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Dear Sirs,

We are writing in advance of our scheduled follow-up communication regarding our previous requests and to express our deep concern in regard to human rights and indigenous peoples<sup>1</sup> rights violations in Standing Rock, North Dakota as a result of the Dakota Access Pipeline<sup>2</sup>

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<sup>1</sup> United Nations Subcommission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add. 4, para. 379 (1986).

Indigenous communities, people and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the bases of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal systems.

<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 crude Dakota Access Pipeline.

(DAPL), a project facilitated and constructed by Energy Transfer Partnership (ETP)<sup>3</sup> – a counterparty and company with which Credit Suisse (CS)<sup>4</sup> maintains a banking relationship.

This letter seeks to update CS as to new developments regarding ETP's DAPL and to further inform CS decisions makers of some of the human rights and indigenous rights issues discussed by the delegation with bank representatives in the April 2017 meeting. Updates include a recent federal court decision finding ETP's DAPL in violation of local law, information regarding ETP's DAPL private security abuses, and further information regarding U.S. domestic law's inadequacy in meeting minimum human right standards for indigenous peoples including but not limited to Free, Prior and Informed Consent (FPIC).

## I. WOMEN'S EARTH AND CLIMATE ACTION NETWORK (WECAN) ENGAGEMENT WITH CREDIT SUISSE IDENTITY AND INTEREST

The Indigenous Women's Delegation to Switzerland, facilitated by the Women's Earth and Climate Action Network (WECAN), was initiated by grassroots indigenous women who were harmed by and/or observed human rights and indigenous rights abuses arising out of DAPL and its effects. Delegates included Wasté Win Young, Ihunktowanna/Hunkpapa of the Standing Rock Sioux Tribe, a former Tribal Historic Preservation Officer; Michelle Cook, a Diné/Navajo human rights lawyer and founding member of the Water Protector Legal Collective at Standing Rock; Tara Houska, Anishinaabe tribal attorney, National Campaigns Director of Honor the Earth, and former advisor on Native American affairs to Bernie Sanders; Dr. Sarah Jumping Eagle, Oglala Lakota/Mdewakantonwan Dakota pediatrician living and working on the Standing Rock Sioux Reservation; Autumn Chacon, Diné/Navajo writer and performance artist; and Osprey Orielle Lake, Executive Director of WECAN.

### A. *The Women's Earth and Climate Action Network (WECAN)*

The Women's Earth and Climate Action Network (WECAN) International is a climate justice-based initiative established to unite women worldwide as powerful stakeholders in sustainability solutions, policy advocacy, and worldwide movement building for social and ecologic justice. WECAN engages women grassroots activists, Indigenous and business leaders, scientists, policy makers, farmers, academics and culture-shapers in collaboration with the goal of stopping the escalation of climate change and environmental and community degradation, while accelerating the implementation of just climate solutions through women's empowerment, advocacy at international policy forums, trainings, on-the-ground projects, advocacy campaigns, and political, economic, social and environmental action.<sup>5</sup>

### B. *Why Indigenous Women*

Indigenous women are the living descendents and members of independent, free, and self-determining Original Nations and peoples that existed prior to the formation of what is now

<sup>3</sup> Energy Transfer, Energy Transfer.com, "Dakota Access, LLC ("Dakota Access") is developing a new pipeline to provide crude oil transportation service from point(s) of origin in the Bakken/Three Forks play in North Dakota to Patoka, Illinois." [http://www.energytransfer.com/ops\\_copp.aspx](http://www.energytransfer.com/ops_copp.aspx) (last visited June 21, 2017).

<sup>4</sup> <https://www.credit-suisse.com/us/en.html>

<sup>5</sup> <http://wecaninternational.org/about>

known as the United States of America. At present these women are members of 567 tribal nations acknowledged by the United States Department of the Interior (DOI).<sup>6</sup>

Indigenous women in the United States experience unique human rights violations and adverse impacts when extractive industries and fossil fuel infrastructure such as DAPL enter their traditional lands and territories.<sup>7</sup> One of those adverse impacts includes increased crime and sexual violence (section III.C. below).

The Indigenous Women's Delegation seeks to create platforms, mechanisms of participation, and accountability between indigenous women to interface with the banks, and international financial institutions involved with extractive industries that have an adverse impacts on their human rights and indigenous rights, the ETP's DAPL being a prime example.

#### C. *Credit Suisse Involvement with Energy Transfer Family of Partnerships and DAPL Related Companies*

According to an NGO, Society for Threatened Peoples (STP)<sup>8</sup> CS has acted with ETP including but not limited to the following ways,

- Participating in a new loan issue for Sunoco Logistic Partners on December 16, 2016;
- Acting as joint-lead manager of books for two new long-term Senior Notes for ETP worth \$1.5 billion, with maturities as distant as 2027 and 2047, on January 11, 2017;
- Lending a \$2.2 billion senior secured term loan to ETE on February 3, 2017;<sup>9</sup>
- Increasing managed shares of ETP sevenfold and quadrupling the ones on ETE between October 1 and December 31, 2016, despite escalations of the protests on the ground at that time.<sup>10</sup>

In regard to ETP, CS maintains that its “transactions include the provision of loans, the issuing of securities (notes) and advisory mandates.”<sup>11</sup>

#### D. *Indigenous Women's Delegation April 2017*

In April 2017 the Indigenous Women's Delegation met with Credit Suisse officers Mr. Bruno Bischoff, Director of Public Policy Sustainability Affairs; Mr. Joachim Oechlin, Chief Risk Officer; Mr. René Buholzer, Global Head of Sustainability and Head of Public Policy of Swiss Universal Bank; and Mr. John A. Ciolek, Managing Director of Investment Banking in its oil and gas group, regarding the ongoing human and indigenous rights violations resulting from DAPL

<sup>6</sup> DEPARTMENT OF THE INTERIOR Bureau of Indian Affairs, Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs AGENCY: Federal Register / Vol. 81, No. 86 (May 4, 2016), pg. 26826 , <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-031255.pdf>

<sup>7</sup> <https://www.bostonglobe.com/opinion/2016/09/29/sexual-assault-pipeline/3jQscLWRcmD12cfefQTNsL/story.html>

<sup>8</sup> [https://www.oecdwatch.org/cases/Case\\_475](https://www.oecdwatch.org/cases/Case_475)

<sup>9</sup> <http://mobile.reuters.com/article/idUSFWN1FO146>

<sup>10</sup> [https://assets.gfbv.ch/downloads/summary\\_2017\\_ncp\\_complaint\\_stp\\_vs\\_cs\\_def\\_korrigiert\\_vs\\_def.pdf](https://assets.gfbv.ch/downloads/summary_2017_ncp_complaint_stp_vs_cs_def_korrigiert_vs_def.pdf)

<sup>11</sup> <https://www.credit-suisse.com/us/en/about-us/responsibility/current-topics/dakota-access-pipeline.html>

in Standing Rock, North Dakota – a project that CS<sup>12</sup> has enabled through business relationships with ETP.

In a two-hour meeting in April, Delegates provided information about some of the human rights violations, indigenous rights violations, and other adverse impacts arising from ETP's DAPL project, including the following:

- The use of attack dogs by unidentified and unlicensed private security agents employed by DAPL and ETP on September 3, 2016;
- DAPL and ETP's employment and use of unlicensed and unidentified private security agents and mercenaries;
- State law enforcement and ETP's private security agents' use of excessive force against indigenous peoples;
- Private security agents and mercenaries employed by DAPL and ETP's use of surveillance against indigenous peoples;
- The high levels of collusion, collaboration, and sharing of materials and resources between local, state, and federal law enforcement agencies and private security agents employed by DAPL, resulting in the state acting either as an arm of DAPL, DAPL acting as an arm of the state, or both;
- The inhumane detention while in police custody of indigenous peoples by law enforcement and private security employed by DAPL and ETP;
- The forced removal of Indian people from Treaty lands by law enforcement and private security agents employed by DAPL and ETP;
- How DAPL, private security, and state law enforcement personnel's destruction of religious artifacts and objects of cultural patrimony, sites of historic and cultural significance, and burial sites are elements of genocide<sup>13</sup> against indigenous peoples' culture, identity, and religion;
- How the forced removal of Indian peoples from their traditional lands for a private pipeline is an element of genocide;
- How the United States' domestic legal system is inadequate for securing human rights and the rights of indigenous peoples and does not measure up to the minimum standards of international law and human rights enumerated by the United Nations Declaration on the Rights of Indigenous Peoples;
- The absence of meaningful consultation and Free, Prior, and Informed Consent by the Tribes, as prescribed by the UN Declaration on the Rights of Indigenous Peoples;
- How indigenous peoples in the United States are Original Nations with rights to self-determination and governance, and are the ancestral titleholders of lands

<sup>12</sup> <https://www.credit-suisse.com/us/en/about-us/responsibility/news-stories/articles/news-and-expertise/2017/04/en/standing-rock-sioux-delegation.html>

<sup>13</sup> THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998 (entry into force July 1, 2002), 2187 U.N.T.S 90. (Article 6 of the Rome Statute, '[G]enocide' means any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group condition of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.")

they have traditionally used and occupied, including the enjoyment of off-reservation usufructuary rights as subsistence rights to fish, hunt, and gather, as well as the right to access, preserve, protect religious sites and sites of cultural and historic significance;

- Violations of the United States Constitution;
- Violations of such local and national laws as the Clean Water Act, Rivers and Harbors Act, Environmental Protection Act, and the National Historic Preservation Act;
- Violations of the Treaty of Fort Laramie;
- Impacts on public and environmental health;
- Impacts on the safety of local communities as a result of oil spills;
- Lack of effective spill notification and clean up;
- Need for just transition from fossil fuel economies to renewable energy sources;
- Extractive industries and violence against indigenous women in the United States;
- Copies of such pending legal filings as *Vanessa Dundon, et al. v. Kyle Kirchmeier, et al.*, (8th Cir.), Case No. 17-1306.<sup>14</sup>

The adverse impacts described in the personal narratives, observations, and lived experiences of indigenous women involving ETP’s DAPL project are linked to CS’s failure to implement its human rights policy in relationship to ETP.

CS has stated that the meeting with the Indigenous Women’s Delegation “was an open, transparent exchange and the discussion took place in a constructive atmosphere.”<sup>15</sup> The Delegation did appreciate the meeting and the opportunity for constructive exchange. We would also offer some suggestions for future meetings. CS inappropriately told the women not to bring “weapons.” They also failed, when asked, to provide the business cards containing the names of several of the CS representatives with whom the Delegation met.

#### E. *DAPL and Human Rights Violations*

The Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and the Yankton Sioux Tribe’s request to the Inter-American Commission for precautionary measures filed in December 2016 provides details and evidence regarding the human and indigenous rights violations that occurred at Standing Rock and the associated serious and urgent risks of irreparable harm arising out of the construction of DAPL.<sup>16</sup> The Water Protector Legal Collective discussed these human-rights violations and impacts stating,

We request that Credit Suisse (“CS”) immediately withdraw current and prohibit future lending commitments to Energy Transfer Partners, Enbridge, Kinder Morgan and TransCanada, four companies behind the Dakota Access, Keystone

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<sup>14</sup> <https://waterprotectorlegal.org/water-protectors-file-arguments-8th-circuit-militarized-policing/>

<sup>15</sup> <https://www.credit-suisse.com/us/en/about-us/responsibility/news-stories/articles/news-and-expertise/2017/04/en/standing-rock-sioux-delegation.html>

<sup>16</sup> [https://www.eenews.net/assets/2016/12/09/document\\_pm\\_03.pdf](https://www.eenews.net/assets/2016/12/09/document_pm_03.pdf)

XL, and other pipelines planned without the Free, Prior, and Informed Consent of indigenous peoples. The Dakota Access Pipeline’s construction and use violates fundamental human rights, violates treaty-based customary “good faith” international law, policy, and the rights of indigenous peoples as expressed by the United Nations, violates the 1851 and 1868 Fort Laramie Treaties between the government of the United States and the Great Sioux Nation (the Oceti Sakowin), and conflicts with numerous international human rights standards, norms, and principles.<sup>17</sup>

CS’s involvement with ETP’s DAPL concerns other guidelines, including the Equator Principles, the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, the International Finance Corporation Guidelines for Environmental Protection and Social Standards, the UN Protection Program of Financial Principles, the UN Principles for Responsible Investments, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights.

This letter’s references to human rights or violations of them is guided by and based upon the Universal Declaration on Human Rights,<sup>18</sup> and references to indigenous rights or violations of them is guided by the UN Declaration on the Rights of Indigenous Peoples, including articles on Free, Prior, and Informed Consent (FPIC).<sup>19</sup>

#### F. *Violations of Credit Suisse Human Rights Policies and Guidelines*

CS’s actions in maintaining its banking relationship with the Energy Transfer Family of Partnerships violates the bank’s current policies and guidelines in regard to human rights, indigenous rights, and international law relating to:

- Not financing or advising oil and gas companies against which credible evidence exists of involvement in such grave human rights abuses as forced labor, employment of children, or the use of violence against local communities and indigenous groups;
- Public involvement, consultation, and disclosure;
- Water contamination and use;
- Prevention, preparedness, and response for oil spills, gas leaks, or both;
- Worker and community health and safety; and
- Violations of local laws.<sup>20</sup>

## II. UPDATES AND CONTINUED ADVERSE IMPACTS ARISING FROM ETP’S DAPL

DAPL continues to result in adverse impacts. Since the meeting with CS in April this year, DAPL has already spilled 84 gallons (318 liters) of oil despite not being fully operational.<sup>21</sup>

<sup>17</sup> <https://other98-action-agitpopcommunica.netdna-ssl.com/wp-content/uploads/sites/7/2017/06/WPLC-CS-Bank-Divestment-Letter-5-31-2017.pdf>

<sup>18</sup> [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)

<sup>19</sup> [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

<sup>20</sup> <https://www.credit-suisse.com/media/assets/corporate/docs/about-us/responsibility/banking/policy-summaries-en.pdf>

Additionally, regarding ETP's Rover Pipeline, "the Federal Energy Regulatory Commission has curtailed work on a natural-gas pipeline in Ohio after the owner, ETP, reported 18 leaks and spilled more than 2 million gallons [7.57 million liters] of drilling materials."<sup>22</sup>

DAPL will not release to the public any emergency response plans in the event of an oil spill, claiming that such plans "merit additional protection because they contain information that could assist potential terrorist activity in circumventing pipeline security and response procedures designed to protect public health and the environment."<sup>23</sup> The document that they have made available "is so heavily redacted that it offers the public little information about Dakota Access's preparations for a spill."<sup>24</sup> Additionally, recent reports find that DAPL found Native American artifacts along the pipeline route and failed to notify the North Dakota Public Service Commission.<sup>25</sup>

DAPL, and the ongoing indigenous rights and human rights violations which stem from its construction, continues to receive assessment and documentation, with approximately 800 people facing charges for exercising their right to assemble, many of whom are being mischarged, falsely charged, and overcharged, demonstrating a general climate of law-enforcement repression of indigenous peoples and their allies in favor of a private pipeline.<sup>26</sup>

#### A. *Court Finds ETP's DAPL In Violation of Local Law*

On June 14, 2017 a D.C. federal court found that DAPL violated local law. A recent U.S federal court decision from the District of Columbia agreed with the Standing Rock Sioux Tribe that the Army Corp of Engineers failed to consider the National Environmental Protection Act and off reservation treaty rights in DAPL's permitting process,

A federal judge ruled that the federal permits authorizing the pipeline to cross the Missouri River just upstream of the Standing Rock reservation, which were hastily issued by the Trump administration just days after the inauguration, violated the law in certain critical respects.<sup>27</sup>

Particularly, the Court found,

Although the Corps substantially complied with NEPA in many areas, the Court agrees that it did not adequately consider the impacts of an oil spill on fishing

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<sup>21</sup> [https://www.washingtonpost.com/national/energy-environment/dakota-access-pipeline-leaked-84-gallons-of-oil-in-april/2017/05/10/5086deba-35ad-11e7-ab03-aa29f656f13e\\_story.html?utm\\_term=.7d807bbbef67](https://www.washingtonpost.com/national/energy-environment/dakota-access-pipeline-leaked-84-gallons-of-oil-in-april/2017/05/10/5086deba-35ad-11e7-ab03-aa29f656f13e_story.html?utm_term=.7d807bbbef67)

<sup>22</sup> [https://www.washingtonpost.com/news/energy-environment/wp/2017/05/10/pipeline-shut-down-after-18-leaks-and-a-2-million-gallon-spill-of-drilling-materials/?utm\\_term=.c29229b92963](https://www.washingtonpost.com/news/energy-environment/wp/2017/05/10/pipeline-shut-down-after-18-leaks-and-a-2-million-gallon-spill-of-drilling-materials/?utm_term=.c29229b92963)

<sup>23</sup> <https://www.documentcloud.org/documents/3711383-Merit-Additional-Protection-Because-They-Contain.html#document/p6/a352739>

<sup>24</sup> <https://insideclimatenews.org/news/10052017/dakota-access-pipeline-oil-spill-standing-rock-court-battle-protests>

<sup>25</sup> <http://www.kfyrtv.com/content/news/PSC-issues-Dakota-Access-hearing-notice-425552564.html>

<sup>26</sup> <http://www.truth-out.org/news/item/40431-settler-state-repression-standing-rock-battles-continue-in-the-courts>

<sup>27</sup> <http://earthjustice.org/news/press/2017/in-victory-for-standing-rock-sioux-tribe-court-finds-that-approval-of-dakota-access-pipeline-violated-the-law>

rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial.<sup>28</sup>

The Standing Rock Sioux Tribe represented by the nonprofit environmental law firm Earthjustice clarified the key findings of the Court as follows:

- First, it held that the Corps failed to address—or even mention—significant expert criticism of the agency's oil spill risk review, which found that the Corps' risk analysis was inadequate in several respects.
- Second, the Court found that the Corps never adequately considered the impacts of an oil spill on the Tribe's treaty rights, which includes protecting the Tribe's right to hunt and fish on tribal lands.
- Finally, the Court found that the Corps' environmental justice analysis was unlawful because it adopted a half mile buffer to assess oil spill risks, when studies have shown that, on a river like the Missouri, oil spills could reach far beyond a half mile. Only considering environmental justice implications within half a mile—when the Standing Rock reservation lies 0.55 of a mile from the pipeline—was not reasonable in the Court's view.<sup>29</sup>

As a result of ETP's conduct DAPL's stock dropped to an all-time low of \$20 U.S. dollars on June 16, 2017<sup>30</sup> and moreover, “[t]he units further declined over the next two trading days to close at \$19.19 on June 16.”<sup>31</sup>

Despite the growing evidence of DAPL's violations of human rights, indigenous rights, and environmental protections, CS continues to have a business relationship with ETP. WECAN as well as U.S. attorneys like the Water Protector Legal Collective, other banks like DNB and ING, and UN authorities, have all provided ample, actionable, and credible evidence of human rights violations and violence against indigenous peoples, yet CS still has a business relationship with ETP and has not mitigated the situation in any meaningful way to victims and Native American Indian people who are severely harmed by DAPL. It should be noted that Norway's largest bank, DNB<sup>32</sup>, and the Netherlands-based bank ING<sup>33</sup> sold their assets, loans, and credit to DAPL due to its indigenous rights violations.

#### B. *ETP's DAPL and Private Security Abuses*

Indigenous peoples at Standing Rock were confronted with an unprecedented presence of militarized law enforcement, including heavily militarized private security agents employed by ETP's DAPL, the company that CS currently has as a business partner. Regarding assessment of clients like ETP, CS's Oil and Gas Policy, states,

<sup>28</sup> <http://earthjustice.org/sites/default/files/files/DAPL-order.pdf>

<sup>29</sup> <http://earthjustice.org/features/dapl-ruling-what-was-decided-what-s-next>

<sup>30</sup> <https://www.ecowatch.com/energy-transfer-partners-stock-2442760591.html>

<sup>31</sup> <http://m.nasdaq.com/article/energy-transfers-dakota-pipeline-hits-another-legal-snap-cm804888>

<sup>32</sup> <http://fortune.com/2017/03/26/dnb-bank-dakota-pipeline/>

<sup>33</sup> <https://www.ing.com/Newsroom/All-news/ING-has-sold-its-stake-in-Dakota-Access-pipeline-loan.htm>

<sup>34</sup> <https://www.theguardian.com/us-news/2017/mar/21/dakota-access-pipeline-ing-sells-stake-loan-standing-rock>



In its assessment of clients, Credit Suisse values the application of or participation in the following best practice standards as positive factors: the World Bank Group / International Finance Corporation's ("IFC") Environmental, Health and Safety Guidelines for: Onshore Oil and Gas Development, Offshore Oil and Gas Development, Liquefied Natural Gas (LNG) Facilities, Natural Gas Processing, and Petroleum Refining; IFC Environmental & Social Performance Standards, the Extractive Industries Transparency Initiative ("EITI"), and the Voluntary Principles on Security and Human Rights (for security services).<sup>35</sup>

The Voluntary Principles on Security and Human Rights are, "...a set of principles designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights. The duty to protect human rights rests with governments, but other actors in society, including business, have a responsibility to respect human rights."<sup>36</sup> Energy Transfer Partner and DAPL related companies Sunoco Logistics, Marathon Petroleum, Enbridge, and Phillips 66 are not corporate participants to the Voluntary Principles on Security and Human Rights.<sup>37</sup>

#### 1. *ETP's Failure to License Private Security*

On September 3, 2016 DAPL security used attack dogs on indigenous peoples. According to the WPLC letter to CS,

Notably, on September 3, 2016, DAPL security workers set attack dogs on Water Protectors who had gathered nearby for prayer at identified sacred and ceremonial sites that the Dakota Access Pipeline Company was attempting to bulldoze. Numerous Water Protectors were bitten by dogs, with several seriously injured—including one woman who was bitten on her breast. This, sadly, was only the first of many uses of violence against peaceful Water Protectors by local law enforcement and DAPL security.<sup>38</sup>

According to the North Dakota Morton County Police Department's (MCPD) investigation into DAPL private security's September 3, 2016 dog-bite attack, private security companies working for ETP include, but may not be limited to, "TigerSwan Security, Leighton Security, HE Security, 10-Code, Russle Group, and SRG Security."<sup>39</sup> Specifically, MCPD reported that:

The MCPD investigation found that DAPL's private security was not licensed. Through this investigation it has become evident that many security companies have been hired to do security work for DAPL pipeline project. Although lists of

<sup>35</sup> <https://www.credit-suisse.com/media/assets/corporate/docs/about-us/responsibility/banking/policy-summaries-en.pdf>

<sup>36</sup> [http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPs\\_Companies\\_Fact\\_Sheet\\_-\\_129742\\_v1\\_FHE-DC.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPs_Companies_Fact_Sheet_-_129742_v1_FHE-DC.pdf)

<sup>37</sup> <http://www.voluntaryprinciples.org/for-companies/>

<sup>38</sup> <https://other98-action-agitpopcommunica.netdna-ssl.com/wp-content/uploads/sites/7/2017/06/WPLC-CS-Bank-Divestment-Letter-5-31-2017.pdf>

<sup>39</sup> [http://www.co.morton.nd.us/vertical/Sites/%7B90CBB59C-38EA-4D41-861A-81C9DEBD6022%7D/uploads/Morton\\_Investigation\\_summary\\_of\\_security\\_licensure.pdf](http://www.co.morton.nd.us/vertical/Sites/%7B90CBB59C-38EA-4D41-861A-81C9DEBD6022%7D/uploads/Morton_Investigation_summary_of_security_licensure.pdf)

security employees have been provided, there is no way of confirming whether the list is accurate or if names have been purposely withheld. Many of the initial security officers have come and gone and there is no way to prove who was doing security work. Through this investigation it has been proven that the dog handlers were not properly licensed to do security work in the State of North Dakota.<sup>40</sup>

On May 9, 2017 Foley Hoag LLP (Foley Hoag)<sup>41</sup> released a public summary “Good Practice for Managing the Social Impacts of Oil Pipelines in the United States.” This report highlighted among other critical aspects the need for oil companies like ETP to screen private security providers for licensing.

C.4 Screen potential private security providers: Companies should not only ensure that security providers are licensed, but also review the security company’s record, including any lawsuits or reports regarding the excessive use of force. Companies should ensure that the security provider is adequately screening its employees’ records for histories of violence or criminal acts. Companies should also consider whether their chosen security provider has the experience and training to peacefully handle more complex security scenarios, such as large crowds and protests or sabotage of equipment. If not, given the challenges that the pipeline industry currently faces, companies should have in place a back-up provider with such capabilities.<sup>42</sup>

Here ETP’s DAPL failure to screen private security for dog handling licenses and that failure to screen for licenses resulted in dog bite injuries and human rights abuses. The North Dakota Private Investigation and Security Board on June 12, 2017 filed a civil action lawsuit against TigerSwan for failing to have a license to operate in violation of North Dakota law.<sup>43</sup>

## 2. *ETP’s Private Security and the Use of Counter-terrorism Tactics*

The recent report by The Intercept found that the private security companies working in North Dakota for ETP included groups such as “Silverton, Russell Group of Texas, 10 Code LLC, Per Mar, SRC, OnPoint, and Leighton.”<sup>44</sup> The report focuses on TigerSwan, a private security force hired by ETP for DAPL, for mounting a domestic counter-insurgency and counter-terrorism campaign against the indigenous people and their supporters in Standing Rock. The Intercept found that

<sup>40</sup> [http://www.co.morton.nd.us/vertical/Sites/%7B90CBB59C-38EA-4D41-861A-81C9DEBD6022%7D/uploads/Morton\\_Investigation\\_summary\\_of\\_security\\_licensure.pdf](http://www.co.morton.nd.us/vertical/Sites/%7B90CBB59C-38EA-4D41-861A-81C9DEBD6022%7D/uploads/Morton_Investigation_summary_of_security_licensure.pdf)

<sup>41</sup> [http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good\\_practices\\_social\\_impacts\\_oil\\_pipelines\\_united\\_states](http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good_practices_social_impacts_oil_pipelines_united_states)

<sup>42</sup> [http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good\\_practices\\_social\\_impacts\\_oil\\_pipelines\\_united\\_states](http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good_practices_social_impacts_oil_pipelines_united_states)

<sup>43</sup> <http://hpr1.com/index.php/feature/news/nd-board-files-civil-action-against-tigerswan/#.WUwMiRga9pM.facebook>

<sup>44</sup> <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>

A shadowy international mercenary and security firm known as TigerSwan targeted the movement opposed to the Dakota Access Pipeline with military-style counterterrorism measures, collaborating closely with police in at least five states, according to internal documents obtained by The Intercept. The documents provide the first detailed picture of how TigerSwan, which originated as a U.S. military and State Department contractor helping to execute the global war on terror, worked at the behest of its client Energy Transfer Partners, the company building the Dakota Access Pipeline, to respond to the indigenous-led movement that sought to stop the project.<sup>45</sup>

A private security firm hired by the developer of the \$3.8 billion Dakota Access pipeline conducted an aggressive, multifaceted operation against protesters that included a close working relationship with public law enforcement, documents obtained by an online magazine indicate.<sup>46</sup>

According to the Foley Hoag report provided to banks, oil companies like ETP, and their private security companies should avoid sharing equipment with local, state, and federal law enforcement:

C.8 Avoid sharing equipment with public security: Companies should ensure that they and their private security providers do not provide equipment to public security forces. Were this equipment to be used against individuals, the company could be considered to be complicit in any abuses. Sharing of equipment is less likely in the U.S. context, where public security is well-equipped. These steps nevertheless have the potential benefit of helping to protect the company from the appearance of complicity in public security abuses and potential lawsuits under the Alien Tort Statute.<sup>47</sup>

According to leaked documents, ETP's private security contractors provided resources to and acted in concert with local, state, and federal law enforcement agencies, causing human and indigenous rights violations. More allegations of abuses by ETP's private security are surfacing, such as unlawful behavior even the authorization of deadly force aimed at suppressing Water Protectors:

“They [security companies] had incentives for people to hurt other people,” Dockter said. “They wanted the protesters to be riled up, they wanted their guns shown, they even sent in people from the other side that would have guns to make it seem that the protesters had guns and they could jump in and act on it.” TigerSwan at times authorized deadly force, and looked favorably at employees who incited violence that led to arrests, Dockter said. “They did have deadly

<sup>45</sup> <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>

<sup>46</sup> [http://m.bismarcktribune.com/news/state-and-regional/dakota-access-pipeline-law-officers-had-close-relationship/article\\_ce808f15-a267-599e-ae28-7bcbc71c3c72.html?utm\\_medium=social&utm\\_source=facebook&utm\\_campaign=user-share](http://m.bismarcktribune.com/news/state-and-regional/dakota-access-pipeline-law-officers-had-close-relationship/article_ce808f15-a267-599e-ae28-7bcbc71c3c72.html?utm_medium=social&utm_source=facebook&utm_campaign=user-share)

<sup>47</sup> [http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good\\_practices\\_social\\_impacts\\_oil\\_pipelines\\_united\\_states](http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good_practices_social_impacts_oil_pipelines_united_states)

force authorized, but there were times like the incident with the horse when TigerSwan authorized deadly force and they're not even supposed to be doing that. They acted above the law."<sup>48</sup>

### C. *Credit Swiss Business Involvement and Human Rights Violations*

In regard to ETP, CS maintains that its “transactions include the provision of loans, the issuing of securities (notes) and advisory mandates.”<sup>49</sup> According to the Society of Threatened Peoples (STP), “Even if Credit Suisse has not directly financed the project, the bank clarified to STP that they do not exclude the possibility that investee use[d] the money for DAPL.” According to the United Nations Environment Program’s Finance Initiative report, banks have an impact on human rights in three ways:

Category 1: The company causes an impact through its own activities.

Category 2: The company contributes to the impact through its own activities – either directly or through some such outside entity as government or business.

Category 3: The company does not cause or contribute to the impact, but it has a business relationship with an entity that is causing the impact, and the impact is directly linked to the company’s own operations, products, or services.<sup>50</sup>

Conduct falling into Category 3 requires the fulfillment of two conditions:

- The impact must be directly linked to the bank’s operations, services, or products;
- The bank must be connected to the entity committing the abuses through its business relationships.<sup>51</sup>

CS falls into Category 3. It has a business relationship with ETP, which has a project, DAPL, that is responsible for human rights violations. These violations are linked to CS’s provision of loans, issuing of securities (notes), and advisory mandates. Moreover, despite its knowledge of the human rights abuses, CS has continued and intensified its business with DAPL-related companies, thereby contributing and failing to mitigate ETP’s human rights abuses.

John Ruggie, the UN Secretary-General's Special Representative for Business and Human Rights, further elaborates on the UN Guiding Principles on Business and Human Rights (UNGPs) and how banks can be involved in human rights abuses through the provision of products and services noting:

The UNGPs stipulate three categories of business involvement in human rights harm. The critical distinction that banks (and other businesses) should be

<sup>48</sup> <http://hpr1.com/index.php/feature/news/former-dapl-security-speaks-out-damning-tigerswan-tactics/>

<sup>49</sup> <https://www.credit-suisse.com/us/en/about-us/responsibility/current-topics/dakota-access-pipeline.html>

<sup>50</sup> <http://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf>

<sup>51</sup> <http://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf>

making is not only between “their own activities” versus harms in which they may otherwise be involved. Perhaps even more important in practice, especially for banks, is the distinction between harm they may “contribute to” and harm that may be committed by a third party to which they are “directly linked” through their business relationships even without their having caused or contributed to the harm. This distinction is important because the two situations have very different implications for what banks, or any other businesses, should do about that actual or potential harm (see bullets 2 and 3 above), including in relation to remedy.<sup>52</sup>

For example, providing a general corporate loan to a private prison company that is alleged to engage in severe human rights abuses ought to require a very deep dive by the bank, coupled with the imposition of strict conditions if it decides to go ahead with the loan. If the bank does neither and yet proceeds, then it is squarely in “contribution” territory for any adverse impacts, even though the loan is not asset or project specific. Where the real challenge to banks lies is in their need to obtain sufficient information in the case of a company that is not as obviously high-risk from a human rights perspective as in this example. That may well call for more effort to be dedicated to human rights due diligence in some instances. But the concern cannot simply be excluded based on the type of financing involved.<sup>53</sup>

According to Ruggie’s interpretation of the UN Guiding Principles on Business and Human Rights, banks can contribute to human rights abuses regardless of the type of financing involved or whether the loan was asset or project specific.

In the CS Statement of Human Rights, CS states as to Products and Services that,

The provision of our financial products and services is the third area in which we may be linked to human rights issues. From the outset, Credit Suisse strives to contribute positively to the realization of human rights - as an allocator of capital for economic activities in general and through the offering of investment opportunities that contribute to sustainable development (e.g., microfinance) in particular.

However, we are aware that some of our products and services (e.g., the provision of financing) may lead to adverse human rights impacts. This could be the case if our clients' business activities affect these rights, for example, if establishing a plantation impacts the livelihoods of local communities or if an infrastructure project threatens the sacred sites of indigenous peoples. In general, heightened attention is required when a client (whether a corporate client or an individual) operates in a jurisdiction that experiences political instability, weak governance, or repression of minority groups, and when the bank is considering the financing of business activities in a conflict zone, developing financial

<sup>52</sup>[https://www.ihrb.org/uploads/submissions/John\\_Ruggie\\_Comments\\_Thun\\_Banks\\_Feb\\_2017.pdf](https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2017.pdf)

<sup>53</sup>[https://www.ihrb.org/uploads/submissions/John\\_Ruggie\\_Comments\\_Thun\\_Banks\\_Feb\\_2017.pdf](https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2017.pdf)

products associated with vulnerable client segments, or providing financial services to a sector with known human rights issues. Credit Suisse therefore examines aspects of client relationships or transactions that are sensitive from a human rights perspective using a clearly defined, comprehensive risk review process. This process is supported by our industry-specific sector policies and guidelines containing specific provisions that address human rights. For relationships with private clients anti-money laundering regulations are applied, which also include the identification and monitoring of Politically Exposed Persons (PEP).<sup>54</sup>

### III. INDIGENOUS PEOPLES, HISTORIC LEGACIES OF COLONIZATION, AND VIOLENCE AGAINST WOMEN

After meeting with CS bank representatives in Switzerland, it has become apparent that there is a need to provide more information regarding the unique situation of indigenous peoples human rights in the context of the United States.

Indigenous rights violations in the United States, such as the ones involved in ETP's building of DAPL, are not isolated events but integral to a historic legacy of the dispossession of Indian peoples from their territories for mineral resources and fossil fuels, often through physical aggression by private, local, state, and federal actors. According to S. James Anaya, former UN Special Rapporteur on Rights and Fundamental Freedoms of Indigenous Peoples:

The conditions of disadvantage of indigenous peoples undoubtedly are not mere happenstance. Rather, they stem from the well-documented history of the taking of vast expanses of indigenous lands with abundant resources, along with active suppression of indigenous peoples' culture and political institutions, entrenched patterns of discrimination against them and outright brutality, all of which figured in the history of the settlement of the country and the building of its economy.<sup>55</sup>

Violent dispossession of indigenous people's land continues, as does brutality, as the case of Standing Rock, ETP and DAPL exemplifies. While CS may not be responsible for the discrimination and legal deficiencies found within U.S. law, they take advantage of indigenous people's disadvantaged legal positionality and thus benefit from the lack of enforceable human rights mechanism and protections available to indigenous peoples in the United States.

#### A. *Who are Indigenous Peoples*

According to the United Nations, "there are an estimated 370 million indigenous peoples in the world, representing approximately five percent of the world's total population. [They] account for more than 5,000 languages in over 70 countries on six continents . . . nearly 75 percent of

<sup>54</sup> [https://www.banktrack.org/download/credit\\_suisse\\_on\\_human\\_rights/160530\\_human-rights-statement-en.pdf](https://www.banktrack.org/download/credit_suisse_on_human_rights/160530_human-rights-statement-en.pdf)

<sup>55</sup> A/HRC/21/47/Add.1 , [http://unsr.jamesanaya.org/docs/countries/2012-report-usa-a-hrc-21-47-add1\\_en.pdf](http://unsr.jamesanaya.org/docs/countries/2012-report-usa-a-hrc-21-47-add1_en.pdf)

all languages believed to exist.”<sup>56</sup> The United Nations Permanent Forum on Indigenous Issues reported that “up to 90 percent of the world’s languages are likely to become extinct or threatened with extinction by the end of the century.”<sup>57</sup> Indigenous peoples in some parts of the world continue to face extinction when their rights to land and resources are violated by natural resource extraction and third parties.<sup>58</sup> While indigenous peoples are only five percent of the world’s total population they “account for about fifteen percent of the world’s poor.”<sup>59</sup> Moreover, indigenous peoples while 6% of the total population, represent ninety percent of the world’s cultural diversity.<sup>60</sup> Indigenous peoples hold 20% of the earth’s land mass; land that harbors 80% of the world’s remaining biodiversity.<sup>61</sup> Despite socio-economic marginalization and disenfranchisement many indigenous peoples living throughout the world today exercise varying degrees of territorial and political sovereignty and self-government over the lands and resources they have traditionally occupied or used.

Given the severity of environmental degradation worldwide at this critical time and the existential threat to all of humanity, it should be highlighted with great significance and respect that indigenous peoples and their knowledge and life-ways are protecting the vast majority of the earth’s still existing biodiversity upon which all life depends.

### B. *Historical Legacy of Colonialism and Indigenous Human Rights in America*

Despite indigenous peoples’ historic and ongoing relationship to their traditional territories and homelands, their ability and rights to protect their communal lands and territories, to exist as distinct peoples, and to govern themselves remains unsecured. For example:

One of the most significant and immediate threats facing indigenous peoples identified in the report . . . is displacement and the dispossession of their lands, territories and resources. The report lists many examples of this happening in Malaysia, Indonesia, Thailand, Hawaii, Rwanda, Burundi, Uganda, Democratic

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<sup>56</sup> United Nations Educational, Scientific, and Cultural Organization (UNESCO), Themes, Indigenous Peoples (March, 3, 2105) available at <http://www.unesco.org/new/en/education/themes/strengthening-education-systems/inclusive-education/indigenous-people/>

<sup>57</sup> Allison Meier, *On the Brink of Extinction, an Indigenous Language Gets Its First Dictionary*, Hyperallergic (Jan. 16, 2014) available at <http://hyperallergic.com/178685/on-the-brink-of-extinction-an-indigenous-language-gets-its-first-dictionary/>

<sup>58</sup> Jeremy Kryt, *Guns, Farms, and Oil: How Colombian Tribes Are Being Driven to Extinction*, Earth Island Journal (Jan. 16, 2015) available at, <http://earthfirstjournal.org/newswire/2015/01/16/guns-farms-and-oil-how-colombian-tribes-are-being-driven-to-extinction/> (“We don’t want to be wiped out, and we don’t want to lose who we are,” says Governor Santos Sauna, who is also a Mama. “We don’t want tourists coming here either – too much tourism damages the psychology of the tribe. The only thing we want,” he says, “is to be left alone.”)

<sup>59</sup> United Nations Department of Economic and Social Affairs, Indigenous Peoples, (March, 3, 2105) available at <https://sustainabledevelopment.un.org/majorgroups/indigenouspeoples>

<sup>60</sup> First Peoples Worldwide, Who Are Indigenous Peoples (March 10, 2015), available at, <http://www.firstpeoples.org/who-are-indigenous-peoples.htm>

<sup>61</sup> First Peoples Worldwide, Who Are Indigenous Peoples (March 10, 2015), available at, <http://www.firstpeoples.org/who-are-indigenous-peoples.htm>

Republic of the Congo (DRC) and Colombia. There are many, many other cases around the world.<sup>62</sup>

Indigenous struggles for the enjoyment of their human rights, self-determination, and cultural survival continue today. Many face discrimination, inadequate legal protection, and lack of security for their basic human rights including securing and protecting indigenous peoples property rights in their traditional lands and territories. Bank activities must consider this historic legacy of colonization and its continued impact on the enjoyment of indigenous human rights when carrying out due diligence concerning indigenous peoples in the United States and elsewhere.

Displacement of indigenous peoples from their traditional territories in the United States is a historical fact that provides the backdrop for present-day indigenous human rights violations in the United States. For example, the “Long Walk” or forced removal of the Navajo people and the subsequent forced detention and confinement in internment camps is another flashpoint in Navajo history where violence and genocide was introduced and perpetuated against Navajo people by the U.S. military. General Carleton, while instructing Kit Carson to deliver the message to the Navajo people of their forced removal to Bosque Redondo at Ft. Sumner stated:

Say to them; Go to the Bosque Redondo or we will pursue and destroy you . . . This war shall be pursued against you if it takes years, now that we have begun, until you cease to exist or move. There can be no other talk on the subject.<sup>63</sup>

The U.S. government engaged in a military campaign of destruction; destruction of food, corn, wheat, and sheep. This scorched-earth policy of starvation set into motion the eventual attrition, military surrender, and internment of the Navajo people. It is said that, “[b]etween 1863-1868, roughly 9,000 of the Navajo people were forcibly marched 300 miles, and imprisoned on a concentration camp, at Bosque Redondo, Ft. Sumner.”<sup>64</sup> As Navajo historian Jennifer Denetdale has observed, “[j]ust at one camp alone, more than 2,500 Navajos died.”<sup>65</sup> The Navajo people arrived at Ft. Sumner naked and starving and were imprisoned for four years at the behest of the United States government. The military was not ready for the number of surrendered Navajo, and Navajo were not ready for the internment camp’s rationed food of coffee and flour, lack of clean water, and lack of wood for fire during severe winters. After four years of imprisonment, Navajos under duress signed the Treaty of 1868 with the United States government; a treaty which recognized Navajo territorial sovereignty; they were finally able to return to the “reservation” of their homelands. While the treaty history demonstrates the Navajo people’s resilience and determination to maintain their land and their spiritual ties to it, it also reflects a profound wound on the collective history of the Navajo people. This is an example of many attempts to exterminate indigenous peoples in the Americas. The question of genocide is

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<sup>62</sup> Allison Meier, *On the Brink of Extinction, an Indigenous Language Gets Its First Dictionary*, Hyperallergic (Jan. 16, 2014) available at <http://hyperallergic.com/178685/on-the-brink-of-extinction-an-indigenous-language-gets-its-first-dictionary/>

<sup>63</sup> Bill P. Acrey, *NAVAJO HISTORY, THE LAND AND THE PEOPLE* 39 (1998).

<sup>64</sup> Jennifer Nez Denetdale, Chairmen, *Presidents and Princesses: The Navajo Nation, Gender, and the Politics of Tradition*, 21 WICAZO SA REV. 9, 9-28,12 (2006).

<sup>65</sup> *Id.*



therefore pertinent to all considerations of extractive industries and their effects, including DAPL, on indigenous lands.

When women from the Delegation provided this historic analysis of genocide and land removal and its continued legacy impacting the realization and contemporary enjoyment of indigenous human rights in the United States, a CS representative became visibly uncomfortable and interrupted the women stating, “We here in Europe, we take the word ‘genocide’ very seriously.” Similar dismissive and disrespectful behavior was also documented by other indigenous peoples engaging with CS on matters relating to the history of indigenous peoples in the United States.<sup>66</sup>

The denial of genocide and its lingering impacts in the lives of Native American Indian women and peoples by CS bank representatives is troubling. Bank representatives must be educated and respectful of indigenous people’s historic experiences when engaging with them and afford them the utmost respect considering the serious human rights violations and the sensitive subject matter concerning impacted communities and women.<sup>67</sup>

### *C. Violence Against Indigenous Women, Human Rights, and the United States*

Indigenous women in the United States experience unique human rights violations and adverse impacts when extractive industries and fossil fuel infrastructure such as DAPL enter their traditional lands and territories.<sup>68</sup> One of those adverse impacts includes increased crime and sexual violence. For example,

In North Dakota, the man camps created during the Bakken oil boom drastically increased the levels of violent crime perpetrated against women and girls — and particularly native women and girls. Studies conducted during the peak of the oil boom — from 2010 to 2013 — showed that the number of reported domestic violence incidents and sexual assaults increased by hundreds, flooding and overwhelming service providers. Victim advocates from the Mandan, Hidatsa, and Arikara Nation — a native nation that became ground zero for the increase in violent crimes that accompanied the boom — have reported a doubling, and in some instances a tripling, in the number of calls that victim-service providers receive for domestic violence, sexual assault, and sex trafficking.<sup>69</sup>

What further exasperates the influx of violence is lack of accessible remedy and accountability for sexual crimes which occur by non-Indians against Indians on Indian reservations. In the context of the United States legal system, due to jurisdictional gaps created by the Supreme Court between tribal, state, and federal law enforcement, non-native oil workers who commit sexual violence against Indian women on Indian reservations may not be prosecuted.

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<sup>66</sup> <https://www.voanews.com/a/standing-rock-tribe-fight-against-pipeline-goes-global/3892805.html>

<sup>67</sup> See ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS HISTORY OF THE UNITED STATES (2014).

<sup>68</sup> <https://www.bostonglobe.com/opinion/2016/09/29/sexual-assault-pipeline/3jQscLWRcmD12cfefQTNsL/story.html>

<sup>69</sup> <https://www.bostonglobe.com/opinion/2016/09/29/sexual-assault-pipeline/3jQscLWRcmD12cfefQTNsL/story.html>

Amnesty International's *Maze of Injustice: Report on Sexual Violence Against Native Women* was a watershed document in creating awareness and state action in regard to the epidemic of rape against Native women by non-Native perpetrators.<sup>70</sup> The report focused on the disturbing findings that "1 in 3 Native women will be raped in her life time" and that "86% of reported rapes are perpetrated by non-Native men."<sup>71</sup> The report highlighted how racialized Supreme Court jurisprudence like *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), created jurisdictional gaps between tribal, state, and federal law that result in an overall lack of prosecution of sexual crimes against Native women, amounting to what Amnesty International characterized as a human rights violation.<sup>72</sup>

According to *Oliphant*, tribes cannot exercise criminal jurisdiction over non-Indians defendants on Indian reservations.<sup>73</sup> The Court stated, "Indians do not have criminal jurisdiction over non-Indians, absent affirmative delegation of such power by Congress."<sup>74</sup> The Amnesty report helped to encourage the passage of two critical pieces of legislation in Indian Country<sup>75</sup>, the Tribal Law and Order Act of 2010<sup>76</sup> and the Tribal Provisions within the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).<sup>77</sup> Yet, jurisdictional gaps remain in the Violence Against Women Act's Tribal provisions. The Indian Law Resource Center recently indicated that,

VAWA 2013 is not adequate to stop the epidemic of violence and significant legal gaps continue to threaten the safety of Indian and Alaskan Native Women in the United States. The life-threatening status quo continues because, unless approved to participate in a special pilot project, tribes may not prosecute non-Indian abusers until March 7, 2015. Even then, stringent requirements, coupled with lack of funding, may delay or even deter the exercise of such jurisdiction by tribe. Furthermore, VAWA doesn't cover domestic violence or sexual crimes perpetrated by strangers or individuals without relationship to the tribe.<sup>78</sup>

The Indian Law Resource Center describes this human rights crisis in Indian Country,

It is outrageous that the vast majority of these women never see their abusers or rapists brought to justice. An unworkable, race-based criminal jurisdictional

<sup>70</sup> AMNESTY INTERNATIONAL MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007) <http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>.

<sup>71</sup> AMNESTY INTERNATIONAL MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007) <http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>.

<sup>72</sup> AMNESTY INTERNATIONAL MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007) <http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>.

<sup>73</sup> *Oliphant v. Suquamish*, 435 U.S. 191 (1978).

<sup>74</sup> *Id.* at 208.

<sup>75</sup> "Indian Country" defined by federal statute codified at 18 U.S.C. § 1151 which includes tribal trust lands/reservations, dependent Indian communities and Indian allotments held in trust status.

<sup>76</sup> Tribal Law and Order Act of 2010, 25 U.S.C. § 1302.

<sup>77</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 113th Congress, §§ 904-905 (Mar. 7, 2013).

<sup>78</sup> Indian Law Resource Center, *A Report on Tribal Capacity for Enhanced Sentencing and Restored Criminal Jurisdiction* 22 (Fall, 2013) [http://indianlaw.org/sites/default/files/TribalCapacityReport\\_Final\\_1.pdf](http://indianlaw.org/sites/default/files/TribalCapacityReport_Final_1.pdf)

scheme created by the United States has limited the ability of Indian nations to protect Native women from violence and to provide them with meaningful remedies. For more than 35 years, United States law has stripped Indian nations of all criminal authority over non-Indians. As a result, Indian nations are unable to prosecute non-Indians, who reportedly commit 88% of the violent crimes against Native women on tribal lands.....

United States law creates a discriminatory system for administering justice in Native communities—a system that allows criminals to act with impunity in Indian country, threatens the lives and violates the human rights of Native women and girls daily, and perpetuates an escalating cycle of violence in Native communities. Women who are subjected to violence should not be treated differently and discriminated against just because they are Native and were assaulted on an Indian reservation or in an Alaska Native village!<sup>79</sup>

Robert A. Williams Jr., an indigenous legal scholar, has noted as to colonization and the imposition of discriminatory law that,

Colonization of one race of peoples by another race then, indelibly inscribes a legal system of racial discrimination based on cultural differences, denying rights of self-determination to the colonized race which has been displaced from the territory desired by the colonizer race.<sup>80</sup>

This is certainly true in the case of the United States Supreme Court's discriminatory and erroneous race-based interpretation of tribal sovereignty, self-determination, and criminal jurisdiction reflected in *Oliphant*. The former UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous Peoples, S. James Anaya, confirmed the Supreme Court's need to abandon racist legal doctrines noting,

...[T]hat the rights-limiting strain of this doctrine is out of step with contemporary human rights values. As demonstrated by a significant body of scholarly work, the use of notions of discovery and conquest to find Indian rights diminished and subordinated to plenary congressional power is linked to colonial era attitudes toward indigenous peoples that can only be described as racist.<sup>81</sup>

Walter R. Echo-Hawk in his book, *In the Light of Justice: The Rise of Human Rights in Native American and the UN Declaration on the Rights of Indigenous Peoples* also argues that U.S. federal Indian law falls short of the human rights standards articulated in the recently adopted United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>82</sup> James Anaya

<sup>79</sup> <http://indianlaw.org/issue/ending-violence-against-native-women>

<sup>80</sup> Robert A. Williams Jr., COLUMBUS'S LEGACY: THE REHNQUIST COURT'S PERPETUATION OF EUROPEAN CULTURAL RACISM AGAINST INDIAN TRIBES. In D.H Getches, C.F Wilkinson, and Robert A. Williams Jr., *Cases and Materials on Federal Indian Law* 35 (1993).

<sup>81</sup> A/HRC/21/47/Add.1, [http://www.mitsc.org/documents/104\\_2012-8-30report-usa-a-hrc-21-47-add1\\_en.pdf](http://www.mitsc.org/documents/104_2012-8-30report-usa-a-hrc-21-47-add1_en.pdf)

<sup>82</sup> WALTER R. ECHOHAWK, *IN THE LIGHT OF JUSTICE, THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*. 184 (2013).

states that "... [the federal judiciary] has also articulated grounds for limiting those rights on the basis of colonial era doctrine that is out of step with contemporary human rights values."<sup>83</sup>

It is critical that CS and other banks and financial institutions working in the United States interact and seek meaningful and effective participation from indigenous peoples, and with indigenous women, when carrying out risk-based, human rights due diligence in regard to projects and companies with which they are involved. It is also necessary to acknowledge the unique legal personality and positionality of indigenous women's rights and situations in the United States, as well as providing effective redress and grievance mechanisms regarding banks and companies like ETP that become engaged in human and indigenous rights violations in the United States.

Credit Suisse must be informed that ETP's DAPL is another tragic manifestation and extension of colonial violence that represents the vestiges of rights-limiting legalized racism against Indian people in the United States that has yet to be fully eliminated or eradicated.

#### IV. INDIGENOUS PEOPLES' HUMAN RIGHTS AND U.S. DOMESTIC LAW AND FPIC

##### A. *Indigenous Peoples and International Standards of Free, Prior, and Informed Consent*

The normative standards for the enjoyment of rights of participation, consultation, and Free, Prior, and Informed Consent, as stated in the UN Declaration on the Rights of Indigenous Peoples, for example, outline that

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 18).<sup>84</sup>

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 19).<sup>85</sup>

The right of consultation and Free, Prior, and Informed Consent, is an extension and corollary right to be free from discrimination. The 1997 General Recommendation No 23 on indigenous peoples, the Committee on the Elimination of Racial Discrimination (CERD) elaborated on the relevancy of non-discrimination and meaningful participation as it relates to indigenous peoples,

With specific reference to land and resource rights, the Committee calls for restitution in situations where decisions have already been taken without the prior and informed consent of the affected indigenous peoples. It has also highlighted the obligation of States to ensure that the right of indigenous peoples

<sup>83</sup> A/HRC/21/47/Add.1, [http://www.mitsc.org/documents/104\\_2012-8-30report-usa-a-hrc-21-47-add1\\_en.pdf](http://www.mitsc.org/documents/104_2012-8-30report-usa-a-hrc-21-47-add1_en.pdf)

<sup>84</sup> [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

<sup>85</sup> [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

to free, prior and informed consent is respected in the planning and implementation of projects affecting the use of their lands and resources.

More recently, the Committee on Economic, Social and Cultural Rights (CESCR) has further expanded on free, prior and informed consent in general comment No. 21. In its interpretation of cultural rights, the Committee outlines that the right to participate in cultural life includes the right of indigenous peoples to restitution or return of lands, territories and resources traditionally used and enjoyed by indigenous communities if taken without the prior and informed consent of the affected peoples. It also calls on States parties to “respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights” and to “obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.”<sup>86</sup>

The right of consultation and consent must also include representivity:

The issue as to from whom the State can seek consent is critical. In this regard, several communities around the world are working on establishing their own protocols on how outsiders should communicate with them to obtain their free, prior and informed consent. The consent of indigenous peoples should be determined in accordance with their customary laws and practices. This does not necessarily mean that every single member must agree, but rather that the consent process will be undertaken through procedures and institutions determined by indigenous peoples themselves. Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.<sup>87</sup>

Maori lawyer Kingi Snelgar and indigenous human rights observer at Standing Rock offered the following recommendations regarding standard setting and practices to achieving good faith and meaningful Free, Prior, and Informed Consent as it applies to indigenous peoples:

1. Indigenous nations are sovereign nations, not communities or tribes. This is an important distinction. Rather than the government-to-government framework suggested in the joint statement, the discussion on reform should occur on a sovereign-to-sovereign basis.
2. As sovereign indigenous nations, construction and extractive corporations must obtain free prior and informed consent like any other sovereign nation. Free, prior and informed consent rather than consultation is the right standard to ensure the participation of indigenous peoples as sovereign nations. Consultation does not acknowledge this. Too often, consultation occurs in the least way possible.

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<sup>86</sup> <http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf>

<sup>87</sup> <http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf>

3. Any framework that is designed and imposed on indigenous nations by the state could undermine their sovereignty and amount to an ongoing form of colonization. Therefore, extreme care should be taken by the State. Any framework that is designed and later implemented must be decided upon and approved by the indigenous nation.
4. Consistent with this, free prior and informed consent should be obtained in a way decided by the indigenous nation and not by the state or corporation.
5. As each indigenous nation is distinct, the framework for how to obtain consent may differ from nation to nation.<sup>88</sup>

#### B. *U.S. Domestic Law Inadequacy with International Standards and FPIC*

Credit Suisse communicated in the April meeting that they had complied with the United States regulatory framework; however the delegation quickly informed the representatives that United States law does not secure or guarantee in practice indigenous peoples human rights to Free, Prior, and Informed Consent (FPIC).

The domestic laws of the United States do not recognize or require the human right of Free, Prior, and Informed Consent (FPIC) regarding development projects that occur within or impact indigenous peoples' lands, territories, and natural resources. In terms of consultation,

In the U.S. this right is severely restricted by the present U.S. legal regime that often claims the right to unilaterally exercise absolute authority over Native people and their property whether the affected group consents or not. For example, the U.S. government authorized use of Western Shoshone land by a number of industries, including gold mining, energy developers, and nuclear weapons testing and waste disposal, despite clear opposition by, and devastating consequences for the human rights of the Western Shoshone people and the environment. Another example is the ruling of the 9th Circuit in *Save the Peaks vs U.S. Forest Service* to uphold the use of snow made from treated sewage effluent on the sacred San Francisco Peaks. In this instance, wastewater was used for artificial snow on peaks sacred to the Navajo. A court overruled the tribe's concerns. Another example is the U.S. governments' lack of consultation of Native Americans by state and federal authorities regarding the development of the Keystone XL Pipeline Project that extends over 1000 miles from Canada to Nebraska including areas of tribal jurisdiction.<sup>89</sup>

While the United States has noted that it affirms the UN Declaration on the Rights of Indigenous Peoples it only requires that “[a]ll federal agencies [have] established policies on tribal consultations”<sup>90</sup> not “consent.” The current model of consultation is inadequate in fulfilling,

<sup>88</sup> <http://bsnorrell.blogspot.com/2016/09/oceti-sakowin-camp-human-rights.html>

<sup>89</sup> [http://www.theadvocatesforhumanrights.org/uploads/indigenous\\_rights\\_fact\\_sheet\\_2013\\_2.pdf](http://www.theadvocatesforhumanrights.org/uploads/indigenous_rights_fact_sheet_2013_2.pdf)

<sup>90</sup> CCPR/C/SR.3046/2014 (March 19). at para. 6.

meeting, and aligning with the consultation and consent standards established within international human rights law relating to FPIC.

The problem of the United States' lack of effective consultation with indigenous peoples is not new and has been documented and chronicled for many years in appeals made by indigenous peoples to United Nations Treaty Bodies and Committees. For example, beginning in 2001, the Committee on the Elimination of Racial Discrimination (CERD) has made general land rights recommendations relating to the right to consultation and participation of indigenous people in the United States.<sup>91</sup> The CERD Committee recommended,

The Committee notes with concern that treaties signed by the Government and Indian tribes, described as “domestic dependent nations” under national law, can be abrogated unilaterally by Congress and that the land they possess or use can be taken without compensation by a decision of the Government. It further expresses concern with regard to information on plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples.

The Committee recommends that the State party ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5 (c) of the Convention, and draws the attention of the State party to general recommendation XXIII on indigenous peoples which stresses the importance of securing the “informed consent” of indigenous communities and calls, *inter alia*, for recognition and compensation for loss. The State party is also encouraged to use as guidance the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.<sup>92</sup>

In 2014, the Committee for Civil and Political Rights (ICCPR) continued to recommend that the United States ensure treaty rights and consultations with indigenous peoples stating,

The State party should adopt measures to effectively protect sacred areas of indigenous peoples against desecration, contamination and destruction and ensure that consultations are held with the indigenous communities that might be adversely affected by the State party's development projects and exploitation of natural resources with a view to obtaining their free, prior and informed consent for proposed project activities.<sup>93</sup>

In 2008 the CERD Committee explicitly requested the State to consult with the Western Shoshone regarding natural resources and,

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<sup>91</sup> 2001 A/56/18, paras.380-407, at 400.

<sup>92</sup> 2001 A/56/18, paras.380-407, at 400.

<sup>93</sup> CCPR/C/USA/CO/4, 23 April 2014

(b) Desist from all activities planned and/or conducted on the ancestral lands of Western Shoshone or in relation to their natural resources, which are being carried out without consultation with and despite protests of the Western Shoshone peoples;<sup>94</sup>

Moreover, the United States itself admits that the right of consultation is not fully enjoyed by all indigenous peoples in the United States. For example the United States maintains that,

...federal agencies' current consultation policies relative to federally recognized tribes are not generally applicable to the Native Hawaiian community and Indigenous Insular Communities.<sup>95</sup>

Adequate consultations mechanisms that mirror the normative standards set in international human rights are not readily available to indigenous peoples in the United States. Indigenous peoples' human right to consultation and consent over lands and resources they traditionally used and occupied are not secured or guaranteed in the United States legal system and are routinely violated by state and non-state actors, and such is the case with the Dakota Access Pipeline and its promoters. The United States should implement the UN Declaration and secure the right to FPIC for indigenous peoples.

### *C. Developed Nations vs. Developing Nations and Indigenous Rights in the United States*

Despite living in what is a "developed" nation Indigenous peoples in the United States are not guaranteed full enjoyment of their human rights. Indigenous peoples in the United States still experience severe socio-economic disadvantages in relation to their non-native counterparts:

For example, Native Americans, especially on reservations, have disproportionately high poverty rates, rising to nearly double the national average. Along with poverty, Native Americans suffer poor health conditions, with low life expectancy and high rates of disease, illness, alcoholism and suicide. As for education, 77 per cent of Native Americans aged 25 or older hold a high school diploma or alternative credential as compared with 86 per cent of the general population, while 13 per cent of Native Americans hold a basic university degree as compared to 28 per cent of the general population. Indigenous peoples also face disproportionate rates of incarceration, and rates of violent crime on Indian reservations exceed those of any other racial group and are double the national average.<sup>96</sup>

A recent letter by ten banks to the Equator Principles Association Secretariat requested that the Association's Steering Committee apply the IFC Performance Standards to both "Designated" and "Non-Designated" countries<sup>97</sup> and put forward two important changes:

<sup>94</sup> DECISION 1 (68), CERD/C/USA/DEC/1, 11 April 2006 (Early Warning & Urgent Action Procedure

<sup>95</sup> CERD/C/USA/7-9/2013 at para. 171.

<sup>96</sup> A/HRC/21/47/Add.1, [http://unsr.jamesanaya.org/docs/countries/2012-report-usa-a-hrc-21-47-add1\\_en.pdf](http://unsr.jamesanaya.org/docs/countries/2012-report-usa-a-hrc-21-47-add1_en.pdf)

<sup>97</sup> Request Letter from 10 Banks to Equator Principles Association (May 22, 2017), <https://other98-action-agitpopcommunica.netdna-ssl.com/wp-content/uploads/sites/7/2017/06/170522-letter-10-banks-to-EP-secretariat.pdf>



- Requiring that projects in Designated Countries (as defined in the EPs) are developed to comply with the same environmental and social standards as in non-Designated Countries, i.e. the IFC PS, in addition to applicable local standards.

This is crucial with respect to critical issues such as FPIC and biodiversity conservation. Moreover, this would address concerns that local laws in Designated Countries are not necessarily as stringent as the IFC PS in all respects. We request that this proposal be discussed in the coming months in order to reach a decision in a timely manner.

- Propose amendments to the EP framework to facilitate the resolution of issues resulting from a potential breach of the applicable E&S standards that may lead to a significant damage to the environment and / or communities. We request that a working group be put in place as soon as possible to review this request and make proposals to the EP Association on how to implement them.<sup>98</sup>

Attorney Robin Martinez has stated,

DAPL shone a spotlight on the Equator Principles because a number of the banks in DAPL's lending syndicate have signed on to the Principles. DAPL revealed a significant flaw in the overall framework. The Equator Principles assume that in the developed world (in what the Association defines as "Designated Countries"), adequate protections exist under law for rights of indigenous peoples. The US is a Designated Country under the Equator Principles. In non-designated countries, the IFC (International Finance Corporation) Performance Standards on Environmental and Social Sustainability apply. Significantly, the IFC Performance Standards require lenders to assess whether the Free Prior and Informed Consent (FPIC) of indigenous peoples was obtained by project sponsors. This left a tremendous gap, where here in the US, the default review standard under domestic law applied – which was merely whether consultation with tribes occurred. There's a big difference between FPIC and "consultation."<sup>99</sup>

Credit Suisse and other financial institutions should not assume that indigenous peoples' human rights like FPIC are protected or fully enjoyed by virtue of living in what is referred to as "developed" nations like the United States.

#### D. *Rights Violations, FPIC, and Request for CS to Divest*

On March 3, 2017, Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous Peoples, confirmed violations of indigenous people's rights, including FPIC, in Standing Rock:

<sup>98</sup> Request Letter from 10 Banks to Equator Principles Association (May 22, 2017), <https://other98-action-agitpopcommunica.netdna-ssl.com/wp-content/uploads/sites/7/2017/06/170522-letter-10-banks-to-EP-secretariat.pdf>

<sup>99</sup> <https://waterprotectorlegal.org/fpic-favored-mandatory-sponsors-projects-affecting-indian-country/>

In the context of the Dakota Access Pipeline, the potentially affected tribes were denied access to information and excluded from consultations at the planning stage of the project. Furthermore, in a show of disregard for treaties and the federal trust responsibility, the Army Corps approved a draft environmental assessment regarding the pipeline that ignored the interests of the tribe. Maps in the draft environmental assessment omitted the reservation, and the draft made no mention of proximity to the reservation or the fact that the pipeline would cross historic treaty lands of a number of tribal nations. In doing so, the draft environmental assessment treated the tribe's interests as non-existent, demonstrating the flawed current process.<sup>100</sup>

Despite the UN expert's recommendation, CS continues to be involved financially with ETP. According to the May 2017, Foley Hoag report "Good Practice for Managing the Social Impacts of Oil Pipelines in the United States"<sup>101</sup> United States law doesn't guarantee indigenous human rights,

Although U.S. law is generally robust, international law – and related IIGP [international industry good practice] – has developed rapidly in recent years, particularly in the area of indigenous rights. U.S. law is less stringent than international standards in at least two vital ways.

First, IIGP provides more detailed guidance than U.S. law on what constitutes company-tribal consultation, and offers a solid foundation for companies and potentially impacted tribes to develop strong working relationships, regardless of the government's level of involvement. IIGP defines consultation as a two-way exchange that begins early, with tribes playing an active role in risk identification, mitigation, and monitoring. Companies may need to financially assist tribes with such activities, and compensate them for certain impacts created by projects.

Second, IIGP calls for company-tribal consultation and even Free, Prior, and Informed Consent (FPIC) in a significantly wider range of circumstances than U.S. federal law. Under U.S. federal law, if a project is not sited on Indian country, tribal consent is almost never required. Tribes have a right to consultation when projects are not sited on Indian country only in limited circumstances, typically when a federal action would impact their cultural heritage, legally recognized hunting/fishing/gathering rights, or the environment on Indian country. Compounding the challenges, no single federal agency has overall jurisdiction over oil pipelines. As a consequence, permits are typically only required for small portions of such projects, and the portion of the pipeline's cultural or environmental impacts that is likely to require tribal consultation under federal law is correspondingly limited.<sup>102</sup>

<sup>100</sup><http://unsr.vtaulicorpuz.org/site/index.php/en/statements/177-usa-end-mission>

<sup>101</sup> [http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good\\_practices\\_social\\_impacts\\_oil\\_pipelines\\_united\\_states](http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good_practices_social_impacts_oil_pipelines_united_states)

<sup>102</sup> [http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good\\_practices\\_social\\_impacts\\_oil\\_pipelines\\_united\\_states](http://www.foleyhoag.com/publications/ebooks-and-white-papers/2017/may/good_practices_social_impacts_oil_pipelines_united_states)

Not only did the law firm hired by the banks find U.S. law to be inadequate and less stringent than international industry good practice, but additionally that U.S. domestic law may not provide for FPIC, as articulated in the United Nations Declaration on the Rights of Indigenous Peoples.

CS's borrower ETP's pipeline is nominally located outside of the reservation boundaries, but is nonetheless located directly within the traditional lands and ancestral territories of impacted indigenous peoples, as affirmed in the Ft. Laramie Treaties – land upon which their culture, religion, subsistence, water, survival, and continued existence intimately depend. Other reports have been issued regarding similar oil and gas infrastructure, such as the Kinder Morgan Pipeline, which describes the risks involved in investing in pipelines involving outstanding territorial claims by indigenous peoples.<sup>103</sup>

According to the Inter-American Court of Human Rights in *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, indigenous peoples have property rights to land they traditionally used and occupied, despite formal title issued by the state. The court found that,

....[T]he Mayagna Community has communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory. Their rights “exist even without State actions which specify them.” Traditional land tenure is linked to a historical continuity, but not necessarily to a single place and to a single social conformation throughout the centuries. The overall territory of the Community is possessed collectively, and the individuals and families enjoy subsidiary rights of use and occupation;<sup>104</sup>

Here, as in the *Mayagna (Sumo) Awas Tingni Community*, the United States, like Nicaragua, violated indigenous people's rights to use and occupy their traditional lands and territories when they made the path of DAPL pass into indigenous peoples territories without their meaningful consultation or their Free, Prior and Informed Consent.

Moreover, the United States, DAPL, and ETP violated indigenous people's property rights to use and occupy those lands when they deployed state and private military forces to forcibly remove them from their treaty lands and territories. Additionally, the United States, DAPL, and ETP have continued to violate human rights in the subsequent criminalization, unjust prosecutions,<sup>105</sup> and inhumane treatment of human-rights defenders while holding them in detention;<sup>106</sup> all for a private pipeline facilitated in part by CS's advisement and loans.

<sup>103</sup> <https://twnsacredtrust.ca/kindermorganiporisk/>

<sup>104</sup> *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001), at para. 140 (a).

<sup>105</sup> <https://waterprotectorlegal.org/bismarck-tribune-last-minute-trial-cancellations-corner-protesters/>

<sup>106</sup> <https://other98-action-agitpopcommunica.netdna-ssl.com/wp-content/uploads/sites/7/2017/03/WPLC-ING-Bank-Divestment-Letter-3.10.2017.pdf>

For the above reasons, CS should divest its ETP portfolio and end its continued involvement and business relationships with the predatory partnerships that are constructing DAPL and violating indigenous and human rights in the process.<sup>107</sup>

## V. REQUESTS, DEMANDS, AND QUESTIONS

In view of the above facts and considerations, continued involvement in and support of ETP by CS defies moral and practical explanation. That being the case, it is all the more unconscionable that CS, by enabling the construction of DAPL by its investments in ETP, implicitly or explicitly permits and condones the numerous and egregious human and indigenous rights violations occurring at Standing Rock as a result of ETP's DAPL.

The extensive constellation of rights violations that occurred at Standing Rock would not have taken place and or could have been mitigated or prevented if actors like Credit Suisse had made a good-faith effort to properly apply and implement their human rights policies regarding violence against indigenous peoples.

We are calling for CS to do the following:

1. Exclude Energy Transfer Family of Partnerships, ETP, and DAPL-related companies completely from the CS investment universe and to divest immediately from DAPL, and end all banking relationships with ETP;
2. Credit Suisse to respect indigenous rights and human rights as articulated and adopted in Switzerland and international law;
3. Credit Suisse to respect indigenous rights and human rights as articulated in its current policies and guidelines;
4. Implement and comply with its own human rights policy and include "indigenous peoples" in that policy;
5. Examine, and amend where necessary, its policies and guidelines to include sound and robust, risk-based, indigenous peoples human rights due diligence;
6. Improve implementation of its human rights policy, guidelines, and field practices to support speedy, fair, and just legal evaluations and determinations in regard to reported indigenous and human rights violations;
7. Incorporate into financial contracts and project loan documentation, via covenants, exit clauses that allow the bank to dissolve contracts if clients and business partners are involved in indigenous or human rights violations or environmental damage and contamination;

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<sup>107</sup> <https://other98-action-agitpopcommunica.netdna-ssl.com/wp-content/uploads/sites/7/2017/03/WPLC-ING-Bank-Divestment-Letter-3.10.2017.pdf>

8. Clarify whether funds it lends or otherwise provides to ETP are being used, in any amount or way, to pay for the heavily militarized response to the Standing Rock Sioux, including but not limited to attack dogs, sound-cannon trucks, and heavily armed officers;
9. Clarify whether ETP used the loans or other monies they received from CS to engage TigerSwan Security and other private security companies in the suppression or other harms of Water Protectors at Standing Rock;<sup>108</sup>
10. Answer the question: for what did ETP use its CS loans;
11. Answer the questions: what steps has CS taken to address and mitigate cited human rights violations, have those steps addressing ETP's involvement in human and indigenous rights abuses been effective, and how does CS measure the efficacy of these mitigation steps;
12. Answer the question: has the bank received any formal reporting that addresses the human rights impacts of ETP's building of DAPL, and, if so, what.

## VI. CONCLUSION

In conclusion, CS still maintains a business relationship with ETP, although the latter continues to violate international human and indigenous rights. It maintains this relationship despite the evidence and indigenous people's sincere and desperate cries for visibility and accountability. As the UN Rapporteur noted,

International norms today provide legal grounds, however limited, for indigenous peoples to roll back the lingering scourge of colonial patterns and to exist as distinct communities in pursuit of their own destinies under conditions of equality. The United Nations Charter and other widely ratified international treaties affirm the principle of self-determination of people or include related human rights norms.<sup>109</sup>

Switzerland's international financial institutions deeply affect the rights and survival of indigenous peoples in the United States. Along with other European states, Switzerland is frequently at or near the head of international civil liberties and political rights rankings and has adopted the UN Declaration of the Rights of Indigenous Peoples. Now is the time to realize these commitments by taking the right action and excluding ETP from CS investments as well as making real policy changes in the CS compliance procedures with human and indigenous rights in order to prevent these horrific abuses from occurring in the future.

Standing Rock and the violations that occurred there are reflections on the international community, Switzerland, and its financial sector's commitments to enforce and implement their

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<sup>108</sup> <https://www.commondreams.org/news/2017/05/27/dapl-company-hired-war-terror-contractors-suppress-native-uprising>

<sup>109</sup> S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, 4 (Oxford University Press, 2<sup>nd</sup> ed. 2004).

human rights obligations and standards. ETP's DAPL is responsible for one of the greatest human rights abuses against the Indian Nations and Native peoples to occur in the United States in the twenty-first century. Switzerland and its banks must not remain complicit or neutral when extractive companies that CS financially enables, invests in, and facilitates put indigenous peoples' very existence and survival at risk.

CS has claimed that "Credit Suisse takes concerns about DAPL seriously and will consider them in the further development of internal guidelines."<sup>110</sup> If CS took human and indigenous rights abuses seriously, however, it would have already complied with and implemented its current human rights policy and publicly withdrawn its credit and banking relationship from ETP. CS needs to show that its commitment to sustainability and human rights policy is more than mere lip service obscuring complicity and involvement in severe abuses of human, environmental, and indigenous rights in the United States.

DAPL has caused indigenous people to suffer disgraceful amounts of harm, yet those people's fight for justice and accountability for that harm remains unwavering and focused. It is true that great potential for transformative power can emerge from great cataclysms, and the indigenous women who travelled to Switzerland to seek accountability from CS for the part played by the bank in this disaster have demonstrated that power. The violence occurring at Standing Rock has empowered a generation of indigenous peoples and other American citizens to demand justice and accountability. The torch and spirit of this historic movement for water, life, and human rights has entered the doorway of CS and is seeking justice, truth, transformation, and accountability from the economic powers behind destructive projects like DAPL.

Credit Suisse is now part of this historic movement of indigenous peoples that is emerging from experiences at Standing Rock. This is an opportunity for Switzerland and its bank CS to play a positive role in that history by helping to protect indigenous peoples' ability to survive by ending their involvement and support of bad actors like Energy Transfer Family of Partnerships and DAPL-related companies.

If you wish further information, evidence, or communication do not hesitate to contact us.\*

Yours sincerely,

Michelle Cook, J.D.

Osprey Orielle Lake, Executive Director  
Women's Earth and Climate Action Network, International

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<sup>110</sup> <https://www.credit-suisse.com/us/en/about-us/responsibility/current-topics/dakota-access-pipeline.html>

\* Footnotes and endnotes herein are formulated primarily for e-reading by informed parties to provide links to germane documents and background information, and to outline important points of discussion. Further citation and reference detail available upon request.

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Enclosures

### Materials and Resources

1. Standing Rock Sioux Tribe v. U.S. Army Corps. Of Engineers, Civ. A. No. 01534 (D.D.C June 14, 2017)  
<http://earthjustice.org/sites/default/files/files/DAPL-order.pdf>
2. Water Protector Legal Collective (Formerly Red Owl Legal Collective) Letter to DNB Bank, <http://martinezlaw.net/wp-content/uploads/2016/11/20161108-DNB-Bank-Divestment-Letter-ROLC.pdf>
3. Water Protector Legal Collective Letter to ING Bank  
<https://other98-action-agitpopcommunica.netdna-ssl.com/wp-content/uploads/sites/7/2017/03/WPLC-ING-Bank-Divestment-Letter-3.10.2017.pdf>
4. Water Protector Legal Collective Letter to Credit Suisse Bank  
<https://other98-action-agitpopcommunica.netdna-ssl.com/wp-content/uploads/sites/7/2017/06/WPLC-CS-Bank-Divestment-Letter-5-31-2017.pdf>
5. A Joint Memorial Recognizing all Twenty-Three Native American New Mexico Nations, Tribes and Pueblos' Support for the Standing Rock Sioux Tribe in Their Opposition to the Dakota Access Pipeline and for all Inherent Tribal Sovereign Rights, Water Rights and Treaty Rights of Indian Tribes in the United States  
<https://www.nmlegis.gov/Sessions/17%20Regular/memorials/senate/SJM020.html>
6. U.S. Blocks Major Pipeline After 18 Leaks and a 2 Million Gallon Spill of Drilling Mud, Washington Post, [https://www.washingtonpost.com/news/energy-environment/wp/2017/05/10/pipeline-shut-down-after-18-leaks-and-a-2-million-gallon-spill-of-drilling-materials/?utm\\_term=.c29229b92963](https://www.washingtonpost.com/news/energy-environment/wp/2017/05/10/pipeline-shut-down-after-18-leaks-and-a-2-million-gallon-spill-of-drilling-materials/?utm_term=.c29229b92963)
7. Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and the Yankton Sioux Tribe (the "Tribes") 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, <https://turtletalk.files.wordpress.com/2016/12/standing-rock-cheyenne-river-yankton-sioux-tribes-request-for-precautionary-measures-final-dec-02-2016.pdf>
8. UN Special Rapporteur on the Rights of Indigenous Peoples Victoria Corpuz "End of Mission Statement" to the United States (March 3, 2017)  
<http://unsr.vtaulicorpuz.org/site/index.php/en/statements/177-usa-end-mission>
9. LEAKED DOCUMENTS REVEAL COUNTERTERRORISM TACTICS USED AT STANDING ROCK TO "DEFEAT PIPELINE INSURGENCIES (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>



*Documents published with this story:*

- [Internal TigerSwan Situation Report 2016-09-07](#)
- [Internal TigerSwan Situation Report 2016-09-11](#)
- [Internal TigerSwan Situation Report 2016-09-12](#)
- [Internal TigerSwan Situation Report 2016-09-13](#)
- [Internal TigerSwan Situation Report 2016-09-14](#)
- [Internal TigerSwan Situation Report 2016-09-22](#)
- [Internal TigerSwan Situation Report 2016-10-16](#)
- [Internal TigerSwan Situation Report 2016-11-05](#)
- [Security Operations Overview 2016-10-16](#)
- [Security Operations Overview 2016-10-19](#)
- [Shared Daily Intelligence Update 2016-10-16](#)
- [Shared Daily Intelligence Update 2016-11-05](#)
- [Intel Group Email Thread 2016-10-12](#)

#### 10. STANDING ROCK DOCUMENTS EXPOSE INNER WORKINGS OF

“SURVEILLANCE-INDUSTRIAL COMPLEX, (June 3, 2017),

<https://theintercept.com/2017/06/03/standing-rock-documents-expose-inner-workings-of-surveillance-industrial-complex/>

*Documents published with this story:*

- [Law Enforcement Email Thread 2016-11-22](#)
- [Intel Group Email Thread 2016-11-20](#)
- [Shared Daily Intelligence Update 2016-10-20](#)
- [Shared Daily Intelligence Update 2016-10-19](#)
- [Shared Daily Intelligence Update 2016-10-18](#)
- [Internal TigerSwan Situation Report 2016-12-21](#)
- [Internal TigerSwan Situation Report 2016-11-21](#)
- [Internal TigerSwan Situation Report 2016-11-19](#)
- [Internal TigerSwan Situation Report 2016-11-18](#)
- [Internal TigerSwan Situation Report 2016-11-17](#)
- [Internal TigerSwan Situation Report 2016-11-13](#)
- [Internal TigerSwan Situation Report 2016-11-12](#)
- [Internal TigerSwan Situation Report 2016-11-11](#)
- [Internal TigerSwan Situation Report 2016-11-10](#)
- [Internal TigerSwan Situation Report 2016-11-09](#)
- [Internal TigerSwan Situation Report 2016-11-08](#)
- [Internal TigerSwan Situation Report 2016-11-07](#)
- [Internal TigerSwan Situation Report 2016-11-06](#)
- [Internal TigerSwan Situation Report 2016-10-10](#)
- [Internal TigerSwan Situation Report 2016-10-03](#)

11. AS STANDING ROCK CAMPS CLEARED OUT, TIGERSWAN EXPANDED SURVEILLANCE TO ARRAY OF PROGRESSIVE CAUSES (June 21, 2017)  
<https://theintercept.com/2017/06/21/as-standing-rock-camps-cleared-out-tigerswan-expanded-surveillance-to-array-of-progressive-causes/>

*Documents published with this story:*

- [Internal TigerSwan Situation Report 2017-02-28](#)
- [Internal TigerSwan Situation Report 2017-02-27](#)
- [Internal TigerSwan Situation Report 2017-02-26](#)
- [Internal TigerSwan Situation Report 2017-02-25](#)
- [Internal TigerSwan Situation Report 2017-02-24](#)
- [Internal TigerSwan Situation Report 2017-02-23](#)
- [Internal TigerSwan Situation Report 2017-02-22](#)
- [Internal TigerSwan Situation Report 2017-02-21](#)
- [Internal TigerSwan Situation Report 2017-02-20](#)
- [Internal TigerSwan Situation Report 2017-02-19](#)
- [Internal TigerSwan Situation Report 2017-02-18](#)
- [Internal TigerSwan Situation Report 2017-02-17](#)
- [Internal TigerSwan Situation Report 2017-02-16](#)
- [Internal TigerSwan Situation Report 2017-02-15](#)
- [Internal TigerSwan Situation Report 2017-02-14](#)
- [Internal TigerSwan Situation Report 2017-02-13](#)
- [Internal TigerSwan Situation Report 2017-02-12](#)
- [Internal TigerSwan Situation Report 2017-02-11](#)
- [Internal TigerSwan Situation Report 2017-02-10](#)
- [Internal TigerSwan Situation Report 2017-02-09](#)
- [Internal TigerSwan Situation Report 2017-02-08](#)
- [Internal TigerSwan Situation Report 2017-02-07](#)
- [Internal TigerSwan Situation Report 2017-02-05](#)
- [Internal TigerSwan Situation Report 2017-02-04](#)
- [Internal TigerSwan Situation Report 2017-01-25](#)
- [Internal TigerSwan Situation Report 2017-01-18](#)

12. DAKOTA ACCESS-STYLE POLICING MOVES TO PENNSYLVANIA'S MARINER EAST 2 PIPELINE (June 21, 2017)  
<https://theintercept.com/2017/06/21/dakota-access-style-policing-moves-to-pennsylvanias-mariner-east-2-pipeline/>

*Documents published with this story:*

- [Internal TigerSwan Situation Report 2017-02-28](#)
- [Internal TigerSwan Situation Report 2017-02-27](#)
- [Internal TigerSwan Situation Report 2017-02-26](#)
- [Internal TigerSwan Situation Report 2017-02-25](#)

- [Internal TigerSwan Situation Report 2017-02-24](#)
  - [Internal TigerSwan Situation Report 2017-02-23](#)
  - [Internal TigerSwan Situation Report 2017-02-22](#)
  - [Internal TigerSwan Situation Report 2017-02-21](#)
  - [Internal TigerSwan Situation Report 2017-02-20](#)
  - [Internal TigerSwan Situation Report 2017-02-19](#)
  - [Internal TigerSwan Situation Report 2017-02-18](#)
  - [Internal TigerSwan Situation Report 2017-02-17](#)
  - [Internal TigerSwan Situation Report 2017-02-16](#)
  - [Internal TigerSwan Situation Report 2017-02-15](#)
  - [Internal TigerSwan Situation Report 2017-02-14](#)
  - [Internal TigerSwan Situation Report 2017-02-13](#)
  - [Internal TigerSwan Situation Report 2017-02-12](#)
  - [Internal TigerSwan Situation Report 2017-02-11](#)
  - [Internal TigerSwan Situation Report 2017-02-10](#)
  - [Internal TigerSwan Situation Report 2017-02-09](#)
  - [Internal TigerSwan Situation Report 2017-02-08](#)
  - [Internal TigerSwan Situation Report 2017-02-07](#)
  - [Internal TigerSwan Situation Report 2017-02-05](#)
  - [Internal TigerSwan Situation Report 2017-02-04](#)
  - [Internal TigerSwan Situation Report 2017-01-25](#)
  - [Internal TigerSwan Situation Report 2017-01-18](#)
13. Morton County Investigation Into DAPL Private Security  
[http://www.co.morton.nd.us/vertical/Sites/%7B90CBB59C-38EA-4D41-861A-81C9DEBD6022%7D/uploads/Morton\\_Investigation\\_summary\\_of\\_security\\_licensure.pdf](http://www.co.morton.nd.us/vertical/Sites/%7B90CBB59C-38EA-4D41-861A-81C9DEBD6022%7D/uploads/Morton_Investigation_summary_of_security_licensure.pdf)
14. Water Protectors File Arguments in the 8th Circuit on Militarized Policing (May 25, 2017)  
<https://waterprotectorlegal.org/water-protectors-file-arguments-8th-circuit-militarized-policing/>
15. Water Protector Legal Collective Legal Filings
- Opening Brief *Dundon et al. v. Kirchmeier*
  - <https://waterprotectorlegal.org/water-protector-legal-collective-files-suit-excessive-force-peaceful-protesters/>
  - <https://waterprotectorlegal.org/police-attack-unarmed-standing-rock-water-protectors-freezing-temperatures-water-cannons-weapons-5-hour-standoff/>
  - <https://waterprotectorlegal.org/standing-rock-demonstrators-file-class-action-lawsuit-police-violence/>

- <https://waterprotectorlegal.org/050317-update-truthout-regarding-ongoing-legal-struggles-water-protectors-face/>

16. Fort Laramie Treaties

<https://www.ourdocuments.gov/doc.php?flash=true&doc=42&page=transcript>

## **RESOLUTION NO. 591-16**

**WHEREAS**, the Standing Rock Sioux Tribe is an unincorporated Tribe of Indians, having accepted the Indian Reorganization Act of June 18, 1934, with the exception of Section 16; and the recognized governing body of the Tribe is known as the Standing Rock Sioux Tribal Council; and

**WHEREAS**, the Standing Rock Sioux Tribal Council, pursuant to the amended Constitution of the Standing Rock Sioux Tribe, Article IV, Section 1[a], 1[b], 1[c], 1[h], and 1[j], is authorized to negotiate with Federal, State and local governments and others on behalf of the Tribe, and is further authorized to promote and protect the health, education and general welfare of the members of the Tribe and to administer such services that may contribute to the social and economic advancement of the Tribe and its members; and is further empowered to authorize and direct subordinate boards, committees or Tribal Officials to administer the affairs of the Tribe and to carry out the directives of the Tribal Council; and is empowered to manage, protect and preserve the property of the Tribe and natural resources of the Standing Rock Sioux Reservation; and

**WHEREAS**, the Standing Rock Sioux Tribe is a signatory to the Treaty of Fort Laramie of 1851 [11 Stat. 749], and the Fort Laramie Treaty of 1868 [15 Stat. 635]; and

**WHEREAS**, Article 2 of the Treaty of Fort Laramie of 1868 provides for the "undisturbed use and occupation" of the Great Sioux Reservation by the Oceti Sakowin Oyate; and

**WHEREAS**, the Standing Rock Indian Reservation was established as permanent homeland for the Hunkpapa, Yanktonai, Cuthead and Blackfoot bands of the Great Sioux Nation; and

**WHEREAS**, in the Territory of the Oceti Sakowin [Seven Council Fires], as Original and Allied Nations of Great Turtle Island, we hereby declare and affirm our fundamental understanding of Mni Wiconi [Water is Life]; and

**WHEREAS**, Standing Rock Sioux Tribe condemns the efforts to destroy our Nations has been pursued through a State-Corporate-Industrial process that has invaded our national territories;

**NOW THEREFORE BE IT RESOLVED**, the Standing Rock Sioux Tribe stands united in our steadfast opposition to the Dakota Access Pipeline and similar projects. As free, independent, and self-determining Original Nations, we pledge and commit that our national treasuries, financial holdings, bank accounts, and other financial interests will be divested and severed from any and all banks, mutual funds, securities companies, or other financial entities that invest in, or otherwise financially support any aspect of the Dakota Access Pipeline Project; and

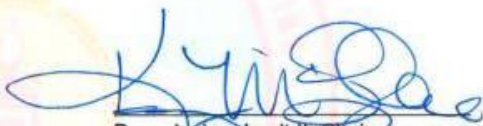
**BE IT FURTHER RESOLVED**, that the Chairman and Secretary of the Tribal Council are hereby authorized and instructed to sign this resolution for and on behalf of the Standing Rock Sioux Tribe.

### CERTIFICATION

We, the undersigned, Chairman and Secretary of the Standing Rock Sioux Tribe, hereby certify that the Tribal Council is composed of [17] members, of whom 12 constituting a quorum, were present at a meeting duly and regularly called, noticed, convened and held on the 04<sup>th</sup> day of **OCTOBER, 2016**, and that the foregoing resolution was duly adopted by the affirmative vote of 10 members, with 0 opposing, and with 2 not voting. **THE CHAIRMAN'S VOTE IS NOT REQUIRED EXCEPT IN CASE OF A TIE.**

DATED THIS 04<sup>th</sup> DAY OF OCTOBER, 2016.

ATTEST:



Dave Archambault II, Chairman  
Standing Rock Sioux Tribe



Adele M. White, Secretary  
Standing Rock Sioux Tribe

[OFFICIAL TRIBAL SEAL]

Meeting Date: 10/04/2016  
Motion No. 20