

**THOSE WE FORGET: NEPA DOES NOT PROTECT
REMOTE ALASKA NATIVE COMMUNITIES FROM
EXPLOITATION BY RESOURCE EXTRACTION COMPANIES**

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PRECIS

The tiny Native village of Nuiqsut is on the North Slope of Alaska, well above the Arctic Circle. From the village, the horizon reveals almost nothing but tundra as far as the eye can see. But several ConocoPhillips oil drilling compounds break the view of the wild landscape.¹ The Willow Project is a new oil drilling project by ConocoPhillips that, when operational, will extract up to 180,000 barrels of oil per day from the land around Nuiqsut.² Residents of Nuiqsut are vocal about their opposition to the project and concerns about damage to the environment and their living conditions.³ Reports produced by the Bureau of Land Management (BLM) show significant effects to human health and wildlife habitats.⁴ Resource extraction projects are known to cause damage to the climate,⁵ subsistence lifestyles,⁶ and overall health of the local population.⁷ Additionally, recent studies show that resource extraction worker camps in proximity to Indigenous communities substantially increases violence and sexual crimes against Indigenous women.⁸ Yet there is no data about past or potential harm of this kind in the Environmental Impact Statement (EIS) released by the BLM for the Willow Project.⁹

The lack of independent and accurate data collection surrounding Indigenous populations and extraction projects creates the perfect storm of confusion, violence, and disenfranchisement of Alaska Native people. Current National Environmental Policy Act (NEPA)¹⁰ regulations allow ConocoPhillips and government agencies to conduct harmful projects near

1. *If Willow is Approved, Nuiqsut Community Will Be Completely Engulfed by Oil and Gas Development*, STOP WILLOW (Nov. 1, 2022), <https://stopwillow.org/resources/if-approved-nuiqsut-community-will-be-completely-engulfed-by-oil-and-gas-development/> [hereinafter STOP WILLOW].

2. *ConocoPhillips Welcomes Record of Decision on the Willow Project*, CONOCOPHILLIPS (Mar. 13, 2023), <https://www.conocophillips.com/news-media/story/conocophillips-welcomes-record-of-decision-on-the-willow-project/>.

3. U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., WILLOW MASTER DEVELOPMENT PLAN SCOPING MEETING, NUIQSUT, ALASKA 36 (2018) [hereinafter *Scoping Meeting*].

4. U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., WILLOW MASTER DEVELOPMENT PLAN SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT DOI-BLM-AK-0000-2018-0004-EIS 354 (2023) [hereinafter *Final EIS*].

5. *Global Outlook Highlights Resource Extraction as Main Cause of Climate Change, Biodiversity Loss*, INT'L INST. FOR SUSTAINABLE DEV. (Mar. 20, 2019), <https://sdg.iisd.org/news/global-outlook-highlights-resource-extraction-as-main-cause-of-climate-change-biodiversity-loss/>.

6. *Food Security and Climate Change in Alaska*, CLIMATE HUBS U.S. DEP'T OF AGRIC., <https://www.climatehubs.usda.gov/hubs/northwest/topic/food-security-and-climate-change-alaska> (last visited Mar. 7, 2024).

7. *Final EIS*, *supra* note 4.

8. See Lily Cohen, *The Role of Environmental Law in Addressing the Violent Effects of Resource Extraction on Native Women*, 47 HARV. ENV'T L. REV. 275, 277 (2023) (arguing that the National Environmental Policy Act creates a legal obligation for federal agencies to take the effects on Native women into account when evaluating resource extraction project impacts).

9. *Final EIS*, *supra* note 4, at 361.

10. 42 U.S.C. § 4332.

Native communities by controlling the flow of data that informs project approval. For projects like Willow, requisites for accurate data collection under NEPA are vague and do not require independent, corroborative research for the data produced by and for extraction companies.¹¹ Despite urging by affected communities, lawsuits alleging poor data collection methods, and clear conflicts of interest, the law requires very little independent data collection before oil drilling projects like Willow begin.

The increased danger to Native women and the ability to ignore public input calling for independent research are both exacerbated by the unique legal positions of Alaska Native tribes and the extreme remoteness of the location. The future of small, remote, Alaska Native communities depends on a reliable subsistence lifestyle. Extractive projects, like Willow, further disrupt the ability of these communities to adapt subsistence strategies to a rapidly changing landscape.

This Note argues that EISs are inadequate to protect Alaskan environments and Alaska Native communities directly affected by resource extraction projects. Part I outlines Nuiqsut and the Willow Project within the context of North Slope oil extraction and the United States's colonization of Alaska Natives. It also provides a brief overview of the unique legal position of Alaska Natives compared with other Indigenous American groups, and the relevant NEPA regulations.¹² Part II demonstrates how NEPA regulations provide inadequate protections for the land and the people living near extraction projects, and how certain Alaska-specific factors affecting Alaska Native populations compound those issues. Part III of the Note explores solutions to the problem and various facets of it. This Note concludes that a combination of approaches to this multi-faceted issue is necessary to protect communities like Nuiqsut, and one of those approaches must be to support the independent tribal sovereignty of Indigenous people.

11. See 40 C.F.R. § 1506.5(b) (2023) (listing the requirements for the formation of an EIS).

12. KAREN JARRAT-SNIDER, TWO CASES OF NAVIGATING LEGAL COMPLEXITY: ENVIRONMENTAL JUSTICE IN BARROW AND TAR CREEK 123 (Karen Jarrat-Snider & Marianne O. Nielsen eds., 2020) [hereinafter Snider].

I. BACKGROUND

A. Extraction Projects are Especially Dangerous to Indigenous Communities

The United States has a long history of violence, disenfranchisement, and erasure when it comes to its Indigenous¹³ populations.¹⁴ Although the United States government¹⁵ began the colonization and genocide of Indigenous peoples many years ago, Indigenous communities experience ongoing colonization of their lands and bodies. This is visible in the crisis of Missing and Murdered Indigenous Women (MMIW) from reservations and communities around the country, including Alaska.¹⁶ Indigenous women are especially vulnerable to violence and sexual crimes.¹⁷ The Bureau of Indian Affairs' website states that "violence against Native Americans and Alaska Natives far exceed national averages."¹⁸ But statistics only show part of the story. Inconsistencies in how data is collected and recorded results in a skewed average that obscures the extent of the problem in areas considered tribal land.¹⁹ Even with holes in the data, researchers estimate that "rates of violence on reservation[s] can be up to ten times higher than national averages."²⁰ Though Alaska does not have reservations, Alaska Native women have the highest victimization rate for sexual offenses of any racial or gender group in the state. Areas of the state where the population is almost entirely Alaska Native have a rate of felony-level sexual offenses that was 106% higher than the statewide rate in 2017.²¹

Indigenous communities are particularly susceptible to sexual violence and crime when resource extraction projects encroach on residential areas.²²

13. Throughout this Note, the term "Indigenous" is used to refer to Indigenous Americans in general, and the term "Native" or "Alaska Native" is used to refer to Indigenous Alaskans specifically, with the exception of quoted materials. The term "Indian" is only used in reference to statutory language.

14. Summer Blaze Aubrey, *Violence Against the Earth Begets Violence Against Women: An Analysis of the Correlation Between Large Extraction Projects and Missing and Murdered Indigenous Women, and the Laws that Permit the Phenomenon Through an International Human Rights Lens*, 10 ARIZ. J. ENV'T L. & POL'Y 34, 37 (2019).

15. *Id.*

16. Aubrey, *supra* note 14, at 37; *see also*, *Gender Justice & Healing* NATIVE MOVEMENT, <https://www.nativemovement.org/gender-justice> (last visited Mar. 7, 2024) (affirming that Alaska, like many other states, struggles with high numbers of missing or murdered Indigenous women and girls).

17. Laura Cahier, *Environmental Justice in the United Nations Human Rights System: Challenges and Opportunities for the Protection of Indigenous Women's Rights Against Environmental Violence*, 13 GEO. WASH. J. ENERGY & ENV'T L. 37, 38 (2022).

18. *Missing and Murdered Indigenous People Crisis*, DEP'T OF THE INTERIOR BUREAU OF INDIAN AFF., <https://www.bia.gov/service/mmu/missing-and-murdered-indigenous-people-crisis> (last visited Feb. 20, 2024).

19. *Id.*

20. *Id.*

21. CHRISTEN L. SPEARS, DIV. OF STATEWIDE SERVS. CRIM. RECS. & IDENTIFICATION BUREAU, FELONY LEVEL SEX OFFENSES: 2017 CRIME IN ALASKA SUPPLEMENTAL REPORT 4 (Aug. 2018).

22. Cohen, *supra* note 8, at 283.

Documented increases in crime related to sex trafficking and violence follow resource extraction projects near Indigenous communities.²³ Tribal victim services workers in North Dakota observed this phenomenon connected to the “influx of transient oil field workers” for an oil extraction project nearby.²⁴ An extraction company will often place temporary housing for its transient workers near the worksite, allowing for an easy commute but few entertainment options in a rural or remote area.²⁵ These workers are usually men, away from their families from weeks to months at a time, and with access to substantial paychecks from the project.²⁶ The workers are also more likely than the average person to have a history of sexual violence, because the high demand for workers results in lower standards of employee screening.²⁷ Under-resourced tribal law enforcement and jurisdictional complexities can give extraction workers a sense of freedom from accountability when it comes to Indigenous communities.²⁸

The Native village of Nuiqsut is the closest civilization to the proposed site of the Willow Project. The location of Nuiqsut was originally only a place for the Native Iñupiat people to gather seasonally for trading, hunting, and fishing.²⁹ The seasonal camp became an incorporated village in 1975 after the Arctic Slope Regional Corporation agreed to fund the village’s construction.³⁰ The Willow Project and the village of Nuiqsut are located in a region called the National Petroleum Reserve-Alaska (NPR-A). Nuiqsut is the northernmost town in Alaska with road access, which connects it to the rest of the state for only four months out of the year.³¹ The next closest civilization is Prudhoe Bay, a community that sprung up around a long-time oil drilling site, about 60 miles west.³² Nuiqsut has a year-round population between 400 and 500 residents and relies on Kuukpik Native Corporation (Corporation) for most of its public services.³³ Over 90% of Nuiqsut residents are Iñupiat Alaska Native,³⁴ part of the Indigenous Inuit culture of

23. Cohen, *supra* note 8, at 277.

24. *Id.* at 276.

25. Aubrey, *supra* note 14, at 44.

26. *Id.*

27. Cohen, *supra* note 8, at 280.

28. Aubrey, *supra* note 14, at 45.

29. *Nuiqsut*, N. SLOPE BOROUGH, <https://www.north-slope.org/our-communities/nuiqsut/> (last visited Jan. 17, 2024) [hereinafter *North Slope Borough*].

30. *Id.*

31. *Id.*

32. *Gates of the Arctic Research Portal: Nuiqsut*, UNIV. OF ALASKA FAIRBANKS, <https://jukebox.uaf.edu/gatesportal7/community/nuiqsut> (last visited Mar. 8, 2024).

33. *Nuiqsut*, KUUKPIK, <https://www.kuukpik.com/history/nuiqsut/> (last visited Oct. 26, 2024) [hereinafter *Kuukpik*].

34. *Id.*

people that spans the northern coasts of Alaska, Canada, and Greenland.³⁵ The residents of Nuiqsut rely heavily on subsistence hunting, fishing, and gathering for food.³⁶ This enables Nuiqsut residents to offset the high prices of imported food to the remote area, and to maintain connections to traditional ways of life.

Current and future extraction projects in Alaska risk the viability of this lifestyle and jeopardize the long-term resilience of remote communities like Nuiqsut. The federal government designated this area for oil and gas production one year after the Arctic Slope Regional Corporation incorporated Nuiqsut as a permanent residential village.³⁷ In 1998, ConocoPhillips began developing an oil drilling site at the Alpine oil field, very near the village of Nuiqsut.³⁸ Because the Corporation owns portions of the surface rights to that land, ConocoPhillips pays it a royalty whenever oil production is underway.³⁹

B. Unique Legal Positions of Alaska

Laws governing Alaska Native people differ in several ways from those defining Indigenous rights in the contiguous United States. These differences are due in part to confusing and contradictory statements in Russia's cession of Alaska to the United States, and a series of similarly confusing congressional enactments and court decisions since then.⁴⁰ Article III of the 1867 Treaty of Cession from Russia placed Alaska Natives in roughly the same legal position as other Indigenous Americans. This position, however, was largely ignored by governments and remained in flux until 1999.⁴¹ The federal Organic Act of 1884 provided that "Indians . . . shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them"⁴² In 1959, the federal government changed Alaska's status from a federal military district to full statehood.⁴³ The Statehood Act required that the state government cede control of Alaska lands held by any

35. *The Inupiat People*, KIKIKTAGRUK INUPIAT CORP., <https://kikiktagruk.com/shareholders/inupiat-people/> (last visited Mar. 13, 2024).

36. *Final EIS*, *supra* note 4, at 363.

37. Timothy Puko, *What is Willow? How an Alaska oil project could affect the environment*, THE WASH. POST, <https://www.washingtonpost.com/climate-environment/2023/03/17/willow-project-alaska-oil-drilling-explained/> (last updated Apr. 22, 2023, 5:35 PM); *North Slope Borough*, *supra* note 29.

38. STOP WILLOW, *supra* note 1.

39. *Nuiqsut*, KUUKPIK, <https://www.kuukpik.com/corporation/about-us/> (last visited Oct. 26, 20024).

40. DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 165–67 (University of Alaska Press eds., 3rd ed. 2012) [hereinafter *Case*].

41. Treaty of Cession, Russ.-U.S., art. III, Mar. 30, 1867, 15 Stat. 539; *Case*, *supra* note 40, at 165.

42. Organic Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26; *Case*, *supra* note 40, at 166.

43. *Case*, *supra* note 40, at 166.

Native groups to the federal government.⁴⁴ Subsequently, Native groups brought several cases asserting various land rights, further complicating the law.⁴⁵ A mire of legal ambiguities set the stage for the federal government to claim expansive rights to Alaskan land.

The federal government views Alaska almost exclusively as a source of natural resources.⁴⁶ Shortly after Alaska became a state, prospectors discovered oil.⁴⁷ Before this, the federal government had not fully defined Alaska Native rights under American law.⁴⁸ To gain access to the oil, the government enacted legislation that dramatically altered Native land rights in Alaska. The Alaska Native Claims Settlement Act (ANCSA) of 1971⁴⁹ terminated all Native reservations in Alaska except one, and transferred title for 44 million acres to 12 Alaska Native regional corporations and over 200 smaller village corporations.⁵⁰ ANCSA dispensed \$963 million to Alaska Natives through those regional corporations as compensation for the state and the federal government to have “collaborative use” of the land.⁵¹ Each Alaska Native person received 100 shares in stock in the corporation representing their tribal group, and Native children born after ANCSA could inherit that stock.⁵²

The critical effect of ANCSA is that it unilaterally extinguished Native claims to inherent land rights in Alaska.⁵³ Through ANCSA, Alaska Natives may not claim any land as protected for their exclusive use, outside the boundaries of specific villages.⁵⁴ Originally, ANCSA contained language ensuring that the new corporations use part of the settlement to provide public services and safeguard subsistence lifestyles, but the final version did not.⁵⁵ The original language alluded to a deal that would pay Native people for conservation easements to preserve the land for subsistence.⁵⁶ Instead, the federal government insisted on fee simple title transfer of Native lands,

44. Case, *supra* note 40, at 166.

45. See generally *Tlingit & Haida Indians v. United States*, 177 F. Supp. 452 (Ct. Cl. 1959); *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45 (1962); *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969) (illustrating the confusion of the law, and the struggle for Native groups to have their rights clearly defined).

46. Snider, *supra* note 12, at 123–24.

47. *Id.*

48. *Id.*

49. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629h.

50. Kuukpik, *supra* note 33.

51. *Id.*

52. Snider, *supra* note 12, at 124; see also Case, *supra* note 40, at 35 (confirming the distribution of Corporation shares in the wake of ANCSA).

53. Alaska Native Claims Settlement Act, 43 U.S.C. § 1603(a)–(c).

54. *Id.* §§ 1603, 1611, 1613.

55. Case, *supra* note 40, at 35.

56. *Id.*

conveying it entirely away from the tribes.⁵⁷ In short, the effect of ANCSA is that Alaska Natives cannot exercise full sovereignty over any part of Alaska's lands or waters.⁵⁸ This presents many problems for tribes in Alaska, including curtailing tribal governments' ability to ensure that Native communities may subsist in clean, healthy, and safe environments.

Jurisdictional complications arise from a series of overlapping court decisions and laws regarding which entities should decide criminal cases originating on tribal land. The Major Crimes Act, enacted in 1885, granted federal courts exclusive jurisdiction over certain felonies committed on tribal land.⁵⁹ In 1953, Public Law 280 transferred jurisdiction over most criminal cases to certain states, including Alaska, though Alaska would not officially become a state until 1959.⁶⁰ Then in 1978, *Oliphant v. Suquamish Indian Tribe* removed tribal jurisdiction for non-Indigenous offenders altogether, even when the victim was Indigenous.⁶¹ In 1999, the Alaska Supreme Court officially recognized the status of Alaska Tribes as separate governments with inherent sovereignty, and this legal view continues today.⁶² The 2013 reauthorization of the Violence Against Women Act (VAWA) restored tribe's ability to prosecute non-Indigenous people for certain domestic violence offenses, but this jurisdiction was extremely limited.⁶³ The 2022 VAWA reauthorization restores even greater jurisdiction to tribal courts,⁶⁴ but significant limitations remain. This complex and shifting area of the law creates uncertainty over who has jurisdiction, and many cases go undecided, resulting in a culture of little accountability.⁶⁵

57. Marilyn J. Ward Ford, *Twenty Five Years of the Alaska Native Claims Settlement Act: Self Determination or Destruction of the Heritage, Culture, and Way of Life of Alaska's Native Americans?*, 12 J. Env't L. & Litig. 305, 328–29 (1997).

58. *Id.*

59. 18 U.S.C. § 1153(a); Ana Condes, *Man Camps and Bad Men: Litigating Violence Against American Indian Women*, 116 NW. U. L. REV. 515, 532 (2021).

60. Pub. L. No. 83–280, 67 Stat. 588 (1953); *Tribal Crime and Justice: Public Law 280*, NAT'L INST. OF JUST. (May 19, 2008), <https://nij.ojp.gov/topics/articles/tribal-crime-and-justice-public-law-280>.

61. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

62. *John v. Baker*, 982 P.2d 738, 743 (Alaska 1999).

63. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, § 904, 127 Stat. 54 (2013); Condes, *supra* note 59, at 534.

64. Consolidated Appropriations Act of 2022, Pub. L. No. 117–103, 136 Stat. 49, 904–08, sub. B, §§ 811–813 (codified at 25 U.S.C. §§ 1304–1305).

65. See Condes, *supra* note 59, at 534–37 (discussing relevant case law and other issues that compound the difficulty of enforcing accountability for violence against Indigenous women).

C. Environmental Justice for Indigenous Americans

The essential goal of the environmental justice movement is to “create equal access to ecological resources and equal protection from environmental hazards for all persons.”⁶⁶ The Environmental Protection Agency (EPA) defines environmental justice as “the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment.”⁶⁷ The EPA recognizes the right of all communities to environmental justice, or “the same degree of protection from environmental and health hazards,” as well as an equal opportunity to have meaningful involvement in decision-making processes.⁶⁸ Many people recognize the roots of American environmental justice in the Civil Rights Movement of the 1960s, when Black communities began to pressure city and state governments for cleaner, safer living and working conditions.⁶⁹ However, Rebecca Tsosie argues that Indigenous “‘sovereignty claims’ constituted the focal point of the first generation of environmental justice claims” in the United States.⁷⁰

Environmental justice has a different meaning to Indigenous populations than to other minority and disadvantaged groups in the United States. “[T]he term ‘environmental justice’ has been used to highlight the distributional impacts of the dominant society’s environmental decision-making process on disadvantaged communities, including the poor and racial minorities.”⁷¹ Though many Indigenous communities face environmental injustices by private companies and federal colonization of land, many tribal governments also sell natural resources and operate industrial plants to promote the economic welfare of the tribe.⁷² In contracting for economic development projects on tribal land, the tribe asserts its sovereignty to provide employment opportunities and essential tax revenue.⁷³ Self-determination means that Indigenous nations make their own decisions about when to allow these projects on their land. “[T]he injustice faced by federally recognized tribes

66. Julia C. Rinne & Carol E. Dinkins, *Environmental Justice: Merging Environmental Law and Ethics*, 25 NAT. RES. & ENV’T 3, 3 (2011).

67. *Learn About Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> (last visited Aug. 16, 2023).

68. *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last visited Nov. 15, 2023).

69. *Environmental Justice Timeline*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline> (last visited June 27, 2023).

70. Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1627 (2007).

71. *Id.*

72. Louis G. Leonard III, *Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache’s Decision to Store Nuclear Waste*, 24 B.C. ENV’T AFFS. L. REV. 651, 682 (1997).

73. Tsosie, *supra* note 70, at 1631.

was primarily caused by the federal government's failure to acknowledge the tribes' sovereign powers and by decades of paternalistic federal management policies, which had allowed reservation resources to be exploited without adequate compensation or mitigation."⁷⁴ Self-determination, economic independence, and environmental justice are not mutually exclusive. Rather, for Indigenous communities, each cannot exist independently of the others.

Environmental justice is not a new concept, but it is a growing concern due to the urgency of climate change. Resource extraction contributes significantly to the changing climate and loss of biodiversity,⁷⁵ affecting the long-term health of the planet as well as the short-term ability of Native communities to subsist on wild-caught and gathered food sources. "Certain groups, such as Indigenous populations in both the continental United States and non-contiguous states and territories, have a complex, historical fight over land jurisdiction that complicates their fight for justice."⁷⁶ Many of the most adversely affected communities around resource extraction projects are Indigenous American or Alaska Native.⁷⁷ This reality lowers the resiliency of the community to handle other challenges.

To achieve environmental justice, governments and agencies must acknowledge the significance of "structural causes and consequences of uneven distribution of harms across time, space and demographics."⁷⁸ Many states are now adopting their own laws and policies regarding environmental justice.⁷⁹ Alaska currently does not have any such laws.⁸⁰ The state does have many small, remote, mostly Native communities that are vulnerable to climate change and exploitation by resource extraction companies and other industrial projects.⁸¹ In Nuiqsut, though the Kuukpik Tribal Corporation supports the Willow Project, its residents lack economic alternatives and political power to resist a "dirtier or more dangerous environment in return for the promise of jobs and economic aid."⁸² Tribal Corporation boards are

74. Tsosie, *supra* note 70, at 1632.

75. *Global Outlook Highlights Resource Extraction as Main Cause of Climate Change, Biodiversity Loss*, INT'L INST. FOR SUSTAINABLE DEV. (Mar 20, 2019), <https://sdg.iisd.org/news/global-outlook-highlights-resource-extraction-as-main-cause-of-climate-change-biodiversity-loss/>.

76. Jasleen Shokar, *A New Hope, With a New NEPA: How Existing Environmental Impact Statements Fail to Protect People of Color at the Federal Level*, 13 ARIZ. J. ENV'T L. & POL'Y, 261, 264 (2023).

77. Cohen, *supra* note 8, at 279.

78. Miranda Forsyth et al., *A Future Agenda for Environmental Restorative Justice?* 4 INT'L J. OF RESTORATIVE JUST. 17, 24 (2021).

79. *Environmental Justice Law and Policy Database*, ENV'T JUST. STATE BY STATE, <https://ejstatebystate.org/law-policy-database> (last visited Mar. 10, 2024).

80. *How Alaska is Addressing Environmental Justice*, ENV'T JUST. STATE BY STATE, <https://ejstatebystate.org/directory/alaska> (last visited Mar. 10, 2024).

81. *Id.*

82. Leonard III, *supra* note 72, at 685–86.

made up of Native people, but sentiments differ about how best to support the Tribe even within small communities.

D. Sorting out NEPA and Regulations Regarding EISs

NEPA imposes requirements like producing an EIS for particular projects overseen by federal agencies.⁸³ Federal laws like NEPA bind federal agencies.⁸⁴ According to the EPA, the basic policy of the law is “to ensure that all branches of government give proper consideration to the environment” before starting projects that could significantly affect it.⁸⁵ To do this, NEPA requires that a governing agency produce an EIS before certain types of projects may move forward.⁸⁶ This is required for any proposed project that could significantly affect the “quality of the human environment.”⁸⁷

Under NEPA, all agencies must “provide meaningful opportunities for public participation.”⁸⁸ Each federal agency has its own procedures for ensuring that it meets this requirement. For the Willow Project, the BLM is the governing agency.⁸⁹ The BLM is in charge of managing most of the 22.1 million acres of surface and subsurface estate of the NPR-A, as well as overseeing the title transfer for all ANCSA conveyances.⁹⁰ Because the NPR-A is federal land, the law considers all projects conducted on it “federal action.”⁹¹ Though the land is considered tribal land for subsistence hunting and fishing purposes, the federal government, through the BLM, has the power to determine whether to use it for resource extraction. For the BLM, opportunities for public participation largely manifest in producing an EIS, which provides its own requirements for public comment and participation by affected parties.⁹² Executive Order 12898 also encourages public participation to further the pursuit of environmental justice in agency

83. 42 U.S.C. § 4332; 40 C.F.R. § 1502.1 (2023).

84. 42 U.S.C. § 4332 (“all agencies of the Federal Government shall—”).

85. *Summary of the National Environmental Policy Act*, EPA, <https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act> (last visited Sep. 6, 2023) [hereinafter *NEPA Summary*].

86. 42 U.S.C. § 4332(C-G).

87. 42 U.S.C. § 4332(C); Cohen, *supra* note 8, at 287.

88. 40 C.F.R. §§ 1501.2(4)(ii), 1501.5(e) (2023); *How Citizens can Comment and Participate in the National Environmental Policy Act Process*, EPA, <https://www.epa.gov/nepa/how-citizens-can-comment-and-participate-national-environmental-policy-act-process> (last visited Oct. 3, 2023).

89. *Bureau of Land Management Seeks Public Input for Supplemental Analysis of Willow Project*, BUREAU OF LAND MGMT. (Feb. 3, 2022), <https://www.blm.gov/press-release/BLM-seeks-public-input-supplemental-analysis-willow-project>.

90. *What We Manage in Alaska*, BUREAU OF LAND MGMT., <https://www.blm.gov/about/what-we-manage/alaska> (last visited Mar. 10, 2024).

91. *NEPA Summary*, *supra* note 85.

92. *National Environmental Policy Act*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/planning-and-nepa/what-informs-our-plans/nepa> (last visited Mar. 10, 2024).

action.⁹³ This includes holding public meetings “for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice.”⁹⁴

NEPA also imposes other requirements such as: tribal and public participation, environmental justice considerations, impacts for the community, and EIS inclusions. Regulations for NEPA explicitly require that an agency consult with relevant tribal governments on the project proposal.⁹⁵ “Agencies shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable in preparing environmental assessments.”⁹⁶ NEPA provides multiple opportunities for the public to submit comments on the project proposal.⁹⁷ NEPA does not mandate any action from the federal agency attached to an EIS, though the EIS does hold weight and provides a basis for advocacy groups and others to challenge agency actions in court.⁹⁸ The language of NEPA recommends that agencies consider social and environmental justice impacts to the community.⁹⁹ However, there is no requirement or specific guidance on how to do so.¹⁰⁰ Furthermore, EISs “do not exist to mediate or eradicate environmental harm . . . [t]hey are merely a public acknowledgement and notification of potential harm to a community about the environment.”¹⁰¹ NEPA does not contain any provisions requiring a project to halt due to the environmental impact, only that the agency complete the assessment.¹⁰²

II. WHY THE WILLOW PROJECT’S EIS IS INADEQUATE

The Willow Project’s Final Supplemental EIS does not adequately address either the potential risk to or participation of the community. Compounded by several unique aspects of Alaska related to these issues, NEPA requirements offer especially hollow protection against exploitation by extractive industries. First, the BLM’s Final EIS did not provide a complete analysis of potential human rights impacts, such as the likelihood of increased violence and sexual abuse of Native women. Second, the report does not address a concern about independent research that community

93. Exec. Order No. 12898, 3 C.F.R. § 1–101 (1994).

94. *Id.* § 5–5(d).

95. 40 C.F.R. §§ 1501.2(4)(ii), 1501.5(e) (2023); Cohen, *supra* note 8, at 287.

96. 40 C.F.R. § 1501.5(e) (2023).

97. 42 U.S.C. § 4332.

98. Cohen, *supra* note 8, at 287–88.

99. 40 C.F.R. §§ 1501.2(b)(2), 1501.2(b)(4)(ii), 1501.5(e) (2023).

100. *Id.*

101. Shokar, *supra* note 76, at 267.

102. *Id.* at 267–68.

members raised on multiple occasions. These issues combine with other issues relatively unique to Alaska, such as extreme remoteness and the tenuous hold that Alaska Natives have on their ancestral lands. These failures demonstrate the inadequacy of NEPA and EIS requirements to protect communities like Nuiqsut.

A. The EIS for the Willow Project Fails to Address Increased Risk to Native Women

The environmental impacts considered for project evaluations must include all potentially significant impacts to an affected community. NEPA does not currently have any requirements that EISs include the potential for increased crime or violence against women.¹⁰³ However, the push to include more environmental justice concerns in NEPA analyses could increase recognition of how extractive industries exploit more than the land. The U.S. Department of State acknowledges the link between resource extraction and increased violence and sex trafficking of women that Indigenous communities have felt since the oil boom began.¹⁰⁴ Though NEPA does not expressly create a legal obligation to “evaluate the violent impacts accompanying certain resource extraction projects on Native women,” federal agencies are beginning to recognize the need to do so.¹⁰⁵

The goal of an EIS is to have an agency evaluate the potential impacts and alternatives of a project on the surrounding environment.¹⁰⁶ If that environment includes a community, the agency conducting the project must consider all impacts to such a community. According to substantial research on the risk of extraction projects resulting in increased violence against Indigenous women, the potential impacts of the Willow Project on Nuiqsut should include the likelihood of an increase in risk to the safety of women in Nuiqsut.

The increased risk of sexual violence to Alaska Native women and girls in Nuiqsut falls squarely within environmental justice considerations for federal agencies. The 1994 Executive Order 12898 charged all federal

103. See 42 U.S.C. §§ 4331-4336(e) (neglecting to include the potential for increased violence in connection with environmental projects).

104. U.S. DEP’T OF STATE OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERS., *THE LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING* (2017), <https://www.state.gov/wp-content/uploads/2019/02/272964.pdf>; Julia Stern, *Pipeline of Violence: The Oil Industry and Missing and Murdered Indigenous Women*, IMMIGR. AND HUM. RTS. L. REV. BLOG (May 28, 2021), <https://lawblogs.uc.edu/ihr/r/2021/05/28/pipeline-of-violence-the-oil-industry-and-missing-and-murdered-indigenous-women/>.

105. Cohen, *supra* note 8, at 278.

106. *What is the National Environmental Policy Act?*, EPA, <https://www.epa.gov/nepa/what-national-environmental-policy-act#NEPArequirements> (last visited Oct. 5, 2023).

agencies to include environmental justice considerations in their missions by “identifying and addressing . . . disproportionately high adverse human health or environmental effects of its programs, policies, and activities on minority populations”¹⁰⁷ The Council on Environmental Quality, the office in charge of NEPA implementation, defined the Order’s direct effects on NEPA regulations.¹⁰⁸ These effects included determining whether minority populations or Indigenous tribes were present and recognizing “interrelated cultural, social, occupational, historical, or economic factors” that could amplify the effects of the federal action.¹⁰⁹ As a minority population, the effects of the Willow Project on Nuiqsut must include environmental justice considerations.

The BLM states in its Environmental Justice Implementation mission that it will consider “all potential social and economic effects” for the general population and compare that to minority and Tribal populations to determine any disproportionately adverse effects.¹¹⁰ The potential risk to the Native women of Nuiqsut, and an analysis of why the danger to them is disproportionate, should be part of the social and economic effects included in the EIS for Willow. The BLM recognized the risk to Indigenous women in a previous EIS.¹¹¹ In 2020, the BLM acknowledged the correlation between extraction workers and an increase in crime in an environmental justice analysis for the Moneta Divide oil and gas project in Wyoming.¹¹² This analysis led to a recommendation that the oil company take extra measures to protect Indigenous women against the potential of violence.¹¹³ Admitting that such a correlation exists for one project shows that the BLM is aware that increased risk to Alaska Native women in Nuiqsut is a possible outcome of the Willow Project as well. Therefore, the issue should be part of the environmental justice analysis.

The Willow Project EIS’s environmental justice statement finds that Nuiqsut residents will bear highly adverse effects but does not mention an additional risk of violence towards women.¹¹⁴ The statement summarizes the points and requests made by residents during public engagement

107. Exec. Order No. 12898, 3 C.F.R. § 1–101 (1994).

108. FED. INTERAGENCY WORKING GRP. ON ENV’T JUST. & NEPA COMM., COMMUNITY GUIDE TO ENVIRONMENTAL JUSTICE AND NEPA METHODS 3–4 (Mar. 2019).

109. *Id.* at 4.

110. *Environmental Justice Implementation*, BUREAU OF LAND MGMT., <https://www.blm.gov/policy/im2022-059> (last visited Sep. 20, 2022).

111. Cohen, *supra* note 8, at 297.

112. *Id.* at 300.

113. Angus M. Thuermer Jr., *BLM: Oilfield Developers Should Protect Indigenous Women*, WYOFILE (March 3, 2020), <https://wyofile.com/blm-oilfield-developers-should-protect-indigenous-women/>.

114. *Final EIS*, *supra* note 4, at 347–48.

opportunities, the proposed mitigation strategies, and the standards under which ConocoPhillips will require its employees to operate.¹¹⁵ The statement's section on public health concludes that the Project's effects on public health "may be highly adverse" and would be borne by the residents of Nuiqsut.¹¹⁶ The environmental justice statement determines that, regardless of the mitigating or alternative measures employed, the Willow Project would significantly reduce the ability of Nuiqsut residents to use the land for subsistence purposes.¹¹⁷ The statement goes on to conclude that this loss will increase the living cost for residents who will be forced to buy more imported food.¹¹⁸ It will also adversely affect "Inupiat cultural identity, social organization, social cohesion, transmission of cultural values, and community and individual well-being."¹¹⁹ These effects will also impact the way that women are treated, both by the transient extraction workers and within the community. Because the subject of violence against Native women did not come up during the opportunities for public comment about the Willow Project, if such an impact does result from the Willow Project, there is no basis on which to make a legal claim.

The mitigation strategies of impacts to the community section includes: "Minimize cultural and resource conflicts" by conducting "training developed to train employees on how to prevent transmission of communicable diseases, including sexually transmitted diseases, to the local communities."¹²⁰ This strategy is the only mention of likely sexual contact between extraction workers and local women in an over-500-page report about potential impacts to the community. Just as the BLM previously recognized the correlation between extraction projects and violence against Indigenous women, the BLM again admits there will likely be sexual contact between the two groups. Yet the EIS failed to recognize that, in addition to consensual sexual contact, violence and sexual assault are also possible.

Here again the EIS report did not include any research into the potential for increased violence against Native women residents of Nuiqsut, so there is no record of data that could support subsequent mitigating action.¹²¹ In other words, by successfully avoiding doing the research in the first place, the BLM and ConocoPhillips avoid the blame if the problem does eventually surface. Industrial corporations, like ConocoPhillips, often fail to implement their own recommended mitigation measures because federal agencies, like

115. *Final EIS*, *supra* note 4, at 349–61.

116. *Id.* at 366.

117. *Id.* at 368.

118. *Id.*

119. *Id.*

120. *Final EIS*, *supra* note 4, at 361.

121. Aubrey, *supra* note 14, at 45–46.

the BLM, lack enforcement authority.¹²² In fact, “[a]n analysis of 17 Supreme Court cases concluded the Court’s interpretation is that NEPA imposes purely procedural obligations.”¹²³ This effectively reduces the value of the EIS to the mere fact of its existence, rather than imparting any enforceable responsibilities.¹²⁴ Without any legal consequences for any damage caused by the project, ConocoPhillips is free to ignore the mitigation strategies that do make it into the EIS. Though Congress proposed several amendments to NEPA, including measures that require action and implementation of the EIS, none of them have passed.¹²⁵ This lack of accountability shows how inadequate the EIS requirement for NEPA really is.

Given the way that government agencies like the BLM implement EISs, the EISs are not a tool that provides substantial protection for the communities that need it most. Though the EIS might have begun with “thoughtful intentions,” it has become instead “political fodder in the battle between economic prosperity and environmental preservation.”¹²⁶ Forgotten communities like Nuiqsut get caught in the crossfire of this battle. The research shows that increased violence and sexual assault of Indigenous women results from proximity to resource extraction projects. Yet there is no specific requirement for Willow’s EIS to include this danger in the sections regarding environmental justice, human health impacts, or mitigation. For an EIS involving Native communities especially, the reports on potentially harmful effects of the project and mitigation strategies must include this information. Furthermore, without legal enforcement of the mitigation strategies the EIS does propose, simple recognition of the risk is not enough. For these reasons, the Willow Project’s EIS does not adequately protect the Native women of Nuiqsut.

B. The Pretense of Public Participation

Though the BLM and ConocoPhillips technically met NEPA requirements for public participation, the residents’ recommendations resulted in minimal alterations to mitigation strategies and project alternatives. Regulations for NEPA and projects conducted by federal agencies require a certain amount of public participation. The conflicting interests of many parties complicate opportunities for public participation in a major project. In the Willow Project’s approval process, local people frequently pointed out issues with the data collection methods

122. Shokar, *supra* note 76, at 276.

123. *Id.* at 268.

124. *Id.* at 271.

125. *Id.* at 276.

126. Shokar, *supra* note 76, at 266.

ConocoPhillips and the BLM used.¹²⁷ These issues included health data for Nuiqsut residents not being up to date; concerns about researchers collecting data without the benefit of Native knowledge or perspectives; and that independent organizations did not collect the data.¹²⁸ The BLM's EIS acknowledged that the village of Nuiqsut would likely experience irreparable harm from the Project.¹²⁹ Unfortunately, these concerns did not result in significant changes to the project plan.

Public participation for an EIS encompasses many entities that make up the “public.” A large extraction project may affect or benefit many groups differently. The Tribal Corporation for the North Slope area, the Kuukpik Corporation, supports the Willow project, possibly because of the financial benefit it will bring the Corporation and the people they are responsible for supporting.¹³⁰ Though the Kuukpik Corporation represents the people's tribal interests, many Nuiqsut residents oppose the project.¹³¹ Additionally, there are also Nuiqsut residents who must live with any consequences of the project despite not receiving benefits from the Corporation.¹³²

In an early scoping meeting for the Willow Project in 2018, Nuiqsut residents believed the research did not produce enough data about current and potential effects and worried that the data produced was not the result of independent research.¹³³ To Nuiqsut residents, “independent research” means research conducted by scientists hired by the Tribe, the village, or another entity that does not have financial stake in ensuring the project moves forward. One resident stated that the Tribe should conduct the studies for the Health Impact Assessment in the EIS to avoid the conflict of interest by researchers hired by development companies.¹³⁴ The comment was later reflected in the final summary of public comments for the EIS but did not change the BLM's or ConocoPhillips's approach to the project.¹³⁵ This resident also observed that the studies seemed like they were “designed

127. *Final EIS*, *supra* note 4, at 349, 352–56; *Scoping Meeting*, *supra* note 3, at 10, 11, 13, 33, 34, 36, 37, 46.

128. *Final EIS*, *supra* note 4, at 352–56.

129. *Id.* at 420.

130. Letter from Joe Nukapigak, Kuukpik Corp. President, to Hon. Deb Haaland, Sec'y of Interior (Feb. 23, 2023) (on file with author).

131. *Comments Regarding BLM Willow MDP Preliminary Final FSEIS Review*, NATIVE VILL. OF NUIQSUT & CITY OF NUIQSUT (Jan. 25, 2023), <https://static1.squarespace.com/static/565291dee4b06ed63ea669d4/t/63d8287ab74e196371bdcflf/1675110527125/City+of+Nuiqsut+and+NVN+letter+re+Willow.pdf> [hereinafter *Nuiqsut Letter*].

132. *Scoping Meeting*, *supra* note 3, at 31

133. *Id.* at 36.

134. *Id.*

135. U.S. DEP'T OF THE INTERIOR, DOI-BLM-AK-0000-2018-0004-EIS, WILLOW MASTER DEVELOPMENT PLAN FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, BUREAU OF LAND MGMT., 5 (Jan. 2023), https://eplanning.blm.gov/public_projects/109410/200258032/20073119/250079301/Willow%20FSEIS_Vol%208_App%20B%20-%20C.pdf.

for . . . development to move forward, disregarding then [*sic*] voice of Nuiqsut.”¹³⁶ With such little weight given to the community feedback, the public participation requirement is little more than a publicity stunt.

In a January 2023 letter from the Native Village of Nuiqsut and the City of Nuiqsut, village and city leaders submitted their comments regarding a previous EIS for the Willow Project.¹³⁷ The comment letter laid out in great detail many issues with the process, the BLM’s assumptions, and mistrust in ConocoPhillips. This letter outlined concerns about a “fundamental responsibility to protect the people of our village,” and the consistent position of the residents opposing the “endless expansion of oil development.”¹³⁸ The letter called the EIS process “deeply flawed” and asserted that the most recent report did not reflect local public commentary and concerns.¹³⁹ Not only was the public participation report incomplete, but the resulting mitigation proposals were not realistic methods of protecting their way of life—which most concerned the residents. For undisclosed reasons, several newly elected city council members and the new mayor of Nuiqsut have since changed their official position and now endorse the project; the position of Nuiqsut residents appears unchanged however.¹⁴⁰

In a letter to the Secretary of the Department of the Interior in March of 2023, Nuiqsut village leaders again explained some of their issues with the Willow Project and the way the agency and ConocoPhillips were approaching the project.¹⁴¹ The letter details the ways that the BLM failed to adequately include input from Nuiqsut, instead focusing narrowly on “justifying why the project should go forward.”¹⁴² The village leaders pointed out that a previous EIS did not even include the comments of Nuiqsut residents.¹⁴³ Like the comments from the scoping meeting and other previous public commentary, the letter also accused the agency of orchestrating the whole process to keep the project moving forward, rather than doing what is best for the community.¹⁴⁴ The letter outlined dire effects to livelihood and health that village residents experience because of existing oil extraction

136. *Scoping Meeting*, *supra* note 3, at 46.

137. *Nuiqsut Letter*, *supra* note 131, at 1.

138. *Id.* at 1-2.

139. *Nuiqsut Letter*, *supra* note 131, at 2.

140. Nathaniel Herz, *As ConocoPhillips’ Willow Project Advances, Two Local Governments Have Withdrawn Their Criticism*, ALASKA BEACON, (Jan. 10, 2024, 6:11 PM), <https://alaskabeacon.com/2024/01/10/as-conocophillips-willow-project-advances-two-local-governments-have-withdrawn-their-criticism/>.

141. Letter to the Honorable Debra Haaland, Secretary, DEP’T OF THE INTERIOR 2 (Mar. 4, 2023), <https://ndncollective.org/consultation-process-inadequate-new-letter-from-nuiqsut-community-leaders-to-department-of-interior/> [hereinafter *Haaland Letter*].

142. *Id.* at 3.

143. *Id.* at 2.

144. *Id.* at 3-4.

projects.¹⁴⁵ It also conveyed their frustration that the federal agency appears to ignore these issues in favor of increasing the area's oil production.¹⁴⁶

Under the section on environmental justice, the Final EIS proposed one mitigation measure: for ConocoPhillips to provide funding to the village of Nuiqsut to hire a third-party contractor to operate an air quality monitoring station.¹⁴⁷ However, since the mitigation measures proposed in an EIS are not legally enforceable, ConocoPhillips has discretion whether to implement this strategy.¹⁴⁸

Though the BLM afforded Nuiqsut residents access to the approval process through scoping meetings and other opportunities for public comment, there is no evidence that the participation elicited any effect other than the checking of a box. Communities like Nuiqsut are already disproportionately excluded from privileges afforded to other citizens in more urban areas and are often excluded from making decisions about their own living environments as well. When there is significant turnout at public participation meetings, decision-makers will likely face political consequences for disregarding the public's input. But if the only affected community is small and remote, as is often the case in Alaska, their voices are easier for decision-makers to ignore.¹⁴⁹ Simply put, "[m]ore access to the system without power within that system means nothing."¹⁵⁰ The BLM only gave Nuiqsut residents the illusion of access to the system. Opportunities for public participation have limited usefulness if there is no requirement to take recommendations from the public into account when making decisions.

The reality of the people of Nuiqsut is that under their colonizers' desire for production, they are abandoned as an unfortunate but affordable casualty. "Environmental hazards are inequitably distributed in the United States," and low-income populations and people of color bear a disproportionate burden of environmental dangers.¹⁵¹ If the federal government discovered oil near a wealthy white suburb, the vast differences in how the local people would be treated illustrates the profound injustice of the situation in Nuiqsut. Nuiqsut and the Willow Project reveal an ugly truth at the heart of the resource extraction industry—the economic benefits of extraction outweigh the consequences of disenfranchising and endangering populations which are already considered of low value to society. Creating "national sacrifice

145. *Haaland Letter*, *supra* note 141, at 17.

146. *Id.*

147. *Final EIS*, *supra* note 4, at 354.

148. Cohen, *supra* note 8, at 287.

149. Luke W. Cole, *Legal Service, Public Participation, and Environmental Justice*, 29 CLEARINGHOUSE REV. 449, 455 (1995).

150. *Id.* at 449.

151. *Id.*

areas”¹⁵² allows the government to avoid similarly damaging extraction projects in areas inhabited by those it considers of higher value. To truly protect vulnerable communities, a finding of “significant impacts” to the environment or the community should trigger a full review of the project, with project termination being a real possibility. Otherwise, the EIS and project review process is just an expensive and time-consuming way to prove that the federal government will approve the project regardless of its adverse impacts.

C. Factors Unique to Alaska that Make NEPA Especially Inadequate

Legal and practical factors specific to Alaska add to the inadequacy of the Willow Project’s EIS. NEPA is a federal statute written to cast a broad net over environmental policies in the country. The EIS requirement is a low bar that ensures little more than a justification for why a project should move forward, with no built-in enforcement of proposed mitigation strategies.¹⁵³ While an EIS may be enough administrative red tape to protect parts of the country under closer scrutiny, it is not enough in Alaska. The complex legal relationship that the Alaska Native Claims Settlement Act (ANCSA) creates between the state, federal government, and Alaska Native tribes is one unique legal factor. A practical factor with legal implications is the extreme remoteness of small villages like Nuiqsut. Remoteness compounds other issues, such as access to law enforcement, legal accountability for decision-makers, accurate data collection, and cost of living.¹⁵⁴ All these issues combine to make the Willow Project’s EIS decidedly inadequate to provide any protection for the local residents.

Alaska Native history is different than the legal history of Indigenous tribes in any other state. ANCSA settled and extinguished tribal claims to aboriginal land title, but not the tribal governments themselves.¹⁵⁵ Because of this, tribal sovereignty in Alaska is tied not to land but to resources managed by Tribal Corporations. Alaska Native tribes have multiple governing bodies that manage different aspects of tribal government.¹⁵⁶ The two major entities are the Alaska Native Regional Corporations, which manage land for Native people as the shareholders, and Alaska Native Regional Non-Profit Organizations, which generally provide social services

152. Tsosie, *supra* note 70, at 1630.

153. 40 C.F.R. §§ 1501.2(4)(ii), 1501.5(e) (2023) (lacking an enforcement provision).

154. ALASKA DEP’T OF LAB. & WORKFORCE DEV., 42 No. 7, ISSN 0160-3345, ALASKA ECONOMIC TRENDS: THE COST OF LIVING 4 (2022) [hereinafter Alaska Economic Trends].

155. Alaska Native Claims Settlement Act, Pub. L. No. 92–203, 85 Stat. 688 (1971) (current version at 43 U.S.C. §§ 1601–1629h (2012)).

156. *See* 43 U.S.C. §§ 1601-1629h (describing the system of Native Corporations that manage tribal governance in Alaska).

and healthcare to Alaska Natives.¹⁵⁷ Tribal governments operate under the non-profit organizations and have inherent authority to exercise tribal jurisdiction over Native people in the villages they serve.¹⁵⁸ But this jurisdiction has limited power when it comes to crimes involving non-Natives.¹⁵⁹ Every time a new legal question arises, federal courts must decide whether it makes sense to apply federal law to Alaska Native people in the same way as Indigenous American groups in the lower 48 states.

The remoteness of many Alaska Native communities like Nuiqsut compounds many other problems: the Missing and Murdered Indigenous Women (MMIW) crisis, lack of accountability and oversight, and high costs of living and transportation. The nearest Alaska Native village to Nuiqsut is Utqiagvik, formerly known as Barrow, which is 136 miles away.¹⁶⁰ The only transportation to Utqiagvik is by plane, which is also how freight such as food and mail arrives.¹⁶¹ The Dalton Highway connects Nuiqsut to Southern Alaska for four months out of the year, but the rest of the time the weather and snowfall make the road impassable, cutting off the village from ground access to the rest of the state.¹⁶² This kind of extreme remoteness makes many aspects of life that most people take for granted nearly impossible.

The MMIW crisis is an ongoing issue across the country. Alaska Native communities have the additional issue of having little to no access to law enforcement and emergency resources.¹⁶³ Community organizer and Alaska Native activist Ruth Miller told *Indian Country Today* that Native women in Alaska “face total negligence by police and federal forces when it comes to prosecuting attackers or murderers of our women.”¹⁶⁴ Recognizing the severe lack of law enforcement in rural communities, Alaska Governor Mike Dunleavy declared a federal public safety disaster in 2019.¹⁶⁵ As a result, the state promised increased funding and placement of State Troopers and police in communities off the road system, which, for the most part, communities have not seen.¹⁶⁶ The Alaska Department of Public Safety is primarily responsible for providing law enforcement in remote areas of Alaska but

157. 43 U.S.C. § 1601.

158. 25 U.S.C. § 2812(d)(1)(A)–(B).

159. *Id.*

160. *North Slope Borough*, *supra* note 29.

161. *North Slope Borough*, *supra* note 29.

162. *Id.*

163. Joaqlin Estus, *Striving to Make Indigenous Women, Girls Feel Safe in Alaska*, ICT NEWS (Feb. 3, 2020), <https://ictnews.org/news/striving-to-make-indigenous-women-girls-feel-safe-in-alaska?redir=1>.

164. *Id.*

165. Casey Grove, *The Lack of Law Enforcement in Rural Alaska Prompted Promises of More Police. Two Years Later, They Haven't Been Kept.*, ALASKA PUB. MEDIA (Dec. 16, 2021), <https://alaskapublic.org/2021/12/16/the-lack-of-law-enforcement-in-rural-alaska-prompted-promises-of-more-police-two-years-later-they-havent-been-kept/>.

166. *Id.*

funds only 373 positions for the entire state.¹⁶⁷ The huge distances, unreliable communication, and uncertain weather of rural Alaska make the job of law enforcement agencies that much more difficult.

Lack of accountability and oversight is a major challenge in remote Alaska. Alaska is vast, with a very low population density, so the state tends to focus its resources on higher-population areas. Remote regions receive very little state funding, resulting in a corresponding lack of state government oversight.¹⁶⁸ This allows for a lot of freedom and independence, not just for law enforcement, but for industrial projects and research teams as well. In such a remote area, it is easy to imagine that there are no consequences for one's actions. The lack of accountability for research teams compounds another issue—the historically inaccurate information on Indigenous populations.

The difficulty of collecting data about remote Alaska Native communities further complicates a process in which there is already minimal incentive for accuracy. Inconsistent census data collection and a general distrust in the government creates a marked lack of data surrounding Indigenous populations across the country.¹⁶⁹ In fact, “the way the U.S. government currently collects, aggregates, and publishes race and ethnicity data can lead to the exclusion of more than three-quarters of Native Americans from some official data sets.”¹⁷⁰ Culturally, many rural communities in Alaska do not trust the government or outside organizations and do not want them collecting information about themselves or their families.¹⁷¹ These sentiments are not unfounded given the brutal colonization, removal, and forced assimilation of Indigenous populations in the United States, including Alaska.¹⁷² Alaska is especially hard to collect data for, as its many isolated populations make for expensive and slow progress.¹⁷³ Understandable as these challenges are, tribal leaders often stress the importance of census data and research for tribal communities, as it can

167. INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 57 (2013).

168. Grove, *supra* note 165.

169. See Robert Maxim et al., *Why the Federal Government Needs to Change How it Collects Data on Native Americans*, BROOKINGS (Mar. 30, 2023), <https://www.brookings.edu/articles/why-the-federal-government-needs-to-change-how-it-collects-data-on-native-americans/> (asserting that the current methods of collecting data about Native American population result in issues with accuracy).

170. *Id.*

171. Annie Zak, *As 2020 Census Nears, Groups Work to Ensure Accurate Numbers in Hard-to-Count Alaska*, ANCHORAGE DAILY NEWS (May 5, 2019), <https://www.adn.com/alaska-news/2019/05/06/as-2020-census-nears-groups-work-to-ensure-accurate-numbers-in-hard-to-count-alaska/>.

172. Aubrey, *supra* note 14, at 37, 42.

173. Zak, *supra* note 171.

result directly in thousands more dollars per household making its way into the community.¹⁷⁴

Expenses are a necessary consideration of any large-scale project, but in Alaska they affect all parties involved very closely. Transportation, utilities, and store-bought groceries are extremely expensive for those living in remote regions of the state.¹⁷⁵ For example, a Nuiqsut resident reported in the scoping meeting that although scientists recommended that locals struggling to catch wild game should subsidize their traditional diet with food from the store, her family was unable to afford the prices.¹⁷⁶ The EIS for Willow acknowledged that Nuiqsut residents use subsistence hunting and fishing to supplement their diet, as well as to maintain a connection to their culture.¹⁷⁷ Despite this, and the conclusion that the project was likely to contribute to lasting effects on the viability of subsistence livelihoods, the EIS states that the Project would not “impact the long-term economic sustainability of the area.”¹⁷⁸ Those high prices also contribute to access challenges for outside teams conducting research, and the availability of entertainment for extraction workers spending long periods away from home.

III. SOLUTIONS

The correct approach to balancing large-scale economic projects with environmental justice protections is a multi-faceted issue requiring an equally comprehensive solution, which is impossible to fully detail in this Note. However, there are several possible solutions that could begin to improve the current situation. The first option is to try to improve the legislation already in place, i.e., NEPA. The second option is to enact new legislation to protect communities most affected by environmental justice concerns. Third, though not a solution to environmental concerns, the reauthorization of the Violence Against Women Act (VAWA) may provide recourse for Alaska Native tribes to improve emergency response and protection of women in rural areas. Fourth, non-Indigenous people must support inherent tribal sovereignty to allow Indigenous communities the self-empowerment, resilience, and traditions to heal and decide the path forward for themselves.

174. Matt Miller, *Census Bureau Claims Nearly All Alaska Households Have Been Counted*, KTOO (Oct. 9, 2020), <https://www.ktoo.org/2020/10/09/census-bureau-claims-nearly-all-alaska-households-have-been-counted/>.

175. Alaska Economic Trends, *supra* note 154.

176. *Scoping Meeting*, *supra* note 3, at 30.

177. *Final EIS*, *supra* note 4, at 370.

178. *Id.* at 300.

Reforming the current system is one option. Most broadly, a reformed NEPA could focus more directly on environmental justice issues.¹⁷⁹ Furthermore, Congress could change the EIS from an informational document to a legally binding one.¹⁸⁰ This change should include language that requires and enforces actions based on findings of irreparable harm, environmental racism, or injustice in the EIS process.¹⁸¹ Congress could also add language that requires NEPA mandates to be “subject to judicial enforcement through litigation.”¹⁸² This would require the judiciary to have a clearly defined role in the new legislation. Third parties with an interest in the project should get copies of the EIS, time to conduct independent research, and time to assess the agency’s findings before project approval.¹⁸³

A not-yet-passed bill called the Environmental Justice for All Act would establish new requirements under NEPA aimed at making more concrete strides towards federal policy on environmental justice.¹⁸⁴ A stated goal of the bill is to “address the disproportionate adverse human health or environmental effects of federal laws or programs on communities of color, low-income communities, or tribal and [I]ndigenous communities.”¹⁸⁵ This would impose more stringent requirements on federal agencies to assess the impact of agency actions on vulnerable communities. The bill also explicitly raises the royalty rates for extractive industries to support both dependent communities and displaced workers so they can transition away from fossil fuel.¹⁸⁶

State laws based on NEPA have great potential to help communities with environmental justice struggles.¹⁸⁷ For example, the Montana Environmental Policy Act mirrors NEPA to ensure that state as well as federal agency actions are subject to detailed review.¹⁸⁸ The problem with this solution for Nuiqsut is that laws regarding Alaska Native and Indigenous Americans are federal in nature, so state legislation must be carefully worded to have the desired effect. However, this does not mean state environmental justice legislation is meritless. Alaska could still implement legislation to protect communities vulnerable to environmental injustices, thereby providing legal recourse for harmed communities at the state level.

179. See Shokar, *supra* note 76 (outlining various changes Congress could make to improve NEPA).

180. *Id.* at 276.

181. *Id.* at 282.

182. *Id.* at 278.

183. *Id.* at 286.

184. See H.R. 2021, 117th Cong. (2021) (establishing more requirements under NEPA related to federal environmental justice policy).

185. *Id.*

186. *Id.*

187. Cole, *supra* note 149, at 451.

188. MONT. CODE ANN. § 75-1-102 (2023).

Alaska currently has no laws or policies tailored explicitly to environmental justice, despite the growing threat of climate change and the detrimental effects of big extraction and industrial projects on small, rural communities. To convince policymakers that these types of laws and policies are necessary, advocates need access to data about the most affected communities in the state. There are tools like the Climate Vulnerability Index (CVI)¹⁸⁹ and EJScreen,¹⁹⁰ that indicate environmental justice needs, but they are not very reliable when it comes to Alaska because accurate data about small, rural communities is hard to collect.¹⁹¹ Collecting independent, accurate data to improve mapping tools like CVI is a necessary step towards more effective advocacy for Alaska's most vulnerable communities.

A potential solution to one aspect of the danger Willow poses to the people of Nuiqsut is the 2022 reauthorization of VAWA, which came with provisions specific to Alaska Native tribes.¹⁹² Because it addressed only tribes in the lower 48 states, the previous reauthorization created a highly complex jurisdictional hurdle to implementing VAWA in Alaska.¹⁹³ Now, the recent reauthorization allows tribes in Alaska to apply to be part of a pilot project which would extend the tribes' jurisdiction over non-Natives for certain crimes, on a trial basis.¹⁹⁴ If the pilot program is successful, Alaska Native tribes may be granted extended jurisdiction over non-Natives for crimes of a violent or sexual nature committed against a Native person in order to better protect the people of remote Native villages.¹⁹⁵ Importantly though, this would only be possible for those tribes and villages that can demonstrate that they have the resources to protect due process rights as required in the Indian Civil Rights Act.¹⁹⁶

There is a difference between choosing to sell a tribe's resources and being forced to go along with a choice that has already been made. Alaska Natives should not have to choose between funding for basic public services and a clean, healthy place to live. At the very least, legislation requiring more robust protection, research, and input from the Tribe would ensure that extraction projects near Native communities were a choice. Rebecca Tsosie writes that "[s]overeignty claims focus on the tribe's autonomy to choose,

189. *Overall Climate Vulnerability*, THE U.S. CLIMATE VULNERABILITY INDEX, https://map.climatevulnerabilityindex.org/map/cvi_overall/usa?mapBoundaries=Tract&mapFiler=0&reportBoundaries=Tract&geoContext=State, (last visited Feb. 20, 2023).

190. *EJScreen: EPA's Environmental Justice Screening and Mapping Tool (Version 2.3)*, EPA, <https://ejscreen.epa.gov/mapper/> (last visited Jan. 20, 2023).

191. Zak, *supra* note 171.

192. 25 U.S.C. § 1305; ALASKA NATIVE WOMEN'S RES. CTR., *VAWA 2022 AND ALASKA INDIAN TRIBES: NOW THAT VAWA IS REAUTHORIZED, WHAT NEXT?* 1 (2022).

193. *Id.* at 3.

194. *Id.* at 1.

195. *Id.*

196. *Id.* at 2.

rather than on the substantive result of such a choice as favoring ‘preservation’ or ‘development.’”¹⁹⁷ Whether new in part or in full, solutions must consider the effects on Indigenous and other vulnerable populations. Solutions must also account for the differences between the lifestyles of urban versus rural or remote communities, their ways of life, and how these might be affected by the proposed project.

CONCLUSION

This Note proposes that Environmental Impact Statements do not adequately protect communities particularly susceptible to exploitation by resource extraction industries. Alaska’s unique legal and physical landscape compounds the inadequacies of the National Environmental Policy Act and the EIS process regarding the Willow Project. The first major failure of the EIS process was complete avoidance of the potential risk of increased violence and sexual exploitation of Native women that could reasonably result from the camps of extraction workers so close to the village. The second failure was a lack of concrete changes to the proposal in response to community comments on the project. Factors unique to Alaska escalate the effects of both these deficiencies. These factors include the complex and singular relationship between Alaska Native tribes and the federal government, plus the extreme remoteness of Willow’s location. The remote location exacerbates more issues, such as the MMIW crisis, lack of access to law enforcement, lack of accountability and oversight, and high costs associated with shipping. Because the issue is so multi-faceted, there is no simple solution. However, this Note concludes that both the state and federal government must do more to support the inherent tribal sovereignty of Indigenous peoples and halt the ongoing exploitation of the forgotten communities like Nuiqsut.

197. Tsosie, *supra* note 70, at 1633.