

**STAKEHOLDER REPORT TO THE UN HUMAN RIGHTS COUNCIL, UNIVERSAL PERIODIC REVIEW WORKING GROUP**

Review of the United States of America  
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**Submitted by the University of Arizona Indigenous Peoples Law and Policy Program\* on behalf of the Water Protector Legal Collective\*  
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\*The Indigenous Peoples Law and Policy (IPLP) Program at the University of Arizona Law was established in 2001 in order to protect and promote indigenous peoples' rights and increase the representation of Native and indigenous lawyers and advocates within the practice of law and legal academia. The IPLP Program partners with tribes, tribal organizations, and indigenous communities across the United States and world on precedent-setting cases on indigenous peoples' rights before domestic legal forums, tribal courts, the Inter-American Commission on Human Rights, and the United Nations.

\*The Water Protector Legal Collective (WPLC) is an Indigenous-led legal organization that provides legal support, advocacy and knowledge-sharing to Indigenous-led and centered environmental and climate justice movements. WPLC was the on-the-ground legal team for the 841 water protectors who were arrested resisting the Dakota Access Pipeline during 2016 and 2017. WPLC continues to coordinate legal defense for those still facing charges, to pursue civil rights litigation and advocate for water and land protectors in domestic and international fora.

## **Introduction**

1. Peaceful demonstrations are a catalyst for the advancement of human rights. Yet around the world governments are criminalizing dissent to protect corporate interests. Indigenous peoples increasingly find themselves the targets of arrests and violence when defending their lands from resource extraction by industries operating without their free, prior and informed consent.<sup>1</sup> This report addresses the criminalization and suppression of peaceful resistance to the Dakota Access Pipeline (DAPL)<sup>2</sup> at Standing Rock, North Dakota by the United States (U.S.) federal, state and local governments working with private security forces.

2. Standing Rock is an emblematic case of indigenous resistance to extractive industry that drew global attention as water protectors met in peaceful assembly in what was the largest gathering of indigenous peoples in the U.S. in 100 years.<sup>3</sup> Standing Rock is merely one example of how the U.S. government works with industry to approve development projects carried out without the meaningful participation or consent of indigenous nations.<sup>4</sup> Indigenous peoples are left with no choice but to peacefully resist and then are criminalized for their efforts to defend their lands and resources.

3. Since Standing Rock, there has been an alarming trend at federal and state levels to criminalize opposition to energy projects. These anti-protest and “critical infrastructure” laws<sup>5</sup> implicitly condone the use of excessive force, often directed at indigenous peoples who are at the forefront of resistance to extractive industries. The use of excessive force and mass arrests to threaten, intimidate and silence “water protectors” seeking to defend their lands, resources, and culture, violates fundamental human rights to free speech and assembly enshrined in international human rights law<sup>6</sup> and the U.S. Constitution.<sup>7</sup>

4. The United Nations has reported on the situation at Standing Rock through the Expert Mechanism on the Rights of Indigenous Peoples, the Permanent Forum on Indigenous Issues and the Special Rapporteur on the rights of indigenous peoples.<sup>8</sup> Despite this international condemnation, water protectors continue to suffer impacts from the criminalization of their dissent<sup>9</sup> while, the United States permits new pipeline projects in the face of opposition from impacted indigenous communities.<sup>10</sup> The United States actions are in direct conflict with its commitments during the 2<sup>nd</sup> cycle of the UPR.<sup>11</sup>

## **Background on Dakota Access Pipeline Project**

5. The 1172-mile DAPL crosses the Missouri River in North Dakota 1/2 mile north of the Standing Rock Sioux Reservation and continues through the traditional territory of the Great Sioux Nation which has occupied the area since time immemorial.<sup>12</sup> The territory was formally recognized in the 1851 Fort Laramie Treaty with the United States.<sup>13</sup> In 1868, the US signed a second treaty with the Sioux leaders,<sup>14</sup> designating the territory as unceded Indian land.<sup>15</sup>

6. When the US Army Corps of Engineers (“Corps”) issued permits for the construction of the pipeline, they were required by federal law,<sup>16</sup> to consult with the affected tribes even though DAPL was routed outside existing reservation boundaries.<sup>17</sup> The permits were issued without meaningful consultation or the free, prior and informed consent of the Sioux tribes<sup>18</sup> violating treaties with the

Great Sioux Nation and the United States' obligations under the UN Declaration on the Rights of Indigenous Peoples.<sup>19</sup>

7. On December 4, 2016, the Corps denied an easement, effectively halting construction of the pipeline<sup>20</sup> and announced it would begin a comprehensive environmental review of the project.<sup>21</sup> In January 2017, President Trump issued a presidential memorandum to approve and expedite construction of the pipeline<sup>22</sup> prompting the Corps to forgo further environmental impact studies and grant the easement.<sup>23</sup> After the pipeline became operational on June 1, 2017, a District Court found that the Corps did not adequately consider the impacts of an oil spill and ordered<sup>24</sup> them to do a response plan, compliance audit and operations report.<sup>25</sup> Meanwhile, the oil company, Energy Transfer Partners,<sup>26</sup> was allowed to continue operating the pipeline.<sup>27</sup> The Corps completed its analysis and stated that no formal reconsideration of the pipeline's impacts was needed, a decision that is being challenged by the tribes.<sup>28</sup> Dakota Access has since revealed plans to expand operations in the area.<sup>29</sup>

8. The Dakota Access pipeline leaked at least five times in 2017,<sup>30</sup> posing significant harm to the tribes' primary source of drinking water and threatening sacred sites. An oil spill in the Missouri River is more than a minor encroachment on land, it threatens the physical and cultural survival of the Sioux Nation.<sup>31</sup>

### **State and private security violence against water protectors**

9. As it became clear that DAPL construction would proceed without meaningful consultation and consent, indigenous leaders and community members gathered to oppose construction of the pipeline and protect their rights. In August 2016, the Standing Rock Sioux Tribe issued a call for international observers.<sup>32</sup> By September, thousands gathered at or visited the *Oceti Šakowin* camp<sup>33</sup> including Chief Edward John of the UN Permanent Forum on Indigenous Issues, and Baskut Tuncak, UN Special Rapporteur on Human Rights and Hazardous Substances and Wastes.<sup>34</sup>

10. On September 2, 2016, Standing Rock tribal officials informed the federal government and Dakota Access construction managers that the proposed pipeline construction was in the path of traditional sacred areas and burial grounds. The next day, water protectors encountered workers bulldozing the burial sites that had just been identified. A number of water protectors were pepper sprayed by security guards and/or bitten by attack dogs.<sup>35</sup> Law enforcement failed to intervene in the attacks against peaceful water protectors.<sup>36</sup>

11. 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.<sup>37</sup> It is reported that private security worked with local law enforcement to operate disinformation campaigns to discredit the peaceful resistance, and directed law enforcement at times.<sup>38</sup> These actions substantiate concerns of the UN Special Rapporteur on Human Rights Defenders over the ever increasing "blurring of lines" between public and private security.<sup>39</sup> In a recent report, the UN Human Rights Council confirmed that extractive industries hire private security forces, to supplement local law enforcement and infiltrate opposition in order to sow discord and monitor actions of human rights defenders.<sup>40</sup>

12. Law enforcement and private security worked together to intimidate and suppress the free expression and assembly of water protectors in a variety of ways including:

- Utilizing riot gear, Specialty Impact Munitions (SIM),<sup>41</sup> flash-bang grenades, attack dogs, batons and chemical weapons against water protectors;<sup>42</sup>
- Using high pressure fire hoses on water protectors in below freezing temperatures;<sup>43</sup>
- Injuring over 200 people,<sup>44</sup> including one person who lost partial use of one eye;<sup>45</sup> another who lost vision, taste and hearing;<sup>46</sup> and yet another who nearly lost her arm;<sup>47</sup>
- Closing the highway between the Standing Rock Sioux Reservation and the nearest city, Bismarck, to water protectors for five months while allowing pipeline workers to pass;
- Arresting nonviolent water protectors without warning or opportunity to disperse, including medics<sup>48</sup> and journalists;<sup>49</sup> and
- Subjecting arrestees to abusive conditions including: unnecessary strip searches, confinement in cages with numbers written on their arms, and bussing to jails hours away.<sup>50</sup>

13. On November 25, 2016, the Corps issued an eviction notice to the Standing Rock Sioux Tribal Chairman.<sup>51</sup> The water protectors remaining at the *Oceti Šakowiy* camp were forcibly evicted on February 23, 2017.

### **Disproportionate punishment of indigenous and environmental activism**

14. In total, 841 water protectors were arrested for rioting, trespass and other offences. Most cases lacked evidence and probable cause.<sup>52</sup>

15. According to the Water Protector Legal Collective (WPLC), 836 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, resulting in a dismissal, 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 two served jail time. There are forty state court cases remaining on inactive status and two currently open cases.<sup>53</sup>

16. Prosecutors brought the most serious charges in federal court, against five indigenous water protectors. Despite extensive documentation of bias in the jury pool from the oil company's publicity campaign, the federal court denied the defendants' motions for change of venue. The federal defendant who received the most severe sentence was charged related to possession of a firearm shown to belong to an FBI informant who had infiltrated the water protector camp but the court denied discovery regarding this infiltration.<sup>54</sup> Facing a life sentence, she accepted a non-cooperating plea agreement and is serving 57 months in prison.<sup>55</sup> The other four federal defendants were each charged with use of fire to commit a federal felony and civil disorder. Similarly forced to proceed in a hostile forum, and with the court denying essential discovery, the defendants had no choice but to accept non-cooperating plea agreements to the civil disorder charge, to avoid harsh sentences of up to fifteen years.<sup>56</sup>

17. 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.<sup>57</sup>

18. WPLC is currently pursuing a federal civil rights class action lawsuit<sup>58</sup> seeking injunctive relief and damages against local governments on behalf of hundreds of water protectors injured by unlawful police violence. In December 2016, the federal court denied the initial request to enjoin the indiscriminate use of high-pressure fire hoses in freezing temperatures, impact munitions and other life-threatening weapons on peaceful water protectors. The litigation has been in limbo for over a year, while plaintiffs await the court's decision on a law enforcement motion to dismiss the case. The individual excessive force lawsuit filed by a young woman who suffered a severe arm injury, is also currently awaiting the court's decision on a dismissal motion.<sup>59</sup> The status of the lawsuit filed by four residents concerning the constitutionality of the road closure is at a similar stage of litigation.<sup>60</sup>

19. The law enforcement response to *peaceful* resistance at Standing Rock stands in stark contrast to the response even to *violent* occupations and armed protests in the U.S. involving non-indigenous peoples. Examples include the Neo-Nazi march in Charlottesville, Virginia<sup>61</sup> and standoffs in the states of Oregon and Nevada led by the Bundy family and anti-government militias.<sup>62</sup> In those cases there was little law enforcement intervention, compared to the heavy, militarized response at Standing Rock.<sup>63</sup>

### **Legislation intended to suppress peaceful demonstrations and criminalize dissent**

20. Since Standing Rock, there are increasing attempts by the federal government and state legislatures to criminalize opposition to so-called "critical infrastructure" projects. On June 3, 2019 the Trump administration announced that it would seek to expand criminal penalties for pipeline protests, imposing up to 20 years in prison on anyone who attempts to or does vandalize, tamper with, impede, disrupt, or inhibit the operation of a pipeline or a pipeline construction site. Even participating in protest planning could lead to lengthy prison sentences and/or steep fines.<sup>64</sup>

21. This federal action follows an alarming trend by 35 state legislatures who have proposed approximately 101 anti-protest bills, 16 of which have passed into law, 14 which are pending and 69 that have expired or been defeated.<sup>65</sup> The bills typically impose disproportionate punishments on nonviolent civil disobedience including up to 10 years in prison and \$100,000 in fines, no matter how minor the damage.<sup>66</sup> Other features of bills that have been introduced or enacted by states include:

- Creating vicarious civil liability for organizations that "aid" protestors;<sup>67</sup>
- Eliminating civil and criminal liability for drivers running into protestors blocking public roads,<sup>68</sup> a method increasingly used to attack protestors;<sup>69</sup>
- Encouraging SLAPP suits (Strategic Lawsuit against Public Participation)<sup>70</sup> to silence water protectors and organizations that support them<sup>71</sup>
- Restricting the number of people who can gather to protest;<sup>72</sup> and
- Prohibiting the use of drones to document extraction projects.<sup>73</sup>

22. Oil and gas interests<sup>74</sup> are engineering bills purported to protect against “critical infrastructure sabotage” but they are really about suppressing the growing anti-fossil fuel movement in which indigenous peoples and nations have played a central role.<sup>75</sup> These bills are admittedly a direct response<sup>76</sup> to the events at Standing Rock, and are designed to silence dissent against planned or existing extractive industry projects.<sup>77</sup> Tribal leaders have objected to the laws as targeting Native Americans.<sup>78</sup>

23. During a recent Inter-American Commission on Human Rights hearing on the Criminalization of Indigenous Human Rights Defenders and Extractive Industries in the United States,<sup>79</sup> the U.S. government referred to an interagency working group to monitor violence against environmental defenders globally. There is little publicly available information about this “informal” working group formed by the U.S. Department of State to inform U.S. policy.<sup>80</sup> The working group acknowledged that state-backed security forces have responded with force to social protest over land use and that conflicts could be avoided by providing adequate stakeholder information, greater transparency, participation and access to justice.<sup>81</sup>

24. Globally, 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.<sup>82</sup> The U.N. has identified indigenous peoples as particularly vulnerable human rights defenders<sup>83</sup> and noted that land defenders are most impacted by legal consequences and smear campaigns.<sup>84</sup>

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

25. The United States acknowledges its duty to consult with tribes under federal statutes,<sup>85</sup> executive orders,<sup>86</sup> 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.<sup>87</sup>

26. Often, government agencies consult with tribes on development projects after the fact, with little to no face-to-face communication.<sup>88</sup> U.S. federal law requires consultation only in limited circumstances, and jurisdiction over various projects such as pipelines is divided between several agencies.<sup>89</sup> Unrepresented or unrecognized tribes enjoy no rights of consultation under U.S. law.<sup>90</sup> For example, the Carrizo Comecrudo Tribe of South Texas is not federally recognized so oil companies are not required by law to consult with them regarding pipeline construction. On May 7, 2019 when the Tribal Chairman and other members attended the vote on anti-protest bill HB 3557, they were detained and threatened with criminal trespass.<sup>91</sup>

27. Multiple development projects are currently under construction on traditional lands in the absence of meaningful consultation or consent from impacted indigenous communities including but not limited to:

- Telescopes on the summit of Mauna Kea, Hawai’i;<sup>92</sup>
- Enbridge Line 3<sup>93</sup> pipeline;
- TC Energy (formerly TransCanada) KXL pipelines;<sup>94</sup>

- Border wall on Tohono O’Odham, Kickapoo, and Ysleta del Sur Tigua Tribes and Lipan Apache lands;<sup>95</sup>
- Resolution copper mine on the sacred Oak Flats of the San Carlos Apache;<sup>96</sup> and
- Snowbowl Ski Resort on the San Francisco Peaks, an area sacred to 13 tribes.<sup>97</sup>

## **Conclusions and Recommendations**

28. Freedom of expression, association, and peaceful assembly are secured by the First Amendment of the United States Constitution<sup>98</sup> and protected by international human rights law.<sup>99</sup> 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 human rights violations against DAPL water protectors. By failing to uphold its obligations, the United States is emboldening state and non-state actors to use excessive force against peaceful dissent.

29. Further the U.S. is failing to uphold its obligations under the UN Declaration on the Rights of Indigenous Peoples, specifically 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.<sup>100</sup>

30. We call upon the UPR working group to urge the United States to:

- a) Review criminal proceedings against DAPL water protectors, the majority of whom were arrested without probable cause, and urge the U.S. Attorney General and local prosecutors to have convictions set aside, arrestees exonerated and political prisoners released;
- b) Convene a truth commission with indigenous representative institutions to investigate,<sup>101</sup> punish, and provide appropriate reparations for human rights violations in relation to the DAPL protests, including violations by law enforcement, energy companies and private security;
- c) Adopt a regulatory framework to monitor and report on the corporate conduct and human rights accountability of energy companies,<sup>102</sup> investors, 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 managing peaceful demonstrations; the right to free expression and assembly; and indigenous peoples’ rights under international law;<sup>103</sup>
- e) Implement national measures in compliance with domestic and international standards to protect indigenous nations and human rights defenders right to free expression and assembly and right to religious freedom;<sup>104</sup>
- f) Reject or amend legislation, including critical infrastructure laws, that violate rights to free speech and assembly; and
- g) Ensure that state and local emergency powers are not abused in the context of peaceful demonstrations.

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<sup>1</sup> The 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 (Apr. 26, 2019)

<https://truthout.org/articles/un-to-launch-global-campaign-against-criminalization-of-indigenous-peoples/>  
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/>

<sup>2</sup> 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](http://www.energytransfer.com/ops_bakken.aspx) (last visited April 2, 2019)

<sup>3</sup> 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>

<sup>4</sup> *Infra* ¶¶ 6-7, 25-27.

<sup>5</sup> Letter from Thomas W. Wetterer, General Counsel, Greenpeace Inc. to Paulo Abrão, Executive Secretary, Inter-American Commission on Human Rights (April 24, 2019) (Attached as “Annex 1”) “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.”

<sup>6</sup> 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 20 UDHR & Article 22 ICCPR; Right to security of the person- Article 3 UDHR & Art. 9 ICCPR; Right to be free from arbitrary arrest and detention- Article 9 UDHR & ICCPR; Right to be free from inhuman and degrading treatment-Article 5 UDHR & Article 7 ICCPR.

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 “Annex 2”)

See also Letter from Thomas W. Wetterer, *id.*

<sup>7</sup> “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).

<sup>8</sup> United Nations Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/36/56, ¶ 6 (Attached as “Annex 3”)

United Nations Permanent Forum on Indigenous Issues, E/2017/43-E/C.19/2017/11, ¶ 23 (Attached as “Annex 4”)  
UN DSPD, 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), November 1, 2016, <http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Report-ChiefEdwardJohn-DAPL2016.pdf>;



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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) ¶¶ 72, 73 & 93 (Attached as “Annex 5”)

Report to Human Rights Council: Attacks against and criminalization of indigenous peoples defending their rights, A/HRC/39/17 (Aug. 10, 2018) ¶¶ 91-96 (Attached as “Annex 6”)

<sup>9</sup> One water protector was recently arrested, three years after his alleged crime. *DNA From Cigarette leads to Dakota Access Arrest 3 Years On*, ASSOCIATED PRESS (Sept. 6, 2019)

[https://www.washingtonpost.com/national/dna-from-cigarette-leads-to-dakota-access-arrest-3-years-on/2019/09/06/97054c5c-d0db-11e9-a620-0a91656d7db6\\_story.html](https://www.washingtonpost.com/national/dna-from-cigarette-leads-to-dakota-access-arrest-3-years-on/2019/09/06/97054c5c-d0db-11e9-a620-0a91656d7db6_story.html)

<sup>10</sup> South Dakota recently criminalized protest against the Keystone XL pipeline: Ayana Byrd, *South Dakota Criminalizes Protest Against Keystone Pipeline*, COLOR LINES (Mar. 20, 2019)

<https://www.colorlines.com/articles/south-dakota-criminalizes-protest-against-keystone-xl-pipeline/>;

The Atlantic Coast pipeline was permitted to move forward despite a public outcry, and locals continue to oppose the project, Elizabeth McGowan, *Rural Virginia Activist, 75, vows to 'Keep on Fighting' Atlantic Coast Pipeline*, ENERGY NEWS NETWORK (Aug. 20, 2019), <https://energynews.us/2019/08/20/southeast/rural-virginia-activist-75-vows-to-keep-on-fighting-atlantic-coast-pipeline/>;

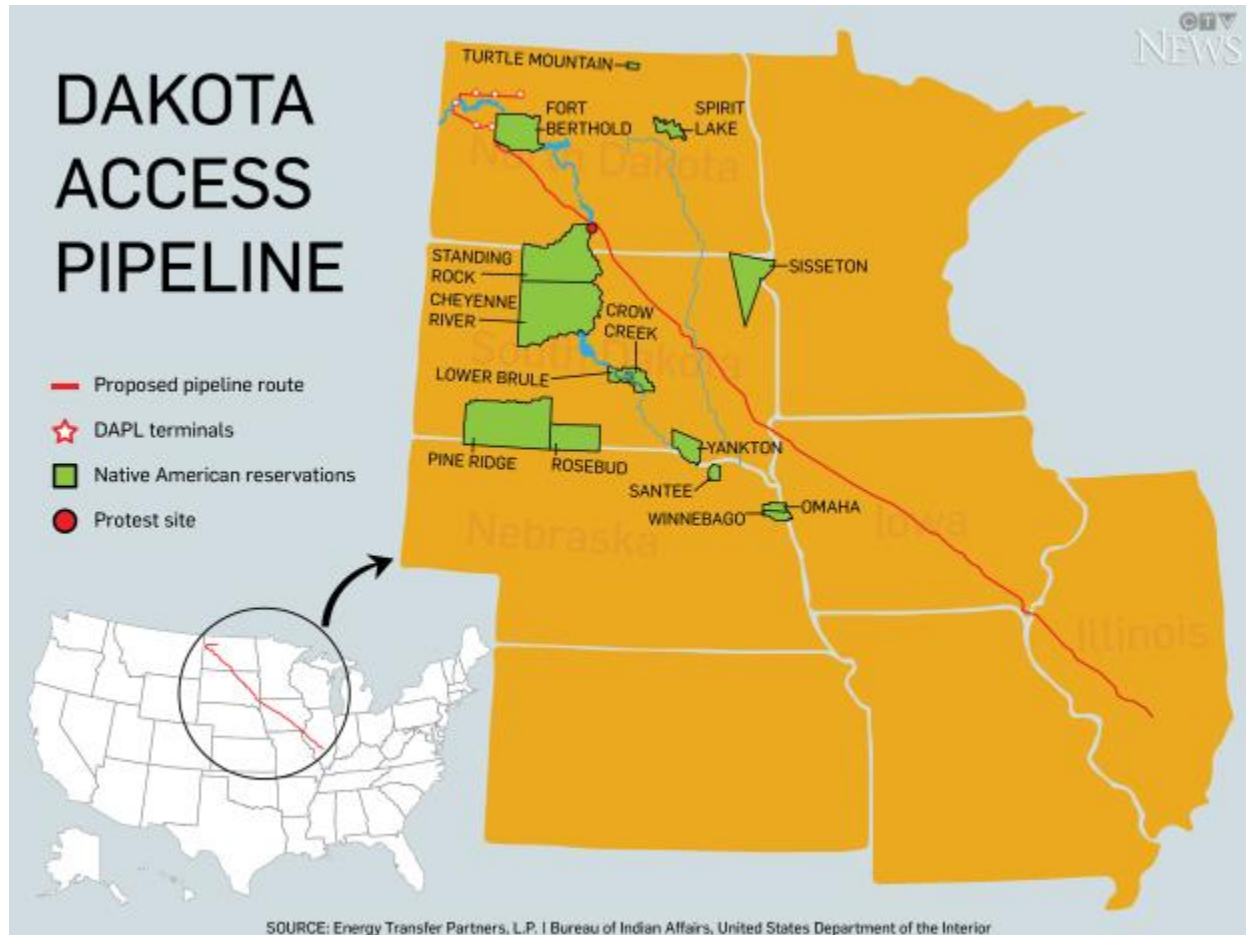
The Enbridge Line 3 pipeline is projected to move forward soon and is facing backlash from indigenous groups whose lands would be affected, *Protesters Rally Against Line 3 Pipeline at Enbridge Office in Minnesota*, THE ASSOCIATED PRESS (Aug. 19, 2019), <https://www.apnews.com/dc45173999b746d38b5e43d670ed25ca>

<sup>11</sup> The U.S. supported calls (172.322, 172.323) to implement the UN Declaration consistent with its 2010 Announcement of Support for the UNDRIP. It also gave support to Recommendation 176.324 to “Regularly consult with indigenous peoples on matters of interest to their communities, to support their rights to traditionally owned lands and resources and to adopt measures to effectively protect sacred areas of indigenous peoples against environmental exploitation and degradation (Republic of Moldova)” 176.324 and 176.326 to “Respect indigenous peoples and ethnic minorities’ rights and interests; fully consult with them on their land, autonomy, environment, language and other issues; correct the historical injustice and offer compensation (China).

Rep. of the Working Group on the Universal Periodic Review, United States of America, U.N. Doc. A/HRC/30/12 (July 20, 2015) at 33. [https://documents-dds-](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/159/71/PDF/G1515971.pdf?OpenElement)

[ny.un.org/doc/UNDOC/GEN/G15/159/71/PDF/G1515971.pdf?OpenElement](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/159/71/PDF/G1515971.pdf?OpenElement)

Report of the Working Group on the Universal Periodic Review, United States of America, Addendum: Views on conclusions and/or recommendations, A/HRC/30/12/Add.1 (Sept. 14, 2015) ¶ 11 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/207/66/PDF/G1520766.pdf?OpenElement>



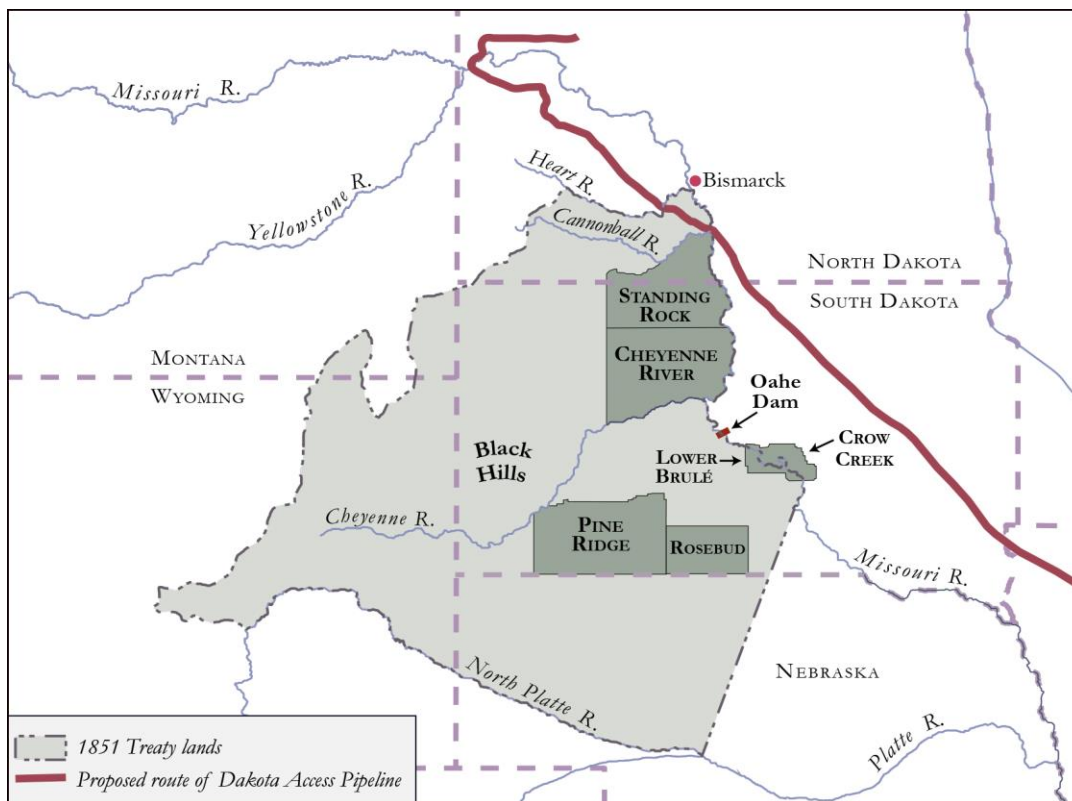


Photo source: ‘The Supreme Law of the Land’: Standing Rock and the Dakota Access Pipeline, Shouldn’t the US obey the Constitution? Jeffrey Ostler and Nick Estes, Indian Country Today (Jan 16, 2017).

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

<sup>13</sup> 11 Stat. 749 (Sept. 17, 1851)

<sup>14</sup> 15 Stat. 635 (Apr. 29, 1868), Article XVI

<sup>15</sup> 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>

<sup>16</sup> Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108 and other laws.

<sup>17</sup> 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 Sperling, (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>

<sup>18</sup> The Yankton Sioux Tribe was not consulted. Complaint, Yankton Sioux, *supra* note 15. 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* 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) ¶¶102-125 (Attached as “Annex 7”);

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/p16021col17/id/2801>;

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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>

<sup>19</sup> United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 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](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.”

<sup>20</sup> 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>

<sup>21</sup> *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>

<sup>22</sup> 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>

<sup>23</sup> 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/>

<sup>24</sup> *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/infdc020170615a83>

<sup>25</sup> *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>

<sup>26</sup> 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-protested-dakota-pipeline-tops-u-s-crude-spill-charts-;](https://www.reuters.com/article/us-usa-pipeline-nativeamericans-safety-i/sunoco-behind-protested-dakota-pipeline-tops-u-s-crude-spill-charts-)

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>

<sup>27</sup> *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, (Aug. 28, 2017) <https://earthjustice.org/sites/default/files/files/SRST-CRST-Reply-Brief-re-Remedy.pdf>.

<sup>28</sup> The Standing Rock, Cheyenne River, Yankton, and Oglala Sioux Tribes are challenging this in ongoing federal court litigation: *Standing Rock Sioux Tribe, Press Release Standing Rock Sioux Tribe Seeks Court Ruling to Halt Pipeline Operations, as Dakota Access LLC Pushes for Expansion* (Aug. 16, 2019) <https://www.standingrock.org/content/standing-rock-sioux-tribe-seeks-court-ruling-halt-pipeline-operations-dakota-access-llc>

<sup>29</sup> *Id.*

<sup>30</sup> 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/>



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Julia Conley, *WATCH: Ocasio-Cortez Grills Wells Fargo CEO Over Profiting From 'Caging of Children' and Pipeline Disasters*, COMMON DREAMS (Mar. 12, 2019) <https://www.commondreams.org/news/2019/03/12/watch-ocasio-cortez-grills-wells-fargo-ceo-over-profiting-caging-children-and-pipeline-disasters>

<sup>31</sup> “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](https://shadowproof.com/wp-content/uploads/2017/02/document_ew_05.pdf)

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](https://www.standingrock.org/sites/default/files/uploads/srst_impacts_of_an_oil_spill_2.21.2018.pdf)

<sup>32</sup> Indigenous Environmental Network: <http://www.ienearth.org/urgent-appeal-for-international-observers/>

<sup>33</sup> 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/>

<sup>34</sup> 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>

<sup>35</sup> Request for Precautionary Measures, *supra* note 18, Exhibit 1 p. 5 University of Colorado Timeline; and Exhibit 17 Declaration of Ta'sina Sapa Win Smith ¶¶17&41.

<sup>36</sup> Request for Precautionary Measures, *supra* note 18, p. 8 citing Exhibit 17 p. 256 Declaration of Ta'sina Sapa Win Smith.

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](https://www.democracynow.org/2016/9/6/full_exclusive_report_dakota_access_pipeline)

<sup>37</sup> 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>

<sup>38</sup> TigerSwan private security firm 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.” 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 law enforcement. 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 water protectors' movements during a demonstration.

<https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>

<https://theintercept.com/2018/12/30/tigerswan-infiltrator-dakota-access-pipeline-standing-rock/>.

“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/>

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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>

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 but the North Dakota Supreme Court upheld a lower court ruling dismissing the Board's request for an injunction against TigerSwan operating in North Dakota as TigerSwan claimed it voluntarily left North Dakota and didn't plan on returning. The board is still pursuing fines. <https://www.prairiebusinessmagazine.com/news/government-and-politics/4612572-north-dakota-supreme-court-hears-arguments-pipeline-security/>; <https://www.grandforksherald.com/news/crime-and-courts/4625625-North-Dakota-Supreme-Court-affirms-ruling-in-pipeline-security-dispute/>

*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](https://ccrjustice.org/sites/default/files/attach/2017/11/Ex.%20A%20N.D.%20Complaint_0.pdf)

<sup>39</sup> 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>

<sup>40</sup> Rep. of the Human Rights Council, *Relationship Between Private Military and Security Companies and the Extractive Industry from a Human Rights Perspective*, Doc. A/HRC/42/42 (2019).

<sup>41</sup> Lead-filled, shotgun-fired “beanbag” rounds and rubber-plastic “sponge” rounds.

<sup>42</sup> *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, ¶6 <http://www.sfbla.com/wp-content/uploads/2017/07/1st-Amd-Complaint.pdf>.

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/>

<sup>43</sup> *Police Deploy Water Hoses, Tear Gas Against Standing Rock Protestors*, Joshua Barajas, PBS News (November 21, 2016) <https://www.pbs.org/newshour/nation/police-deploy-water-hoses-tear-gas-against-standing-rock-protesters>

<sup>44</sup> *Id.* ¶2.

<sup>45</sup> *Id.* ¶36.

<sup>46</sup> Will Parrish, *Standing Rock activist faces prison after officer shot him in the face*, THE GUARDIAN – US Edition (Oct. 4, 2018) <https://www.theguardian.com/us-news/2018/oct/04/standing-rock-marcus-mitchell-shooting-charges>

“I’m Afraid They Are Out to Kill”: *Water Protectors Testify to Police Violence at Standing Rock*, DEMOCRACY NOW! (Jan. 25, 2017) [https://www.democracynow.org/2017/1/25/im\\_afraid\\_they\\_are\\_out\\_to](https://www.democracynow.org/2017/1/25/im_afraid_they_are_out_to)

*DAPL: Navajo Water Protector Shot in Eye By Police Near Standing Rock Tells What Happened*, MINING AWARENESS (Mar. 8, 2017) <https://miningawareness.wordpress.com/2017/03/08/dapl-navajo-water-protector-shot-in-eye-by-police-near-standing-rock-tells-what-happened/>

<sup>47</sup> Chiara Sottile & Daniel Medina, *Pipeline Protesters Say Police Nearly Blew Off Woman’s Arm*, NBC NEWS (2016) <https://www.nbcnews.com/storyline/dakota-pipeline-protests/pipeline-protesters-decry-excessive-force-after-woman-s-arm-blown-n687326>

<sup>48</sup> 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/>

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>

<sup>49</sup> *Reporter Jenni Monet Arrested at Standing Rock*, U.S. PRESS FREEDOM TRACKER (May 25, 2017)

<https://pressfreedomtracker.us/all-incidents/reporter-jenni-monet-arrested-standing-rock/>;

*Journalist Tracie Williams Arrested at Standing Rock*, U.S. PRESS FREEDOM TRACKER (May 24, 2017),

<https://pressfreedomtracker.us/all-incidents/journalist-tracie-williams-arrested-standing-rock/>;

Alleen Brown, *Arrests of Journalists at Standing Rock Test the Boundaries of the First Amendment*, THE INTERCEPT (Nov. 27, 2016) <https://theintercept.com/2016/11/27/arrests-of-journalists-at-standing-rock-test-the-boundaries-of-the-first-amendment/>

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<sup>50</sup> Sam Levine, *Dakota Access pipeline protests: UN group investigates human rights abuses*, THE GUARDIAN (Oct. 31, 2016) <https://www.theguardian.com/us-news/2016/oct/31/dakota-access-pipeline-protest-investigation-human-rights-abuses>

Larry Buhl, *Mass Arrests and Strip Searches of Dakota Access Pipeline Protesters Raise Tensions*, DESMOG (Oct. 25, 2016) <https://www.desmogblog.com/2016/10/25/mass-arrests-and-strip-searches-dakota-access-pipeline-protesters>

<sup>51</sup> Daniela A. Media, *U.S. Army Corps Gives Eviction Notice to Dakota Access Protest Camp*, NBC NEWS, (Feb. 3, 2017) <https://www.nbcnews.com/news/us-news/u-s-army-corps-gives-eviction-notice-dakota-access-protest-n716686>

<sup>52</sup> Sam Levin & Julia Carrie Wong, *Bogus Charges: Standing Rock Activists Say They Face Campaign of Legal Bullying*, THE GUARDIAN (Nov. 30, 2016) <https://www.theguardian.com/us-news/2016/nov/30/north-dakota-access-pipeline-standing-rock-legal-fine-threats>

<sup>53</sup> Current as of September 2019. Data provided by Water Protector Legal Collective. 836 is the number of North Dakota 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/>

<sup>54</sup> Will Parish, *An Activist Stands Accused of Firing a gun at Standing Rock. It belonged to her lover-An FBI Informant*, THE INTERCEPT (Dec. 11, 2017) <https://theintercept.com/2017/12/11/standing-rock-dakota-access-pipeline-fbi-informant-red-fawn-fallis/>

C.S. Hagen, *Infiltrated: No-DAPL Activist Hoodwinked by Paid FBI Informant, Defense Says*, HIGH PLAINS READER (Jan. 11, 2018), <http://hpr1.com/index.php/feature/news/infiltrated-no-dapl-activist-hoodwinked-by-paid-fbi-informant-defense-says/?platform=hootsuite>

Water Protector Legal Collective, *Red Fawn Fallis*, (2019) <https://waterprotectorlegal.org/red-fawn-fallis/>

<sup>55</sup> *US v. RedFawn Fallis*, United States District Court for the District of North Dakota Western Division, Docket Number 1:17-CR-00016-DLH (July 11, 2018).

<sup>56</sup> 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 far 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. *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).

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 Minnesota and currently has a release date of May 1, 2021. (According to a search executed on the Federal Bureau of Prisons “Find an Inmate” website ([www.bop.gov/inmateloc/](http://www.bop.gov/inmateloc/)), search executed on June 20, 2019 with the name “Michael Markus.”)

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

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. *US v. James White*, United States District Court for the District of North Dakota Western Division, Docket Number 1:17-CR-00030, (Dec. 5, 2018).

<sup>57</sup> Sam Levine, *Judge rejects riot charges for journalist Amy Goodman after oil pipeline protest: Authorities had issued a warrant for her arrest after Democracy Now! host filmed guards for the Dakota access pipeline using dogs and pepper spray on protesters - North Dakota arrest warrant for Amy Goodman raises fears for press freedom*, THE GUARDIAN (Oct. 17, 2016) <https://www.theguardian.com/us-news/2016/oct/17/amy-goodman-north-dakota-oil-access-pipeline-protest-arrest-riot>

Sandy Tolan, *Journalist Faces Charges after Arrest while Covering Dakota Access Pipeline Protest*, LA TIMES (Feb. 5, 2017) <http://www.latimes.com/nation/la-na-standing-rock-journalist-arrest-20170205-story.html>;

Chris Sommerfeldt, *SEE IT: Journalist Shot While On-Air at Standing Rock Protests*, NEW YORK DAILY NEWS (Nov. 4, 2016) <http://www.nydailynews.com/news/national/journalist-shot-on-air-standing-rock-protests-article-1.2857929>;

*Charges for journalists covering Standing Rock protests*, Committee to Protect Journalists, (Feb. 17, 2017); <https://cpj.org/blog/SRock-NEW.pdf>

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Alexandra Ellerbeck, *Journalists covering Standing Rock face charges as police arrest protesters*, Committee to Protect Journalists (Feb. 17, 2017) <https://cpi.org/blog/2017/02/journalists-covering-standing-rock-face-charges-as.php>

Unicorn Riot, *Statement on Recent Censorship of #NoDAPL Coverage* (Sep. 20, 2016) <https://www.unicornriot.ninja/2016/statement-recent-censorship-nodapl-coverage/>

Alleen Brown, *Arrests of Journalists at Standing Rock Test the Boundaries of the First Amendment*, THE INTERCEPT (Nov. 27, 2016) <https://theintercept.com/2016/11/27/arrests-of-journalists-at-standing-rock-test-the-boundaries-of-the-first-amendment/>

<sup>58</sup> Dundon Amended Complaint, *supra* note 42 (asserting violations of U.S. Const. Amend. I (right to speech, assembly, press, and religious exercise) and IV (right to be free of government excessive force).)

<sup>59</sup> *Wilansky v. Morton County, North Dakota et al*, U.S. District Court, D.N.D. Case No. 18-cv-00236.

<sup>60</sup> *Thunderhawk et al. v. County of Morton, North Dakota et al.*; D.N.D. Case No. 1:18-cv-00212 (Attached as “Annex 8”) (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).) American Declaration on the Rights of Indigenous Peoples, Arts. IV (Sovereignty), XXI (Autonomy).

<sup>61</sup> On August 11, 2017 approximately 100 white nationalists demonstrated in opposition to the Charlottesville City Council decision to remove the statute 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](https://docs.wixstatic.com/ugd/c869fb_04949e939e2e440d99520dfb8400219c.pdf)

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](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_EWU_USA_8285_E.pdf)

<sup>62</sup> 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>

<sup>63</sup> 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 protestors. 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. Letter from ACLU to Morton County Sheriff’s Department (Sept. 27, 2016)

[https://www.aclund.org/sites/default/files/field\\_documents/ora\\_mortoncounty\\_dapl.pdf](https://www.aclund.org/sites/default/files/field_documents/ora_mortoncounty_dapl.pdf)

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

[https://www.aclund.org/sites/default/files/field\\_documents/ora\\_ndhwyprtl\\_dapl.pdf](https://www.aclund.org/sites/default/files/field_documents/ora_ndhwyprtl_dapl.pdf)

<sup>64</sup> E.A. Crunden, “Trump pushes up to 20 years in prison for pipeline protestors,” THINK PROGRESS, (June 3, 2019) <https://thinkprogress.org/trump-pipeline-protestors-20-years-texas-7d6e4e06a33b/>; DOT Legislative Proposal: New Federal Criminal Penalties for Protests Near Pipelines (2019)

<https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/news/71476/2019-pipeline-safety-reauthorization.pdf>

<sup>65</sup> Anti-Protest Legislature Chart, prepared for the WPLC by the Center for Constitutional Rights (Attached as “Annex 9”) For updates see International Center for Not-For-Profit Law, US Protest Law Tracker:

<http://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative>



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“Among other things, the new laws expanded the definition of criminal trespass, and raised the penalty for a riot conviction. Though the measures were clearly in response to Standing Rock, they also reflected a much broader conservative backlash to direct action—a backlash that resulted in a wave of legislation introduced in states across the United States.” Zoë Carpenter, *Since Standing Rock, 56 Bills Have Been Introduced in 30 States to Restrict Protests*, THE NATION (Feb. 16, 2018) <https://www.thenation.com/article/photos-since-standing-rock-56-bills-have-been-introduced-in-30-states-to-restrict-protests/>

<sup>66</sup> Illinois HB1633, 101st Gen. Assembly (April 11, 2019)

<http://www.ilga.gov/legislation/billstatus.asp?DocNum=1633&GAID=15&GA=101&DocTypeID=HB&LegID=116175&SessionID=108>

Idaho SB1090

<https://legislature.idaho.gov/sessioninfo/2019/legislation/S1090/>

South Dakota SB189 (March 11, 2019)

[https://sdlegislature.gov/Legislative\\_Session/Bills/Bill.aspx?File=SB189P.htm&Session=2019&Version=Printed&Bill=189](https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?File=SB189P.htm&Session=2019&Version=Printed&Bill=189)

Texas SB 2229, 86<sup>th</sup> Leg. Session (March 21, 2019),

<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB2229>

Naveena Sadasivam, *After Standing Rock, protesting pipelines can get you a decade in prison and \$100K in fines*, Grist (May 14, 2019) <https://grist.org/article/after-standing-rock-protesting-pipelines-can-get-you-a-decade-in-prison-and-100k-in-fines/>

<sup>67</sup> Idaho SB1090 (2019).

Texas HB 3557 1993, 86<sup>th</sup> Leg. Session (April 23, 2019),

<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB3557>

Texas SB 1993, 86<sup>th</sup> Leg. Session (March 27, 2019),

<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB1993>

ND SB 2044, 66<sup>th</sup>, Leg. Assembly (March 25, 2019), <https://www.legis.nd.gov/assembly/66-2019/bill-index/bi2044.html>;

James MacPherson, *Legislature approves bumping pipeline tampering penalties*, ASSOCIATED PRESS (March 25, 2019), <https://apnews.com/cd39b04dbbc84246b61171dd9900c1e3> (“The bill says someone who intentionally tampers with infrastructure faces up to five years in prison and a \$10,000 fine. It also increases those fines up to \$100,000 for an organization found to have conspired with multiple individuals.”)

<sup>68</sup> On April 27, 2017, the North Carolina legislature, in a 67-48 vote, passed House Bill 330 (“HB 330”) An Act Providing That a Person Driving an Automobile While Exercising Due Care is Immune from Civil Liability for any Injury to Another if the Inured Person was Participating in a Protest or Demonstration and Blocking Traffic in a Public Street or Highway at the Time of the Injury

<https://www.ncleg.net/Sessions/2017/Bills/House/PDF/H330v2.pdf>

This North Dakota Bill was defeated in the legislature: “Liability exemption for motor vehicle driver.

Notwithstanding any other provision of law, a driver of a motor vehicle who negligently causes injury or death to an individual obstructing vehicular traffic on a public road, street, or highway may not be held liable for any damages.”

North Dakota H.R. 1203, 65<sup>th</sup> Leg. Assembly (Jan. 9, 2017), [https://www.legis.nd.gov/assembly/65-](https://www.legis.nd.gov/assembly/65-2017/documents/17-0351-01000.pdf)

<https://www.legis.nd.gov/assembly/65-2017/bill-actions/ba1203.html>

<http://www.legis.nd.gov/assembly/65-2017/bill-actions/ba1203.html>

<sup>69</sup> On August 12, 2017, an Ohio man drove a car into a crowd of individuals demonstrating against a white nationalist gathering injuring 19 individuals and killing 32 year-old Heather Heyer. Michael Edison Hayden, M.L. Nestel, *Timeline: What led to the violence that unfolded in Charlottesville*, ABC NEWS, (Aug 14, 2017)

<http://abcnews.go.com/US/timeline-led-violence-unfolded-charlottesville/story?id=49207428>

In October of 2016, a pick-up driver plowed through a group of people during a peaceful demonstration in downtown Reno, Nevada hitting two people. The demonstration 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) [www.theguardian.com/us-news/2016/oct/11/native-american-rights-protesters-hit-by-truck-nevada](http://www.theguardian.com/us-news/2016/oct/11/native-american-rights-protesters-hit-by-truck-nevada)

<sup>70</sup> Protect the Protest, “What is SLAPP?” <https://www.protecttheprotest.org/category/resource-categories/what-is-slapp/>

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<sup>71</sup> Texas passed HB 2730 86<sup>th</sup> Leg. Session (April 18, 2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB2730> that encourages SLAPP suits. In August 2017, Energy Transfer Partners filed a \$900 million SLAPP suit against Greenpeace in order to reframe the indigenous-led movement at Standing Rock. Energy Transfer Equity, L.P., and Energy Transfer Partners L.P., v. Greenpeace International et al., Case 1:17-cv-00173-CSM (Aug. 22, 2017) <https://earthrights.org/wp-content/uploads/ETP-complaint.pdf> The lawsuit included claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), a law created to prosecute organized crime. 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. Earth Rights International, In February 2019, the lawsuit was fully dismissed 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. The venue may have changed, but the misrepresentations about Standing Rock and meritless legal claims continue.

“Energy Transfer Partners v. Krystal Two Bulls Indigenous Water Defender Sued by Company Behind Dakota Access Pipeline,” <https://earthrights.org/case/etp-v-krystal-two-bulls/>  
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/>  
Blake Nicholson, *Dakota Access developer sues Greenpeace in state court*, ASSOCIATED PRESS (Feb. 23, 2019) <https://apnews.com/c86795a2c7a64cb1b5c1f7e42c649dba>

<sup>72</sup> South Dakota Senate Bill 176 (March 13, 2017)  
<http://sdlegislature.gov/docs/legsession/2017/Bills/SB176ENR.pdf>

On September 18, 2019, a judge issued a preliminary injunction blocking South Dakota’s new “riot-boosting” law as unconstitutional. Delilah Friedler, *A Judge Just Blocked South Dakota’s “Riot-Boosting” Law, But Anti-Protest Measures Keep Spreading: MLK “could have been liable” under a law like this, judge says*, MOTHERJONES (Sept. 18, 2019)

<https://www.motherjones.com/politics/2019/09/a-judge-just-blocked-south-dakotas-riot-boosting-law-but-anti-protest-measures-keep-spreading/>

<sup>73</sup> Texas HB 4448, 86<sup>th</sup> Leg. Session (April 4, 2019),  
<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB4448>

<sup>74</sup> The Louisiana Mid-Continental Oil and Gas Association drafted the amendment to the state’s critical infrastructure law that greatly increased the penalties for protesters near pipelines or pipeline construction sites. Steve Hardy, *Environmentalists see proposed Louisiana law to protect pipelines and penalize protesters as overreach*, The Advocate (March 31, 2018).

[https://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_1b087942-34ee-11e8-8dcb-2b3538173f63.html](https://www.theadvocate.com/baton_rouge/news/crime_police/article_1b087942-34ee-11e8-8dcb-2b3538173f63.html)

<sup>75</sup> International Center for Nonprofit Law, Legislative Briefer: “Guilt by Association” Critical Infrastructure Bills and the Right to Protest (Sept. 2018)

<http://www.icnl.org/programs/US%20Programs/Critical%20Infrastructure%20Legislative%20Briefer.pdf>

<sup>76</sup> Jennifer Brooks, *North Dakota bill aimed at Standing Rock Protest*, STAR TRIBUNE (Jan. 16, 2107)

<http://www.startribune.com/north-dakota-bill-aimed-at-standing-rock-protest/410860535/>

<sup>77</sup> Louisiana HB727(May 30, 2018) was immediately used to target peaceful pipeline resisters and 16 people were arrested for resisting the Bayou Bridge Pipeline, the terminus of the Bakken pipeline built by Energy Transfer Partners. <https://legiscan.com/LA/text/HB727/2018>

Letter from Loyola University College of Law to Senate Judiciary Committee, Louisiana State Senate (April 19, 2018) (Attached as “Annex 10”).

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. *Supra* note 67.

<sup>78</sup> The Governor of South Dakota 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.” John Hult, *Daugaard urges calm from tribes*, ARGUS LEADER (March 14, 2017) <https://www.argusleader.com/story/news/2017/03/14/daugaard-urges-calm-tribes/99162354/>;

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Levi Rickert, *Cheyenne River Sioux Chairman reject South Dakota Governors' call to stop protest*, NATIVE NEWS ONLINE NET, (March 5, 2019), <https://nativenewsonline.net/currents/cheyenne-river-sioux-chairman-rejects-south-dakota-governors-call-to-stop-protests/>;

South Dakota: Official statement from Ella Robertson Chairwoman of the Sisseton Wahpeton Oyate, Lastreal Indians (March 12, 2019) <https://lastrealindians.com/news/2019/3/12/mar-12-2019-sisseton-wahpeton-oyate-opposes-anti-protest-legislation>

<sup>79</sup> Inter-American Commission on Human Rights, *Hearing on the Criminalization of Indigenous Human Rights Defenders and Extractive Industries in the United States* (May 8, 2019) <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17>

<sup>80</sup> 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/>

<sup>81</sup> 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](https://docs.wixstatic.com/ugd/f623ce_e2b7e5e1951147cbbd23ade707d70fb4.pdf).

<sup>82</sup> 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. 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>.

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>.

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.”

<sup>83</sup> 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> 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). See also OHCHR, Statement of Michel Forst, Human rights defenders face worsening risks for challenging firms, UN expert warns (Oct. 25, 2017)

See also *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.”

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

<sup>84</sup> 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](http://www.oas.org/en/iachr/media_center/PReleases/2017/204.asp)  
UN Special Rapporteur on the Rights of Indigenous Peoples Report to the Human Rights Council: Attacks against and criminalization of indigenous peoples defending their rights, A/HRC/39/17 (Aug. 10, 2018)

<sup>85</sup> 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) 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)).

<sup>86</sup> 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](http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/Req-EO13175tribgovt.pdf)

<sup>87</sup> 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](https://www.colorado.edu/law/sites/default/files/attached-files/bailey_final_1_web_1.pdf)

<sup>88</sup> *GAO Issues Recommendations for Improving Tribal Consultation on Infrastructure Projects*, Jody Cummings, Steptoe (April 30, 2019) <https://www.steptoe.com/en/news-publications/gao-issues-recommendations-for-improving-tribal-consultation-on-infrastructure-projects.html>

<sup>89</sup> 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>

<sup>90</sup> The federally unrecognized Houma Nation of Louisiana faces significant threats to its water sources and sacred sites with the construction of the Bayou Bridge Pipeline across lands it has historically occupied. The 162-mile pipeline built by Energy Transfer Partners is the terminus of the Bakken pipeline that begins with DAPL. *See supra* note 2. The Houma Nation’s concerns are well-founded because the pipeline, which will transport over 500,000 barrels of oil per day, has already leaked numerous times. Since the Houma Nation lacks federal recognition, there are no formal consultation requirements for federal agencies, such as the National Historic Preservation Office, the Bureau of Indian Affairs, or the Army Corps’ of Engineers. For example, under the National Historic Preservation Act, the Corps is required to consult with tribes before commencing a project or undertaking that may affect tribal land or culture. 36 C.F.R. § 800.3(c)(1) and (3). Similarly, under the National Environmental Policy Act, the Corps is required to “coordinate” or consult with federally recognized tribes if the project or undertaking poses a threat to the tribe’s environment. DIV. OF ENVTL. AND CULTURAL RES. MGMT., INDIAN AFFAIRS NATIONAL POLICY ACT (NEPA) GUIDEBOOK, at 7 § 2.5 (Aug. 2012) [https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/59\\_IAM\\_3-H\\_v1.1\\_508\\_OIMT.pdf](https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/59_IAM_3-H_v1.1_508_OIMT.pdf)>

*See also* 36 C.F.R. § 800.3.  
Adam Crepelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation’s Struggle for Federal Recognition*, 64 LOYOLA L. REV. 1, 143 (2018);

Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000).

*Joint Statement on the US Army Corps of Engineers’ Approval of the Bayou Bridge Pipeline*, Indigenous Environmental, <http://www.ienearth.org/joint-statement-on-the-us-army-corps-of-engineers-approval-of-the-bayou-bridge-pipeline/>;

Tribal Energy Resources, LLC, Bayou Bridge Pipeline Project Tribal Monitoring Plan (2017).

<sup>91</sup> Frank Hopper, *Kill the bill! Save the land! Native protectors disrupt Texas legislature*, INDIAN COUNTY TODAY (May 10, 2019) <https://newsmaven.io/indiancountrytoday/news/kill-the-bill-save-the-land-native-protectors-disrupt-texas-legislature-qNlvwX7IPkeLgU5y6wJVpw/>

<sup>92</sup> HPD Cites 547, Arrests 11 on Mauna Kea BIG ISLAND NOW (Sept. 19, 2019)

<https://bigislandnow.com/2019/09/19/hpd-cites-547-arrests-11-on-mauna-kea/>

Amy Goodman, *Native Hawaiians Fight Construction of Telescope on Mauna Kea*, TRUTH-OUT, (July 22, 2019) <https://truthout.org/video/native-hawaiians-fight-construction-of-telescope-on-mauna-kea/>.



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<sup>93</sup> *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>

<sup>94</sup> Native American Rights Fund, *The Tribes' Case Against KXL Still Stands*, (June 7, 2019)

<https://www.narf.org/keystone-xl/>

<sup>95</sup> Tohono O'odham Nation, *No Wall*, <http://www.tonation-nsn.gov/nowall/>

Michelle Guzman and Zachary Hurwitz, *Violations on the Part of the United States Government of Indigenous Rights Held by Members of the Lipan Apache, Kickapoo, and Ysleta del Sur Tigua Tribes of the Texas-Mexico Border*, University of Texas at Austin (Oct. 18, 2008)

<https://law.utexas.edu/humanrights/borderwall/analysis/briefing-violations-of-indigenous-rights.pdf>

<sup>96</sup> Apache Stronghold, Protect Oak Flat <http://apache-stronghold.com/>

<sup>97</sup> Petition to IACHR, submitted by the Navajo Nation against the United States of America, (March 2, 2015)

[http://www.nnhrc.navajo-](http://www.nnhrc.navajo-nsn.gov/docs/sacredsites/Navajo%20Nation%20Petition%20to%20IACHR%20March%202%202015.pdf)

[nsn.gov/docs/sacredsites/Navajo%20Nation%20Petition%20to%20IACHR%20March%202%202015.pdf](http://www.nnhrc.navajo-nsn.gov/docs/sacredsites/Navajo%20Nation%20Petition%20to%20IACHR%20March%202%202015.pdf)

<sup>98</sup> *Supra*, note 7.

<sup>99</sup> *Supra*, note 6; 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.”<sup>99</sup> 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>; 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, *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.

<sup>100</sup> UNDRIP, *supra* note 19.

<sup>101</sup> 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.” Letter from ACLU to DOJ (Nov. 4, 2016) <https://www.aclu.org/letter/aclu-standing-rock-letter-justice-department>

<sup>102</sup> 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>

<sup>103</sup> Foley Hoag, *supra* note 89.

<sup>104</sup> Precautionary Measures Request, *supra* note 18.