com/briefing/2020/05/21/can-covid-help-flatten-the-climate-curve> (“Those hoping for fossil fuels’ imminent demise should not be overconfident.”).

174. *Supra* Part II.

A. *Contemplate Threats in Oil and Gas Leasing*

For Native women, extractive industry development impacts personal safety.¹⁷⁵ Native women experience sexual abuse and other forms of violence against them, often fueled by alcohol abuse from the outside workers brought in for extractive industry projects.¹⁷⁶

The lease contract is a powerful yet underutilized tool available to the BLM. The BLM should require firms seeking approval in the leasing process to implement certain preventative policies and mitigation measures before exploration with Native women's safety concerns in mind.¹⁷⁷ With their vast resources, firms may have more influence over the workforce than traditional deterrence, which has shown to be ineffective.¹⁷⁸ Borrowing from state laws that mandate human trafficking awareness training and signage, with resources for potential victims, oil and gas firms could similarly train their workforce in laws and policies related to substance abuse and human trafficking.¹⁷⁹ Firms are better positioned to conduct random drug testing and monitor worksites and nearby man camps more closely. By taking these measures, the firm complies with federal, state, and—in certain situations—tribal laws and represents to the workforce its commitment to preventing conditions that give rise to violent crime against Native women. Moreover, if legal compliance is insufficient to persuade the parties to mitigate the oil

175. James Anaya, UN Special Rapporteur on the Rts. of Indigenous Peoples, Statement Before the International Expert Group Meeting on the Theme: "Sexual Health and Reproductive Rights: Articles 21, 22(1), 23, and 24 of the United Nation Declaration on the Rights of Indigenous Peoples" (Jan. 15, 2014), <https://unsr.jamesanaya.org/?p=1083>.

176. Kyle Edwards, *MMIWG's Findings on 'Man Camps' Are a Good Place for Government to Get Started*, MACLEAN'S (June 3, 2019), <https://www.macleans.ca/news/canada/mmiwgs-finding-s-on-man-camps-are-a-good-place-for-government-to-get-started/>.

177. See Angus M. Thuermer Jr., *BLM: Oilfield Developers Should Protect Indigenous Women* GILLETTE NEWS REC. (Mar. 4, 2020), https://www.gillettenewsrecord.com/news/wyoming/article_66b121e9-8f39-5bd8-b5c7-0067ecda4816.html (noting that the BLM has publicly recommended that energy developers better screen and train workers); see also *supra* notes 105–112 and accompanying text (explaining the BLM's discretion to set the terms, conditions, and stipulations in the lease contract).

178. See Sweet, *supra* note 27, at 1175–76 (positing human rights standards for corporations to prevent and address effects of development); *supra* notes 51–56 and accompanying text (describing issues that render policing ineffective as a deterrent).

179. Of the western states with the highest acreage of BLM-administered lands, only California requires signage and training for hospitality employees. PUBLIC LAND STATISTICS, *supra* note 121; KAREN WIGLE WEISS, ECPAT-USA, UNPACKING HUMAN TRAFFICKING, A SURVEY OF STATE LAWS TARGETING HUMAN TRAFFICKING IN THE HOSPITALITY INDUSTRY 16 (2019), <https://static1.squarespace.com/static/594970e91b631b3571be12e2/t/5cf7f48501de0f0017a00fb/1559753870065/Unpacking+Human+Trafficking+-+FINAL.pdf>.

and gas industry's operational impacts on Native women, evidence suggesting that corporate responsibility makes for good business should also prompt action.¹⁸⁰

B. Bolster Environmental Review

During the scoping phase, the BLM should account for rapid population growth from influxes of oil and gas industry workers on and near areas where tribal communities live. This must occur before *and* during drilling, construction, and exploration for fossil fuel resources.¹⁸¹ Specifically, the BLM can standardize geographic analysis and crime mapping as part of early environmental review for projects that tribal communities have expressed concerns over because of foreseen environmental or cultural disruptions.¹⁸²

The DOI's SOs serve as essential directives that guide the quality of the BLM's environmental review of its programming.¹⁸³ Therefore, to promote consistency in implementation, the Secretary should issue a SO to the BLM's regional offices emphasizing the potential site-specific impacts of energy development on Native women, with guidelines for how the agency will enhance its environmental review procedures when leasing to oil and gas operators.¹⁸⁴

In addition to the guiding SOs and EOs, the BLM's instructional memoranda and handbooks assist the field offices and lessees in complying with governing environmental and land use statutes and their implementing regulations. For example, the agency's "Gold Book" describes the basics of how operators may use "Environmental Best Management Practices" to

180. See Adamson, *supra* note 13, at 28–29 (discussing empirical research that shows a correlation between economic performance based on a company's ability to manage the social impacts of proposed extractive industry projects); GLOB. WITNESS, RESPONSIBLE SOURCING: THE BUSINESS CASE FOR PROTECTING LAND AND ENVIRONMENTAL DEFENDERS AND INDIGENOUS COMMUNITIES' RIGHTS TO LAND AND RESOURCES 9 (2020), https://www.globawitness.org/documents/19887/Responsible_Sourcing_Investor_Briefing_April_2020.pdf (stating the risks associated with companies lacking a social license to operate within a community, including excessive delay and severe financial losses).

181. See *supra* notes 85–89 and accompanying text (describing this early interventionist approach to mitigating anticipated risks, which the DOI previously endorsed).

182. See *MAPS: How Mapping Helps Reduce Crime and Improve Public Safety*, NAT'L INST. JUST. (Mar. 26, 2013), <https://nij.ojp.gov/topics/articles/maps-how-mapping-helps-reduce-crime-and-improve-public-safety> (explaining the benefits of geographical analysis).

183. See *supra* Part I.C (reviewing the influence of the DOI's SOs over the BLM's environmental review policies).

184. See *supra* notes 97–102 and accompanying text (discussing how RMPs are used in leasing); *cf. supra* notes 90–91 (providing an example of how the Obama Administration's DOI used agency action to balance development with the concerns it heard from stakeholders).

“minimiz[e] undesirable impacts [on] the environment.”¹⁸⁵ From this and other advisory manuals, the agency should supplement the existing land management requirements with guiding principles for operators beyond the standard boilerplate language found in permits and lease contracts.¹⁸⁶

If energy development—made possible by oil and gas leasing—leads to violence against Native women, why are state and local agencies, and the tribes, not better situated than the BLM to address these site-specific impacts and tailor solutions for Native women’s security concerns? This argument is not without merit. However, the BLM is never on an island during its environmental review of a proposed project. Consultation from stakeholders is essential; the agency must consider state, local, and tribal concerns (in addition to other impacted agencies) and respond with proposed actions to ameliorate those concerns or proceed because there is no other option.¹⁸⁷ As such, the environmental obligations the BLM undertakes in oil and gas leasing are the vehicles through which careful agency analysis of potential public safety threats to Native women in the human environment should occur.¹⁸⁸ Accordingly, consulting with local and federal partners, the impacted communities, and the industry gives the agency a better chance at meaningful mitigation.

C. Incorporate a Social Impacts Analysis

The BLM has a duty to promote health, safety, and comfort on federal lands.¹⁸⁹ Through the BLM’s law enforcement authority, this duty extends to several varied conceptions of “safety.” Safety management extends to those who, while on federal land, pose a public disturbance or risk to others, including through unreasonable noise, creating a hazard, or assault.¹⁹⁰

185. SURFACE OPERATING STANDARDS, *supra* note 101, at 2–3. Notably, the Gold Book has not been revised in more than a decade. *Id.*

186. *Supra* Part II.A.2.

187. See 40 C.F.R. § 1508.9(b) (2019); *cf.* Acee Agoyo, ‘Am I Cutting Out Again?’: Missing and Murdered Task Force Off to Shaky Start Amid COVID-19 Challenges, INDIANZ.COM (May 28, 2020), <https://www.indianz.com/News/2020/05/28/am-i-cutting-out-again-missing-and-murde.asp> (covering tribal leader frustrations concerning Task Force participation).

188. NEPA, 42 U.S.C. § 4332(C); *cf.* CTR. BIOLOGICAL DIVERSITY ET AL., THE #CLIMATE PRESIDENT ACTION PLAN: 10 STEPS FOR THE NEXT ADMINISTRATION’S FIRST 10 DAYS 4 (2019), <https://www.climatepresident.org/climate-president-action-plan.pdf> (proposing that a president should direct federal agencies to proactively mitigate, rather than just identify, environmental harms to vulnerable communities).

189. 43 C.F.R. § 8365.1-4 (2019).

190. *Id.* § 8365.1-4(a)(1), (a)(2), (a)(5).

The core of the BLM's EIS analysis is that the agency must take into consideration the economic and social impacts that might be felt by local communities.¹⁹¹ Furthermore, the EIS must be based on interdisciplinary data that includes the natural and social sciences and environmental design.¹⁹² Indeed, Congress used the phrase "human environment" to promote the understanding that any impacts on the natural environment are human impacts.¹⁹³

A social impacts analysis that captures landscape changes from population shifts is one way to understand the impact on Native women's safety.¹⁹⁴ Further study is necessary to identify whether there are pervasive trends between imbalanced populations in areas that cannot anticipate the boom—experiencing less available housing and more traffic congestion—and the socioeconomic inequality between the community and the oil workers.¹⁹⁵

191. Compare 40 C.F.R. § 1502.1 (stating that an EIS must address impacts on the "human environment"), with *id.* § 1508.14 (noting that an EIS should discuss social and economic impacts when they are interrelated with environmental effects).

192. *Id.* § 1502.6.

193. See *supra* notes 128–136 and accompanying text (discussing the statutory construction of "environment" under the FLPMA and the NEPA).

194. Courts have previously considered the intersections between the NEPA and crime as an environmental effect. See *Hanly v. Kleindienst*, 471 F.2d 823, 826, 836 (2d Cir. 1972) (ordering the General Services Administration to make findings regarding increased risk of crime from the operation of a nearby jail facility); *Stand Up for Cal. v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 258, 275 (D.D.C. 2016) (deferring to an agency's determination that taking a tract of land into trust for a tribe's operation of a casino would not produce serious community harms, including gambling problems and traffic and transportation impacts); *Chelsea Neighborhood Ass'n v. U.S. Postal Serv.*, 389 F. Supp. 3d 1171, 1184 (S.D.N.Y. 1975) (holding that for a proposed housing project, crime control problems must be considered in an EIS). *But cf.* *Juliana v. United States*, 947 F.3d 1159, 1171, 1181 (9th Cir. 2020) (holding that a claim against the federal government for its contribution to climate change from authorized fuel extraction and development was not redressable and showing that redressability issues remain when dealing with attenuated causation).

195. The BLM would link principles underlying the right to a supportive, healthy environment with observed changes in landscape from energy development that risks violating those rights. See 40 C.F.R. § 1508.14 (explaining that social and economic impacts on the human environment should be assessed when they are interrelated to environmental effects); see also NEPA HANDBOOK, *supra* note 94, at 22 (noting that proposed actions require NEPA analysis when existing environmental analysis documents are inadequate in light of new information); *GIS Data*, BUREAU OF LAND MGMT., <https://www.blm.gov/services/geospatial/GISData> (last visited Nov. 21, 2020) (reviewing the types of geospatial data the BLM collects and uses to identify social and economic impacts).

CONCLUSION

“[T]he health of our Peoples cannot be separated from the health of our environment . . . upon which the mental, physical and social health of our communities is based.”

— Andrea Carmen¹⁹⁶

Against the backdrop of its statutory and regulatory framework, the BLM has lessened its crucial role in environmental review and risks sidestepping its obligations to the ecosystem, Native women, and tribal communities. Thus, the BLM must account for and mitigate the human environmental consequences from proposed oil and gas projects under the NEPA and its leases with oil and gas firms.

Federal agencies cannot address these complex problems alone—nor are they authorized to consider the jurisdictional patchwork that is federal, state, and tribal criminal law. However, the status quo of leaving investigatory reactivity to states and localities has not reduced unsolved crimes.¹⁹⁷ Instead, perpetrators have targeted Native women under the belief that muddled law enforcement will continue to leave this already vulnerable group exposed. Edith’s story and others are reminders that securing environmental justice for Native women and tribal communities remains unfinished work. Nevertheless, the BLM has the authority and discretion to rectify the booming impacts of oil and gas leasing operations on federal and tribal lands and, in doing so, promote a higher quality of life for Native women.

196. ANDREA CARMEN, INT’L INDIAN TREATY COUNCIL, CLIMATE CHANGE, HUMAN RIGHTS, AND INDIGENOUS PEOPLES 2 (2008).

197. *Cf. Reviewing the Trump Administration’s Approach to the Missing and Murdered Indigenous Women (MMIW) Crisis: Hearing Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 116th Cong. 1 (2019) (statement of Charles Addington, Deputy Bureau Director, Bureau of Indian Affs.) (“[S]ignificant gaps in data that exacerbate the [MMIW crisis] remain.”).