



Criminalization of Human
Rights Defenders of
Indigenous Peoples Resisting
Extractive Industries in the
United States

Report to the Inter-American
Commission on Human Rights

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Introduction

1. Peaceful demonstrations are a catalyst for the advancement of human rights. Yet around the world governments are criminalizing dissent and suppressing public protest, often as a means to protect corporate interests. In this context, indigenous peoples increasingly find themselves as the subjects of arrests, criminal prosecution and police violence when defending the lands they rely upon for their existence and survival from resource extraction by industries who are operating without the free prior and informed consent of the affected communities.¹

2. This report is submitted to the Inter-American Commission on Human Rights (IACHR) in conjunction with a thematic hearing held during the 172nd period of sessions.² At the hearing, Commissioners heard directly from those involved in the indigenous-led resistance to the Dakota Access Pipeline (DAPL) at Standing Rock, North Dakota.³ This report addresses the criminalization and suppression of protest by indigenous human rights defenders and their allies by United States (U.S.) federal, state and local governments, working hand-in-hand with private security forces, specifically in relation to the construction and operation of DAPL by Energy Transfer Partners and Dakota Access, LLC (Dakota Access) and the connected Bayou Bridge Pipeline (collectively the “Bakken Pipeline”).

3. Standing Rock is an emblematic case of indigenous resistance to extractive industry that drew attention from around the world as water protectors met on the banks of the Missouri River in peaceful assembly in what was the largest gathering of indigenous peoples in the U.S. in 100 years.⁴ Standing Rock is merely one example of how the U.S. government works with industry to approve energy projects carried out without the meaningful participation or consent of indigenous nations.⁵ Indigenous peoples are left with no choice but to peacefully protest and then are criminalized for their efforts to defend their lands and resources.

4. Since Standing Rock, there has been an alarming trend by the United States government and state legislatures to criminalize opposition to pipelines and other energy projects. These anti-protest and so-called “critical infrastructure laws”⁶ progress towards criminalizing dissent and implicitly condone the use of excessive force towards human rights defenders, often including indigenous peoples and their allies who are at the forefront of resistance to extractive industries. As the international community has acknowledged, these laws are incompatible with domestic and international law.⁷ The governments’ use of excessive force and mass arrests to threaten, intimidate, and silence “water protectors” seeking to defend their lands, resources, and culture, and the collusion with private security forces, violate fundamental human rights to free speech and assembly enshrined in international human rights law⁸ and the US Constitution.⁹

5. The information provided here builds on a 2016 request for Precautionary Measures filed by the Standing Rock, Cheyenne River and Yankton Sioux¹⁰ tribes, past Commission hearings on similar matters that remain unsettled, and reports on *Indigenous Peoples and Extractive Activities*,¹¹ and *the Criminalization of Human Rights Defenders*.¹² In addition, the United Nations has reported on the situation at Standing Rock through the Expert Mechanism on the Rights of

Indigenous Peoples,¹³ the Permanent Forum on Indigenous Issues¹⁴ and the Special Rapporteur on the rights of indigenous peoples.¹⁵ Despite condemnation from these international bodies and mechanisms, water protectors continue to suffer impacts from the criminalization of their dissent, while the United States moves forward permitting new pipeline projects on indigenous territories.¹⁶

Background on Dakota Access Pipeline Project

6. The 1172-mile DAPL crosses the Missouri River in North Dakota half a mile north of the Standing Rock Sioux reservation and continues south towards the Gulf Coast.¹⁷ The pipeline crosses through the traditional territory of the Great Sioux Nation or Oceti Šakowij – the “Seven Council Fires” – who have occupied the area since time immemorial. The territory was formally recognized in the 1851 Fort Laramie Treaty with the United States government.¹⁸ In 1868, the United States entered into a second treaty with the leaders of the Great Sioux Nation (1868 Treaty),¹⁹ stipulating that this territory would be considered unceded Indian land.²⁰ The Oceti Šakowij have never relinquished the unceded lands.

7. The US Army Corps of Engineers (“Corps”), a federal agency, issued the permits necessary for the construction of the Dakota Access pipeline. The Corps was obligated to consult with the affected tribes under section 106 of the National Historic Preservation Act,²¹ and other federal laws and polices even though the impacted areas are outside existing reservation boundaries.²²

8. The Corps first met with the Standing Rock Sioux Tribe on February 28, 2016, nearly three months after the release of a draft Environmental Assessment on the Dakota Access Pipeline. By that time, the Corps had already adopted the proposed environmental assessment prepared by the oil company.²³ The permits were issued in the absence of meaningful consultation and without the free, prior and informed consent of the affected tribes: Standing Rock Sioux, Yankton Sioux, and Cheyenne River Sioux.²⁴ This lack of consultation violates both treaties with the Great Sioux Nation and the United States’ obligations under the American Declaration on the Rights of Indigenous Peoples.²⁵

9. On December 4, 2016, during Barack Obama’s presidency, the Corps denied an easement, effectively halting construction of the pipeline²⁶ and later announced it would begin a comprehensive environmental review of the project.²⁷ Four days after his inauguration, President Donald Trump quickly moved to undo the Obama-era decision and issued a presidential memorandum to approve and expedite construction of the pipeline.²⁸ This executive action prompted the Corps to forgo further environmental impact studies and grant the easement.²⁹ The pipeline became operational on June 1, 2017. Shortly thereafter, the US District Court for the District of Columbia found that the Corps “did not adequately consider the impacts of an oil

spill on the fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial.”³⁰

10. The Dakota Access pipeline leaked at least five times in 2017.³¹ The District Court recognized the inherent risk of oil pipelines to tribal lands and ordered: (1) the finalization and implementation of oil-spill response plans at Lake Oahe; (2) completion of a third-party compliance audit; and (3) public reporting of information regarding pipeline operations.³² The company, Energy Transfer Partners, was allowed to continue operating the pipeline while the new environmental analysis moved forward despite court precedent requiring operations to cease pending compliance with the National Environmental Protection Act.³³ The Corps completed its analysis on August 31, 2018, standing by its prior conclusion that no formal reconsideration of the pipeline's impacts was needed.³⁴

11. The pipeline poses significant harm to the Tribes' primary source of drinking water and threatens sacred sites.³⁵ An oil spill in the Missouri River is more than a minor encroachment on land, it threatens the tribes' physical and cultural survival.³⁶ Standing Rock has stated that “subsistence hunting and fishing, and the cultural norms that remain intact, are jeopardized by an oil spill from DAPL.”³⁷

12. Energy Transfer Partners, the company that built, owns, and operates the Dakota Access Pipeline in North Dakota, has also partly constructed the Bayou Bridge Pipeline, a 162.5-mile pipeline in Louisiana which connects the Dakota Access Pipeline to the Gulf of Mexico. The Bayou Bridge Pipeline traverses 11 parishes and cuts across 700 waterways, including through the Atchafalaya Basin, the largest river swamp in the country that is vital for flood control in the region.³⁸ The pipeline also runs below a key source of drinking water for the indigenous Houma Nation.³⁹ There is strong opposition to the Bayou Bridge pipeline from indigenous leaders, fishermen, conservationists, and advocates for environmental justice from African American communities in “Cancer Alley,” a heavily polluted region and petrochemical corridor disproportionately impacting Black communities in Louisiana.⁴⁰

State and private security violence against protesters

13. As it became clear that DAPL construction in North Dakota would proceed in the absence of meaningful consultation and consent, indigenous leaders and community members gathered to oppose construction of the pipeline and to protect their rights to lands and resources; self-determination; equality; religion; culture; and free prior and informed consent.⁴¹

14. In August 2016, the Standing Rock Sioux Tribe issued a call for international observers⁴² that was taken up by Amnesty International,⁴³ and many other indigenous nations, organizations, media outlets and individual supporters. Chief Edward John of the UN Permanent Forum on Indigenous Issues, and Mr. Baskut Tuncak, UN Special Rapporteur on Human Rights and Hazardous Substances and Wastes,⁴⁴ were among the international observers who visited the

Oceti Šakowij camp. By September, thousands of indigenous water protectors and their allies had gathered to resist the construction of the pipeline.

15. During the seven months from September 2016 to February 2017, at least 76 different law enforcement agencies, federal agencies, and private security firms hired by the oil company were present at some time.⁴⁵ Law enforcement and private security donned heavy-duty riot gear and used highly dangerous Specialty Impact Munitions (SIM),⁴⁶ explosive flash-bang grenades and chemical weapons against water protectors.⁴⁷

16. Energy Transfer Partners, private security company TigerSwan,⁴⁸ and other contractors worked closely with local law enforcement, providing surveillance information and even infiltrating the camp. They were present inside law enforcement's Joint Operation Command Center, helped prosecutors build cases against water protectors, and were reported to have been directing law enforcement at times.⁴⁹ These actions substantiate the concerns of the UN Special Rapporteur on Human Rights Defenders over the "growing tendency worldwide for public forces to have dual functionality [as] [m]emorandums of understanding between companies and police forces often contribute to the blurring of limits between public and private security, a situation in which the police become the asset of private interests and fail to protect local communities."⁵⁰

17. On September 2, 2016, Standing Rock tribal officials informed the federal government and Dakota Access construction managers that the proposed pipeline construction was in direct conflict with traditional sacred areas and burial grounds. Dakota Access declined to suspend construction and instead accelerated the destruction of these areas the next day. On Saturday, September 3, 2016, water protectors were on a peaceful march and pipe ceremony when they encountered workers bulldozing the now known ancestral burial sites.⁵¹ The water protectors approached the construction site to pray and to attempt to protect the graves and sacred areas from permanent destruction and desecration. They were met by security guards who had been brought in by Dakota Access and used attack dogs and pepper spray against the water protectors. A number of indigenous people, including a pregnant woman, were bitten and sprayed and one person was deliberately struck with a truck. Law enforcement, including Morton County Sheriff personnel, failed to intervene in the unwarranted attacks on peaceful protestors.⁵²

18. In response to overwhelming tribal and public outcry, on September 9, 2016, the Corps withdrew an easement to drill and install a pipeline under Lake Oahe and repeatedly requested that Dakota Access cease all construction within 20 miles of Lake Oahe. Dakota Access ignored these repeated requests from the Corps. Instead, the parent company, Energy Transfer Partners, hired military contractor, TigerSwan, to run an "information operations campaign" which included surveilling, infiltrating, sowing divisions within and attempting to discredit the growing movement against DAPL and falsely portray the water protectors as dangerous and violent.⁵³

19. Rather than halting the illegal construction, law enforcement increased their use of force and arrests of water protectors, responding to nonviolent expression in an increasingly militarized and violent fashion. On multiple occasions in October 2016, law enforcement conducted indiscriminate and unlawful mass arrests of people who were expressing opposition to the

pipeline, accompanied by unjustified violence against nonviolent protesters. For example, on October 22, 2016, law enforcement surrounded a peaceful prayer march and arrested 128 people without any warning or opportunity to disperse. The arrestees were strip searched and detained in jails all over the state.

20. Another method state and local officials used to suppress the speech, assembly, and prayer associated with the resistance movement was to close the main highway between the Standing Rock reservation and the nearest city, Bismarck, location of the nearest hospital, airport, and shopping center. On October 24, 2016, Morton County, North Dakota indefinitely closed a nine-mile stretch of Highway 1806 to water protectors, while allowing pipeline workers to continue to use the road. In the months prior to the closure, this road had been a primary location of speech, assembly, and prayer for members of the movement including travel to and from the water protector camps. Authorities kept the road closed for approximately five months, intentionally curtailing expressive or religious activity by the Tribe and its supporters at its sacred sites and treaty lands close to the pipeline route until the highway was reopened on March 21, 2017. Icy road conditions in winter regularly rendered alternate routes between the reservation and the region's nearest population center prohibitively difficult.

21. On October 27, 2016, local law enforcement forcibly ousted water protectors from a camp on Sioux unceded treaty land in the path of the DAPL construction, despite the federal halt on construction in that area, very close to Lake Oahe. Hundreds of law enforcement officers⁵⁴ in Humvees and helicopters descended on the small camp, destroying tepees and ceremonial items, and using an array of weapons including a Long Range Acoustic Device sound weapon, explosive teargas grenades, chemical agents, Tasers, rubber bullets, batons and a Directed Energy weapon on nonviolent water protectors.⁵⁵ 142 people were arrested, including elders and other people who were pulled from prayer ceremonies in an aggressive and often brutal fashion. As medics arrived to aid the injured, officers arrested them, pulling one medic from her moving vehicle and shoving another into the still moving car, hitting and kicking him.⁵⁶

22. One of the indigenous women who testified at the IACHR thematic hearing, a Councilwoman for the Ponca Tribe of Oklahoma, described the event:

On October 27th of 2016, I was attending a THPO (Tribal Historic Preservation Office) meeting in Fort Yates, N.D. as an elected official of the Ponca Tribe of Oklahoma. Before the forced removal to Oklahoma, the Ponca Tribe had lived along the Missouri River since time immemorial and felt that it was necessary to protect our ancestral territory from potential harm if the Dakota Access Pipeline was allowed to proceed with drilling under the Missouri River. As a prayer for lunch was being said on that day, we learned that a militarized police force of hundreds of individuals, tanks, helicopter, planes, and private security personnel were approaching the unarmed encampment of indigenous water protectors at nearby Treaty Camp close to Cannonball N.D. We voted unanimously to caravan to the Treaty Camp to act as Observers and ensure that no harm would be inflicted on unarmed men, women and children.

Once we arrived at the Treaty Camp, we observed hundreds of police in riot gear slowly approaching the encampment with armed personnel vehicles, ATVs, percussion grenades, Tasers, pepper spray, sound cannons, guns, helicopters, planes and it was terrifying to see and hear the chaos they were creating.

Our people stood or sat in prayer. Some chanted, some sang, some observed and filmed the assault that happened. We were violently overcome. None of us were armed with anything more than our prayers and Sacred Pipes and Eagle Feather Staffs. Several of us were Elders of our Nations, 70 and above. Many were our Sacred Youth. We were pepper sprayed in our faces, struck down, tazed, then hands zip-tied behind us, thrown to the ground and eventually 142 of us were taken by bus to jail. Before we were put on the bus, each of us had a number written on our arm. It felt like when the Jews were taken to be gassed. Eventually, we were taken to the basement of the jail in Bismark, N.D. where we were strip searched and placed in chain link dog cages.

I'll always hold one image in my mind. When I had last seen my oldest son, he was being assaulted and dragged away by 5 police in riot gear because he was asking for the Elders to have the zip-ties removed or at least placed in front of our bodies. The next place I saw him was in the basement of that jail, he was injured and in a dog cage, but alive.

Our cages, the women's, was separated from the men's by a tarp. There were 37 women in one cage and 34 in the other. We on a bare cement floor and the cages were about the size of a 15 passenger van. There is more, this is only part of what happened.

23. When the arbitrary mass arrests in October failed to deter all protests, law enforcement resorted to even more violent tactics. On November 2, 2016, hundreds of protesters, including indigenous elders, held a prayer ceremony across a river from the pipeline construction site. When a few protesters entered the frigid river, law enforcement bombarded the entire group with tear gas and SIM,⁵⁷ endangering their safety and health. Again on November 15, 2016, at a protest on a public roadway near a DAPL construction yard, law enforcement responded with widespread and indiscriminate use of chemical agents and stun guns.

24. The most violent attack occurred on November 20, 2016, on the Backwater Bridge, just north of the road block. When a few individuals tried to remove abandoned vehicles that law enforcement had placed as part of a road block,⁵⁸ officers immediately began shooting at water protectors with SIM and chemical weapons. In response, more water protectors gathered at the bridge, peacefully praying, chanting, singing and protesting the road block and the pipeline construction. More law enforcement agents arrived in armored vehicles, and used high pressure fire hoses to spray water protectors despite the below freezing weather. They shot SIM, chemical agent canisters, explosive flashbangs and "stinger" grenades indiscriminately into the crowd over

a period of more than eight hours, without justification, and without providing any clear warnings or opportunity to disperse.⁵⁹ Law enforcement used this force despite the fact that the water protectors were not threatening or attacking the officers or attempting to breach the barricade.

25. Over 200 people were injured,⁶⁰ including a Navajo woman who was shot in the eye with a tear gas canister by a law enforcement agent as she was helping journalists to safety.⁶¹ Another young woman lost part of her arm when the police launched an explosive device at her. Dozens of people were hospitalized, while medics worked around the clock at the camp to tend to people suffering broken bones, bruising, lacerations, head injuries, and hypothermia. Even the medics themselves were targeted with chemical weapons as they rendered urgent medical aid south of the bridge.

26. On November 25, 2016, the Corps issued an eviction notice advising the Standing Rock Sioux Tribal Chairman that they would be closing access to the Oceti Šakowij camp by December 5, 2016.⁶² The water protectors remaining at the camp were forcibly evicted on February 23, 2017.

Disproportionate punishment of indigenous and environmental activism

27. Over these seven months, law enforcement and prosecutors aggressively arrested and charged 841 water protectors exercising their rights to free expression and peaceful assembly. Many of the arrestees were detained under abusive conditions, subjected to unnecessary strip searches, and bussed to jails hours away from their camps. Local authorities prosecuted criminal charges against all of those arrested, despite the fact that there was no probable cause to support the vast majority of the arrests and no evidence to prove almost any of the charges.

28. Members of the press were also arrested, their equipment confiscated, and websites voicing opposition to DAPL were shut down. Low-flying helicopters, planes, and drones kept the camps under constant surveillance as cell phones were locked and protestor's phone calls were recorded.⁶³

29. According to records compiled by the Water Protector Legal Collective, 836⁶⁴ criminal cases were prosecuted in North Dakota state court. Of these, 392 were dismissed, forty-two were acquitted at trial, 188 agreed to accept diversion, which resulted in dismissal of those cases, 146 accepted plea agreements involving no jail time (primarily to avoid having to return to court from out of state), and twenty-six were convicted, of whom only two served jail time. There are still forty state court cases remaining on inactive status and two currently open cases.⁶⁵ Charges included rioting and trespassing. The vast majority of these criminal cases should never have been brought or continued due to lack of evidence and witnesses, lack of probable cause, and legal defenses of privilege and lawful conduct.

30. Prosecutors brought the most serious charges in federal court, against five indigenous water protectors, all alleged to arise from the October 27, 2016, incident discussed in paragraphs 21-22 above. Despite extensive documentation of bias in the local jury pool from the oil company's publicity campaign, the federal court denied the federal defendants' motions for change of venue. Forced to proceed in a hostile forum, and with the court denying them essential discovery, each of the federal defendants had no choice but to accept plea agreements to avoid harsh sentences. None of the plea agreements involved any cooperation with law enforcement investigations.

31. The federal defendant who received the most severe sentence, Red Fawn Fallis, is an Oglala Lakota indigenous woman from Pine Ridge, South Dakota. Red Fawn was charged related to possession of a firearm that was shown to belong to an FBI informant who had infiltrated the water protector camp.⁶⁶ During legal proceedings, virtually every motion made by her defense team was denied. Facing up to life in prison, she accepted a non-cooperating plea agreement on January 22, 2018, and is serving 57 months in prison.⁶⁷ She provides the following statement from a federal prison in Texas:

I was at the Oceti Sakowin Camp at Standing Rock to defend the water, the land, and the treaties of the Lakota, Dakota and Nakota Nations. I was also there to honor the memory and the lifework of my mother, Troylynn Star Yellow Wood, who passed to the spirit world on June 11, 2016. At Oceti Sakowin Camp, I found a place where I belonged. I worked with elders and youth, and I was trained as a medic for the people. During my time there, I was arrested three times. The first arrest was on August 11, 2016 in a ditch along a public right of way where a small group of us were exercising our free speech rights against the Dakota Access Pipeline (DAPL). We were not obstructing traffic or workers. Not everyone there was arrested.

On September 28, 2016, I was arrested along with 20 other people. We were praying and tying prayer ties to a fence. We did not cross any fences. As we were leaving, Morton County sheriff's deputies began arresting us – for praying peacefully on our treaty homeland.

On October 27, 2016, I was tackled from behind and brutally arrested without probable cause and accused of having a gun. The only gun that was brought into camp was brought by Heath Harmon, an FBI informant. He started a dishonest relationship with me. It was his gun I was accused of possessing at the time of my arrest. This was an especially difficult day for me as it was the anniversary of my mother's birthday.

As we go forward it is important for indigenous voices to be heard and our treaties honored. We have been defenders of the water, the air, and the earth for centuries. We understand the importance of our reciprocal relationship with water and all the life that it supports. The land that my family and I watch over on the Pine Ridge Reservation no longer has water because it was polluted by uranium mining. It was the contamination and theft of our traditional lands, that inspired me and hundreds

of thousands of others from hundreds of indigenous nations, and other peoples from various nations and faiths and traditions to take a stand at Standing Rock.

32. The other four federal defendants were each charged with use of fire to commit a federal felony and civil disorder, with possible sentences of up to fifteen years in prison. Each took a non-cooperating plea to the civil disorder charge.

a. Michael Giron is from the Coastal Band of the Chumash Nation in Santa Barbara, California. Giron was sentenced to a thirty-six month federal prison term. He was incarcerated 1,300 miles from his family, at a maximum-security prison in West Virginia. Scheduled to be released in October, 2019, authorities are requiring him to live in North Dakota during this three-year parole rather than in New Mexico where his wife and family reside.

b. Michael Markus is Oglala Lakota from Pine Ridge, South Dakota. Markus was also sentenced to thirty-six months in prison. He was placed at FCI Sandstone in Minnesota⁶⁸ and currently has a release date of May 1, 2021.⁶⁹

c. Dion Ortiz, a member of the San Felipe Pueblo in New Mexico, is twenty-two years old, the youngest of the federal defendants. He was sentenced to a sixteen-month prison term.⁷⁰

d. James White is the only federal defendant who is a Standing Rock Lakota. White was sentenced to time served plus two years of supervised release, which he is serving at Standing Rock.⁷¹

33. Energy Transfer Partners, the corporation behind DAPL that is trying to construct the tail end of the Bakken pipeline in Louisiana, again contracted with private security corporations to crack down on pipeline opposition in Louisiana. TigerSwan, the controversial private security firm the oil company employed in North Dakota, also attempted to obtain a license to operate in Louisiana. The license was denied. Materials produced in response to a public records request confirm that immediately after the denial, a TigerSwan employee formed a new non-descript corporation and attempted to obtain a license without disclosing her employment with TigerSwan.⁷² The companies later contracted with another local private security company which employed off-duty law enforcement officers who violently arrested and detained protesters, and charged them with felonies under the newly passed critical infrastructure law.⁷³ In 2018, through a series of public records requests it was revealed that the FBI, Governor's Office of Homeland Security, and other law enforcement agencies were surveilling the activities of Bayou Bridge pipeline opponents, including L'Eau Est la Vie, an indigenous-led camp formed to oppose the pipeline.⁷⁴

Water Protectors Efforts to Seek Redress for Human Rights Violations in U.S. Domestic Court

34. Water Protector Legal Collective is pursuing a federal civil rights class action lawsuit⁷⁵ in which nine named plaintiffs are suing local governments on behalf of the hundreds of water protectors who were injured by unlawful police violence on November 20, 2016. In December, 2016, the federal court denied the water protectors' initial request that it enjoin the indiscriminate use of high pressure fire hoses in freezing temperatures, impact munitions and other life threatening weapons on peaceful protesters.

35. Within a month, another young indigenous water protector was severely injured when he was shot in the face by a Morton County Sheriff's Deputy with a so-called "bean bag" munition on January 19, 2017.⁷⁶ One or more lead pellets entered his left eye socket, tearing his face open and damaging his cervical spine. As a result, the twenty-one-year-old Navajo man lost much of his vision, his sense of taste, and hearing.⁷⁷

36. The WPLC civil litigation, which seeks both injunctive relief and damages, continued, but at the time of writing has been in limbo for a full year awaiting the local federal court's decision on a law enforcement motion to dismiss the case.

37. The individual excessive force lawsuit filed by Sophia Wilansky, who suffered a severe arm injury, is also currently awaiting the court's decision on a similar dismissal motion.⁷⁸

38. The status of the lawsuit filed by four local residents concerning the constitutionality of the road closure is similar. The plaintiffs claim, with substantial support (including official governmental reports and statements), that the true purpose of the closure was to hinder water protectors' exercise of constitutional rights and to extort political concessions from the Standing Rock Sioux Tribe.⁷⁹

Legislation intended to suppress protest and criminalize dissent

39. The United States takes pride in the constitutional protections of the rights to free expression and assembly as being stronger within its borders than virtually any other place in the world.⁸⁰ This reputation may soon change. As Commissioner Macaulay stated during a hearing on the rights to freedom of association, expression and peaceful assembly in the United States: "We are concerned about what has been happening lately.... there is a regression in these pillars of democracy.... from the highest levels of power."⁸¹ Since the May 9, 2019 thematic hearing, the federal government has attempted to ramp up the criminalization of protesters who interfere with pipeline construction. On June 3, 2019 the Trump administration announced that it would seek to amend current legislation that prescribes a maximum penalty of 20 years in prison for damaging or destroying existing pipelines. The amendment would apply that same penalty to pipelines under construction as well as disruption of pipelines.⁸²

40. This federal action follows an alarming trend by 35 state legislatures who have proposed approximately 100 anti-protest bills, 14 of which have passed into law, 26 which are pending and 58 that have expired or been defeated.⁸³ The bills typically impose draconian and disproportionate punishments on nonviolent civil disobedience including up to 10 years in prison and \$100,000 in fines.⁸⁴ Some bills criminalize organizations that “aid” protestors making them liable for actions of their members.⁸⁵ Oil and gas interests are pushing to criminalize protests against their fossil fuel projects by engineering bills purported to protect against “critical infrastructure sabotage” but they are really about suppressing the growing anti-fossil fuel movement in which indigenous people and nations have played a central role.⁸⁶ These bills are a direct response to the indigenous-led protests at Standing Rock, and are designed to stifle debate and silence opposition to pipelines and other extractive industry projects. According to Defending Rights and Dissent:

With high profile and effective campaigns against oil and gas pipelines, such as the resistance to the Dakota Access Pipeline by Standing Rock Water Protectors, these civil society movements have come under fire from powerful interests. As part of the effort to silence them, a number of states are considering “critical infrastructure” bills. These bills purport to protect against “critical infrastructure sabotage” --which sounds serious--but they’re really about shutting down social movements. Bills vary from state to state, but they typically impose draconian and disproportionate punishments on nonviolent civil disobedience. In some cases, they are so broad they may even criminalize First Amendment protected activity. These bills are part of a campaign to demonize protestors and portray them as threatening. And, these bills are being pushed by industry connected groups, including the American Legislative Exchange Committee (ALEC).⁸⁷

41. At the IACHR thematic hearing, the U.S. representatives stated that these bills do not criminalize acts protected by the 1st Amendment of the US Constitution (free speech and assembly) and American Declaration and that criminal trespass and tampering with infrastructure are not protected activities. However trespass and damage to private property are already criminal offences; these laws are unnecessary and intended to dissuade protestors.

42. The state of North Dakota, the location of DAPL, went so far as to introduce a bill⁸⁸ that eliminated civil and criminal liability for drivers running into protestors blocking public roads, a method increasingly used to attack protestors.⁸⁹ The bill’s sponsor explained that it was in direct response to DAPL.⁹⁰ Fortunately, this bill was not passed by the legislature⁹¹ but similar bills are being introduced around the country.⁹² A recent North Dakota bill that did pass on March 2019, increased criminal penalties for tampering with “critical infrastructure” or “public service” and includes fines for organizations who help human rights defenders.⁹³

43. Since the State of Louisiana passed HB727⁹⁴ in March 2018, 16 protestors have been arrested for resisting the Bayou Bridge Pipeline.⁹⁵ The Louisiana Mid-Continental Oil and Gas Association drafted the amendment to the state’s critical infrastructure law that greatly increased the penalties for protestors near pipelines or pipeline construction sites.⁹⁶ The new law was

immediately used to target peaceful pipeline opponents who were arrested by corporate security rather than police.

44. In South Dakota, a Senate bill was passed to restrict protest to twenty or fewer people and increase penalties for protest on public lands.⁹⁷ The legislation was a direct response to DAPL and passed in anticipation of indigenous resistance to the Keystone XL pipeline in South Dakota.⁹⁸ The Governor sent letters to nine tribal chairmen encouraging them to “work together to manage potential protests that are likely to occur in South Dakota relating to the KXL Pipeline.”⁹⁹ Tribal leaders objected to the bill and said it “targeted Native Americans and that tribes were not adequately consulted.”¹⁰⁰

45. Another bill recently passed in South Dakota imposes hefty monetary penalties, not only on pipeline protesters, but on anyone who supports them in any way.¹⁰¹ The Cheyenne River Sioux and the Sisseton Wahpeton tribes are voicing their opposition to the law and its impact on indigenous peoples’ human rights.¹⁰² The Cheyenne River Sioux tribal chairman stated that: “The Governor has not discussed any proposed legislation with the Sioux Nation or Cheyenne River Sioux Tribe. ... This legislation only shows that [the state legislature] are more concerned with saving money while suppressing South Dakotans rights of assembly and intimidating anyone who is considering options to stand up for what they believe is right.”¹⁰³ The Oglala Sioux Tribe banished the South Dakota governor from their reservation.¹⁰⁴

46. The American Civil Liberties Union (ACLU) filed a constitutional challenge to these South Dakota laws that threaten criminal and civil penalties for protesters and organizations that support them, including resistance to the Keystone XL Pipeline.¹⁰⁵ The ACLU notes one provision that allows damages to be collected from protesters to pay for law enforcement operations essentially requiring protesters to fund the thing they are protesting.¹⁰⁶

47. Illinois House Bill HB1633 is aimed specifically at anti-pipeline protesters¹⁰⁷ to silence opposition to pipelines/fracking and other energy projects. The bill defines critical infrastructure broadly, to include everything from pipelines, rail yards and freight transportation facilities, to telephone poles, radio transmission facilities, electrical transmission structures, coal mines and water treatment plants. Anyone caught trespassing at one of these sites could be charged with a class 4 felony and subject to a fine of \$1,000 to \$25,000 and one to three years in prison. Damage to critical infrastructure would be punishable by a fine of up to \$100,000 and ten years in prison, no matter how minor the damage. Although the bill includes a First Amendment “savings clause” exempting “exercise of the right of free speech or assembly that is otherwise lawful” in the labor organizing context, the concern is with non-violent civil disobedience.

48. In Texas, opposition to the Trans-Pecos pipeline, the terminus of the Keystone XL pipeline, the Permian Highway pipeline and the LNG plant has led to a number of criminalization bills being introduced. SB 1993 dramatically increase sentences for protesting, blockading or vandalizing “critical infrastructure” or construction equipment for it, and creates vicarious civil liability for organizations who support anyone who is convicted.¹⁰⁸ HB 3557 expands the definition of

"critical infrastructure" and creates vicarious civil liability.¹⁰⁹ HB 4448 creates new penalties for using drones to document extraction projects (or prisons).¹¹⁰ Finally, SB 2229 creates heightened penalties of up to 10 years in prison for protest at "critical infrastructure" facilities.¹¹¹

49. Among those fighting the pipelines and associated bills is the Carrizo Comecrudo Tribe of South Texas. Because the Tribe is not federally recognized, the energy companies are not required by law to consult with them regarding the construction. The Chairman and other Tribal members attended the vote on House Bill 3557 on May 7, 2019. They were detained and given a "criminal trespass warning" before they were escorted out of the building and told if they returned to the Capitol with "ill intent" they would be formally charged with trespass.¹¹²

50. Texas also passed HB 2730 that encourages SLAPP suits (Strategic Lawsuit against Public Participation).¹¹³ SLAPP suits are increasingly being used by corporate interests in a blatant attempt to silence water protectors.¹¹⁴ In August 2017, Energy Transfer Partners filed a \$900 million SLAPP suit against Greenpeace in order to rewrite the indigenous-led movement at Standing Rock.¹¹⁵ The lawsuit included claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), a law created to prosecute organized crime.¹¹⁶ In July 2018, a federal court ordered Energy Transfer Partners to file an amended complaint, explaining that the "187-page complaint is impossible to summarize," and found the company "failed to state plausible RICO claims against Greenpeace," and "failed to comply with basic rules of pleading." Despite this rebuke, the oil company not only amended its complaint, but continued the legal assault on human rights defenders by adding other defendants.¹¹⁷ In February 2019, the lawsuit was fully dismissed¹¹⁸ in a blistering opinion by a federal court judge. Nevertheless, Energy Transfer Partners pressed on with legal intimidation tactics against indigenous rights advocates by repackaging its federal lawsuit and filing in North Dakota state court.¹¹⁹ The venue may have changed, but the misrepresentations about Standing Rock and meritless legal claims continue.

State failure to protect indigenous human rights defenders

51. The situation at Standing Rock is not an isolated event but part of a pattern of violence and discrimination against indigenous peoples. It is one example of an increasing trend to criminalize indigenous peoples, organizations and movements voicing opposition to energy extraction and other projects carried out without their participation or consent.¹²⁰ In many parts of the world indigenous peoples are disproportionately affected by police violence and imprisoned without due process as they defend against corporations looking to exploit their lands and resources.¹²¹

52. The law enforcement response to *peaceful* protests at Standing Rock stands in stark contrast to the response even to *violent* occupations and armed protests involving non-indigenous peoples. Examples include the Neo-Nazi march in Charlottesville, Virginia¹²² and standoffs in the states of Oregon and Nevada led by the Bundy family and anti-government militias.¹²³ In those cases there was little law enforcement intervention, compared to the heavy, militarized response to Standing Rock.¹²⁴ In this respect, the state has failed to take special measures to protect indigenous water protectors defending their lands, resources and cultural survival.

53. The Inter-American Commission has identified indigenous peoples as particularly vulnerable human rights defenders¹²⁵ and outlined the duties states have to protect human rights in the context of extractive industry development¹²⁶ including: 1) the duty to prevent violence; 2) the duty to guarantee access to justice through investigation and punishment; and 3) access to adequate reparations for human rights violations.¹²⁷ The Inter-American Commission joined regional UN human rights offices in issuing a statement of concern over the deteriorating situation for human rights defenders in the Americas.¹²⁸ They noted “among the groups most affected by this violence are defenders of the land, territory, and environment” and that “rights defenders in the region face a series of obstacles to their efforts, such as criminal cases brought against them for their work or smear campaigns to stigmatize and defame them.”¹²⁹

54. The UN Special Rapporteur on the situation of human rights defenders, Michel Forst, reported that violations against defenders mostly occur within energy sectors operating in communities and include criminalization, killings, intimidation, and threats.¹³⁰ He warned that “[h]uman rights defenders who are pressing for companies to be held accountable should not be criminalised or threatened.”¹³¹

55. During the IACHR thematic hearing, the U.S. government made reference to an interagency working group to monitor violence against environmental defenders (“IAWG”) around the world. There is very little publicly available information about this “informal” working group formed by the U.S. Department of State. According to the State Department, IAWG held 17 meetings in 2018 “to engage stakeholders and review UN, NGO and U.S. government reporting about violence against environmental defenders to best inform US policy.”¹³²

56. The IAWG “identified trends in *publicly available reporting* [emphasis added] that indicate long-standing grievances, often pertaining to land use, can be at the root of social protest or action in which state-backed security forces have responded, sometimes with force. Many of these conflicts could be avoided if there were adequate stakeholder access to environmental information, public participation, and access to justice and if environmental quality monitoring were strengthened.”¹³³ The IAWG aimed to improve these areas and indicated that they “seek to evaluate and identify practices to better provide, with parterns (*sic*), strengthened and relevant stakeholder access to environmental information, robust environmental impact review of extractive sector, energy, and infrastructure tenders and projects, transparency, and access to justice in cases of violence.”¹³⁴ The goals of the IAWG can be achieved by implementing the recommendations of the GOA report mentioned in paragraph 61. Providing greater access to environmental information for stakeholders can be achieved through improved tribal consultation.

Failure to consult tribes and comply with existing US laws and treaties

57. During the IACHR thematic hearing, United States representatives pointed to a number of laws, policies and other government initiatives in an attempt to show that the current domestic

legal framework is sufficient to protect the rights of indigenous human rights defenders. The United States acknowledged its duty to consult with Tribes under federal statutes,¹³⁵ executive orders,¹³⁶ treaties, and agency or departmental regulations and policy statements. However, many of these laws and policies have been interpreted to be primarily procedural and provide no rights that can be legally actionable before domestic courts.¹³⁷

58. More often than not, government agencies consult with tribes on development projects after the fact, and information is often provided by email and phone calls, with little to no face-to-face conversations. Unrepresented or unrecognized tribes enjoy no rights of consultation under U.S. law. A number of development projects are currently under construction on indigenous peoples traditional lands without meaningful consultation or consent from impacted indigenous communities including Enbridge Line 3¹³⁸ and TC Energy (formerly TransCanada) KXL pipelines;¹³⁹ Resolution Copper mine on the sacred Oak Flats of the San Carlos Apache;¹⁴⁰ and the Snowbowl ski resort on the San Francisco Peaks, an area sacred to 13 Tribes in the southwest United States.¹⁴¹

59. According to Foley Hoag, the law firm who once served as the Secretariat that administers the Voluntary Principles on Security and Human Rights (*infra para 62 & 63*):

Under U.S. federal law, if a project is not sited on Indian country, tribal consent is almost never required. Tribes have a right to consultation when projects are not sited on Indian country only in limited circumstances, typically when a federal action would impact their cultural heritage, legally recognized hunting/fishing/gathering rights, or the environment on Indian country. Compounding the challenges, no single federal agency has overall jurisdiction over oil pipelines. As a consequence, permits are typically only required for small portions of such projects, and the portion of the pipeline's cultural or environmental impacts that is likely to require tribal consultation under federal law is correspondingly limited.¹⁴²

60. On September 9, 2016, the Department of Justice, the Department of the Army, and the Department of the Interior issued a Joint Statement¹⁴³ regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* and committed to holding a series of formal, government-to-government "listening sessions"¹⁴⁴ on improving tribal consultation to determine whether new federal legislation was needed to achieve this goal. The findings were issued in the January 2017 report "Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions" (2017 Consultation Report).¹⁴⁵ The government's recommendations mainly reinforced existing policies, practices and laws and acknowledged that "[w]ith regard to infrastructure projects, historically Federal agencies have not, as a matter of policy, sought out Tribal input or consistently worked to integrate Tribal concerns into the project approval processes."¹⁴⁶

61. The 2017 Consultation Report was re-evaluated in March 2019 after members of Congress requested a review of the federal programs and policies affecting Tribes. The lawmakers' call came following criticism over the approval of DAPL and other controversial infrastructure projects. In response, the United States Government Accountability Office (GOA) issued its report

“Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects.”¹⁴⁷ The GOA report reviewed the tribal consultation policies and processes of 21 federal agencies and input from 100 tribes and found that many agencies fail to consult Tribes properly on infrastructure projects. According to Tribal representatives, agencies do not consider their input and consultations start too late; and according to agencies, they have difficulty obtaining contact information to consult and experience other challenges.¹⁴⁸ The GOA issued 22 recommendations in its report including the development of a government-wide system to identify and notify tribes of consultations.

62. During the IACHR thematic hearing, the U.S. government assured the Commission that it encourages its companies to implement the Voluntary Principles on Security and Human Rights. The United States has in fact taken this pledge and is one of less than a dozen countries to join the Voluntary Principles Initiative. The Voluntary Principles are the only human rights “guidelines” designed specifically for extractive sector companies. Energy Transfer Partners, Enbridge, and TC Energy (formerly TransCanada) are not on the list of US corporations who participate in the Voluntary Principles initiative.¹⁴⁹

63. Under the Voluntary Principles, a government is encouraged to “promote and protect human rights, consistent with its international human rights obligations”¹⁵⁰ (including the UN and American Declarations on the Rights of Indigenous Peoples) and to “take appropriate steps to prevent, investigate, punish and redress human rights abuses within their territories and/or jurisdiction by third parties, including extractive companies and public and private security service providers, through policies, legislation, regulations, and adjudication, as well as take appropriate action to prevent recurrence.”¹⁵¹ In this case the United States should provide redress for the victims of human rights abuses perpetrated by Energy Transfer Partners and TigerSwan private security firm.

64. While the United States has created a National Action Plan on Responsible Business Conduct¹⁵² there are no enforcement or grievance mechanisms to address violations aside from the Specific Instance process,¹⁵³ within the US National Contact Point of the OECD (Organization for Economic Co-operation and Development). The Specific Instance process is, “merely an offer to facilitate neutral, third party mediation or conciliation to assist the parties in voluntary, confidential and good faith efforts to reach a cooperative resolution of their concerns.”¹⁵⁴ Companies are not required to participate in the grievance mechanism or engage in mediation.

Conclusions and Recommendations

65. Freedom of expression, association, and peaceful assembly are secured by the First Amendment of the United States Constitution¹⁵⁵ and international human rights law.¹⁵⁶ The United States has a positive obligation to ensure and protect these rights. As the UN Rapporteur on Freedom of Expression noted, the U.S. has ratified the International Covenant on Civil and Political Rights and so the “[c]ovenant enjoys status under the U.S. Constitution as supreme law of the land.”¹⁵⁷ Furthermore, the UN Declaration on Human Rights Defenders protects the right

to defend human rights, including the right to free expression and assembly, from violations by state agents and private entities.¹⁵⁸

66. The United States has failed in its duty to prevent and protect against the use of excessive force and unlawful arrests and to investigate, punish, and provide reparations for these human rights abuses. By condoning the behavior of state law enforcement and private security in this context, the United States is normalizing, encouraging, and emboldening state and non-state actors to act similarly in future situations.

67. We encourage the United States to comply with its obligations under the U.S. Constitution, the American Declaration of the Rights and Duties of Man and the American Declaration on the Rights of Indigenous Peoples, specifically the rights of all citizens to: free expression, peaceful assembly, judicial protection, and equality before the law and the rights of indigenous peoples to their culture, religion and property, including rights and interests in traditional territories and sacred areas designated as public lands.

68. We call upon the Commission to follow up on the requests to the United States issued by the UN Special Rapporteur on the Rights of Indigenous Peoples to “develop and provide anti-oppression and anti-racism training to federal and state law enforcement agents, and to mandate the Department of Justice to open an investigation into the excessive use of force and militarized response to the water protectors at the Standing Rock Sioux Reservation, including the use of non-lethal weapons.”¹⁵⁹ In addition, we ask the Commission to urge the United States to:

- a) Review and reconsider criminal proceedings against DAPL water protectors, the vast majority of who were arrested without probable cause;
- b) Investigate, punish, and provide appropriate reparations for human rights violations in relation to DAPL;¹⁶⁰ or convene a truth commission with indigenous representative institutions;
- c) Adopt a regulatory framework to supervise and monitor activities of extractive industries and energy companies,¹⁶¹ private security firms and other non-state actors to prevent future violations against indigenous peoples and their lands;
- d) Provide training to law enforcement and private security on best practices for managing peaceful demonstrations; the right to free expression and assembly; and indigenous peoples’ rights under international law;¹⁶²
- e) Implement national measures to protect indigenous human rights defenders in compliance with the UN Declaration on Human Rights Defenders, the UN and American Declarations on the Rights of Indigenous Peoples and other international standards to ensure the full enjoyment of their rights to free expression and assembly;¹⁶³
- f) Reject or amend state legislation, including critical infrastructure laws, that violate the rights to free assembly and free speech;
- g) Ensure that state and local emergency powers are not abused in the context of social protest; and

- h) Implement the American Declaration on the Rights of Indigenous Peoples into domestic law and policy.

69. We further urge the Commission to report on the corporate conduct and human rights accountability of the companies and investors behind the Dakota Access Pipeline¹⁶⁴ and the need to sanction those responsible for human rights violations.

Submitted June 24, 2019 by:

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¹ The recently announced New Global Campaign against the Criminalization and Impunity of Indigenous Peoples is a global human rights monitoring system and collaboration run by and for indigenous peoples. Julie Molin, *UN to Launch Global Campaign against Criminalization of Indigenous Peoples*, TRUTHOUT (April 26, 2019) <https://truthout.org/articles/un-to-launch-global-campaign-against-criminalization-of-indigenous-peoples/> See also Anna Berry, *UN Aims to Protect Indigenous Peoples Fighting for Land and Resource Rights*, NONPROFIT

QUARTERLY (May 2, 2019) <https://nonprofitquarterly.org/2019/05/02/un-aims-to-protect-indigenous-peoples-fighting-for-land-and-resource-rights/>

² Criminalization of Human Rights Defenders of Indigenous Peoples and the Extractive Industry in the United States, IACHR 172nd Period of Sessions (May 9, 2019)

https://www.youtube.com/watch?v=D6dZlhWxcWk&list=PL5QlapyOGhXvvyKD3Y0-GblPrDQ1xE_Ht&index=16&t=3501s

³ Dakota Access, LLC, is a Delaware Limited Liability Company authorized to do business in North Dakota and engaged in the business of constructing the 1,154-mile-long Dakota Access Pipeline that is intended to transport crude oil from the Bakken Shale of North Dakota to refineries in Patoka, Illinois. “The Dakota Access Pipeline (DAPL) and the Energy Transfer Crude Oil Pipeline (ETCO), collectively the “Bakken Pipeline” went into service on June 1, 2017. The Bakken Pipeline is a 1,872-mile, mostly 30-inch pipeline system that transports domestically produced crude oil from the Bakken/Three Forks productions areas in North Dakota to a storage and terminalling hub outside Patoka, Illinois, and/or down to additional terminals in Nederland, Texas. The Bayou Bridge pipeline project will connect the Dakota Access pipeline, to refineries in St. James Parish and export terminals, forming the southern leg of the Bakken Pipeline. The Bakken Pipeline is a joint venture between Energy Transfer Partners with a 38.25 percent interest, MarEn Bakken Company LLC (“MarEn”) with a 36.75 percent interest, and Phillips 66 Partners with a 25 percent interest. MarEn is an entity owned by MPLX LP and Enbridge Energy Partners L.P.” Energy Transfer Partner L.P., Bakken website http://www.energytransfer.com/ops_bakken.aspx (last visited April 2, 2019)

⁴ Jack Healy, *From 280 Tribes, A Protest on the Plains*, THE NEW YORK TIMES (Sept. 11, 2016)

<https://www.nytimes.com/interactive/2016/09/12/us/12tribes.html>

⁵ See para. 58 *infra*, see also note 24.

⁶ Ltr from Thomas W. Wetterer, General Counsel, Greenpeace Inc. to Paulo Abrão, Executive Secretary, Inter-American Commission on Human Rights (April 24, 2019) (Attached as “Appendix A”) “While the bills themselves vary in content, in general they (1) broadly redefine critical infrastructure, (2) increase criminal penalties for activists engaged in peaceful protest—for example changing a misdemeanor trespass charge into a felony—and (3) impose liability on organizations that seek to support protests. In effect, these bills create new causes of action for companies like Energy Transfer to target activists and organizations alike who are trying to protect the health and rights of people who live near pipelines, many of them Indigenous.”

⁷ The Special Rapporteurs on Free Expression and Free Assembly called on U.S. lawmakers “to stop the ‘alarming’ trend of ‘undemocratic’ anti-protest bills designed to criminalize or impede the rights to freedom of peaceful assembly and expression.” They denounced the bills “as incompatible with US obligations under international human rights law and with First Amendment protections” and acknowledged that “[in] Colorado, North Dakota and Oklahoma, several bills [were] proposed as a response to the protests organized by activists and opponents of the Dakota Access Pipeline in North Dakota.” OHCHR, *UN rights experts urge lawmakers to stop “alarming” trend to curb freedom of assembly in the US* (March 30, 2017) (Attached as “Appendix B”)

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21464&LangID> See also Ltr from Thomas W. Wetterer, *id.*

⁸ Right to free expression- Article IV American Declaration of the Rights and Duties of Man and Article 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR); Right to free assembly- Article XXI and XXII of the American Declaration and Article 20 UDHR & Article 22 ICCPR; Right to security of the person-Article 1 of the American Declaration and Article 3 UDHR & Art. 9 ICCPR; Right to be free from arbitrary arrest and detention- Article XXV of the American Declaration and Article 9 UDHR & ICCPR; Right to be free from inhuman and degrading treatment-Article 5 UDHR & Article 7 ICCPR.

⁹ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I, 1789 (rev. 1992).

¹⁰ See Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and the Yankton Sioux Tribe: Request for Precautionary Measures Pursuant to Article 25 of the Inter-American Commission Rules of Procedure Concerning Serious and Urgent Risks of Irreparable Harm Arising out of Construction of the Dakota Access Pipeline (Dec. 2, 2016) para. 102-125 <https://www.scribd.com/document/333074630/Standing-Rock-Cheyenne-River-Yankton-Sioux-Tribes-Request-for-Precautionary-Measures-FINAL-Dec-02-2016-With-Exhibits> (Attached as “Appendix C”)

¹¹ IACHR, “Indigenous Peoples, Afro-descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities,” OEA/Ser.L/V/II. Doc. 47/15 (Dec.31, 2015)

<http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.docx>

¹² IACHR, “Criminalization of the Work of Human Rights Defenders,” OEA/Ser.L/V/II. Doc. 49/15 31 (Dec. 2015)

<http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

¹³ A/HRC/36/56 (para. 6) (Excerpt attached as “Appendix D”)

¹⁴ E/2017/43-E/C.19/2017/11, para. 23 (Excerpt attached as “Appendix E”) See UN DSPD, Statement from the Chair and PFII Members Dalee Dorrough and Chief Edward John on the Dakota Access Pipeline

(Nov. 4, 2016) <https://www.un.org/development/desa/indigenouspeoples/news/2016/11/statement-from-the-chair-and-pfii-members-dalee-dorough-and-chief-edward-john-on-the-dakota-access-pipeline/>

See also Report and Statement from Chief Edward John Expert Member of the United Nations Permanent Forum on Indigenous Issues: Firsthand observations of conditions surrounding the Dakota Access Pipeline (North Dakota, USA), November 1, 2016, <http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Report-ChiefEdwardJohn-DAPL2016.pdf>

¹⁵ The UN Special Rapporteur, Victoria Tauli-Corpuz, noted her concern over the “militarized, at times violent, escalation of force by local law enforcement and private security forces” ... “the aggressive manner in which peaceful demonstrations were met by local, state, private and national guards’ ... “testimonies of war-like conditions and cases of blunt force trauma and hypothermia as a result of battery with batons, attack dogs and water cannons blasting individuals at freezing temperatures”... “protestors being strip-searched and placed in kennels as temporary holding cells during various and frequent mass raids by local, state and federal enforcement officials, sometimes in the middle of a spiritual and cultural energy cleansing ritual” and information that “over 700 indigenous and non-indigenous people were arrested during the protests, some of whom remain in custody.” Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to the United States of America, A/HRC/36/46/Add.1 (Aug. 9, 2017)

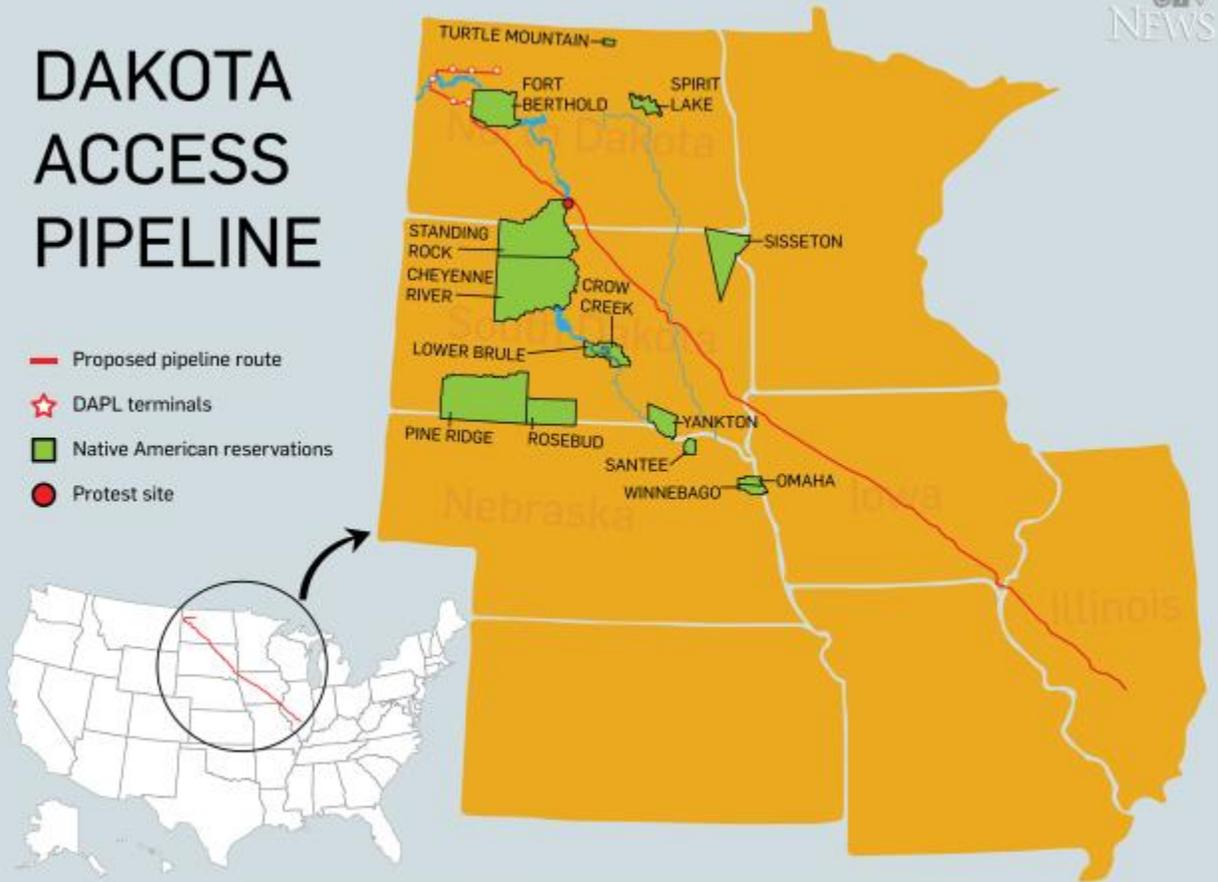
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46/Add.1, paras. 72, 73 & 93 (Excerpt attached as “Appendix F”) and Annual Report to the Human Rights Council A/HRC/39/17 (Aug. 10, 2018) para. 91-96 (Excerpt attached as “Appendix G”)

¹⁶ Keystone XL (USA), Atlantic Coast Pipeline (USA), Enbridge Line 3 (USA), LNG Coastal GasLink Pipeline (Canada), TransMountain Pipeline (Canada)

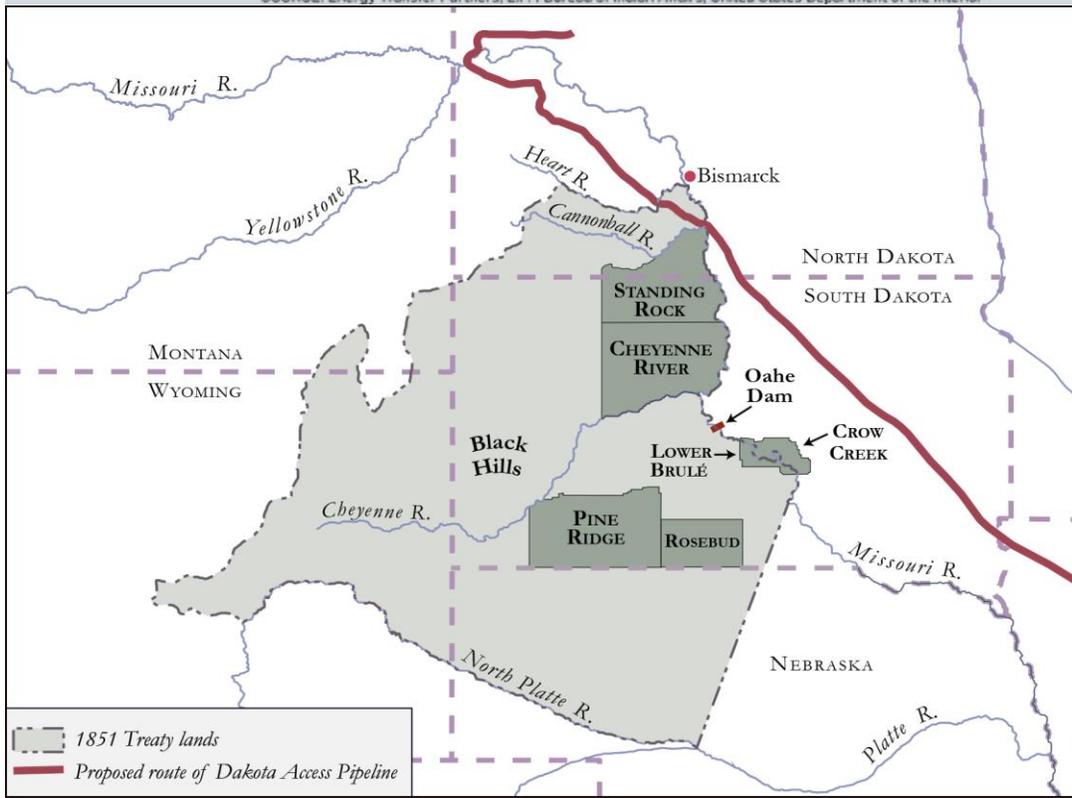
¹⁷

DAKOTA ACCESS PIPELINE

- Proposed pipeline route
- ★ DAPL terminals
- Native American reservations
- Protest site



SOURCE: Energy Transfer Partners, L.P. | Bureau of Indian Affairs, United States Department of the Interior



■ 1851 Treaty lands
— Proposed route of Dakota Access Pipeline

Photo source: *'The Supreme Law of the Land': Standing Rock and the Dakota Access Pipeline, Shouldn't the US obey the Constitution?* Jeffrey Ostler and Nick Estes, Indian Country Today (Jan 16, 2017).

<https://indiancountrymedianetwork.com/news/opinions/supreme-law-land-standing-rock-dakota-access-pipeline/>

¹⁸ 11 Stat. 749 (Sept. 17, 1851)

¹⁹ 15 Stat. 635 (Apr. 29, 1868), Article XVI

²⁰ For more details on the status of the lands, pipeline permitting and construction see: Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 1:16-cv-01534, U.S. District Court for the District of Columbia (July 27, 2016) ("Complaint, Standing Rock")

<https://earthjustice.org/sites/default/files/files/3154%201%20Complaint.pdf>; Complaint for Declaratory and Injunctive Relief, Yankton Sioux Tribe et. al. v. United States Army Corps of Engineers et al., 1:16-cv-01796, U.S. District Court for the District of Columbia (Sept. 8, 2016) ("Complaint, Yankton Sioux")

<https://www.courtlistener.com/recap/gov.uscourts.dcd.181496.1.0.pdf>

²¹ 54 U.S.C. § 306108.

²² Walter E. Stern, "Black Snakes" Or Essential Infrastructure: Dakota Access Pipeline, Standing Rock Sioux Tribe v. U. S. Army Corps of Engineers, The Federal Government's Tribal Consultation Obligations, and Why This Matters' Modrall Sperleng, (Jan. 4, 2018) <https://www.modrall.com/2018/01/17/black-snakes-essential-infrastructure-dakota-access-pipeline-standing-rock-sioux-tribe-v-u-s-army-corps-engineers-federal-governments-tribal-consultation-obligations-m/#fnref-4131-25>

²³ See Draft Environmental Assessment prepared by Dakota Access, LLC, Nov. 2015; Final Environmental Assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands, July 25, 2016, <https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/2801>; Comments of the Standing Rock Sioux Tribe Water Resources Control Board (Nov. 30, 2016) p.2. <https://www.achp.gov/sites/default/files/2018-05/45%20-%20Standing%20Rock%20Sioux%20Water%20Resources%20Control%20Board.pdf>

²⁴ The Yankton Sioux Tribe was not consulted. Complaint, Yankton Sioux Tribe, *supra* note 20. The Cheyenne River Sioux participated in public forums and submitted comments, but has not had meaningful consultation with the Corps. The Standing Rock Sioux repeatedly expressed concerns and objections to no avail. See Precautionary Measures Request, *supra* note 10 ¶¶102-125.

²⁵ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf Article 18: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions."

Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

Article 32(2): "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

²⁶ Memo from Joe-Ellen Darcy, Asst. Sec. of the Army, Department of Defense to Commander, U.S. Army Corps of Engineers, *Proposed Dakota Access Pipeline crossing at Lake Oahe, North Dakota*, (undated) <https://www.army.mil/e2/c/downloads/459011.pdf>

²⁷ *Department of the Army, Notice of Intent To Prepare an Environmental Impact Statement in Connection With Dakota Access, LLC's Request for an Easement To Cross Lake Oahe, North Dakota*, 82 Fed Reg. 5543, 5543-5545 (January 18, 2017) Doc No: 2017-00937 <https://www.federalregister.gov/documents/2017/01/18/2017-00937/notice-of-intent-to-prepare-an-environmental-impact-statement-in-connection-with-dakota-access-llcs>

²⁸ Memo from President Donald J. Trump to the Secretary of the Army, *Presidential Memorandum Regarding Construction of the Dakota Access Pipeline* (Jan. 24, 2017) <https://www.gpo.gov/fdsys/pkg/DCPD-201700067/pdf/DCPD-201700067.pdf>

²⁹ U.S. Army Corps of Engineers, *Corps grants easement to Dakota Access, LLC* (Feb. 8, 2017), <http://www.nwo.usace.army.mil/Media/News-Releases/Article/1077134/corps-grants-easement-to-dakota-access-llc/>

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- ³⁰ Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 255 F. Supp. 3d 101, 102 (D.D.C. June 14, 2017) (“Memorandum Opinion”) <https://www.leagle.com/decision/infdco20170615a83>
- ³¹ Alleen Brown, *Five Spills, six months in operation: Dakota Access Track Record Highlights Unavoidable Reality-Pipelines Leak*, THE INTERCEPT (Jan. 9 2018) <https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners/>
- ³² Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 16-1769, 2017 WL 6001726, 3 (D.D.C. Dec. 4, 2017). <https://earthjustice.org/sites/default/files/files/Order-re-conditions.pdf>
- ³³ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock IV)*, 282 F. Supp. 3d 91, 96 (D.D.C. 2017) (citing *Standing Rock III*, 255 F. Supp. 3d at 111–112); and cases cited in Plaintiffs Reply Brief Regarding Remedy, (August 28, 2017) <https://earthjustice.org/sites/default/files/files/SRST-CRST-Reply-Brief-re-Remedy.pdf>.
- ³⁴ The Standing Rock, Cheyenne River, Yankton, and Oglala Sioux Tribes are challenging this further in the ongoing federal court litigation.
- ³⁵ Memorandum Opinion, *supra* note 30.
- ³⁶ “The Standing Rock and Cheyenne River Sioux Reservations are the permanent and irreplaceable homelands for the Tribes....Their core identity and livelihood depend upon their relationship to the land and environment -- unlike a resident of Bismarck, who could simply relocate if the [Dakota Access] pipeline fouled the municipal water supply, Tribal members do not have the luxury of moving away from an environmental disaster without also leaving their ancestral territory. This underscores the far-reaching effects of a DAPL spill's potential environmental impacts on the Tribes' historic, cultural, social, and economic interests.” US Dept. of Interior, Office of Solicitor, Memo to Secretary of Dept. of Interior: Tribal Treaty and Environmental Statutory Implications of The Dakota Access Pipeline, M-37038, Dec. 4, 2016 at p.30 Filed (and withdrawn) as Exhibit 4 to Case No. 1:16-cv-1534-JEB https://shadowproof.com/wp-content/uploads/2017/02/document_ew_05.pdf
- ³⁷ Standing Rock Sioux Tribe, *Standing Rock Sioux Tribe Impacts of an Oil Spill from the Dakota Access Pipeline on the Standing Rock Sioux Tribe* (February 21, 2018) https://www.standingrock.org/sites/default/files/uploads/srst_impacts_of_an_oil_spill_2.21.2018.pdf
- ³⁸ Lauren Zannoli, *They're billin' us for killin' us': activists fight Dakota pipeline's final stretch* THE GUARDIAN (OCT. 17, 2018) <https://www.theguardian.com/environment/2018/oct/16/dakota-access-pipeline-bayou-bridge-protest-activism>
- ³⁹ Anne Rolfes, *Bayou Bridge Pipeline is an environmental threat to Louisiana | Opinion*, Nola.com (Jan. 17, 2018) https://www.nola.com/opinions/2018/01/bayou_bridge_pipeline.html
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- ⁴³ Amnesty International, *Amnesty International USA Calls on Authorities to Protect Peaceful Protest at Dakota Access Oil Pipeline* (Aug. 30, 2016) <https://www.amnestyusa.org/press-releases/amnesty-international-usa-calls-on-authorities-to-protect-peaceful-protest-at-dakota-access-oil-pipeline-site/>
- ⁴⁴ UN DESA, Statement from the Chair and PFII Members Dalee Dorough and Chief Edward John on the Dakota Access Pipeline (Nov. 4, 2016) <https://www.un.org/development/desa/indigenouspeoples/news/2016/11/statement-from-the-chair-and-pfii-members-dalee-dorough-and-chief-edward-john-on-the-dakota-access-pipeline/>
Report and Statement from Chief Edward John Expert Member of the United Nations Permanent Forum on Indigenous Issues: Firsthand observations of conditions surrounding the Dakota Access Pipeline (North Dakota, USA) (Nov. 1, 2016) <http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Report-ChiefEdwardJohn-DAPL2016.pdf>
- ⁴⁵ For the list of 76 state agencies present See: Thomas Dresslar, *How Many Law Enforcement Agencies Does It Take to Subdue a Peaceful Protest?* AMERICAN CIVIL LIBERTIES UNION (Nov. 30, 2016) <https://www.aclu.org/blog/free-speech/rights-protesters/how-many-law-enforcement-agencies-does-it-take-subdue-peaceful>
- ⁴⁶ Lead-filled, shotgun-fired “beanbag” rounds and rubber-plastic “sponge” rounds.
- ⁴⁷ Including water cannons, sound cannons, tear gas, concussion grenades, rubber bullets, ban bag projectiles, and ferocious dogs.

Dundon v. Kirchmeier et al., First Amended Civil Rights Class Action Complaint for Damages and Injunctive Relief (Jan. 29, 2018) (“Dundon Amended Complaint”) No. 1:16-cv-406 DLH-CSM, ¶16.

Curtis Waltman, *Indiana reveals the arsenal they brought with them to Standing Rock*, Muck Rock (March 6, 2017) <https://www.muckrock.com/news/archives/2017/mar/06/indiana-reveals-arsenal-they-brought-them-standing/>

⁴⁸ TigerSwan documents leaked to The Intercept indicate that during TigerSwan’s first weeks working on the pipeline, TigerSwan operatives met with law enforcement in Iowa and North Dakota, who “agreed to sharing of information.” By September 13, the documents indicate, TigerSwan had placed a liaison inside the law enforcement “joint operation command” in North Dakota. TigerSwan sent situation reports and intelligence briefings to a number of law enforcement recipients who were involved in policing the protests. TigerSwan also aided prosecutors in building cases against pipeline opponents including collecting video and photo evidence and building “Person of Interest (POI) folders”. Activists on the ground were tracked by a Dakota Access helicopter that provided live video coverage to their observers in police agencies, according to an October 12 email thread that included officers from the FBI, DHS, BIA, state, and local police. In one email, National Security Intelligence Specialist Terry Van Horn of the U.S. attorney’s office acknowledged his direct access to the helicopter video feed, which was tracking protesters’ movements during a demonstration. <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.

TigerSwan even infiltrated the protesters. <https://theintercept.com/2018/12/30/tigerswan-infiltrator-dakota-access-pipeline-standing-rock/>. The North Dakota Investigative and Security Board, a state administrative agency, sued TigerSwan for operating without a license and therefore illegally provided services to Energy Transfer Partners. ETP was fined \$2m and TigerSwan was prohibited from operating without a license. The case is on appeal to Supreme Court of North Dakota. <https://www.prairiebusinessmagazine.com/news/government-and-politics/4612572-north-dakota-supreme-court-hears-arguments-pipeline-security>

North Dakota Investigative and Security Board v. Tiger Swan (Jun. 12, 2017), State of North Dakota, County of Burleigh, In District Court, South Central Judicial District, Verified Complaint and Request for Injunction, https://ccrjustice.org/sites/default/files/attach/2017/11/Ex.%20A%20N.D.%20Complaint_0.pdf

The Society of Indian Psychologists issued a report expressing concern with TigerSwan’s alleged use of counterterrorism tactics against water protectors.

The Society of Indian Psychologists, (*SIP*) *Educational Paper Regarding the Use of Counterterrorism Tactics on Native Peoples and Allies* (February 26, 2018) <https://osf.io/72rd5/>

⁴⁹ “The cooperation extended beyond DAPL security and law enforcement, according to an email from Michael Futch. Instructions at times originated from Energy Transfer Partners and were sent to TigerSwan personnel, which were then forwarded to law enforcement.” C.S. Hagen, *The Laney Files, September: 2016*, HIGH PLAINS READER (Dec. 27, 2017) <http://hpr1.com/index.php/feature/news/the-laney-files-september-2016/>

It is reported that Energy Transfer Partners paid for security costs in North Dakota and other states. “North Dakota got \$15 million on from the builder of the Dakota Access pipeline to help pay law enforcement bills related to months of protests over the project's construction.” James Macpherson, *Dakota Access Developer Gives \$15M Toward Security Costs*, ASSOCIATED PRESS (Sept. 28, 2017), <https://www.usnews.com/news/us/articles/2017-09-28/apnewsbreak-pipeline-firm-gives-15m-toward-security-costs>

⁵⁰ United Nations, *Report of the UN Special Rapporteur on the situation of human rights defenders, Situation of Human Rights Defenders*, A/72/170 (July 19, 2017) at ¶18 <https://www.protecting-defenders.org/sites/protecting-defenders.org/files/N1722075.pdf>

⁵¹ Request for Precautionary Measures, *supra* note 10, Exhibit 1 p. 5 University of Colorado Timeline; and Exhibit 17 Declaration of Ta’sina Sapa Win Smith para. ¶¶17&41.

⁵² Request for Precautionary Measures, *supra* note 10, p. 8 citing Exhibit 17 p. 256 Declaration of Ta’sina Sapa Win Smith.

See also Democracy Now, *FULL Exclusive Report: Dakota Access Pipeline Co. Attacks Native Americans with Dogs & Pepper Spray* (Sept. 6, 2016)

https://www.democracynow.org/2016/9/6/full_exclusive_report_dakota_access_pipeline

⁵³ *Supra* note 48.

⁵⁴ Morton County Sherriff’s Department and many other agencies from across the state.

⁵⁵ *Dundon v. Kirchmeier*, 1:16-cv-00406-DLH-CSM (D.N.D.)(Nov, 25, 2016) (Dundon Trial Pleading). <https://waterprotectorlegal.org/wp-content/uploads/sites/7/2017/02/Dundon-Complaint-2.pdf> ¶131.

⁵⁶ Alleen Brown, Will Parrish, Alice Speri, *The Battle of Treaty Camp*, *The Intercept* (Oct. 27, 2017) <https://theintercept.com/2017/10/27/law-enforcement-descended-on-standing-rock-a-year-ago-and-changed-the-dapl-fight-forever/>

See also: Sandy Tolan, *North Dakota pipeline activists say arrested protesters were kept in dog kennels*, *Los Angeles Times* (Oct. 28, 2016) <http://www.latimes.com/nation/la-na-north-dakota-pipeline-20161028-story.html>

⁵⁷ *Supra* note 46.

⁵⁸ *Dundon v. Kirchmeier*, *supra* note 55, ¶¶ 36-43.

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⁶⁴ This is the number of state criminal case in North Dakota that have a separate docket number. There may be several charges in each case, some individuals have had more than one case.

⁶⁵ Current as of May 1, 2019. Data provided by Water Protector Legal Collective. This is the number of state criminal cases that have a separate case number. It may change over time if cases are dismissed due to lack of evidence and then re-charged (with new charges and case numbers). There may be several charges involved in any one case and some people may have more than one case. For more information about the criminal proceedings see <https://waterprotectorlegal.org/criminal-defense/>

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⁶⁸ *US v. Michael Markus*, United States District Court for the District of North Dakota Western Division, Docket Number 1:17-CR-00030-DLH-1 (Sept. 27, 2018).

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⁷⁰ *US v. Dion Ortiz*, United States District Court for the District of North Dakota Western Division, Docket Number 1:17-cr-00030-DLH-5, October 22, 2018

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- ⁷⁹ *Thunderhawk et al. v. County of Morton, North Dakota et al.*; D.N.D. Case No. 1:18-cv-00212 (Attached as “Appendix H”) <https://cccct.law.columbia.edu/sites/default/files/content/Pleading%2044%20-%20Amended%20Complaint.pdf> (asserting violations of U.S. Const. Amend. I (Right to Speech, Assembly, Press, and Religious Exercise); U.S. Const. Amends. V, XIV (Right to Travel); U.S. Const. Art. 4 § 2 (Right to Travel); U.S. Const. Art. 1, § 8 cl. 3 (Right to Commerce).) See American Declaration on the Rights of Indigenous Peoples, Arts. IV (Sovereignty), XXI (Autonomy).
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In October of 2016, a pick-up driver plowed through a group of people during a protest in downtown Reno, Nevada hitting two protestors. The protest was put on by the American Indian Movement of Northern Nevada. Sam Levin, *Video Shows Pickup Truck Plowing into Native American Rights Protesters*, THE GUARDIAN (Oct. 11, 2016)

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<http://sdlegislature.gov/docs/legsession/2017/Bills/SB176ENR.pdf>

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- ¹¹⁸ Protect the Protest, *Court Dismisses Abusive Dakota Access Pipeline Company Lawsuit against Activists and Environmental Groups*, (Feb. 15, 2019) <https://www.protecttheprotest.org/2019/02/15/court-dismisses-abusive-dakota-access-pipeline-company-lawsuit-against-activists-and-environmental-groups/>
- ¹¹⁹ Blake Nicholson, *Dakota Access developer sues Greenpeace in state court*, ASSOCIATED PRESS (Feb. 23, 2019) <https://apnews.com/c86795a2c7a64cb1b5c1f7e42c649dba>
- ¹²⁰ In Latin America, social protests in the region have been incredibly repressed and criminalized by applying anti-terrorism laws. In 2014 the Inter-American Court found that the Chilean government had violated the right to free expression of Mapuche indigenous leaders by imprisoning them under counter-terrorism laws. IACtHR, Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Judgment of May 29, 2014. (Merits, Reparations and Costs) www.corteidh.or.cr/docs/casos/articulos/seriec_279_ing.pdf

See also Cultural Survival, *Indigenous Activist Jailed in Guatemala* (March 24, 2015)

<https://www.culturalsurvival.org/news/indigenous-activist-jailed-guatemala>

See also International Network of Civil Liberties Organizations, *Take Back the Streets: Repression and Criminalization of Protest around the World* American Civil Liberties Union, ACLU (October 2013) www.aclu.org/report/take-back-streets-repression-and-criminalization-protest-around-world.

¹²¹ Of the 281 human rights defenders killed in 25 countries in 2016, almost half had been defending their land, environment and indigenous rights. Front Line Defenders, *Annual Report on Human Rights Defenders at Risk in 2016*, <https://www.frontlinedefenders.org/en/resource-publication/annual-report-human-rights-defenders-risk-2016>

Historically, indigenous people's unique expressions of their cultural identity and assertions of self-determination have been criminalized in the United States. See Nick Estes, *Fighting for Our Lives: #NoDAPL in Historical Context*, The Red Nation, (Sept. 18, 2016), <https://therednation.org/2016/09/18/fighting-for-our-lives-nodapl-in-context/> "The anti-colonial uprising taking place in Oceti Sakowin treaty territory and spilling onto the world stage was met with violent state repression. AIM leaders were assassinated and many were imprisoned. For example, Native leader Leonard Peltier, who participated in this movement for the life and dignity of his people, to this day sits behind bars as one of the longest serving political prisoners in United States history. From 1977 to 2012 South Dakota's prison population increased 500 percent. One-third of its prison population is Native, although Natives make up only nine percent of the total population."

Native Americans are disproportionately in contact with the criminal justice system, are over-incarcerated, and are more likely to be killed by law enforcement than any other racial or ethnic group. Mike Males, *Who are Police Killing?* Center on Juvenile and Criminal Justice (August 26, 2014), <http://www.cjcj.org/news/8113>; See also, U.S. Census Bureau, 2010 U.S. Census, Overview of Race and Hispanic Origin: 2010, at 4 (March 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. See also, John Swaine, et al., The Counted, 2015 and 2016 datasets, THE GUARDIAN (2017) <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/about-the-counted>. See also, Elise Hansen, *The Forgotten minority in police shootings* (Nov. 13, 2017), <http://www.cnn.com/2017/11/10/us/native-lives-matter/index.html?sr=fbCNN111317native-livesmatter0737PMStoryLink>. "Native Americans are killed in police encounters at a higher rate than any other racial or ethnic group, according to data from the Centers for Disease Control and Prevention. Yet rarely do these deaths gain the national spotlight."

¹²² On August 11, 2017 approximately 100 white nationalists demonstrated in opposition to the Charlottesville City Council decision to remove the statue of Confederate general Robert E. Lee from a city park. The white nationalists chanted "white lives matter," and the Nazi-associated phrase "blood and soil." Some white nationalists brawled with counter-protestors which contributed to the tension and violence that ensued the next day in a "Unite the Right" rally that resulted in 19 injuries and the killing of Heather Heyer. An independent investigation and review of the incident was very critical of law enforcement's response. Hunton & Williams LLP, Final Report: Independent Review of the 2017 Protest Events in Charlottesville, Virginia (Nov. 24, 2017) https://docs.wixstatic.com/ugd/c869fb_04949e939e2e440d99520dfb8400219c.pdf

See also: United Nations, CERD early warning and urgent action decision 1(93) (Aug. 18, 2017), http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_EWU_USA_8285_E.pdf

¹²³ Beginning in March 2014, Cliven Bundy, his sons, and co-conspirators "led a massive assault against federal law enforcement officer in Bunkerville, Nevada." Kirk Siegler, *Cliven Bundy's Arrest Caps Years Of Calls For Government To Take Action*, National Public Radio (Feb. 11, 2016) <https://www.npr.org/2016/02/11/466451287/cliven-bundys-arrest-caps-years-of-calls-for-government-to-take-action>

Law enforcement did not engage Bundy and the hundreds of armed protestors because they were outnumbered and did not want to pose a risk to themselves. Criminal Complaint U.S. v. Bundy, 2:16-mj-00127-PAL, p.p. 28-31 (Feb. 11, 2016) <https://www.scribd.com/document/298998019/2-11-16-Doc-1-U-S-A-v-Cliven-Bundy-Criminal-Complaint>; On January 2, 2016, Cliven Bundy's son Ammon Bundy amassed an armed group of mostly white protestors, demonstrating against the federal use of land by taking over a federally-owned National Wildlife Refuge. "ABC News reported at the time of the standoff that the federal government was taking a "low key" approach to dealing with the militia group. Eventually a lengthy negotiations process was set up by authorities, but protestors stayed in control of the federal land for nearly 40 days." Catherine Thorbecke, *Oregon Siege and North*

Dakota Protest: Both Land Battles, But Similarities End There, ABC NEWS (Oct. 28, 2016)

<http://abcnews.go.com/US/comparing-contrasting-protests-oregon-north-dakota/story?id=43131318>

¹²⁴ The ACLU submitted an open records requests to the Morton County Sheriff's Department and North Dakota Highway Patrol to determine if there were incidents of racial profiling in policing and surveillance technologies to spy on and track protesters. They made the request in preparation for a civil lawsuit against the law enforcement agencies for First and Fourteenth Amendment violations. The request was denied and the ACLU has appealed the decision. Ltr from ACLU to Morton County Sheriff's Department (Sept. 27, 2016)

https://www.aclund.org/sites/default/files/field_documents/ora_mortoncounty_dapl.pdf

Ltr from ACLU to North Dakota Highway Patrol (Sept. 27, 2016)

https://www.aclund.org/sites/default/files/field_documents/ora_ndhwyptl_dapl.pdf

¹²⁵ IACHR *Second Report on the Situation of Human Rights Defenders in The Americas*, OEA/Ser.L/V/II, doc. 66 (2011) ¶253 <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>

See also United Nations, *Report of the Special Rapporteur on the rights of indigenous peoples*, UN

Doc.A/HRC/12/34/Add.8 (2009) <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf> ¶19-21.

"It is imperative that States adopt the measures necessary to secure the right of indigenous peoples and individuals to peacefully express opposition to extractive projects, as well as to express themselves on other matters, free from any acts of intimidation or violence, or from any form of reprisals. States should provide adequate training to security forces, hold responsible those who commit or threaten acts of violence, and take measures to prevent both State and private agents from engaging in the unjustifiable or excessive use of force. Additionally, criminal prosecution of indigenous individuals for acts of protest should not be employed as a method of suppressing indigenous expression and should proceed only in cases of clear evidence of genuine criminal acts. Instead, the focus should be on providing indigenous peoples with the means of having their concerns heard and addressed by relevant State authorities."

¹²⁶ IACHR *Report on Indigenous Peoples, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development* ¶47-15. (Dec. 31, 2015).

¹²⁷ *Id.*

¹²⁸ IACHR Press Release, IACHR and UN Regional Human Rights Offices Express Concern over Deteriorating Situation for Rights Defenders in the Americas (Dec. 8, 2017)

http://www.oas.org/en/iachr/media_center/PReleases/2017/204.asp

¹²⁹ *Id.*

¹³⁰ The rapporteur further explained that Indigenous communities are more vulnerable to threats and attacks because of the "lack of political and economic capital or because they belong to groups that have suffered social marginalization." (¶ 20) As such the 'work of human rights defenders in the field of business and human rights is crucial to protecting the land and the environment, securing just and safe conditions of work, combating corruption, *respecting indigenous cultures and rights* and achieving sustainable development." (¶ 1). Special Rapporteur on the situation of human rights defenders, Michael Forst, Report on Situation of Human Rights Defenders, ¶¶ 10 & 15 (July 2017) A/72/170 <http://undocs.org/en/A/72/170>

¹³¹ OHCHR, Statement of Michel Forst, Human rights defenders face worsening risks for challenging firms, UN expert warns (Oct. 25, 2017)

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22297&LangID=E>

¹³² U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor, "Fact Sheet: U.S. Government Efforts to Advance Business and Human Rights in 2018," (Nov. 19, 2018) <https://www.state.gov/remarks-and-releases-bureau-of-democracy-human-rights-and-labor/u-s-government-efforts-to-advance-business-and-human-rights-in-2018/>

¹³³ 2018 Annual Report of the Government of the United States of America for the Voluntary Principles on Security and Human Rights Initiative, at p. 4

https://docs.wixstatic.com/ugd/f623ce_e2b7e5e1951147cbbd23ade707d70fb4.pdf.

¹³⁴ 2018 Annual Report of the Government of the United States of America for the Voluntary Principles on Security and Human Rights Initiative, at p. 4

https://docs.wixstatic.com/ugd/f623ce_e2b7e5e1951147cbbd23ade707d70fb4.pdf.

¹³⁵ National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. §§ 4321–4347, the National Historic Preservation Act (NHPA) 54 U.S.C. §§ 3000101–306131, the Native American Graves Protection and Repatriation Act (NAGPRA)

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- 25 U.S.C. §§ 3001–3013, the Archaeological Resources Protection Act (ARPA) 16 U.S.C. §§ 470aa–470mm, American Indian Religious Freedom Act, Public Law 95-341 (1978) (codified at 42 U.S.C. s. 1996 (2012)).
- ¹³⁶ Executive Order 13007 of May 24, 1996, Sec. 2; and. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments (2000). Executive Order 13175 does not provide for a right on the basis of free and prior informed consent but seeks only “input” and “consensual mechanisms.” Statement on Signing the Executive Order on Consultation and Coordination With Indian Tribal Governments, 2807-2808 (Nov. 6, 2000), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/Req-EO13175tribgovt.pdf
- ¹³⁷ Tarah Bailey, *Consultation with American Indian Tribes: Resolving Ambiguity and Inconsistency in Government-to-Government Relations*, COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV., 196 Vol. 29:1 (2018) https://www.colorado.edu/law/sites/default/files/attached-files/bailey_final_1_web_1.pdf
- ¹³⁸ *Red Lake Band of Chippewa Indians, et al. v. Minnesota Public Utilities Commission*, Minnesota Court of Appeals No. A19-0510; Nina Berglund, *We must stop the catastrophe that is Line 3 pipeline in its tracks*, THE GUARDIAN (Dec. 20, 2018). <https://www.theguardian.com/commentisfree/2018/dec/20/enbridge-line-3-pipeline-battle-protest-minnesota>
- ¹³⁹ Native American Rights Fund, “The Tribes’ Case Against KXL Still Stands,” (June 7, 2019) <https://www.narf.org/keystone-xl/>
- ¹⁴⁰ Apache Stronghold, Protect Oak Flat <http://apache-stronghold.com/>
- ¹⁴¹ Petition to IACHR, submitted by the Navajo Nation against the United States of America, (March 2, 2015) <http://www.nnhrc.navajonnsn.gov/docs/sacredsites/Navajo%20Nation%20Petition%20to%20IACHR%20March%20%202015.pdf>
- ¹⁴² Foley Hoag LLP, Public Summary of Foley Hoag LLP Report, Good Practice for Managing the Social Impacts of Oil Pipelines in the United States, 8 (May 9, 2017) <http://www.foleyhoag.com/-/media/files/foley%20hoag/publications/ebooks%20and%20whitepapers/2017/public%20summary%20of%20foley%20hoag%20llp%20report%20good%20practice%20for%20managing%20the%20social%20impacts%20of%20oil%20pipelines%20in%20the%20united%20states.ashx>
- ¹⁴³ US DOJ, Office of Public Affairs, Press Release Number 16-1034 (Sept. 9, 2016) <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>
- ¹⁴⁴ See Comments of Chairman Dave Archambault, II, Standing Rock Sioux Tribe On Federal Consultation with Tribes on Infrastructure Decision Making (Nov. 22, 2016) <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc2-055454.pdf> See also Comments of the Standing Rock Sioux Tribe Water Resources Control Board (Nov. 30, 2016) <https://www.achp.gov/sites/default/files/2018-05/45%20-%20Standing%20Rock%20Sioux%20Water%20Resources%20Control%20Board.pdf>
- ¹⁴⁵ U.S. Department of the Interior, U.S. Department of the Army & U.S. Department of Justice (Jan. 2017) <https://www.achp.gov/sites/default/files/reports/2018-06/ImprovingTribalConsultationandTribalInvolvementinFederalInfrastructureDecisionsJanuary2017.pdf>
- ¹⁴⁶ *Id.* at p. 2.
- ¹⁴⁷ United States Government Accountability Office, Report to Congressional Requesters, “Tribal Consultation, Additional Federal Actions Needed for Infrastructure Projects,” GAO-19-22, (March 2019) <https://www.gao.gov/assets/700/697694.pdf>
- ¹⁴⁸ *Id.*
- ¹⁴⁹ US Department of State, The Voluntary Principles on Security and Human Rights, (May 29, 2019), <https://www.state.gov/the-voluntary-principles-on-security-and-human-rights/>
- ¹⁵⁰ Voluntary Principles Initiative – Guidance on Certain Roles and Responsibilities of Governments, p. 1 https://docs.wixstatic.com/ugd/f623ce_64253cb1f65740b7940068d7702157c8.pdf
- ¹⁵¹ *Id.* p. 2.
- ¹⁵² US Department of State, Responsible Business Conduct: First National Action Plan for the United States of America (Dec. 16, 2016), <https://2009-2017.state.gov/e/eb/eppd/csr/naprbc/265706.htm>
- ¹⁵³ Specific Instance Process, U.S. Department of State (April 24, 2019), <https://www.state.gov/u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises/#SpecificInstance>
- ¹⁵⁴ A Guide to the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises, U.S. Department of State, pg. 7-8 (March 8, 2019), <https://www.state.gov/u-s-national-contact-point-for-the-oecd->

[guidelines-for-multinational-enterprises/a-guide-to-the-u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises/](#)

¹⁵⁵ *Supra*, note 9.

¹⁵⁶ *Supra*, note 8.

¹⁵⁷ David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 UC Irvine L. Rev. 95, 96 (2013) <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1082&context=ucilr>

¹⁵⁸ *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (March 8, 1999) Preamble, Arts. 2,9, and 12, A/RES/53/144. Although not a legally binding instrument, the Declaration on human rights defenders contains rights that are already recognized in many legally binding international human rights instruments, including the ICCPR. In addition, the Declaration was adopted by consensus by the General Assembly, which consequently REPRESENTS STATES' STRONG COMMITMENT TOWARDS ITS IMPLEMENTATION.

¹⁵⁹ *Supra* note 15, ¶93.

¹⁶⁰ The ACLU asked the United States Department of Justice (DOJ) to investigate "possible constitutional rights violations in the police response to peaceful protestors demonstrating against the Dakota Access pipeline." See Ltr from ACLU to DOJ (Nov. 4, 2016) <https://www.aclu.org/letter/aclu-standing-rock-letter-justice-department> See also Recommendation of the UN Special Rapporteur on Indigenous Peoples: "mandate the Department of Justice to open an investigation into the excessive use of force and militarized response to the water protectors at the Standing Rock Sioux Reservation." Report A/HRC/36/46/Add.1, *supra* note 15 at para. 93.

¹⁶¹ For example, Canada has created the "Canadian Ombudsperson for Responsible Enterprise (CORE)" to respond to human rights complaints arising from Canadian companies operating abroad, as well as a multi-stakeholder Advisory Board on Responsible Business Conduct.

<https://mailchi.mp/dist/iachr-welcomes-creation-by-canada-of-an-ombudsperson-to-oversee-canadian-companies-operating-abroad?e=01f98b5eb0>

¹⁶² Foley Hoag LLP, *Public Summary of Foley Hoag LLP Report, Good Practice for Managing the Social Impacts of Oil Pipelines in the United States*, 8 (May 9, 2017) <http://www.foleyhoag.com/-/media/files/foley%20hoag/publications/ebooks%20and%20whitepapers/2017/public%20summary%20of%20foley%20hoag%20llp%20report%20good%20practice%20for%20managing%20the%20social%20impacts%20of%20oil%20pipelines%20in%20the%20united%20states.ashx>

¹⁶³ See Precautionary Measures Request, *supra* note 10.

¹⁶⁴ Energy Transfer Family of Partnerships and joint partners and subsidiaries including Sonoco, MarEn Bakken Company LLC, Phillips 66, and Enbridge Energy Partners L.P. "Sunoco Logistics is one of the largest pipeline operators in the United States. Energy Transfer is constructing the Dakota Access pipeline to pump crude produced at North Dakota's Bakken shale fields to the U.S. Gulf Coast. Once completed, it will hand over the pipeline's operation to Sunoco." Liz Hampton, *Sunoco behind protested Dakota pipeline, tops U.S. crude spill charts*, Reuters (September 23, 2016) <https://www.reuters.com/article/us-usa-pipeline-nativeamericans-safety-i/sunoco-behind-proteted-dakota-pipeline-tops-u-s-crude-spill-charts-> See also Energy Transfer, *Sunoco Logistics Partners and Energy Transfer Partners Announce Successful Completion of Merger* (April 28, 2017) <http://ir.energytransfer.com/phoenix.zhtml?c=106094&p=irol-newsArticle&ID=2267001>