MONEY TALKS, BANKS ARE TALKING: Dakota Access Pipeline Finance Aftermath

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Abstract

This Article provides a Dakota Access Pipeline (DAPL) finance and divestment campaign retrospective. The Article explains: 1) how DAPL was financed, highlighting the dynamic in which banks take fees for the privilege of financing and refinancing pipeline debt; and 2) how joint venture ownership structures and corporate finance arrangements buffered against efforts to hold DAPL banks accountable. At the same time, many of the same banks finance gun industry and prison industry growth, alongside increased police militarization. Although, intersectional visibility of these financial ties is a start, victims of the financial industry lack enforceable corporate accountability mechanisms for seeking redress. DAPL banks managed to deflect divestment pressure and avoid meaningful remedial actions. These observations point to the need for systemic changes in corporate accountability mechanisms but also to reclaim and reimagine a world outside of capital, of future self-determined indigenous economic structures, new visions and practices of complementary currencies, and other banking alternatives.

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I. Standing Rock, and Oceti Ŝakowiŋ Land

Organizing against the Dakota Access/Bakken Pipeline (DAPL/Bakken) at Standing Rock began in 2014, when pipeline companies first proposed the project to transport oil across the continent from North Dakota to Texas and Louisiana petroleum trading hubs.[1] DAPL is the northern section of the larger Bakken pipeline system, now owned collectively as a joint venture by four North American corporations: Energy Transfer, Phillips 66, Enbridge, and Marathon.[2] The U.S. Army Corps of Engineers, in administering federal permitting of water crossings "considered but eliminated" a different route for the DAPL pipeline. The rejected route was just north of Bismarck, North Dakota; a non-Indian community. The U.S. Army Corps of Engineers cited a need "to protect areas that contribute water to municipal water supply wells," a limiting "buffer requirement" imposed by the local utility company, and other factors in its rejection.[3]

The newly chosen route would run through unceded lands and waters of the indigenous territories of the Oceti Ŝakowiŋ, or Seven Council

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[1] Nick Estes, *'The Supreme Law of the Land': Standing Rock and the Dakota Access Pipeline*, Indian Country Today (Jan. 16, 2017), http://newsmaven.io/indiancountrytoday/archive/the-supreme-law-of-the-land-standing-rock-and-the-dakota-access-pipeline-25phRkIJB0GmipEDLvPLPw [hereinafter Estes, *The Supreme Law of the Land*]; Press Release, Energy Transfer Partners, Energy Transfer Announces Crude Oil Pipeline Project Connecting Bakken Supplies to Patoka, Illinois and to Gulf Coast Markets (June 25, 2014), http://ir.energytransfer.com/news-releases/news-release-details/energy-transfer-announces-crude-oil-pipeline-project-connecting?ID=1942689&c=106094&p=irol-newsArticle.

[2] For an illustration of the DAPL/Bakken/Bayou Bridge expansion project, see Energy Transfer Partners, JP Morgan 2018 Energy Conference Presentation 16 (June 19, 2018), http://ir.energytransfer.com/static-files/e1b2670c-7d3a-4825-b34f-fcefa3a1100d [hereinafter ETP–JP Morgan Presentation]; Phillips 66, Credit Suisse Conference Presentation 7 (Feb. 13, 2018), http://s22.q4cdn.com/128149789/files/doc_presentations/2018/02/2018-Credit-Suisse-Conference-vF.pdf; Energy Transfer Partners, SEC Form 10-K 16–17 (Feb. 23, 2020), https://www.sec.gov/ix?doc=/Archives/edgar/data/1276187/000127618720000011/et12-31x201910k.htm.

[3] U.S. Army Corps of Eng'rs, *Mitigated Finding of No Significant Impact, Environmental Assessment, Dakota Access Pipeline Project, Williams, Morton, and Emmons Counties, North Dakota* 8 (July 25, 2016), http://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/2427.

Fires, in a continuation of North American settler colonial history of treaty rights and human rights violations.[4]

From 2018 until the 2020 oil price collapse, DAPL/Bakken pipeline output was about 500,000 barrels of oil per day, or about 350 barrels of oil per minute. The oil now passes beneath the confluence of the Cannonball and Missouri rivers, downstream of Bismarck, and just upstream of the Standing Rock Sioux Reservation, and across "unceded Indian territory."[5]

Facing DAPL/Bakken pipeline construction, in late March 2016, Standing Rock tribal members and "ally Lakota, Nakota, & Dakota citizens" established Iŋyaŋ Wakȟáŋağapi Othí (or Sacred Stone), a Spirit Camp:

> [A]long the proposed route of the [B]akken oil pipeline, [DAPL] . . . [,] the Spirit Camp is dedicated to stopping and raising awareness of the Dakota Access pipeline, the dangers associated with pipeline spills and the necessity to protect the water resources of the Missouri river. . . . We ask that everyone stands with us against this threat to our health, our culture, and our sovereignty.[6]

Further, in late April 2016, Standing Rock youth ran a 500-mile relay to a U.S. Army Corps of Engineers office in Nebraska to deliver a petition urging that the Corps reject the DAPL/Bakken permit application to cross the Missouri River at Standing Rock.[7]

Along the length of DAPL through North and South Dakota, Iowa, and Illinois, construction was contracted out by Energy Transfer et al. and formally permitted in a piecewise fashion under federal, state, or local jurisdictions. On segments without federal jurisdiction, particularly private lands, construction began in May 2016 in North and South Dakota[8] and the next month in Iowa.[9] In Iowa, Energy Transfer struck a modern colonialist compromise with the state: the company and its partnering companies would drill horizontally, deep beneath an Indigenous burial

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[4] Kyle Powys Whyte, *The Dakota Access Pipeline, Environmental Injustice, and U.S. Colonialism*, 19 Red Ink 154 (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925513; Nick Estes, *Fighting for Our Lives: #NoDAPL in Historical Context*, The Red Nation (Sept. 18, 2016), http://therednation.org/2016/09/18/fighting-for-our-lives-nodapl-in-context [hereinafter Estes, *Fighting for Our Lives*].

[5] Estes, *The Supreme Law of the Land*, *supra* note 1.

[6] *Tribal Citizens Rise Up Against Bakken Oil Pipeline*, Indigenous Rising (Mar. 29, 2016), http://indigenousrising.org/tribal-citizens-rise-up-against-bakken-oil-pipeline.

[7] *Lakota Youth Running 500 Miles in Opposition of Dakota Access Pipeline*, Indigenous Rising (Apr. 27, 2016), http://indigenousrising.org/lakota-youth-running-500-miles-in-opposition-of-dakota-access-pipeline.

[8] Jessica Holdman, *Construction underway on Dakota Access Pipeline*, Bismarck Tribune (May 24, 2016), http://bismarcktribune.com/bakken/construction-underway-on-dakota-access-pipeline/article_44fd2453-74ac-5cda-9ac4-e9ecbe9a31a8.html.

[9] Bakken Pipeline Construction Approved in Iowa, KCCI-CBS [Television News; Des Moines, Iowa] (June 6, 2016, 5:13 PM), http://www.kcci.com/article/bakken-pipeline-construction-approved-in-iowa/6494479#.

ground, to traverse the area, rather than just trench right through the sacred grounds.[10]

In late July 2016, the Army Corps issued the findings of "no significant impact," granting the federal permits for Energy Transfer et al. to also tunnel beneath the Missouri River at Standing Rock, and emplace what would become DAPL/Bakken, without preparation of an Environmental Impact Statement.[11] In August, David Archambault II, then Standing Rock Sioux Tribal Council Chairman, pleaded, "To all Native American Tribes in the U.S. and to all Indigenous Peoples of the world[:] . . . Please stand with Standing Rock by issuing proclamations, resolutions, and/or letters of support."[12] Through hundreds of letters, resolutions, and statements of support, Tribes and First Nations and other organizations expressed their solidarity with the Standing Rock Sioux Tribe.[13]

The Army Corps' "consultation" during the review leading to the finding of "no significant impact" consisted of external reviews; it lacked internal, Indigenous information. The Standing Rock Sioux Tribe did not give consent.[14] As a consequence, some direct and indirect financiers of DAPL/Bakken companies did not meet self-imposed benchmarks for Free, Prior, and Informed Consent (FPIC), the standard established in the "Equator Principles" on financed projects.[15] In 2020, a court ruled in favor of the Standing Rock Sioux Tribe and ordered the Army Corps to produce an Environmental Impact Statement, which could lead to the suspension of DAPL/Bakken operations.[16]

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[10] Tom Traughber, *Bakken Pipeline To Go Under Native Burial Ground In Lyon County*, KIWA Radio [Sheldon, Iowa] (June 21, 2016), http://kiwaradio.com/local-news/bakken-pipeline-to-go-under-native-burial-ground-in-lyon-county.

[11] Standing Rock Sioux Tribe v. U.S. Army Corp of Eng'rs, No 1:16-cv-01534-JEB (D.D.C. July 27, 2016), Compl. 4, available at: http://clearinghouse.net/chDocs/public/EJ-DC-0001-0001.pdf [hereinafter SRST Compl.]; U.S. Army Corps of Eng'rs, *supra* note 3.

[12] Indian Country Today, *Native Nations Rally in Support of Standing Rock Sioux* (Aug. 23, 2016), http://indiancountrytoday.com/archive/native-nations-rally-in-support-of-standing-rock-sioux-mlt8Ck6mgUajgGp9x1OqyA.

[13] *Supporters*, Stand with Standing Rock, http://standwithstandingrock.net/supporters (last visited July 31, 2020).

[14] SRST Compl., *supra* note 11 at 17, 24; *Indigenous Resistance to the Dakota Access Pipeline: Criminalization of Dissent and Suppression of Protest*, Indigenous Peoples Law & Policy Program, The University of Arizona Rogers College of Law (Mar. 16, 2018), http://law.arizona.edu/sites/default/files/Indigenous%20Resistance%20to%20the%20Dakota%20Access%20Pipeline%20Criminalization%20of%20Dissent%20and%20Suppression%20of%20Protest.pdf [hereinafter *Indigenous Resistance to DAPL*].

[15] Performance Standard 7: Indigenous Peoples, Int'l Fin. Corp. (2012), http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps7.

[16] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, —F.Supp.3d— (D.D.C. Mar. 25, 2020), Mem. Op.

II. DAPL Financing Implicates Global Financial Institutions

During DAPL/Bakken construction, Energy Transfer Equity[17] (ETE, the parent company) and its two daughter companies, Energy Transfer Partners[18] and Sunoco Logistics[19], each had publicly disclosed many of their lenders in filings with the U.S. Securities & Exchange Commission (SEC), the federal regulatory body overseeing publicly traded corporations.[20] In mid-August 2016, more than four months after the Sacred Stone Spirit Camp was established, the names of Energy Transfer's lenders, and these banks' respective lending commitments, were published at LittleSis.org, based on information in public SEC filings.[21] These corporate-level financing agreements provide liquidity for general corporate purposes, such as to pay for new pipeline projects. Typically, billions of dollars are made accessible to the borrowing corporation, with each bank committing to lend up to a certain fraction of the total.

Rainforest Action Network—which maintains subscription access to Bloomberg Terminal (a financial transaction database)—soon shared information on additional project-level lending commitments from seventeen banks that provided $2.5 billion in financing to finish the $4.8 billion DAPL/Bakken project.[22] The combined project-level and corporate-level lending data were published as a Sankey plot to better illustrate the flows of capital at Energy Transfer's disposal.[23] The graphic art was shared two days after a group of Water Protectors at Standing Rock were attacked by dogs and peppersprayed by private security contractors, as

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[17] Energy Transfer Equity, L.P., SEC Form 8-K, Ex. 10.1 Amendment and Incremental Agreement No. 3 (Feb. 10, 2015), http://www.sec.gov/Archives/edgar/data/1276187/000127618715000007/0001276187-15-000007-index.htm.

[18] Energy Transfer Partners, L.P., SEC Form 8-K, Ex. 10.1 Commitment Increase Agreement (Feb. 10, 2015), http://www.sec.gov/Archives/edgar/data/1012569/000101256915000015/0001012569-15-000015-index.htm.

[19] Sunoco Logistics Partners L.P., SEC Form 8-K. Ex. 10.1 Amended and Restated Credit Agreement (Mar. 24, 2015), http://www.sec.gov/Archives/edgar/data/1161154/000116115415000024/a25billionamendedandrestat.htm; Sunoco Logistics Partners L.P., SEC Form 10-Q, Ex. 10.1 Amendment No. 1 to Amended and Restated Credit Agreement (Aug. 6, 2015) https://www.sec.gov/Archives/edgar/data/1161154/000116115415000033/0001161154-15-000033-index.htm.

[20] Credit facility agreements appear on SEC EDGAR, an on-line company filing database, as Exhibit 10's accompanying filings of forms of type 8-K, 10-K, or 10-Q. Not all Exhibit 10's are credit facility agreements, but 8-K forms that include credit facility agreements typically carry identifying 8-K section codes, including "1.0." Occasionally the agreements appear as Exhibit 99's. Bond agreements are filed as Exhibit 1's.

[21] *Who's Banking on the Dakota Access Pipeline*, LittleSis (Aug. 17, 2016), http://littlesis.org/maps/1634-who-s-banking-on-the-dakota-access-pipeline?Resistance_to_Dakota_Access_Grows.

[22] The project-level lending agreement, itself, was not filed with the SEC as an exhibit. *See* Sunoco Logistic Partners L.P., SEC Form 8-K (Aug. 8, 2016), http://www.sec.gov/Archives/edgar/data/1161154/000119312516675095/0001193125-16-675095-index.htm. For total DAPL/Bakken cost, see ETP–JP Morgan Presentation, *supra* note 2.

[23] Jo Miles, *Who's Banking on the Dakota Access Pipeline*, Food & Water Watch (Sept. 6, 2016), http://www.foodandwaterwatch.org/news/who%27s-banking-dakota-access-pipeline.

documented by Democracy Now![24] The video of the violent incidents outraged the public, displaying, in realtime the clear, bloody, and brutal continuation of violence against indigenous bodies and lives for oil. A truth, a memory, a nightmare, a visual extension and reanimation of a settler colonial history: the use of force and violence against indigenous peoples to drive, protect, and facilitate the interests of extractive industry.[25]

The graph showed only a static and simplified glimpse of the otherwise dynamic and complex role of global financial institutions facilitating the pipeline. Together, the banks displayed were facilitating a $4.8 billion gamble on maximizing DAPL/Bakken oil throughput, including export overseas, without Free, Prior, and Informed Consent.[26]

III. Divestment Pressure on DAPL Financiers Grows

The divestment arm of the #NoDAPL movement has continued.[27] On October 2, 2016, the Standing Rock Sioux Tribal Council passed a resolution stating the tribe would "end its financial relationships with banks, mutual funds, security companies or other financial entities that invest in, or otherwise financially support any aspect of the Dakota Access Pipeline."[28]

The militarized response to prayerful and peaceful actions of Water Protectors continued through October 2016, with hundreds of arrests of Water Protectors.[29] Energy Transfer hired private firms to handle Water

[24] *Dakota Access Pipeline Company Attacks Native American Protesters with Dogs and Pepper Spray*, Democracy Now! (Sept. 4, 2016), http://www.democracynow.org/2016/9/4/dakota_access_pipeline_company_attacks_native.

[25] Estes, *Fighting for Our Lives*, *supra* note 4.

[26] DAPL, stretching from gathering lines in North Dakota down to Patoka, Illinois, is just the northern portion of the Bakken pipeline. Regarding exports, Phillips 66 recently upped its export capacity at Beaumont terminal at end of 2017. News Release, Phillips 66, Phillips 66 Reports Fourth-Quarter Earnings of $3.2 Billion or $6.25 Per Share (Feb. 2, 2018), http://investor.phillips66.com/financial-information/news-releases/news-release-details/2018/Phillips-66-Reports-Fourth-Quarter-Earnings-of-32-Billion-or-625-Per-Share/default.aspx. Energy Transfer touts ~400,000 barrels of oil per day capacity at Nederland terminal. Energy Transfer, 2018 MLP & Energy Infrastructure Conference Presentation 8 (May 23 & 24, 2018), http://ir.energytransfer.com/static-files/6036e101-b1db-47a3-9c7c-d02506d21a4d.

[27] Morgan Simon, *We're Not Done with DAPL: How Investors Can Still Support Indigenous Rights* [Interview with Rebecca Adamson], Forbes (Nov. 1, 2018), http://www.forbes.com/sites/morgansimon/2018/11/01/were-not-done-with-dapl-how-investors-can-still-support-indigenous-rights/#1a36117d6e0d.

[28] Last Real Indians, *Standing Rock Sioux Tribe Ends Relationships with Financial Institutions that Support Dakota Access Pipeline* (Nov. 4, 2016), http://lastrealindians.com/news/2016/11/4/nov-4-2016-standing-rock-sioux-tribe-ends-relationships-with-financial-institutions-that-support-dakota-access-pipeline.

[29] *Stakeholder Report to the UN Human Rights Council, Universal Periodic Review Working Group*, Indigenous Peoples Law and Policy Program, The University of Arizona Rogers College of Law (Oct. 2, 2019), http://law.arizona.edu/sites/default/files/IPLP%20and%20WPLC%20UPR%20Report%20on%20USA%20-%202019.pdf; *Report to the Inter-American Commission, Criminalization of Human Rights*

Protector surveillance and information warfare to shape larger media narratives,[30] in a "fusing [of] the corporate energy sector and the national security apparatus in both the U.S. and Canada."[31]

Information warfare by these private firms was a prominent dimension in efforts to thwart Water Protectors through the use of force backed by state authorities. For example, on October 28, 2016, the morning after over 100 arrests, a Washington, D.C. energy and environmental news service titled its report "Guns, Fire and 100+ Arrests at Protest Site," described the events as an "armed standoff," and noted "at least two incidences involving firearms."[32] Later it would be learned that one of the two instances of "guns" (other than those possessed by state law enforcement officers) was possessed by a Dakota Access, LLC employee[33] the second, a gun owned by an FBI informant who had infiltrated the camp.[34]

Grassroots activist groups held solidarity actions at many of the banks identified as either project-level or corporate-level financing, and people who had been clients of identified banks withdrew their deposits in collective action.[35] Several Water Protectors created DeFundDAPL.org, which served to facilitate and track self-reporting of such withdrawals.

Defenders of Indigenous Peoples Resisting Extractive Industries in the United States, Indigenous Peoples Law and Policy Program, The University of Arizona Rogers College of Law (June 24, 2019), http://www.sfbla.com/wp-content/uploads/2019/06/FINAL-IPLP-WPLC-Report-to-IACHR-6-24-19.pdf; *Indigenous Resistance to DAPL*, *supra* note 14; American Friends Service Committee, *We Are Our Own Medicine: An AFSC Special Report from the Standing Rock Sioux Tribe's Land and Unceded Territory* 0 (2016), http://www.afsc.org/sites/default/files/documents/We%20Are%20Our%20Own%20Medicine_2.pdf; *Supporters*, *supra* note 13; *Red Owl Legal Collective/National Lawyers Guild Calls on DNB (Bank of Norway) to Divest from Dakota Access Pipeline*, Water Protector Legal Collective (Nov. 10, 2016), http://waterprotectorlegal.org/red-owl-legal-collectivenational-lawyers-guild-calls-dnb-bank-norway-divest-dakota-access-pipeline [hereinafter *Calls on DNB to Divest*].

30 Alleen Brown, Will Parrish, & Alice Speri, *Standing Rock Documents Expose Inner Workings of "Surveillance-Industrial Complex,"* Intercept (June 3, 2017), http://theintercept.com/2017/06/03/standing-rock-documents-expose-inner-workings-of-surveillance-industrial-complex.

31 Will Parrish, *An Activist Stands Accused of Firing a Gun at Standing Rock. It Belonged to Her Lover—an FBI Informant*, Intercept (Dec. 11, 2017), http://theintercept.com/2017/12/11/standing-rock-dakota-access-pipeline-fbi-informant-red-fawn-fallis.

32 Ellen Gilmer, *Guns, Fire and 100+ Arrests at Protest Site*, E&E News (Oct. 28, 2016), http://www.eenews.net/stories/1060044964.

33 Wes Enzinna, *I Watched An Armed Dakota Access Pipeline Employee Get Arrested After Entering Protesters' Camp*, Mother Jones (Oct. 28, 2016), http://www.motherjones.com/politics/2016/10/armed-man-dakota-access-pipeline-protest-dapl.

34 Parrish, *supra* note 31. *See also* Alleen Brown, Will Parrish, & Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to "Defeat Pipeline Insurgencies*," Intercept (May 27, 2017), http://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies.

35 Thomas Hale, *An Environmental Run on the Bank*, Financial Times (July 20, 2018), http://ftalphaville.ft.com/2018/07/20/1532080980000/An-environmental-run-on-the-bank; Mikael Homanen, *Depositors Disciplining Banks: The Impact of Scandals*, Chi.

In early November 2016, working with the Norwegian Sami Association, the Water Protector Legal Collective[36] under the direction of indigenous women at Standing Rock urged the Norwegian bank DNB to end its financing of DAPL/Bakken, citing "numerous corroborated first-hand reports of human and civil rights violations of water protectors, including women, youth, and elders, by police, National Guard, and hired paramilitary personnel."[37] The Chairman of the Norwegian Sami Association met in person with DNB officials and presented the Collective's report documenting these violations. He later explained:

> It is natural that we would try to help Standing Rock. It is easy for Indigenous people around the world to recognize the struggle. We see what they are going through and we feel it. There is no them, only us.[38]

At the same time, BankTrack and numerous other non-Indigenous organizations wrote to the Chair of the "Equator Principles Association," noting that "no less than [thirteen] EPFI [Equator Principle Financial Institutions]" were financing DAPL/Bakken directly, despite commitments to Indigenous rights made in agreeing to the Equator Principles; another eight were financing the "project sponsors."[39]

Soon after these letters, and less than a week after the election of President Donald Trump, Energy Transfer's Chief Executive Officer, Kelcy Warren, referred to direct social pressure on his company's financiers as "terrorism" saying "that's all that nonsense is. It's just terrorism."[40] This is Warren equating money with blood, fearing plainly legitimate questions put to international banks.

In late November 2016, a letter signed by "500+ civil society organizations" was sent to the seventeen banks on the $2.5 billion project-level loan, asking that payouts on that credit facility cease.[41] Also late that

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Booth Sch. Bus. New Working Paper Series No. 28 (2018), available at: http://ssrn.com/abstract=3293254.

[36] Formerly the Red Owl Legal Collective.

[37] *Calls on DNB to Divest*, *supra* note 29.

[38] Alex Bonogofsky, *How Indigenous Activists in Norway Got the First Bank to Pull Out of the Dakota Access Pipeline*, Truthout (Nov. 28, 2016), http://truthout.org/articles/how-indigenous-activists-in-norway-got-the-first-bank-to-pull-out-of-the-dakota-access-pipeline.

[39] BankTrack et al., *An Open Letter to the Equator Principles Association*, BankTrack (Nov. 7, 2017), http://www.banktrack.org/download/open_letter_civil_society_groups_to_equator_principles_association/161107_letter_ep_banks_on_dapl_and_climate_change_final_1.pdf.

[40] Jeffrey Weiss, *Dallas' Kelcy Warren Says Dakota Access Protesters Need the Facts, Threats to Financiers are 'Terrorism'*, Dallas Morning News (Nov. 11, 2011), http://www.dallasnews.com/business/energy/2016/11/11/dallas-kelcy-warren-says-dakota-access-protesters-need-the-facts-threats-to-financiers-are-terrorism.

[41] BankTrack et al., Letter [to seventeen banks] Concerning: Halt Your Support to the Dakota Access Pipeline (Nov. 30, 2016), http://www.banktrack.org/download/letter_from_500_organisations_to_17_banks_on_financing_dapl/161130_final_letter_all_dapl_banks_2.pdf.

month, state and private security forces used a water cannon on Water Protectors in subzero temperatures, injuring and traumatizing many.[42]

Indigenous organizers sought and received new shows of solidarity in the form of peaceful grassroots actions at banks financing DAPL/Bakken at the corporate or project level, in the United States and abroad.[43] A coalition of groups organized a petition, ultimately signed by over 700,000 people, again specifically targeting the seventeen banks providing the $2.5 billion project-level loan, asking these banks to exit that loan agreement.[44] Additional banks providing corporate-level financing of DAPL/Bakken were not included in that petition.

By February 2017, President Trump reversed the halt on DAPL construction and forcibly evicted the resistance camps.[45] That same month, three banks, ING, DNB, and BNP Paribas, stated they would sell off their DAPL/Bakken project-level debt, and ABN AMRO stated it would no longer lend to Energy Transfer Equity (ETE), the parent company, at the time, to Energy Transfer Partners and Sunoco Logistics.[46]

By the end of March 2017, ING, ABN AMRO, Intesa SanPaolo, and DNB had all exited ETE's corporate-level $1.5 billion credit facility agreement.[47] Notably, four banks—Fifth Third, Canadian Imperial Bank of Commerce, Bank of Nova Scotia and Toronto Dominion—joined as new lenders to ETE.[48] Later that year, in December 2017, ETP remade its $3.75 billion credit facility and the Sunoco Logistics facility of $2.5 billion into a single $4 billion, 5-year facility, and a $1 billion 1-year facility.[49]

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[42] Tim Stelloh et al., *Dakota Pipeline: Protesters Soaked with Water in Freezing Temperatures*, NBC News (Nov. 21, 2016), http://www.nbcnews.com/storyline/dakota-pipeline-protests/dakota-pipeline-protesters-authorities-clash-temperatures-drop-n686581.

[43] Nika Knight, *Activists Around the World Take #NoDAPL Fight to the Banks*, Common Dreams (Dec. 1, 2016), http://www.commondreams.org/news/2016/12/01/activists-around-world-take-nodapl-fight-banks.

[44] BankTrack et al., *Over 700,000 People Demand Banks Stop Financing the Dakota Access Pipeline*, BankTrack (Feb. 3, 2017), http://www.banktrack.org/news/global_coalition_stages_protests_and_bank_closures_across_the_globe_to_defund_dakota_access_pipeline.

[45] News Briefing, President Trump Takes Action to Expedite Priority Energy and Infrastructure Projects, The White House (Jan. 24, 2017), http://www.whitehouse.gov/briefings-statements/president-trump-takes-action-expedite-priority-energy-infrastructure-projects.

[46] Six Banks Step Away from Dakota Access Pipeline and Backers, BankTrack (2017), http://www.banktrack.org/article/three_banks_step_away_from_dakota_access_pipeline_backers_v.

[47] *Compare* Energy Transfer Equity, SEC Form 8-K, Ex. 10.1 Credit Agreement (Mar. 24, 2017), http://www.sec.gov/Archives/edgar/data/1276187/000127618717000034/ex-101revolvingcreditagreem.htm, *with* Energy Transfer Equity, SEC Form 8-K, Ex. 10.1 Senior Secured Loan C Agreement (Mar. 5, 2015), http://www.sec.gov/Archives/edgar/data/1276187/000127618715000019/ete-seniortermloancreditag.htm.

[48] *Id.*

[49] Energy Transfer Partners. SEC Form 8-K. Ex. 10.1 and 10.2. (Dec. 6, 2017) https://www.sec.gov/Archives/edgar/data/1161154/000116115417000085/0001161154-17-000085-index.htm. Note disclosures of two credit facilities, together totaling $5 billion

Notably, DNB, ING, BNP Paribas, UBS, Comerica and Citizen did not recommit to lend.

These divestments from DAPL's lead companies were testimony to the effective pressure on Energy Transfer's financiers. That pressure exposed some differences in the visions of British, European, North American, and Asian banks. However, authentic divestment has proved elusive. Most banks managed to avoid accountability for financing DAPL, and some banks credited with divestment continue to finance DAPL/Bakken companies.

IV. Gauging Authenticity in Bank Responses

In 2016 Divest Invest Protect (DIP) founded the Indigenous Women's Divestment Delegations' (IWDD), with partnership from Women's Earth & Climate Action Network (WECAN). The group coordinated pressure on European banks methodologically centering the voice and efforts of Indigenous women.[50] Through this program delegations of women from many indigenous groups have traveled to ask European institutions that either financed DAPL/Bakken and Canadian tar-sands expansion projects directly, or held investments in, or insured the corporations, to divest from the companies involved.[51] After one these trips in October 2017, delegates wrote:

> For the past two weeks, an Indigenous Women's Divestment Delegation to Europe has traveled . . . to engage with political leaders, representatives of financial and insurance institutions, civil society groups, and members of the media to share personal accounts and calls to action for immediate divestment from fossil fuel companies that endanger rights and neglect Indigenous People's right to Free, Prior, and Informed Consent (FPIC) as outlined in the United Nations Declaration on the Rights of Indigenous Peoples.
>
> . . .
>
> During meetings with Norwegian Parliamentarians, DNB, the Council on Ethics to the Norwegian Oil Fund, UBS, Credit Suisse, Zurich Insurance, Swiss Re, Bayern LB, Allianz, Deutsche Bank and others, Delegates brought to the forefront demands for Indigenous and human rights as outlined in international law, and calls for divestment

in liquidity replace the entity's previous $3.75 billion ETP facility and the $2.5 billion SXL facility. *Id.* Bank specific commitments are no longer disclosed. *Id.*

[50] *See Homepage*, Divest Invest Protect, http://www.divestinvestprotect.com (last visited July 31, 2020); WECAN International; *Divest Invest Protect*, WECAN, Int'l, http://wecaninternational.org/divest-invest-protect (last visited July 31, 2020). *See also* Michelle L. Cook, *Striking the Heart of Capital, International Financial Institutions, and Indigenous Peoples Human Rights* 103–57, in #NoDAPL and Mni Wiconi: Reflections on Standing Rock (Nick Estes & Jaskiran Dhillon, eds., 2019).

[51] News Release, WECAN, International, Indigenous Women's Delegation Pursues Fossil Fuel Divestment Across Europe, Amidst Growing Global Movement (Oct. 17, 2017), http://www.commondreams.org/newswire/2017/10/17/indigenous-womens-delegation-pursues-fossil-fuel-divestment-across-europe-amidst.

> through corporate level and/or project level finance to stop unwanted fossil fuel development in their territories.[52]

These delegations, with allied pressure from existing groups in Europe, spurred French bank BNP Paribas to publicly disavow "oil and gas from shale and/or oil from tar sands"[53] and drove DNB to disassociate from Energy Transfer.[54]

Political divestment—a variation on boycotts—has become necessary in cases of government failure on a moral issue. Globalization has tended to shift social responsibility to the corporate realm and that, coupled with transparency and digital connectivity, has enhanced some scrutiny of business ethics.[55] In early September 2016, the Palestinian BDS [Boycott, Divestment, Sanctions] National Committee wrote to the Standing Rock Sioux Tribe:

> The people of Palestine support you and all those standing with you right now in North Dakota to protect your tribal lands and resist the desecration and destruction of your sacred burial sites at the hands of the Energy Transfer Partners corporation and the Dakota Access Pipeline they are building.[56]

Decades ago, divestment was also used to fight South African Apartheid. It was then countered by arguments analogous to those made to the Indigenous women who met, as a delegation, with European bankers involved in financing DAPL/Bakken. Supporting apartheid, and against divestment, the arguments were: "it is not the place of private corporations to judge the internal affairs of another nation," "the purpose of a business entity is to make profits for its owners, not moral judgments," "there are many other competitors available to trade with South Africa" so divestment makes little difference, or "if anyone would be adversely affected by foreign withdrawal, it would be the black population of South Africa."[57]

This century, divestment has galvanized a global and burgeoning youth climate movement.[58] Yet, with DAPL/Bakken as recent example,

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[52] *Id.*

[53] Press Release, BNP Paribas, BNP Paribas Takes Further Measures to Accelerate its Support of the Energy Transition (Oct. 11, 2017), http://group.bnpparibas/en/press-release/bnp-paribas-takes-measures-accelerate-support-energy-transition.

[54] Carl-Gøran Larsson, *DNB sa de solgte seg ut av «The Black Snake»—har fremdeles 7 milliarder i lån til oljerør-firmaene [DNB said they sold out of "The Black Snake"—still have 7 billion in loans for oil pipeline companies]* NRK (Nov. 7, 2017), http://www.nrk.no/sapmi/dnb-sa-de-solgte-seg-ut-av-_the-black-snake_-_-har-likevel-7-milliarder-i-lan-til-firmaene-bak-1.13749257.

[55] Julia Puaschunder, *The Role of Political Divestiture for Sustainable Development*, 6 J. Mgmt. & Sustainability 76 (2016).

[56] Andrew Kadi, *Palestinians Back Standing Rock Sioux in "Struggle for All Humanity,"* Electronic Intifada (Sept. 10, 2016), http://electronicintifada.net/blogs/andrew-kadi/palestinians-back-standing-rock-sioux-struggle-all-humanity.

[57] Paul Lansing, *The Divestment of United States Companies in South Africa and Apartheid*, 60 Neb. L. Rev. 304 (1981), http://digitalcommons.unl.edu/nlr/vol60/iss2/4.

[58] Jessica Grady-Benson & Brinda Sarathy, *Fossil Fuel Divestment in US Higher*

authentic fossil fuel divestment by global financial institutions has been elusive. Divestment pressure focused on finance relies on public visibility of the details held in financial deals. Transparent and accessible finance data are necessary to hold banks accountable to the human rights and climate implications of their business relationships, and investment choices, but not sufficient. For example, the distinction between project-level and corporate-level modes of DAPL/Bakken financing created a layer of uncertainty that proved useful in individual bank efforts to diffuse divestment pressure. Most of the banks identified as financing DAPL/Bakken continue to lend to DAPL/Bakken business partners.

The project- vs. corporate-level finance distinction gave a measure of plausible deniability to those banks only involved at the corporate-finance level with the Energy Transfer family of companies. This is before considering bank involvement with other DAPL/Bakken partners, Enbridge, Phillips 66, and Marathon. Corporate-level financing is for "general purpose use." Hence the finance connection to DAPL/Bakken was indirect, one step removed, and largely unseen. Banks have argued they cannot or should not be held accountable for specific adverse impacts from the specific project when providing corporate-level finance.[59] However, Energy Transfer Partners has specifically referred to its now-expired $3.75 billion credit facility as providing "temporary financing for its growth projects."[60] With the project-specific loan of $2.5 billion, it follows that ~$2.3 billion of the $4.8 billion DAPL/Bakken cost was financed, at least temporarily, by ETP using the corporate-level, general purpose credit facility.[61]

The early DAPL/Bakken finance information presented, in the form of a Sankey plot, only a static and simplified glimpse of the dynamic flows of money used to continue paying for the pipeline in its entirety. The DAPL finance data that informed divestment pressure had included $7.75 billion in general-purpose lending commitments to the Energy Transfer family, and it included the $2.5 billion project-level loan to Energy Transfer Partners and Phillips 66 Partners. However, it did not include general-purpose funds to other stakeholders in the project, namely Phillips 66 Partners, Phillips 66, Enbridge Energy Partners, Enbridge Inc., and

Education: Student-Led Organising for Climate Justice, 21 Local Env't: Int'l J. Just. & Sustainability 661 (2016).

[59] U.S. Bank, U.S. Bank Sustainability Factsheet, http://www.usbank.com/pdf/community/US-Bank-Sustainability-Factsheet.pdf (last visited July 31, 2020); Credit Suisse, Current Topics: Dakota Access Pipeline (DAPL) (Mar 1, 2017), available at: http://www.business-humanrights.org/en/current-topics-dakota-access-pipeline-dapl (last visited July 31, 2020).

[60] Energy Transfer Equity, L.P., SEC Form 10-K, 89 (Feb. 29, 2016), http://www.sec.gov/Archives/edgar/data/1276187/000127618716000132/ete12-31x201510k.htm.

[61] This excludes the cost of ETP's and Phillips 66's extension of the DAPL/Bakken into Louisiana, known as the Bayou Bridge pipeline. Note that Phillips 66, holding a 25 percent stake in DAPL/Bakken, was coborrower on the $2.5 billion DAPL/Bakken project loan.

Marathon Petroleum, the first and last of which are leading shippers of oil through DAPL/Bakken.[62]

Full accounting of such connectivity is necessary to gauge the authenticity of divestment actions performed by banks and financial institutions. Consider that DNB, BNP Paribas, and ING are credited with having divested from DAPL.[63] DNB commitments to Enbridge totaling ~U.S. $280 million (specifically, $50 million[64] + $100 million[65] + CAN $150 million[66]) avoided scrutiny, and DNB recommitted to lend Phillips 66 up to $243 million in February 2017.[67] DNB did not recommit to lend to Phillips 66 in August 2019, when the DAPL/Bakken shipper and part-owner renewed its $5 billion credit facility.[68]

BNP Paribas also has recent commitments totaling ~U.S. $280 million (specifically, $50 million [69] + CAN $25 million[70] + CAN $275 million[71]) to Enbridge and another $162.5 million (specifically, $116 million[72] + $46.5 million[73]) to Marathon. In July 2019, BNP Paribas recommitted

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[62] Institute for Energy Economics and Financial Analysis (IEFFA) & Sightline Institute, The High-Risk Financing Behind the Dakota Access Pipeline 3 (Nov. 2016), http://ieefa.org/wp-content/uploads/2016/11/The-High-Risk-Financing-Behind-the-Dakota-Access-Pipeline_-NOV-2016.pdf.

[63] Carla Fredericks, Mark Meaney, Nick Pelosi, & Kathleen Finn, *Social Cost and Material Loss: The Dakota Access Pipeline*, U. Colo. L. Legal Studies Research Paper 19–1 47 (2018), http://ssrn.com/abstract=3287216; Six Banks Step Away from Dakota Access Pipeline and Backers, BankTrack (2017), http://www.banktrack.org/article/three_banks_step_away_from_dakota_access_pipeline_backers_v.

[64] Enbridge, Inc., SEC Form F-4, Ex. 10.1 Credit Agreement (Sept. 23, 2016), http://www.sec.gov/Archives/edgar/data/895728/000119312516718317/d407725dex101.htm [hereinafter Enbridge, Ex. 10.1].

[65] Enbridge, Inc., SEC Form F-4, Ex. 10.4 Amended and Restated Credit Agreement, http://www.sec.gov/Archives/edgar/data/895728/000119312516718317/d407725dex104.htm.

[66] Enbridge, Inc., SEC Form F-4, Ex. 10.10 Fifth Amending Agreement, http://www.sec.gov/Archives/edgar/data/895728/000119312516718317/d407725dex1010.htm [hereinafter Enbridge, Ex. 10.10].

[67] Phillips 66, SEC Form 10-K, Ex. 10.4 Third Agreement to Credit Agreement (Feb. 17, 2017), https://www.sec.gov/Archives/edgar/data/1534701/000153470117000051/0001534701-17-000051-index.htm.

[68] Phillips 66, SEC Form 8-K, Ex. 10.1 Amended and Restated Credit Agreement (Aug. 1, 2019), https://www.sec.gov/Archives/edgar/data/1534701/000153470119000099/0001534701-19-000099-index.htm.

[69] Enbridge, Ex. 10.1, *supra* note 64.

[70] Enbridge, Inc., SEC Form F-4, Ex. 10.12 Second Amended and Restated Credit Agreement, http://www.sec.gov/Archives/edgar/data/895728/000119312516718317/d407725dex1012.htm.

[71] Enbridge, Ex. 10.10, *supra* note 66.

[72] Marathon Petroleum Corporation, SEC Form 8-K, Ex. 10.1 Four-Year Revolving Credit Agreement (July 26, 2016), http://www.sec.gov/Archives/edgar/data/1510295/000151029516000111/ex101fouryragreement.htm.

[73] Marathon Petroleum Corporation, SEC Form 8-K, Ex. 10.2 364-Day Revolving Credit Agreement (July 26, 2016), http://www.sec.gov/Archives/edgar/data/1510295/000151029516000111/ex102364-dayagreement.htm.

to lend up to $234 million to Phillips 66.[74] In September 2019, BNP Paribas provided $42.75 million in cash to Phillips 66 Partners, in exchange for bonds used to refinance existing maturing debts,[75] and had renewed its $40 million credit facility commitment to the company a few months prior.[76] ING, meanwhile, is financing Continental Resources, a leading Bakken producer and beneficiary of DAPL/Bakken,[77] as well as Oasis Petroleum, which ships its Bakken oil through DAPL.[78] U.S. Bank is another regular financier of DAPL/Bakken companies that made positive statements about project-level financing, but that continues to finance Energy Transfer[79], Phillips 66[80], and Phillips 66 Partners.[81] Many other banks remain as regular parties to the agreements to DAPL/Bakken owners and shippers.

Hence, DAPL finance divestment pressure was generally thwarted, owing in part to the complex financial arrangements and partnerships backing the project. Some banks managed to have their cake and eat it too. Banks credited with divestment by media sources had not fully divested, and banks only financing at the corporate-level, not the project-level, deflected responsibility by drawing a distinction without a significant difference.

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[74] Phillips 66, SEC Form 8-K, Ex. 10.1 Amended and Restated Credit Agreement (Aug. 1, 2019), https://www.sec.gov/Archives/edgar/data/1534701/000153470119000099/0001534701-19-000099-index.htm.

[75] Phillips 66 Partners LP, SEC Form 8-K, Ex. 1.1 Underwriting Agreement A.1 (Sept. 3, 2019), http://www.sec.gov/Archives/edgar/data/1572910/000119312519240078/d796462dex11.htm.

[76] Phillips 66 Partners LP, SEC Form 8-K, Ex. 10.1 Amended and Restated Credit Agreement Schedule A (July 30, 2019), http://www.sec.gov/Archives/edgar/data/1572910/000157291019000041/psxp-arcreditagreement.htm.

[77] Continental Resources, Inc., SEC Form 8-K, Ex. 10.1 Revolving Credit Agreement (Apr. 12, 2018), http://www.sec.gov/Archives/edgar/data/732834/000119312518115589/0001193125-18-115589-index.htm; Continental Resources, CLR October 2018 Investor Update (2018), available at: http://investors.clr.com/presentations.

[78] Oasis Petroleum Inc., SEC Form 8-K (Oct. 16, 2018), http://www.sec.gov/Archives/edgar/data/1486159/000148615918000039/a8-koctober2018.htm; Nilanjan Choudhury, *Oil Boom Drives North Dakota Production to Record Levels*, NASDAQ (Oct. 19, 2018).

[79] Energy Transfer Operating, L.P., SEC Form 8-K, Ex. 1.1 Underwriting Agreement (Jan. 10, 2020), http://www.sec.gov/Archives/edgar/data/1161154/000119312520005442/d856480dex11.htm.

[80] Phillips 66, SEC Form 8-K, Ex. 10.1 Amended and Restated Credit Agreement (Aug. 1, 2019), http://www.sec.gov/Archives/edgar/data/1534701/000153470119000099/0001534701-19-000099-index.htm.

[81] Phillips 66 Partners LP, SEC Form 8-K, Ex. 1.1 Underwriting Agreement A.1 (Sept. 3, 2019), http://www.sec.gov/Archives/edgar/data/1572910/000119312519240078/d796462dex11.htm; Phillips 66 Partners LP, SEC Form 8-K, Ex. 10.1 Amended and Restated Credit Agreement Schedule A (July 30, 2019), http://www.sec.gov/Archives/edgar/data/1572910/000157291019000041/psxp-arcreditagreement.htm.

Specifically, at the end of March 2016, Energy Transfer Partners owed $4 million on its credit facility.[82] By the end of June 2016, the balance ETP owed on its credit facility had jumped to $1.13 billion.[83] Three months later, the ETP corporate-level credit facility balance increased to $1.58 billion.[84] By the end of 2016, near the completion of DAPL/Bakken, ETP reported a balance of $2.78 billion.[85] ETP explained that it would likely roll that shorter-term debt into longer-term debt, such as in the form of bonds.[86] After DAPL/Bakken was completed, and the Marathon Enbridge joint-venture closed its $2 billion purchase of just under half of Energy Transfer's 75 percent ownership stake, the company reported that its ETP credit facility balance was back down to just $389 million.[87]

In March 2019, Energy Transfer used proceeds from new bonds to pay off the $2.5 billion project-level loan (with Phillips 66) to complete DAPL/Bakken.[88] The SEC filing for this 2019 bond deal was atypical in that it did not include the actual bond sale agreement, with the names of the banks involved and the amounts underwritten by each, as an exhibit with the SEC form. The short-term, project-level debt was rolled over into longer term bonds, illustrating how corporate-level credit facility lending commitments fit in the larger dynamic of debt creation still being used to finance DAPL/Bakken.[89] Banks typically enjoy 1 percent discounts on bonds, a transaction bonus that amounts to tens of millions

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[82] Energy Transfer Equity, L.P., SEC Form 10-Q, 13 (May 6, 2016), http://www.sec.gov/Archives/edgar/data/1276187/000127618716000165/0001276187-16-000165-index.htm.

[83] Energy Transfer Equity, L.P., SEC Form 10-Q, 14 (Aug. 5, 2016), http://www.sec.gov/Archives/edgar/data/1276187/000127618716000216/0001276187-16-000216-index.htm.

[84] Energy Transfer Equity, L.P., SEC Form 10-Q, 14 (Nov. 9, 2016), http://www.sec.gov/Archives/edgar/data/1276187/000127618716000234/0001276187-16-000234-index.htm.

[85] Energy Transfer Equity, L.P., SEC Form 10-K, 91 (Feb. 24, 2017), https://www.sec.gov/Archives/edgar/data/1276187/000127618717000023/0001276187-17-000023-index.htm.

[86] Energy Transfer Equity, L.P., SEC Form 10-K, 91 (Feb. 24, 2017), https://www.sec.gov/Archives/edgar/data/1276187/000127618717000023/0001276187-17-000023-index.htm.

[87] Energy Transfer Equity, L.P., SEC Form 10-Q, 15 (May 4, 2017), http://www.sec.gov/Archives/edgar/data/1276187/000127618717000048/0001276187-17-000048-index.htm.

[88] Energy Transfer Operating, L.P., SEC Form 8-K (Mar. 15, 2019), http://www.sec.gov/Archives/edgar/data/1161154/000116115419000018/0001161154-19-000018-index.htm.

[89] News Release, WECAN, International, Indigenous Women's Divestment Delegation Pushes Deutsche Bank for Fossil Fuel Divestment Amidst Pipeline Shutdowns, a Global Pandemic and the Climate Crisis (July 9, 2020), http://www.wecaninternational.org/PressReleases/Indigenous-Women's-Divestment-Delegation-Pushes-Deutsche-Bank-for-Fossil-Fuel-Divestment-Amidst-Pipeline-Shutdowns,-a-Global-Pandemic-and-the-Climate-Crisis.

of dollars in fees to the syndicate of banks involved in each multibillion financing deal.[90]

Initial data on DAPL financing from 2016 did not include the underwriting of longer-term debt, in the form of new issuances of bonds. That is, the dynamic of debt creation, in which new loans are used to pay off old loans and banks dine on the fees, remained hidden.[91]

Encompassing the entire U.S. oil and gas sector, the total value of new issued debt was $211 billion in 2014, $196 billion in 2015, and $186 billion in 2016; collectively, a handful of banks collected billions in fees each year for the privilege of facilitating this debt creation.[92] According to EIA estimates, global oil and gas exploration and production debt topped $700 billion at the end of 2019.[93]

V. Broadening Divestment Pressure

A lesson from DAPL/Bakken divestment pressure is the need for a broadened approach. The joint-venture structure of DAPL/Bakken ownership, and the interplay between project-level and corporate-level finance, allowed DAPL banks to deflect divestment pressure and avoid meaningful remedial actions. Further, DAPL exposed a void in corporate accountability mechanisms.

Mazaskatalks.org was created in 2017 by an alliance of Indigenous individuals and groups to expand DAPL divestment to include tar-sands expansion in Canada.[94] The site published an expanded Sankey plot which included financing in the form of both credit facility commitments and the underwriting of bonds not only to Energy Transfer but also the companies pushing three tar-sands expansion projects: the Kinder Morgan's Trans Mountain pipeline (since acquired by the Canadian government), TransCanada's Keystone XL, and Enbridge's Line 3. Linking back to the original Standing Rock Sioux Tribe divestment call, the expanded effort went beyond calling on individual customers to discipline banks by withdrawing deposits. The group encouraged people to get their tribe or municipal government to stop conducting business with financial institutions working with and investing in these companies.[95]

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[90] *See, e.g.*, Energy Transfer Partners, L.P., SEC Form 424B5 [Prospectus], (Jan. 11, 2017), http://www.sec.gov/Archives/edgar/data/1012569/000119312517008974/0001193125-17-008974-index.htm.

[91] PLS Capitalize, Oil & Gas Industry Raised $186 Billion through U.S. Public Offerings in 2016 (Feb. 13, 2017), http://www.oilandgas360.com/capital-markets-open-oil-gas.

[92] *Id.*

[93] Amy Westervelt, *Will Pandemic Relief Become a Petroleum Industry Slush Fund?*, Drilled News (Mar. 26, 2020), http://www.drillednews.com/post/will-pandemic-relief-become-a-petroleum-industry-slush-fund.

[94] *See The Banks*, Mazaska Talks, http://mazaskatalks.org/banks (last visited July 31, 2020); *The Pipelines*, Mazaska Talks, http://mazaskatalks.org/pipelines (last visited July 31, 2020).

[95] *See Homepage*, Mazaska Talks, http://mazaskatalks.org (last visited July 31, 2020) [hereinafter *Mazaska Homepage*].

From the settler colonialist American mindset, this attests to the "persistence of the problem of Natives' exteriority to settler sovereignty" that Patrick Wolfe writes about in *Traces of History.*[96] To many Americans before Standing Rock, Native Americans were unseen. Wolfe explains:

> This persistence accounts for the structural dimension of invasion, which has to suppress—or, at least, contain—the Native alternative across time. As observed, the structures are not inert. They are constituted through events, through practices that colonizers repeatedly strive to maintain, in various shifting adaptations to Natives' stubborn exteriority. As Elizabeth Strakosch and Alissa Macoun have observed, 'the flipside of invasion being a structure not an event is that [settler] sovereignty is a constant performance claiming to be an essence.'"[97]

In January 2020, DIP and IWDD filed with the Organization for Economic Cooperation and Development (OECD) a Specific Instance at the US National Contact Point (USNCP) regarding Credit Suisse's central role in DAPL/Bakken finance.[98] The complaint "focuses on the violation of indigenous people's right to free, prior, and informed consent in corporate finance, as well as Credit Suisse's continued finance of fossil fuels."[99]

As of February 2020, the complaint is one of six cases challenging corporate finance in the OECD system and is the first case of its kind to be filed on this issue in the Americas.[100] Michelle Cook states:

> The OECD Specific Instance prepared and filed by indigenous women will bring much-needed attention to the structural failures of the financial industry to adhere and align with indigenous people's human rights. We are confident that our filing and engagement will expose the dangerous loopholes that allow banks and businesses to act with impunity over our cultural survival, climate, and futures. The financial sector must listen to the movements of indigenous peoples, and guarantee that human rights and indigenous peoples rights to free, prior, and informed consent will be respected and protected throughout their supply chains, in all their business relationships

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[96] PATRICK WOLFE, TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE 36 (2016).

[97] *Id.*

[98] Indigenous Women and WECAN vs. Credit Suisse, OECD WATCH, http://complaints.oecdwatch.org/cases/Case_565 (last visited July 31, 2020); Press Release, WECAN International, Indigenous Women File OECD Specific Instance Against Credit Suisse for Rights Violations Regarding Pipeline Financing (Jan. 30, 2020), http://www.wecaninternational.org/PressReleases/Indigenous-Women-File-OECD-Specific-Instance-Against-Credit-Suisse-for-Rights-Violations-Regarding-Pipeline-Financing [hereinafter WECAN Press Release, Indigenous Women File OECD Specific Instance].

[99] Vibeka Mair, *Banks Under Scrutiny Over Human Rights Soft Law*, RESPONSIBLE INVESTOR (Feb. 3, 2020), http://www.responsible-investor.com/articles/banks-under-scrutiny-over-human-rights-soft-law.

[100] *Id.*

> irrespective of the type of finance or financial product the banks have provided.[101]

The jurisgenerative power of Indigenous women's precedential filing in "soft law" fora, such as the OECD, seeks to create new interpretations of business and human rights shaped and molded by human rights defenders and Indigenous women themselves, centering their legal arguments and voices.[102] The filing etches into the record of Western financial history Indigenous demands for justice and financial accountability, and to establish mechanisms that actually bring material justice to victims.[103] To create international systems of corporate accountability that sufficiently challenge, respond to, and contain the titans of capital, the Jeffery Epsteins of that financial and corporate world.

Intersectional questions add to the challenge of ensuring divestment authenticity and efficacy. BNP Paribas, for example, having disavowed tar-sands financing, and having won praise for partial DAPL divestments, remains the lead financier of GEO Group, a global private prison corporation capitalizing on U.S. demand for immigrant (and largely Indigenous) family detention and deportation services, including family separation.[104] Growth in gun and ammunition sales is the objec-

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[101] WECAN Press Release, Indigenous Women File OECD Specific Instance, *supra* note 98.

[102] Robert M. Cover, *The Supreme Court, 1982 Term, Forward: Nomos and Narrative*, 97 Harv. L. Rev. 4, 28 (1983) ("A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power, and privilege and in the critiques that may be leveled at the justificatory enterprises of law.").

[103] S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 Ariz. J. Int'l & Comp. L. 1, 39 (1991), http://scholar.law.colorado.edu/articles/880 ("The new indigenous rights norms are grounds upon which indigenous peoples may appeal to decisionmakers within the international human rights program. The norms may even be invoked in purely domestic adjudicative settings. In many countries, as in the United States, domestic tribunals may invoke international treaty and customary norms as rules of decision. Alternatively, international norms may be used to guide judicial interpretation of domestic rules. Indeed, the genesis of United States legal doctrine concerning Native peoples is in the international law of the colonial period. It would be appropriate for the United States doctrine to again cross paths with the relevant international law." [internal citations omitted]).

[104] *See, e.g.*, The GEO Group, Inc., SEC Form 8-K (Mar. 29, 2017), http://www.sec.gov/Archives/edgar/data/923796/000119312517101954/0001193125-17-101954-index.htm; The GEO Group, Inc., SEC Form 8-K, Ex. 99.2 Transcript of Conference Call Discussing GEO's financial results, 6 (Aug. 8, 2018) http://www.sec.gov/Archives/edgar/data/923796/000119312518242807/0001193125-18-242807-index.htm ("We've announced in today's call all additional contracts with our company and I think there

tive of gun industry financing, and forms another dimension of needed intersectional divestment pressure.[105] These markets also converge with the militarization of police and federal agents.[106]

Acknowledging these intersectional challenges, grassroots movements backing the creation of new public banks have emerged. Advocates of public banks aim to establish alternative, municipal banks with charters that exclude the practice of financing growth in "fossil fuels, prisons, assault weapons, and weapons of war."[107] Grassroots campaigns in Los Angeles, New York City, Seattle, San Francisco and elsewhere are setting new possibilities for cities to disassociate from financial institutions that facilitate extractive, destructive, and shortsighted capital spending.[108]

In 2017, grassroots pressure led Seattle's City Council to approve a resolution terminating the city's relationship with Wells Fargo, due to the bank's financing, at both the project-level and the corporate-level, of DAPL/Bakken, and to the bank's financing of private prisons. In parallel, the city initiated a study of the feasibility of establishing its own municipal bank. A year later, however, the city was forced to renew its relationship with Wells Fargo.[109] Months later, Seattle's public bank feasibility study concluded: "Forged over a hundred years of perennial crises, current banking laws and regulatory norms, naturally resist change, which is why new ideas, such as public banks, are difficult to implement."[110]

While early plans for a Green New Deal embrace the possibility of a network of public banks, the Modern Money Network cautions that "[o]nly the federal government holds the fiscal tools powerful enough to achieve a just transition."[111]

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is a growing trend this year compared to last year where ICE is actively seeking out additional capacity because of the increased illegal crossings, and we expect that trend to continue."); Divest Invest Protect, *Timeline* [at: Apr. 30, 2018; Apr. 17, 2018; Oct. 13, 2017, & Mar. 23, 2017], http://bit.ly/DIP_timeline (last visited July 31, 2020).

[105] *See id.* at: Nov. 19, 2018; Oct. 2, 2018; May 6, 2018; Feb. 28, 2018; Feb. 6, 2018; Nov. 28, 2017; June 15, 2017; Mar. 1, 2017; Oct. 27, 2016; & Apr. 1, 2016.

[106] Adam Andrzejewski, *Why Are Federal Bureaucrats Buying Guns And Ammo? $158 Million Spent y Non-Military Agencies*, Forbes (Oct. 27, 2017), http://www.forbes.com/sites/adamandrzejewski/2017/10/20/why-are-federal-bureaucrats-buying-guns-and-ammo-158-million-spent-by-non-military-agencies.

[107] Jackie Fielder, *Questions Remain as Treasurer's Public Bank Task Force Comes to a Close*, San Francisco Examiner (Sept. 23, 2018), http://www.sfexaminer.com/opinion/questions-remain-as-treasurers-public-bank-task-force-comes-to-a-close.

[108] Oscar Perry Abello, *California's More Than Dreamin' About Public Banks*, Next City (Sep. 24, 2019), http://nextcity.org/daily/entry/californias-more-than-dream-in-about-public-banks.

[109] Lynda V. Mapes, *Seattle Returns to Wells Fargo Because No Other Bank Wants City's Business*, The Seattle Times (May 24, 2018), http://www.seattletimes.com/seattle-news/seattle-returns-to-wells-fargo-no-other-bank-wants-citys-business.

[110] HR&A Advisors, Inc., *Public Bank Feasibility Study for the City of Seattle* [1, Letter of Introduction] (2018), http://sftreasurer.org/sites/default/files/2019-09/Seattle%20HR-A-Advisors-Public-Bank-Feasibility-Study.pdf.

[111] Eillie Anzilotti, *The One Strategy That Could Finance the Whole Green New Deal*, Fast Company (Jun. 26, 2019), http://www.fastcompany.com/90364616/public-banking-can-finance-the-green-new-deal; Nathan Tankus, Andrés Bernal & Raúl Carrillo, *The*

VI. Solidarity Focused Finance, and New Indigenous Economic Structures

Financing wars against indigenous peoples for resource colonialism has always been a costly pursuit for states and empires.[112] Financing militarized police at Standing Rock was also expensive, with $15 million in costs sent to North Dakota authorities after the fact[113] from Energy Transfer and, indirectly, its investors.[114] Banks and financial institutions are fundamental and indispensable to the pursuit of empire building[115] and, by extension, the oppression of colonized territories and peoples.

Green New Deal Will Be Tremendously Expensive. Every Penny Should Go on the Government's Tab, Business Insider (Sep. 23, 2019), http://www.businessinsider.com/green-new-deal-climate-change-government-spending-no-private-money-2019-9.

[112] George Washington, Letter to James Duane (Sept. 7, 1783), Founders Online, http://founders.archives.gov/documents/Washington/99-01-02-11798 (last visited July 31, 2020) [Early Access document from The Papers of George Washington] ("At first view, it may seem a little extraneous, when I am called upon to give an opinion upon the terms of a Peace proper to be made with the Indians, that I should go into the formation of New States; but the Settlem[en]t of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other. [F]or I repeat it, again, and I am clear in my opinion, that policy and []economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return [a]s soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho[ugh] they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expense, and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them."). *See also* Robert A. Williams, Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (2005).

[113] News Release, Attorney General of North Dakota, North Dakota Demands Federal Reimbursement for Costs Related to Pipeline Protests (July 20, 2018), http://attorneygeneral.nd.gov/news/north-dakota-demands-federal-reimbursement-costs-related-pipeline-protests ("As a result of the Corps' failure to enforce the law and maintain public order on land under its control, North Dakota was forced to provide a sustained, large-scale public safety response to prevent deaths and protect public safety, health, and property, including that of the protesters. The State response involved thousands of days of law enforcement and first responder time, and the use of considerable amounts of equipment." Attorney General Wayne Stenehjem said, "This cost North Dakota $38 million, which the State maintains the federal government should reimburse because the Corps' failures directly caused the state to incur these costs.").

[114] James Macpherson, *Dakota Access Developer Gives $15M Toward Security Costs*, AP News (Sept. 28, 2017), http://apnews.com/d18a1885882242b8985ba4366ef3c218/Dakota-Access-developer-gives-$15M-toward-security-costs ("The builder of the Dakota Access pipeline sent North Dakota $15 million on Thursday to help pay law enforcement bills related to months of sometimes violent protests over the project's construction. Texas-based Energy Transfer Partners has wired the money, said Mike Nowatzki, a spokesman for Gov. Doug Burgum. Company investors also contributed, he said.").

[115] Peter James Hudson, Bankers and Empire: How Wall Street Colonized the

As criminalization against indigenous peoples has increased and become more militarized and normalized,[116] divestment remains a critical intersectional strategy for the protection of the climate and the world's indigenous peoples and their cultures. However, while divestment pressure increases the visibility of the flows of capital to oil, prisons and guns, there remains a critical lack of mechanisms for enforcing corporate accountability beyond this pressure.

More than survival, this moment of attention on the financial world, running through the NODAPL movement, is not reducible to individual acts of divestment or reformist adjustments of capitalism and banking standards. The moment and Indigenous movement call for deeper interrogations into the legitimacy, origins, normalcy, and imposition of colonial economic paradigms and institutions on indigenous peoples historically and contemporaneously. The moment demands new forms of grassroots, community-driven regenerative economies apart and unburdened from harmbringing frameworks and practices and traditions of colonizing states and empires.

The bold visions of a just economic future led by Indigenous peoples and women include but are not limited to creations of complementary currency, independent currencies, and other alternatives to systems of extraction and capital, as exemplified in The Red Deal.[117] As the planet faces existential crisis, a resurgence in Indigenous peoples' visions and practices of trade and economy will set paths forward.

Caribbean 5 (2017) ("The early history of imperial banking and the internationalization of Wall Street began alongside the project of US colonial expansion at the turn of the nineteenth century and ended amid the financial and economic crisis of the 1930s.").

[116] *Indigenous Resistance to DAPL*, *supra* note 14; Rory Taylor, *The Current Border Crisis Feels All Too Familiar for Indigenous Peoples in the United States*, Teen Vogue (July 12, 2018), http://www.teenvogue.com/story/border-crisis-family-separation-native-indigenous-people.

[117] New indigenous money valuing indigenous futures. *See, e.g.*, Jean Rossiaud, *E-Leman: A local Blockchain Currency in Switzerland and Beyond*, Portal de Economía Solidaria (Oct. 15, 2018), http://www.economiasolidaria.org/noticias-externas/e-leman-local-blockchain-currency-switzerland-and-beyond; *Economy Builders*, Boston Ujima Project, http://www.ujimaboston.com/economybuilders (last visited July 31, 2020); Ray Levy-Uyeda, *The Red Deal is an Indigenous Climate Plan that Builds on the Green New Deal*, Teen Vogue (Nov. 1, 2019), http://www.teenvogue.com/story/red-deal-indigenous-climate-plan-green-new-deal-red-nation ("The Red Deal was crafted by community members, Native people, young people, and poor people. It has four key tenets designed to build on and push forward the ideas in the Green New Deal: First, what creates crisis cannot solve it; second, change must come from below and move to the left; third, politicians can't do what mass movements do; and fourth, the climate conversation must move from theory to action.").