SOCIAL COST AND MATERIAL LOSS: THE DAKOTA ACCESS PIPELINE

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EXECUTIVE SUMMARY

The controversy surrounding the Dakota Access Pipeline (DAPL) showcased for a generation the consequences of failing to account for the total impacts of development on and near indigenous lands, including a failure to respect human rights.

The Standing Rock Sioux Tribe communicated their opposition to DAPL for three years and they were frustrated by the lack of meaningful consultation from Energy Transfer Partners (ETP), DAPL's parent company, and the U.S. Army Corps of Engineers (USACE). In fact, those opportunities for early engagement were ETP's, the USACE's and other investors' missed opportunities to understand the developing social risks that subsequently manifested into intense social conflict and ultimately resulted in material loss.

The types of development impacts that were not accounted for were those that fall within the "S" in ESG. While impact investors have been using environmental, social and governance (ESG) factors to assess risk for over a decade, there are few studies that quantify the social risks of development. This case study analyzes the DAPL project through the lens of social risk to further that body of research.

Specifically, this study seeks to test the proposition that the social risks that occurred attendant to DAPL had material financial impacts. The case study provides a comprehensive cost assessment using various steps to gather and to analyze data. As a starting point, the case study compare's ETP's stock price against a timeline of social pressure exerted by tribes and others who mobilized against DAPL. This step provides data regarding share price value over time and shows instances of possible influence of social pressure on share price. Second, the case study analyses the results of statistical event studies to compare ETP's actual stock price returns with the expected stock returns, which show what the stock price would likely have been if the DAPL project had been completed without controversy from social conflict. This step provides data regarding share price value as well as data regarding share price volatility. Finally, the case study gathers publicly available data on known financial losses to all entities – including financial institutions and nearby communities – to demonstrate the total costs associated with addressing social risks.

Our results revealed that ETP's stock price significantly underperformed relative to market expectations during the event study period, and that it experienced a long-term decline in value that persisted after the project was completed. **In fact, from**

August 2016 to September 2018, ETP's stock declined in value by almost 20% whereas the S&P 500 increased in value by nearly 35%. This case study does not assert that this underperformance is exclusively attributable to social pressure, as many factors influence a company's stock price at any given time. However, given the magnitude of media attention generated by the controversy as well as the quantity of financial losses reported by ETP, social pressure is a likely contributor to the losses.

The cost assessment bolsters the hypothesis. **This case study estimates that the costs incurred by ETP and other firms with ownership stake in DAPL for the entire project are not less than $7.5 billion, but could be higher depending on the terms of confidential contracts.** The banks that financed DAPL incurred an additional $4.4 billion in costs in the form of account closures, not including costs related to reputational damage. Further, at least $38 million was also incurred by taxpayers and other local stakeholders. All of these figures are estimated based on publicly reported data to demonstrate the magnitude of financial losses caused by poor social risk management.

The data points to several conclusions. **First, all entities must conduct thorough due diligence on social risks related to human rights prior to any business transaction, especially those with impacts to indigenous peoples.** In fact, a full and rigorous analysis of human rights and social risks falls immediately within an officer's fiduciary duties because of those risks' potential material impact on project success and, therefore, on the company.

Second, and relatedly, companies must create disclosures inclusive of social risks so that investors can have a clear understanding of the total risks inherent in a development project. When projects, such as DAPL, occur on and near indigenous peoples' lands and territories, these risk analyses must account for indigenous and human rights under applicable international standards; the minimum standards set by most governments as to indigenous peoples are not adequate and must be supplemented through independent and culturally responsive evaluation.

Third, social costs accumulate not only to investors but also to local communities, to states, to taxpayers, and to tribal governments. These communities often bear the financial burden when companies fail to obtain consent from indigenous peoples regarding projects that impact them. Many times, these communities are those with the fewest resources.

Finally, the social movement around DAPL did not occur in a vacuum. Rather, the #NoDAPL movement galvanized worldwide support from indigenous peoples and allies because of the resonance of consistent issues – lack of consultation, minimal adherence to government policies as to consent from indigenous peoples, and lack of due diligence by companies regarding the social and cultural impacts of development on and near indigenous territories.

In sum, the DAPL controversy pushed these issues to the forefront, but the themes underlying the wider social movement continue to simmer in indigenous communities around the world. Companies, financial institutions, and investors must recognize indigenous and human rights through inclusive and rigorous due diligence and disclosure processes, or the social costs of development will continue to result in long-term, material loss.

INTRODUCTION[2]

Impact investors have been using environmental, social, and governance (ESG) standards for several decades to evaluate a corporation's practices and impact.[3] Through environmental criteria, investors consider how a company performs as a steward of natural resources.[4] Investors use governance criteria to evaluate a company's leadership, executive pay, audits, internal controls, and shareholder rights.[5] Through social criteria, investors examine how a company manages relationships with its employees, suppliers, customers and the communities where it operates.[6] While environmental and governance standards are well-articulated within the industry, social standards remain ambiguous particularly in relation to the protection and promotion of human rights.[7] As a result, there are wide gaps in investors' ability to properly assess and quantify social risk.[8]

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[1] The First Peoples Investment Engagement Program (FPIEP) is the successor to First Peoples Worldwide. FPIEP is based at the University of Colorado and works from a foundation of indigenous values to achieve a sustainable future for all. FPIEP facilitates collaboration between indigenous peoples and investors to address the unique social and environmental impacts of corporate development in indigenous communities, while also preparing students to address the pressing social responsibility challenges facing today's businesses.

[2] The authors wish to thank the following for their generous contribution to this work: Calvert Investments/Eaton Vance, Rebecca Adamson, the Nathan Cummings Foundation, the James Walton Foundation, the Bay and Paul Foundation, and the Investors & Indigenous Peoples Working Group/Yethiya ("We all give to them/We all invest in them" -Oneida). Also, our profound thanks to Dave Archambault II for providing insight, guidance and wisdom on this case study and generally for the FPIEP. We wish to express our gratitude to Monica Rowand, Zoe Osterman, LJ Kuhlman, Daniel Condren, and Eric Dude for their research and analysis, as well as thank Sinziana Dorobantu and Sanjai Bhagat for their expertise. Thanks to University of Colorado Provost Russell Moore, Colorado Law Dean S. James Anaya, Leeds School of Business Dean Sharon F. Matusik, Jodi Gillette, Chad Harrison, and Dean DePountis. This article is dedicated to the memory of Susan White. Any errors are ours alone.

[3] Blaine Townsend, *From SRI to ESG: The Origins of Socially Responsible and Sustainable Investment* at 3, BAILARD WEALTH MGMT. (June 2017), https://www.bailard.com/wp-content/uploads/2017/06/Socially-Responsible-Investing-History-Bailard-White-Paper-FNL.pdf?pdf=SRI-Investing-History-White-Paper.

[4] George Serafeim, *Investment Stewardship for Positive Societal Impact* at 2, CALVERT (Jan. 2018), https://www.calvert.com/includes/loadDocument.php?fn=27938.pdf&dt=fundpdfs%27.

[5] *Id.* at 2.

[6] *Id.*

[7] Rebecca Adamson, *Indigenous Rights: A Case Study in Bottom Up Social Metrics*, GREENMONEY (August 2015), https://greenmoneyjournal.com/rights/; *see also* Casey O'Connor & Sarah Labowtiz, Putting the "S" in ESG: Measuring Human Rights Performance for Investors at 8,14, 28, NYU STERN CTR. FOR BUS. AND HUMAN RIGHTS (March 2017).

[8] O'Connor *supra* note 7 at 8,14-15.

This case study examines the numerous impacts attendant to the Dakota Access Pipeline (DAPL) project to highlight the costs that companies, financial institutions and investors linked to the project faced by not respecting the human rights of indigenous peoples. This study serves as a basis for the assertion that social risk resulting from the absence of adequate human rights protections can have material impacts. Therefore, investors must conduct due diligence on companies' human rights policies and practices as part of a thorough risk assessment prior to making investment decisions. To ensure a complete and accurate due diligence process, investors should consider the extent to which companies operationalize both binding and non-binding international human rights instruments. In particular, a critical component of investors' due diligence is whether companies implement provisions in the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP).

This study further shows that the materiality of social risks necessitates that companies disclose information to investors about their human rights policies and practices, as well as disclose the degree of local opposition to their business activities. This disclosure should be timely and subject to the same auditing and accuracy standards as any other risks that investors expect to find in securities filings.

This case study first provides background information on DAPL and the international human rights standards relevant in this case. Section II details the cost assessment approach for the case study including the analysis of ETP's stock price as compared to social events linked the DAPL, and the event study methodology as applied to the "S" in ESG and, more specifically, to DAPL. Section III provides an analysis of the data to show how social risks exerted cumulative pressure on ETP's stock price which led to its long-term decline. In Section IV, the case study provides estimates of costs incurred to banks and Section V estimates the costs of social pressure incurred by the firms with an ownership stake in DAPL. Section VI is an estimate of the costs incurred by Standing Rock Sioux communities, other local communities, and taxpayers. The case study aims to 1) build on existing research that demonstrates how social factors influence the bottom lines of corporations, most notably First Peoples Worldwide's Indigenous Rights Risk Report;[9] 2) inform managerial decisions on social risks, especially within the extractives and financial industries; and 3) offer starting points for further research on social risks.

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[9] *See* REBECCA ADAMSON & NICK PELOSI, FIRST PEOPLES WORLDWIDE, INDIGENOUS RIGHTS RISK REPORT (2014), https://mahb.stanford.edu/wp-content/uploads/2014/12/Indigenous-Rights-Risk-Report.pdf [https://perma.cc/K4ZQ-WNC6].

I. BACKGROUND

A. BACKGROUND ON DAPL

Few events did more to bring the social costs of development to investors' attention than the controversy surrounding DAPL, a 1,172 mile underground pipeline connecting North Dakota's Bakken and Three Forks production areas to storage facilities near Pakota, Illinois.[10] DAPL is operated by Energy Transfer Partners, L.P. (NYSE:ETP), which is a master limited partnership with one of the most diverse portfolio of energy assets in the U.S., including more than 71,000 miles of pipelines.[11] ETP owns 38.25% of DAPL and the remaining stakes are held by Phillips 66 Partners (25%) and MarEn Bakken Company LLC (36.75%).[12] MarEn is owned by MPLX LP (Marathon Petroleum) and Enbridge Energy Partners L.P.[13] The financing and organizational structure of DAPL is covered in more depth in Section I.B.

DAPL faced strong opposition from local community stakeholders before, during, and after construction.[14] Among the most vocal opponents were the Indian tribes whose lands cover portions of the pipeline route.[15] While the pipeline does not cross any existing reservation boundaries, it does cross many tribes' ancestral lands, as well as land that was reserved to the Sioux Nation in treaties and subsequently retaken by force.[16] On September 30, 2014, the Standing Rock Sioux Tribe (g) met with ETP and shared their concerns about the pipeline's impact on the Tribe's water supply and

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[10] *See* David Hasemyer, *Oil investors call for Human Rights Risk Report after Standing Rock*, INSIDE CLIMATE NEWS (Feb. 6, 2018), https://insideclimatenews.org/news/06022018/marathon-oil-shareholder-resolution-human-rights-dakota-access-environment-social-risk-disclosure; Joslyn Chittilapally, *Defund DAPL, Why investors are pulling millions out of the Dakota Access Pipeline*, LIFEGATE (Mar. 9, 2017), https://www.lifegate.com/people/news/dakota-access-pipeline-divestment.

[11] *Corporate Overview*, ENERGY TRANSFER, https://www.energytransfer.com/company_overview.aspx (last visited Sept. 6, 2018).

[12] *Bakken*, ENERGY TRANSFER, https://www.energytransfer.com/ops_bakken.aspx (last visited Sept. 6, 2018).

[13] *Id.*

[14] Rebecca Hersher, *Key Moments In The Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 PM), https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight.

[15] *Id.*

[16] *See* Jenny Schlecht, *1851 treaty resonates in DAPL discussion*, BISMARCK TRIB. (Nov. 10, 2016), https://bismarcktribune.com/news/state-and-regional/treaty-resonates-in-dapl-discussion/article_e9bd6a47-e14e-507e-bb0a-8ee29eb30c9e.html.

sacred sites.[17] The Tribe, which sits directly south of the pipeline route, was particularly concerned about the portion underneath Lake Oahe as the Missouri River is the Tribe's primary source of water.[18] For the next three years, the Tribe continued to communicate their opposition to the pipeline and continued to be frustrated by the lack of meaningful consultation from ETP or the U.S. Army Corps of Engineers (USACE).[19]

Additional environmental justice concerns were raised when the pipeline was rerouted in September 2014.[20] One of the proposed routes went ten miles north of Bismarck, the capital of North Dakota, which has a population that is over 90% white.[21] In the initial approval phase, USACE eliminated this route for several reasons including its proximity to wellhead source water protection areas that created a threat to Bismarck's water supply.[22] USACE did not show similar concern for the Tribe's water source when they approved the route that went directly under Lake Oahe on the Missouri River, which is the Standing Rock Sioux Tribe's main source of water for drinking, for irrigation, and for business uses.[23] See map.[24]

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[17] Standing Rock Sioux Tribe, *Standing Rock Sioux Tribe Council Meeting with DAPL Representatives*, Sept. 30, 2014, FACEBOOK (Nov. 17, 2016), https://www.facebook.com/402298239798452/videos/1437472629614336/.

[18] Erin Brodwin, *People at the front lines of the battle over the Dakota Access Pipeline are calling it a 'death sentence*,*'* BUS. INSIDER (Nov. 1, 2016, 9:11 AM), https://www.businessinsider.com/north-dakota-access-pipeline-protest-drinking-water-2016-10.

[19] Hersher, *supra* note 14.

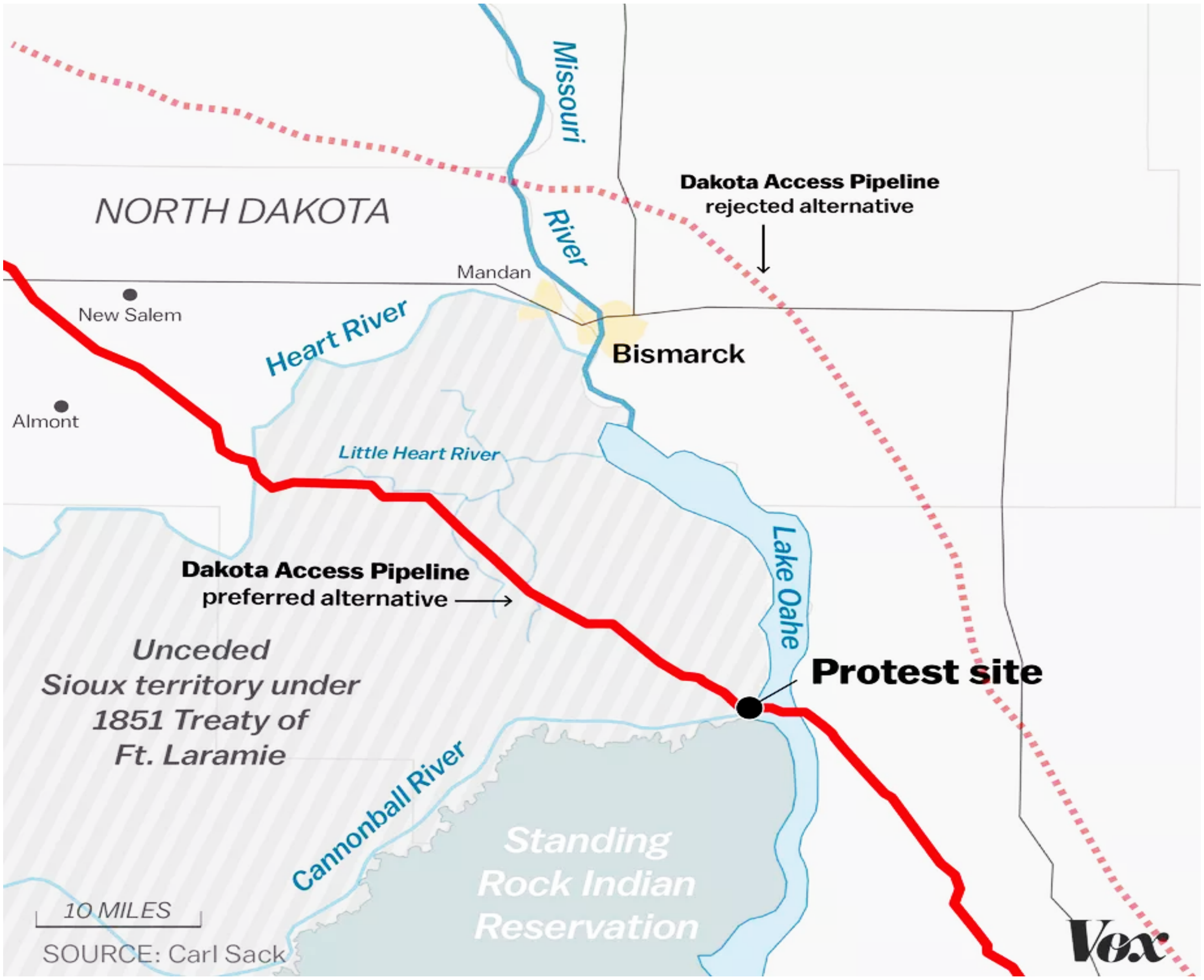
[20] Russell Jaffe, *Dakota Access Pipeline Latest Case of Environmental Racism*, OBERLIN REVIEW (Dec. 2, 2016), https://oberlinreview.org/12010/opinions/dakota-access-pipeline-latest-case-of-environmental-racism/; Amy Dalrymple, *Pipeline route plan first called for crossing north of Bismarck,* BISMARCK TRIB. (Aug. 18, 2016), https://bismarcktribune.com/news/state-and-regional/pipeline-route-plan-first-called-for-crossing-north-of-bismarck/article_64d053e4-8a1a-5198-a1dd-498d386c933c.html.

[21] Dakota Access, *Draft Environmental Assessment: Dakota Access Pipeline Project Crossings of Flowage Easements and Federal Lands* 6 (Nov. 2015) [hereinafter *Draft Environmental Assessment*]. *Quick Facts: Bismarck City, North Dakota*, U.S. CENSUS BUREAU (July 1, 2017).

[22] *Id.*; *See also* Dalrymple, *supra* note 20.

[23] Marjorie Cohn, *The Human Right To Water At Standing Rock*, HUFFINGTON POST (Nov. 5, 2016), https://www.huffingtonpost.com/entry/the-human-right-to-water-at-standing-rock_us_581ccad1e4b0334571e09ac3.; *See also* Standing Rock Sioux Tribe, *Impacts of an Oil Spill from the Dakota Access Pipeline on the Standing Rock Sioux Tribe* at 75-82 (Feb. 21, 2018), https://www.standingrock.org/sites/default/files/uploads/Standing Rock Sioux Tribe_impacts_of_an_oil_spill_2.21.2018.pdf [hereinafter *Impacts of an Oil Spill*].

[24] Map by Carl Sack, Javier Zarracina, Brad Plumer, *The Battle over the Dakota Access Pipeline, explained*, VOX (Nov. 29, 2016, 5:47 PM), https://www.vox.com/2016/9/9/12862958/dakota-access-pipeline-fight.



On July 27, 2016, the Standing Rock Sioux Tribe filed a lawsuit accusing the USACE of violating federal laws—including the National Environmental Policy Act and the National Historic Preservation Act—when it authorized DAPL.[25] On September 8, 2016 the Cheyenne River Sioux Tribe and the Yankton Sioux Tribe also sued to stop the project.[26] Additionally, tribal youth started an opposition camp at the entrance to the

[25] Motion for Partial Summary Judgment Memorandum Opinion at 11, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-01534-JEB (D.D.C. June 14, 2017) [hereinafter Partial Summary Judgment Opinion].

[26] Complaint for Declaratory and Injunctive Relief, Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-1796 (D.D.C. Sept. 8, 2016), ECF No. 1. Intervenor-Plaintiff Cheyenne River Sioux Tribe's First Amended Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 37.

Standing Rock Sioux Tribe's reservation, near the Lake Oahe construction site.[27] The camp grew enormously over 10 months and drew international attention, attracting as many as 15,000 people at its peak.[28] DAPL also faced opposition from non-Native communities along its route.[29]

On September 9, 2016, in response to issues raised by the tribes in litigation, three federal agencies – the Department of Justice, the Department of the Army and the Department of the Interior – wrote a joint statement announcing that the Army would not authorize further construction on USACE land bordering or underneath Lake Oahe while it reviewed the previous federal authorizations regarding that site.[30] The joint statement asked ETP to voluntarily pause construction activity within 20 miles of Lake Oahe.[31] Following that review, on December 4, 2016, the USACE denied the easement for the portion of DAPL that crossed underneath Lake Oahe and announced plans to prepare an Environmental Impact Statement for alternative routes.[32] This decision was ultimately reversed by an executive order signed during the first days of the Trump administration, but ETP's construction schedule was significantly delayed nonetheless.[33]

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[27] Saul Elbein, *The Youth Group That Launched a Movement at Standing Rock*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/magazine/the-youth-group-that-launched-a-movement-at-standing-rock.html.

[28] Natasha Lennard, *Still Fighting at Standing Rock*, ESQUIRE (Sept. 19, 2017), https://www.esquire.com/news-politics/a12181154/still-fighting-at-standing-rock/.

[29] *See* Gregor Aisch & K.K. Rebecca Lai, *The Conflict along 1,172 Miles of the Dakota Access Pipeline,* N.Y. TIMES (updated Mar. 20, 2017), https://www.nytimes.com/interactive/2016/11/23/us/dakota-access-pipeline-protest-map.html.

[30] Press Release No. 16-1034, U.S. Dep't of Justice, Office of Pub. Affairs, Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016), https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing [https://perma.cc/PTW4-VCZY].

[31] *Id*.

[32] Memorandum from Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) to Commander, U.S. Army Corps of Eng'rs, No. 1:16-cv-01534-JEB (D.D.C. Dec. 4, 2016), ECF No. 65-1.

[33] Athena Jones, Jeremy Diamond & Gregory Krieg, *Trump advances controversial oil pipelines with executive action*, CNN (Jan. 24, 2017, 5:57 PM), https://www.cnn.com/2017/01/24/politics/trump-keystone-xl-dakota-access-pipelines-executive-actions/index.html. Julia Carrie Wong & Sam Levin, Dakota pipeline operator goes to court after government delays construction, GUARDIAN (Nov. 15, 2016, 4:52 PM), https://www.theguardian.com/us-news/2016/nov/15/dakota-access-oil-pipeline-construction-delay-court.

The camp disbanded in February of 2017,[34] but not before galvanizing worldwide support for indigenous rights.[35] Calls for divestment from the banks that financed the pipeline project garnered worldwide attention and several brands were negatively linked to the failings of the project.[36] As a result, many investors and financial institutions are now seeking information to better understand and mitigate the financial and reputational risks that rippled out from the wider #NoDAPL movement.[37]

B. FINANCING STRUCTURE

The ownership and financing structure behind the DAPL project has important implications to understand how the social unrest generated by opposition to DAPL was able to have such an expansive reach.

ETP financed construction of DAPL as master limited partnership (MLP).[38] MLPs combine the tax advantages of limited partnerships with the easy access to capital provided by publicly traded securities.[39] MLPs have two types of partners: general partners (which manage the company's operations) and limited partners (which provide capital by purchasing units).[40] MLP units are similar to stocks in that they are bought and sold on a public exchange, and priced according to investors' collective perception of the company's value.[41] For the purpose of this paper, the terms stock price and unit price are used interchangeably.

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[34] *Id.*
[35] John Hult, *How did Dakota Access become world's largest pipeline protest?*, ARGUS LEADER (updated Dec. 1, 2016, 10:36 AM), https://www.argusleader.com/story/news/2016/11/19/how-did-dakota-access-become-worlds-largest-pipeline-protest/94036392/.
[36] Chittilappally, *supra* note 10.
[37] The water protectors and allies that participated in the social movement in opposition to DAPL used hashtags such as #NoDAPL, #StandwithStanding Rock, and #WaterisLife. *See* Sarah Steimer, *#NoDAPL Movement brings Native Voices to the forefront on Social* Media, AM. MKTG. ASS'N (Apr. 3, 2017), https://www.ama.org/publications/MarketingNews/Pages/nodapl-movement-brings-native-voices-to-forefront-on-social-media.aspx.
[38] *Corporate Overview*, ENERGY TRANSFER, https://www.energytransfer.com/company_overview.aspxast (last visited on Sept. 16, 2018).
[39] Molly F. Sherlock & Mark P. Keightley, CONG. RESEARCH SERV., R41893, MASTER LIMITED PARTNERSHIPS: A POLICY OPTION FOR THE RENEWABLE ENERGY INDUSTRY 1 (2011).
[40] *Id.*
[41] *Id.*

ETP financed the construction of DAPL by aligning a consortium of 17 banks that provided a $2.5 billion loan.[42] Additional banks have had financing relationships with ETP through the provision of revolving debt and general corporate loans.[43] As lenders, these banks would not be impacted by the behavior of ETP's stock price. The financial costs incurred to banks is discussed in more depth in Part IV. It is reasonable to suggest that the degree of public criticism directed towards banks—relative to the size of the transaction—was greater than expected and was underestimated during the banks' own review of the project's viability.[44]

C. GAPS WITHIN SOCIAL RISKS AND HUMAN RIGHTS DUE DILIGENCE

In fact, conducting due diligence focused specifically on social risks is a relatively new exercise, but there are existing human rights instruments available to anchor and to guide the process, many of which are becoming operationalized via the wider ESG investing movement.[45] The U.N. Guiding Principles on Business and Human Rights (Guiding Principles) urge businesses and states to carry out human rights due diligence to identify, prevent, mitigate and account for how they address adverse human rights impacts in development projects.[46] The Guiding Principles list the core internationally recognized human rights instruments - the U.N. Declaration on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the eight International Labour Organization (ILO) core conventions - as the primary benchmarks for assessing the human rights impacts of business enterprises.[47] The Guiding Principles also state that, "depending on circumstances, business enterprises may need to consider additional

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[42] *Dakota Access Pipeline*, BANKTRACK, https://www.banktrack.org/project/dakota_access_pipeline#popover=financiers (last visited Sept. 7, 2018).
[43] Alison Kirsch, *Energy Transfer: Which banks continue to support the company behind DAPL?*, RAN (Apr. 6, 2017), https://www.ran.org/the-understory/energy_transfer_refinance/.
[44] Mikael Homanen, *Depositors Disciplining Banks: The Impact of Scandals*, BANKTRACK (MAY 9, 2018), https://www.banktrack.org/blog/depositors_disciplining_banks_the_impact_of_scandals.
[45] Mark B. Taylor, Luc Zandvliet & Mitra Forouhar, *Due Diligence for Human Rights: A Risk-Based Approach*, Corporate Social Responsibility Initiative Working Paper No. 53, Harvard University (Oct. 2009).
[46] U.N. Guiding Principles on Business and Human Rights, Office of the U.N. High Commissioner for Human Rights, HR PUB 11.04 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter Guiding Principles on Business and Human Rights].
[47] *Id.*

standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention."[48]

Indigenous peoples are among the groups that require particular attention, as they have explicit human rights protections beyond those articulated in those core human rights instruments.[49] The UNDRIP and ILO 169 Concerning Indigenous and Tribal Peoples contain provisions pertaining to business activities on or near indigenous land.[50] Most notably, the concept of free, prior, and informed consent (FPIC) is articulated multiple times. For example, Article 32 of the UNDRIP asserts that "[S]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[51]

The Guiding Principles also note that while states have primary responsibility to protect human rights under international law, the responsibility of businesses exists independently of states' abilities or willingness to fulfill their human rights obligation.[52] In the case of DAPL, the lawsuit filed by impacted tribes asserted that the minimum domestic standards for consultation were not fulfilled.[53] The U.N. Special Rapporteur on the Rights of indigenous peoples also highlighted inconsistencies between international human rights standards and the U.S. government's approval of DAPL without tribal consent.[54] Unfortunately, the companies and financiers behind DAPL presumed that compliance with national laws was sufficient for the project to move forward on Sioux territory rather than abiding

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[48] *Id.*
[49] Guiding Principles on Business and Human Rights, *supra* note 46.
[50] G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); Int'l Labour Org. [ILO], Indigenous and Tribal Peoples Convention No. 169 (June 27, 1989) [hereinafter ILO 169].
[51] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).
[52] Guiding Principles on Business and Human Rights, *supra* note 46.
[53] Leigh Paterson, *Tribal Consultation at Heart of Pipeline Fight,* INSIDE ENERGY (Sept. 23, 2016), http://insideenergy.org/2016/09/23/tribal-consultation-at-heart-of-pipeline-fight/.
[54] Press Release, U.N. Human Rights Office of the High Comm'r, End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to the United States of America (Mar. 3, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21274&LangID=E [https://perma.cc/NN42-SPHW].

by international human rights standards.[55] Their lack of attention ultimately resulted in material loss.

While the controversy surrounding DAPL was unique due to its high media profile, it was not the first corporate project to experience significant losses due to the absence of community consent. John Ruggie, who led the development of the Guiding Principles, told *Business Ethics* that "for a world-class mining operation…there's a cost somewhere between $20 million to $30 million a week for operational disruptions by communities" and that the time it takes to bring oil and gas projects online has "doubled over the course of the previous decade, creating substantial cost inflation."[56] Additionally, "analysis by Environmental Resources Management of delays associated with a sample of 190 of the world's largest oil and gas projects (as ranked by Goldman Sachs) found that 73% of project delays were due to 'above-ground' or non-technical risk, including stakeholder resistance."[57] These costs are incurred in part by investors in the form of reduced profits, volatile stock prices, and reputational damage for being financially linked to controversial activities.[58]

Frameworks and tools to help investors mitigate exposure to these types of risks have developed coincident with the advent of ESG investing. As a prominent example, the Equator Principles (EPs) is an environmental and social risk management framework used by 94 financial institutions in 37 countries.[59] Principle 5 of the EPs states, in part,

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[55] Stephen Young, *The Sioux's Suits: Global Law and the Dakota Access Pipeline*, 6 AM. INDIAN L. J. 174, 187 (2017). *See also Petition from Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Yankton Sioux Tribe to Emilio Álvarez Icaza Longoria, Executive Secretary, Inter-American Commission on Human Rights, Re: Request for Precautionary Measures Pursuant to Article 25 of the IACHR Rules of Procedure Concerning Serious and Urgent Risks of Irreparable Harm Arising Out of Construction of the Dakota Access Pipeline (Dec. 2, 2016),* https://www.dropbox.com/s/rjgt7xfprm97uza/Standing%20Rock%2C%20Cheyenne%20River%20%26%20Yankton%20Sioux%20Tribes%20-%20Request%20for%20Precautionary%20Measures%20-%20FINAL%20Dec%2002%2C%202016%20-%20with%20exhibits.pdf?dl=0

[56] Michael Connor, *Business and Human Rights: Interview with John Ruggie*, BUS. ETHICS (Oct. 30, 2011), http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie; *See also* Adamson, *supra* note 7; O'Connor *supra* note 7 at 8,14, 28.

[57] Michael Hackenbruch and Jessica Davis Pluess, *Commercial Value From Sustainable Local Benefits in the Extractive Industries: Local Content* at 2, BUS. FOR SOCIAL RESPONSIBILITY (Mar. 2011), http://www.bsr.org/reports/BSR_LocalContent_March2011.pdf.

[58] *See* Dr. Dinah A. Koehler & Eric J. Hespenheide, *Finding the value in environmental, social, and governance performance*, DELOITTE (Jan. 31, 2013), https://www2.deloitte.com/insights/us/en/deloitte-review/issue-12/finding-the-value-in-environmental-social-and-governance-performance.html.

[59] *EP Association Members & Reporting*, EQUATOR PRINCIPLES, http://equator-principles.com/members-reporting/ (last visited Sept. 6, 2018).

that "[p]rojects with adverse impacts on indigenous people will require their Free, Prior and Informed Consent (FPIC)."[60] Banks can become signatories to the EPs which signals that their brand as a financial entity privileges responsible development in indigenous communities, among others.[61] However, the fact that signatory banks greenlighted DAPL despite staunch opposition from the Standing Rock Sioux Tribe and other communities along its route indicates the continuing need for awareness and education regarding the social impacts of investment and development occurring on indigenous peoples' lands.[62]

A growing number of companies are starting to report ESG information in response to investor pressures or regulatory changes.[63] However, corporate reporting on ESG issues is an evolving practice, and disclosures often lack sufficient information on issues that fall under the "S" in ESG, such as community relations and human rights.[64] When companies do not report sufficient information on human rights, investors need to conduct their own human rights due diligence prior to making investment decisions.[65] Human rights due diligence should be based on the Guiding Principles and the core internally recognized human rights instruments.[66] When indigenous peoples are impacted, human rights due diligence should also be based on the UNDRIP and should include questions to determine whether the company has obtained FPIC for its business operations. Doing so requires nuanced understanding of FPIC, and the complex dynamics behind corporate and community decision-making. *To learn more about how investors can better communicate with companies about FPIC, see the First Peoples Investor Engagement Project's FPIC Due Diligence Questionnaire.*

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[60] EQUATOR PRINCIPLES, http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf (last visited Sept. 6, 2019).
[61] *Id.*
[62] *Ten Equator banks demand decisive action on Indigenous peoples following DAPL debacle*, BANKTRACK (June 16, 2017), https://www.banktrack.org/news/ten_equator_banks_demand_decisive_action_on_indigenous_peoples_following_dapl_debacle.
[63] Christopher P. Skroupa, *ESG Reporting Reshapes Global Markets*, FORBES (Apr. 24, 2017, 4:24 PM), https://www.forbes.com/sites/christopherskroupa/2017/04/24/esg-reporting-reshapes-global-markets/#399c51845d5e.
[64] O'Connor *supra* note 7 at 8,14-15.
[65] *See* John Gerard Ruggie & John F. Sherman, III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT'L LAW 921, 924 (2017).
[66] *Id.* at 925-26.

For additional guidance on human rights due diligence, investors can turn to the Sustainable Development Goals (SDGs), a set of 17 Global Goals measured by progress against 169 targets covering a broad range of social issues.[67] The vast majority of these targets—which range from poverty eradication to food security to climate change—are relevant to indigenous peoples, and some mention indigenous peoples specifically in their benchmarks.[68] In order for these targets to be realized, indigenous peoples must be able to exercise control over their communities, lands, and development goals, which can be achieved through the implementation of their rights enshrined in the aforementioned standards.[69]

All of these instruments and standards are useful to qualitatively express the needs of local indigenous communities, as well as the obligations and responsibilities of states, financial institutions, and companies. They provide the backdrop required to create a quantitative assessment of the operationalization of those responsibilities, which is necessary so that investors have a comprehensive understanding of the risks and rewards of operating on and near indigenous lands.

II. CASE STUDY APPROACH

This case study provides a comprehensive cost assessment attendant to social risks implicated in the DAPL controversy, and uses several methods to gather and analyze data to that end. The first step was to compile the timeline, accessible via the link in Appendix A. The timeline starts when ETP announced plans to build DAPL on June 25, 2014 and goes through July 25, 2018 when ETP's lawsuit against Bank Track was dismissed.[70] The timeline comprises more than 80 points including, but not limited to, legal and regulatory decisions made in response to the Standing Rock Sioux Tribe's efforts to block construction; high-profile media coverage of incidents at the camp; conflicts with non-Native landowners and activist groups not affiliated with the Standing Rock Sioux Tribe; and public statements from ETP. For each date on the timeline, we recorded ETP's stock price on that date, as well as the corresponding

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[67] G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Oct. 21, 2015).
[68] *Id.*
[69] *Indigenous Peoples and the 2030 Agenda*, U.N. Permanent Forum on Indigenous Issues (2016) https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2016/08/Indigenous-Peoples-and-the-2030-Agenda.pdf.
[70] Blake Nicholson, *Greenpeace wants Dakota Access racketeering suit dismissed,* THE ASSOCIATED PRESS (SEPT 5, 2018), https://www.apnews.com/f80ac012259d4c6e968c611906c9408f.

value for two stock indices that serve as benchmarks: the S&P 500 Index, and the S&P North American Natural Resources Sector Index.

Second, we ran event studies to determine the impact of discrete events on ETP's stock price. In short, we tested seven events on the timeline that coincided with noticeable variance between the change in ETP's stock price and the change in the value of the benchmark indices. We ran both single factor and two-factor tests, using the benchmark indices listed above as well as the Russell FTSE4Good Global 100 Index and the Alerian MLP Infrastructure Index.[71]

Finally, as detailed separately in Parts IV, V and VI, we gathered data on the raw costs to all entities affected by the wider social movement surrounding the pipeline – ETP and firms with an ownership stake in DAPL, financial entities, the Standing Rock Sioux Tribe, water protectors, local taxpayers and local communities.

Our proposition at the outset of this project was to see whether the social events and the lack of human rights due diligence that occurred as to this project had a material impact on ETP and associated entities. The findings bear out this proposition to show that the lack of social risk analysis did translate into long-term financial losses.

[71] ETP is not listed as a constituent of the S&P North American Natural Resources Sector Index, nor for the S&P 500. It is not listed as a top ten constituent for the Russell FTSE4Good Global 100 Index. ETP is historically and currently one of the top ten constituents of the Alerian MLP Infrastructure Index.

A. EVENT STUDY METHODOLOGY

In part, this case study employs an event study methodology to more precisely test the proposition that social risks have material impacts on a company's stock price. As a statistical methodology, an event study measures the movement of stock prices in response to specific events.[72] The methodology is useful because it can differentiate between price fluctuations that reflect the typical range of variation due to usual trading, and price fluctuations that are highly unusual and have no other cause than the studied event.[73] Thus, it is used to quantitatively value the impact of a particular event under study.[74]

There are four steps to conducting an event study: 1) defining the time period associated with the event (also called the event window); 2) measuring the stock's returns during that period; 3) estimating the expected returns during the window assuming the event had not taken place; and, 4) computing the abnormal return and measuring its statistical and economic significance.[75] Abnormal return is the difference between the actual stock returns and what would have happened had there not been an event, the expected return, and is found by subtracting the expected returns from the actual returns.[76] Statistical significance is tested to ensure the reliability of the alternative hypothesis (that the event had an impact on firm value) against the null hypothesis (that the event had no impact on firm value).[77] Economic significance is whether the numbers are economically meaningful in that they provide pertinent information that produces an economic effect.[78]

Because of their rigor, event studies provide a standard method for determining value from which to anchor policy and legal decisions.[79] Corporate finance expert Sanjai Bhagat has noted the natural fit between the event study methodology and the corporate and securities fields of law: "[T]he benchmark for evaluating the benefit of corporate and securities laws is whether they improve investor welfare, and this can

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72 Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part I – Technique and Corporate Litigation*, 4 AM. L. & ECON. REV. 141, 142 (2002) [hereinafter Bhagat, *Part I*].
73 Jill E. Fisch, Jonah B. Gelbach & Jonathan Klick, *The Logic and Limits of Event Studies in Securities Fraud Litigation*, 96 TEX L. REV. 553, 555 (2018).
74 Bhagat, *Part I*, *supra* note 72 at 142-43.
75 *Id*.
76 *Id*. at 146.
77 *Id*. at 148.
78 *See id*.
79 *Id*. at 141.

be ascertained by what event studies measure, whether stock prices have been positively affected."[80]

The event study methodology is based upon the efficient market hypothesis, which states that publicly available information is immediately incorporated into the price of a security.[81] Similarly, both landmark securities cases from the U.S. Supreme Court are based on the assumption of an efficient market.[82] In *Basic v. Levinson,* the Court endorsed the presumption that trading occurs in a well-defined and impersonal market, that the market reflects all available public information and that, for those reasons, investors can rely on integrity of the stock price.[83] In securities litigation, lawyers must show whether the stock price was impacted by an alleged misrepresentation or omission of fact in order to proceed with a class of plaintiffs.[84] The U.S. Supreme Court endorsed event study results for use as evidence to determine whether share price was impacted by information in *Halliburton Co. v. Erica P. John Fund, Inc*.[85]

This case study uses the same event study methodology but to reach different conclusions. In fact, the use of event study at the class certification stage in a situation like DAPL would likely not be successful as the information regarding social risks was undoubtedly available to the market via national media coverage and would thus be incorporated into stock price because of the efficient market presumption.

The event study methodology has been applied to a broad range of events including takeovers, equity offerings, change in state of incorporation, adoption of antitakeover provisions, filing of lawsuits against corporations, deaths of corporate executives, and product recalls.[86] For these reasons, it will be applied to measure events that occurred as part of the social conflict that occurred in opposition to DAPL.

B. EVENT STUDY AND THE "S" IN ESG

[80] *Id*. at 142.
[81] *Id*. at 143.
[82] *See* Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part II – Empirical Studies of Corporate Law*, 4 AM. L. & ECON. REV. 380, 398 (2002) [hereinafter Bhagat, *Part II*].
[83] Basic Inc. v. Levinson, 485 U.S. 224, 225 (1988).
[84] *See generally* Bhagat, *Part II*, supra note 82.
[85] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2415 (2014) (*Halliburton II)*.
[86] Bhagat, *Part I*, supra note 72, at 144.

This case study builds on an emerging field of research that applies event study analysis to ESG events.[87] Existing papers have used event study to assess the financial performance of firms that divested from South Africa during the apartheid era.[88] More recently, event study was applied to a sample of 52,000 media-reported interactions between 19 gold mining companies and various stakeholders over a timespan of 18 years.[89]

Event study analysis offers a valuable tool to help investors better understand how ESG events impact stock prices and therefore deduce which types of risks warrant disclosure.[90] With the advent of ESG investing, investors are increasingly seeking better reporting on ESG information from companies, but there is still debate around which ESG information is material.[91] The U.S. Supreme Court defines material information as information that has a substantial likelihood to be "viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" but there is limited regulatory guidance on how this definition applies within the context of ESG specifically.[92] In April 2016, the Securities and Exchange Commission sought public comments on the possibility of issuing guidance on ESG reporting, but has not taken further action.[93] In the European Union, legislation has been passed requiring ESG reporting from European companies.[94] Additionally,

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[87] *See* Koehler & Hespenheide, *supra* note 58.

[88] Siew Hong Teoh, Ivo Welch & C. Paul Wazzan, *The Effect of Socially Activist Investment Policies on the Financial Markets: Evidence from the South African Boycott*, 72 J. BUS. 35 (Jan. 1999).

[89] Witold J. Henisz, Sinziana Dorobantu & Lite Nartey, *Spinning Gold: The Financial Returns to External Stakeholder Engagement*, 35 STRATEGIC MGMT. J. 1727 (2014).

[90] Deloitte, *Using ESG Disclosures as a Risk Management Tool*, WALL ST. J. (Oct. 22, 2013, 12:01 AM), https://deloitte.wsj.com/riskandcompliance/2013/10/22/using-esg-disclosures-as-a-risk-management-tool/.

[91] *See* generally Jody Grewal, George Serafeim & Aaron Yoon, *Shareholder Activism on Sustainability Issues,* Harvard Bus. School Working Paper, No. 17-003 (July 2016).

[92] Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *Disconnect 1:* An overview of the PRI's observations on the *investor-CRA disconnect related to materiality of ESG risk*, UNPRI (June 11, 2018), https://www.unpri.org/credit-ratings/investor-cra-disconnect-1-materiality-of-esg-risk/3253.article.

[93] Hank Boerner, *SEC Proposes Important Amendments to Corporate Disclosure & Reporting - Changes are in the Wind - But Corporate ESG Disclosure is not addressed in the SEC Proposals…*, GOVERNANCE & ACCOUNTABILITY INST.'S SUSTAINABILITY UPDATE (Oct. 12, 2017), https://ga-institute.com/Sustainability-Update/2017/10/12/sec-proposes-important-amendments-to-corporate-disclosure-reporting-changes-are-in-the-wind-but-corporate-esg-disclosure-is-not-addressed-in-the-sec-proposals/.

[94] Directive 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs), 2016 OJ (L 354/37).

voluntary ESG reporting has been adopted by many companies.[95] However, these voluntary reports are inconsistent across companies and not subject to the same accuracy and audibility standards as financial reporting.

Consequently, social risks are often unknown to investors until they become social costs. In this case, ETP's reporting concerning the project was silent or exclusively positive until the publication of its third quarterly report on November 9, 2016, in which the company acknowledged that "protests and legal actions against DAPL have caused construction delays and may further delay the completion of the pipeline project."[96] By this time, social pressure had been mounting for months and there is evidence that the company knew of these risks long before they were disclosed to investors. The event study methodology is used herein to quantify the material impact of ESG events to understand whether or where proper due diligence and disclosure might have allowed investors to better understand the social risks associated with DAPL.

There are several key differences between the types of events to which event study has traditionally been applied and social events, as evidenced in application to the DAPL controversy. First, event studies are based on information made available to investors, which tends to appear primarily in the financial media. News about corporate mergers or the release of new products seldom makes mainstream media headlines, and when it does, the attention is unlikely to last for more than a few days. By contrast, DAPL and similar social movements remained in the media spotlight for months and coverage appeared in mainstream media, financial media, alternative media, and social media.[97]

Furthermore, in the case of DAPL, nearly all of this media attention was relevant. In some cases, the integrity of event studies can be jeopardized by market noise—for example, speculative information about the release of new products that may or may not be true. By contrast, most media attention in this case focused on efforts by the Standing Rock Sioux Tribe and others to challenge the company's ability to complete the project in a timely manner, and thus had an unquestionable impact on the company and, thereby, relevance to investors.

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[95] Linda-Eling Lee & Matt Moscardi, *2018 ESG Trends to Watch* at 18, MSCI (Jan. 2018).
[96] Energy Transfer Partners, L.P., Quarterly Report (Form 10-Q), at 55 (Nov. 9, 2016).
[97] Connie Moon Sehat, *Fighting For, Not Fighting Against: Media Coverage and the Dakota Access Pipeline*, NEWSFRAME (Mar. 1, 2017, 8:51 PM), https://newsframes.globalvoices.org/2017/03/01/fighting-for-not-fighting-against-media-coverage-and-the-dakota-access-pipeline/.

The second important difference concerns timing. In order to accurately detect the abnormal return attributed to a particular event, analysts prefer to use short time windows.[98] Therefore, it is common for events under study to be confined to a single day or a short timespan within a few days.[99] However, social movements are chaotic by nature and news and information hits the market asymmetrically over time.[100] Whereas events traditionally measured via event study, such as filing a lawsuit or a press release stating a CEO's resignation, occur in a defined moment and then the impact on the market can be measured from that moment forward, different approaches must be used to identify measurable time periods that capture social risks and their resulting impacts. For example, in this case, the DAPL controversy lasted months, beginning with initial protest activities on April 1, 2016 and ending when the pipeline was placed into service on June 1, 2017.[101] The timeline could feasibly be extended even further, beginning when ETP announced the project on June 25, 2014 and ending after the project was placed into service when subsequent legal decisions were likely to have affected investors' perceptions. Our modified methodology follows below wherein we systematically chose event windows to place under study given the caveats noted above. Further research on applicability of event studies to the "S" in ESG is necessary to reveal the best methods for defining event windows, for analyzing and contextualizing abnormal return numbers, and for examining ten-day CAR outputs and cumulative effects to the company and markets in question.

C. EVENT STUDY METHODOLOGY APPLIED TO DAPL

We made the following modifications to ensure a rigorous application of event study methodology to this case. While the event window is traditionally defined first, we began by compiling a full timeline alongside historical data on ETP's stock returns for the corresponding dates. In order to define the window for event testing, we reviewed the larger timeline that was inclusive of ETP's stock returns and identified

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[98] Bhagat, *Part I, supra* note 72, at 164.
[99] Andrew C. Baker, *Single-Firm Event Studies, Securities Fraud, and Financial Crisis: Problems of Inference*, 68 STAN. L. REV. 1207, 1227-28 (May 2016).
[100] *See generally* Braden G. King & Sarah A. Soule, *Social Movements as Extra-Social Movements as Extra-Institutional Entrepreneurs: The Effect of Protests on Stock Price Returns*, 52 Admin. Sci. Quarterly 413 (2007) for the proposition that social movements occur in a sequences where multiple protests are scheduled to make a broad impact but where every action is not always equally effective to make institutional change nor is every action covered in the media.
[101] Associated Press, *A Timeline of the Dakota Access Oil Pipeline*, U.S. NEWS (Oct. 12, 2017, 1:24 PM), https://www.usnews.com/news/best-states/south-dakota/articles/2017-10-12/a-timeline-of-the-dakota-access-oil-pipeline.

where ETP's returns move sharply on a given day coincident with an event related to DAPL. We also looked at how the returns behaved based on whether the information would hit the market quickly or not. For example, longer legal decisions could take more time to create a market reaction. We chose seven discrete dates to test based on social events that correlated with significant drops in the stock returns. The event window for each study is one day, but we repeated the event study methodology around each chosen data to create data for 10 days prior to the event date and 10 days after. We did this to take into account that the social event may have had an immediate impact the day it occurred, or it may have been either anticipated or delayed. We assumed that only some of the information would be of interest or create any market reaction at all and we did not know at the outset which instances of social pressure would create a noticeable reaction.

Next, we calculated the expected returns for ETP's stock using the S&P 500 (SPX) as the reference index for each of the seven dates. The expected returns were calculated based on 120 days of previous firm and index performance. We repeated the event studies for ETP against the RussellFTSE4Good Global 100 as well. Finally, we calculated the abnormal return and tested for statistical significance for each date, including the 11-day period surrounding the chosen data. The event study methodology here mirrors traditional single-day event studies except that we did individual single- day event studies for the 11-day period surrounding the chosen date. We did this because of our assumption that information regarding social pressure would not enter the market in a single and punctuated way, but rather would trickle into the market.

Because social movements occur chaotically and information is released unevenly to the market, we also calculated the Cumulative Abnormal Return (CAR) to see how ETP's stock price behaved in the 10 days after the date tested. We used the ten-day CAR to understand whether ETP rebounded, as measured through the abnormal return, in the ten days following the event date or whether there was a more prolonged effect emanating from the event date. It would be enough to have the single-day abnormal return, but the CAR assisted us to understand the full effect of the social event.

The single factor event studies were run against the S&P 500 (SPX) and the RussellFTSE4Good Global 100 Index.

The steps taken for each event study were as follows (numbers are generic steps, letters are specific for these event studies):

1. Calculate the returns of the firm's stock, as well as the returns of the reference index.
    a. In excel =ln(price$_t$/price$_{(t-1)}$
2. Define the estimation period
    a. Calculate firm and index returns for 120 days prior to event
3. For each event, identify the sequences of firm and market returns you want to be included in the estimation window.
    a. Set the excel spreadsheet to calculate the expected and abnormal return on the event date, each of 10 days before the event, and each of 10 days after the event; creating a 21-day estimation window
4. Determine expected returns for the firm through a regression analysis. Calculate the alpha, beta and sigma coefficients (for each event) using the Excel formulas intercept, slope, and steyx respectively.
    a. Intercept (alpha) =INTERCEPT(firmEstimationPeriod,marketEstimationPeriod)
    b. Slope (beta) =SLOPE(firmEstimationPeriod,marketEstimationPeriod)
    c. Standard error (sigma coefficient) =STEYX(firmEstimationPeriod,marketEstimationPeriod)
5. Based on the actual market returns on the event date and the other dates in the event window, use the alpha and beta value of the event to calculate expected returns throughout the event window. These returns represent the hypothetical returns one would expect had the event not have taken place.
6. Deducting the expected returns from the actual returns of the firm's stock throughout the event window to receive the abnormal return.
7. Divide the abnormal return through the root mean square error (i.e., the Steyx-value) to yield t-values to be used for significance testing.

In order to determine whether the actual return was significantly less than expected, we tested whether the abnormal return was significantly less than zero.

Testing event study results for significance:

1. For each event we tested the following hypothesis. Decisions to reject the null were based on the commonly accepted alpha of .05.

    H_0: The abnormal return is equal to zero because there is no difference between the expected return and the actual return (AR = 0)

    H_1: The abnormal return is less than zero because the actual return is less than the return that was expected (AR < 0)

2. Using the t-value calculated already, we calculated a p-value for each date

    a. =TDIST(ABS(t-value),df,tails)

3. Based on alpha =.05, the p-value is used to decide whether or not to reject the null hypothesis and conclude that the negative abnormal return is statistically significant.
    a. For instances where p < alpha, we reject the null hypothesis that there is no difference between the expected return and the actual return (AR = 0) and conclude that a significant negative difference does exist between ETP's expected return and actual return for that date (AR < 0).

We also ran 2 two-factor event studies to compare ETP with the S&P 500 and an industry index. We ran two of these tests, once with the S&P North America Natural Resource Index (SPGSSINR) and once with the Alerian MLP Infrastructure Index (AMZI). The benefit of the two-factor test is that it pulls the regression analysis comparing to the market and industry index so the test controls for the movement of the industry as a whole as compared to the market.

In a two-factor event study, the firm, market, and industry returns are compared against each other. Excel's line estimation (=linest) function was used to calculate the estimated line intercept as well as slopes (betas), standard errors and r-squares for the industry and market indices. These values are then used to calculate the abnormal return for each date in a 5-day event window.

Finally, we calculated the abnormal return for the length of the timeline to better understand the influence of social pressure which, as stated above, occurs unevenly over time and has a cumulative effect rather than a punctuated effect in the market. Our strategy to find the abnormal return along the timeline essentially repeated the event study methodology for the single factor indices. Abnormal return for the two-factor studies was also the same as described with a one-day event window; however, tests were run in five day increments down the length of the timeline April 1, 2016 to October 23, 2017. The abnormal return was tested for significance by dividing the AR by the r-square of the market. This gave the t-statistic. If the absolute value of the t-statistic is greater than 1.96 then we concluded that, based on a 95% confidence interval, the abnormal return is significant.

Where findings of statistical significance diminish with a smaller sample size or an increased event window, these studies remain similar to traditional single-firm, single-day event studies. The event study windows were confined to one day periods; the difference in this study was the number of days on which we ran event studies to more accurately view how and when DAPL influenced ETP's stock price in the markets via abnormal return data.

Results for the single day event periods for each event study were enough to show a correlation between ETP's stock price and the DAPL controversy, and we created additional data for abnormal return across the timeline as well as incorporating the ten-day CAR into our method allowed us to better understand how and where social pressure had the most impact given how information from social movements have an uneven entry into the market.

SUMMARY OF EVENT STUDIES AND BENCHMARK INDICES			
Single Factor ETP v. SPX	Single Factor ETP v. Russell FTSE4Good	Two-Factor ETP v. SPX/SPGSSINR	Two-Factor ETP v. SPX/AMZI

III. CASE STUDY ANALYSIS

The following section is the case study analysis to show the influence of "S" factors on ETP's stock price, via timeline and stock price analysis, and via the event studies. This case study does not assert that the behavior of ETP's stock price is exclusively due to social pressure as it was conducted with the assumption that the market is influenced by many factors. However, the analysis of the event studies revealed many points of wide variability in the abnormal return as tested against benchmark indices. This along with the steady decline of ETP's stock price strongly indicates that ETP's stock price fluctuations are attributable to social pressure.

A. THE DAPL TIMELINE AND ETP'S VALUE OVER TIME

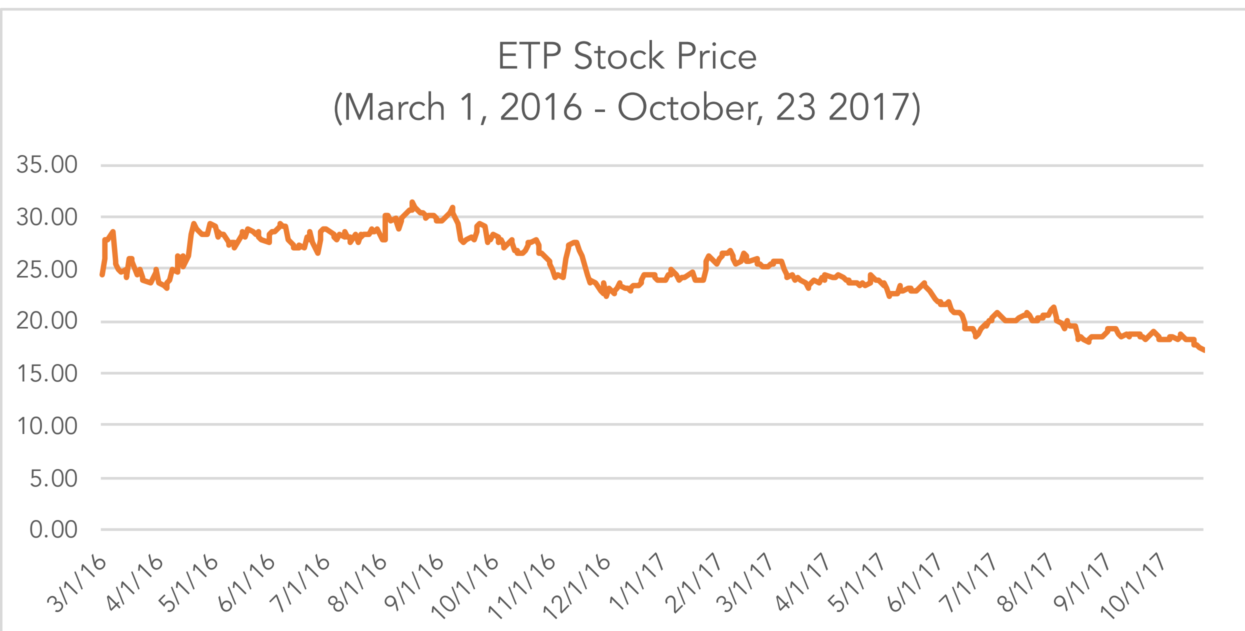
The data accessible via the link in Appendix A gives a comprehensive look at the events that unfolded during the DAPL controversy as well as historical data on ETP's stock price. The Abbreviated Timeline, below, and the following section highlights a small set of particular dates that stand out as compared to ETP's stock price and demonstrates the growing social conflict generated by opposition to DAPL as shown next to ETP's stock price. Some prices are shown without corresponding events because the impact to the market was delayed. This data is also incorporated into the detailed analysis of ETP's stock price in Section III.D.

ABBREVIATED TIMELINE[102]		
Date	Event	ETP Stock Price
4/1/16	Initial protest activities begin at the construction site.	$23.75
8/2/16	ETP announces project-level financing for DAPL.	$27.79
8/3/16		$30.15
8/19/16	North Dakota Governor declares state of emergency.	$30.86
8/31/16	Protesters stop construction for six hours.	$29.60
9/2/16	The Tribe files an affidavit stating they found 82 stone features, and 27 burials on land on the DAPL route.	$29.74
9/ 3/16	ETP bulldozes that same area of the pipeline corridor filled with sacred sites. Demonstrators are pepper sprayed and attacked by guard dogs.	Market closed
9/9/16	Three federal agencies ask ETP to voluntary halt construction at the Lake Oahe crossing.	$30.32
9/13/16	ETP provides an update on DAPL to investors that all four states that DAPL is crossing (ND, SD, IL, IA) have issued all approvals – and project is now 60% done.	$27.84
9/16/16	The court issues an administrative injunction to halt construction while considering the SRST's request for an injunction pending appeal.	$27.80
9/ 26/16	Obama mentions Standing Rock at the White House tribal leaders meeting.	$29.16
11/8/16	President Trump elected.	$24.26

[102] Data for this timeline was pulled directly from data in Appendix A, where all sources for information in this timeline can be found.

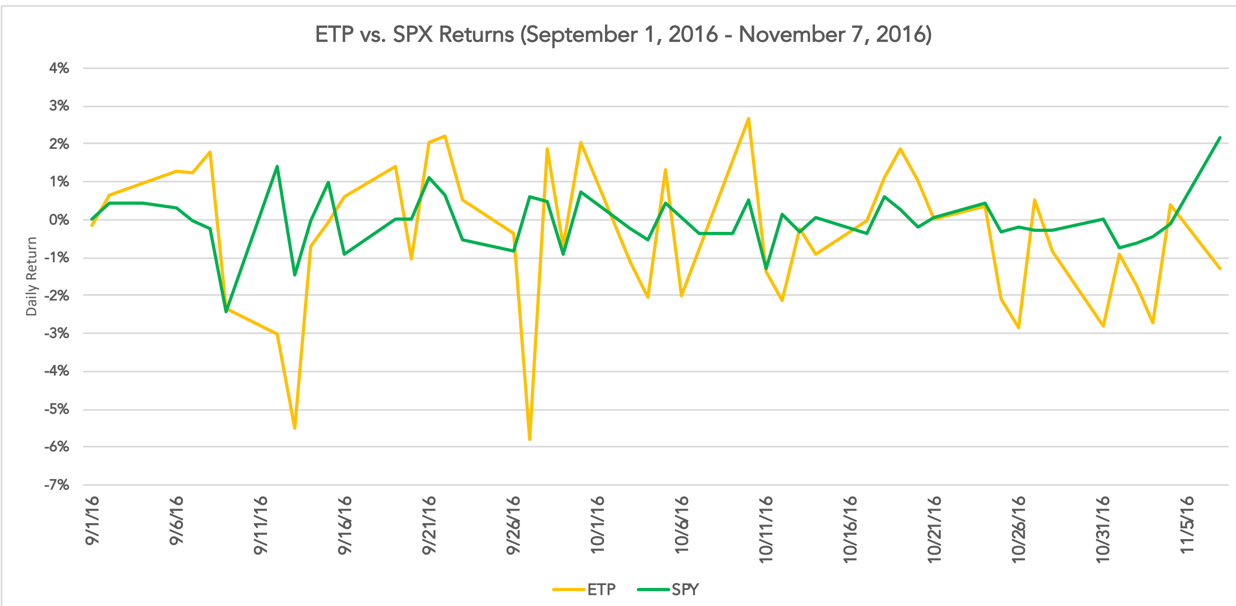
11/9/16	ETP publishes its third quarterly report with first mention of social pressure in SEC filings.	$26.10
11/14/16	USACE delays the decision on the easement.	$27.46
12/5/16	USACE denies the Lake Oahe crossing easement to ETP. (Market closed on 12/4/16, significance tested for 12/5/16).	$22.75
1/24/17	President Trump takes executive action towards approving the Lake Oahe crossing easement.	$24.87
1/ 27/17	Spike after executive action announcement.	$26.07
6/1/17	DAPL placed into service.	$21.95
6/14/17	Judge Boasberg rules that the USACE "did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice..."	$19.76
9/28/18	End date for this case study.	$22.26

The chart below is another visual representation of ETP's stock price over time and is also drawn from data linked in Appendix A.



The short timeline above and the chart demonstrate visually that ETP's stock price reached its peak in September of 2016, and trended downward from that point. Even the spikes following President Trump's election on November 8, 2016 and his signing of the executive action to approve the Lake Oahe easement on January 24, 2017 were not enough to return ETP's stock to its previous levels.

The raw data on ETP and SPX returns also shows volatility of ETP as against the markets.



The raw data demonstrates two important points. First, that stock price returns decreased over time and did not return to the peak near $31 on September 8, 2016. The charts in this section do not show that the price never recovered to its peak as of data drawn on September 28, 2018. Second, the stock price experienced incredible volatility in general, and as against the market. Both of these findings coincide with the intense social conflict opposing DAPL that occurred from August 2016 until February 2017. The social conflict, stemming from unexamined social risks, thus translated into material losses in terms of decreased returns and unexpected volatility.

Further, the raw data on ETP's stock price as well as raw data on the value of the S&P 500 provides useful information regarding ETP's market capitalization and share price value over time. From August 2, 2016 to September 28, 2018, the S&P 500 gained in value by almost 35% where ETP's price declined in value by nearly 20%. Even from

August 2, 2016 to when the pipeline went into service on June 1, 2107, ETP's stocks had lost in value by 21% whereas the S&P had increased by nearly 13%.

August 2, 2016 – September 28, 2018		
	ETP	S&P 500
% Change	-19.90%	34.87%

August 2, 2016 – June 1, 2017		
	ETP	S&P 500
% Change	-21.01%	12.90%

These percentages translate into billions of dollars of losses for ETP. From August 2, 2016 to June 14, 2017, the change in ETP's stock price amounted to a $1.6 billion loss in market capitalization.

As of September 28, 2018, the end date for this study, investors are still dealing with the fact that ETP's stock price has not yet returned to its August 2016 levels. Furthermore, investors that bought ETP's stock during the month that followed the announcement of project-level financing, August through September 2016, have not yet had the opportunity to sell without taking a loss. Finally, the materiality of these losses indicates the need for corporate officers to more fully examine social risks during early project planning stages to adequately fulfill their fiduciary duties to the company to maximize returns and minimize stock volatility.

B. ANALYSIS WITH EVENT STUDY RESULTS

As noted in the methodology in Section II.C, the event studies were run against the S&P 500, the North American Natural Resources Index, the Alerian MLP Index and the Russell FTSE4Good Index. The two-factor studies serve to corroborate whether the abnormal return seen as against ETP and the S&P 500 also occurred within the industry. The abnormal return data provided additional data on the difference between ETP and the benchmark indices. The studies demonstrate the strong correlation between dates when social conflict occurred and when ETP's stock price dropped such that, at a minimum, the totality of social pressure that ultimately caused extensive operational delays - boycotts, protests, media and divestment campaigns in support of critical concerns voiced by the Standing Rock Sioux Tribe and others - constituted social risks material enough to warrant disclosure to investors at a much earlier date.

As seen in the graph of ETP's stock price over time in Section III.A, ETP's stock price reached a tipping point in September 2016, from which it trends downward. Significantly, this tipping point occurred after a swell of nationally-covered opposition to DAPL that also peaked in September 2016. The abnormal return analysis shows a picture of considerable volatility and there are several dates where the negative abnormal return correlates with moments of intense social pressure. This section pulls from data from the simple analysis of ETP's stock price, as well as each of the single-factor and two-factor method event studies to show the relationship between the social conflict opposing DAPL and ETP's stock price.

The results of the single-factor event studies against the S&P 500 are shown below. For the last six dates tested, the ten-day CAR is negative, demonstrating that ETP's did not rebound after the event date and trended downward after the event date.

ETP V. SPX EVENT STUDY RESULTS				
Date	Event	Statistical Significance Abnormal Return	Abnormal Return on Event Date	10 Day CAR
4/1/16	Initial protest activities begin at the construction site.[103]	Significant	-6.62%	1.86%
8/19/16	North Dakota Governor declares state of emergency.[104]	Not significant	0.91%	-2.06%
9/9/16	The SRST's request for a preliminary injunction is	Significant	-4.6%	-5.78%

[103] *About*, SACRED STONE CAMP, http://sacredstonecamp.org/about/ (last visited Sept. 15, 2018).
[104] Caroline Grueskin, *Governor issues emergency declaration in response to pipeline protests,* BISMARCK TRIB. (Aug. 19, 2016) https://bismarcktribune.com/news/state-and-regional/governor-issues-emergency-declaration-in-response-to-pipeline-protests/article_6b189499-0d39-5223-93a4-5f10e53e735c.html.

	denied.[105] That same day, three federal agencies ask ETP to voluntary halt construction at the Lake Oahe crossing.[106]			
9/26/16	Obama mentions Standing Rock and commits to "redouble our efforts to make sure that every federal agency truly consults and listens and works with you, sovereign to sovereign" during the White House Tribal Nations Conference.[107]	Not significant	3.08%	-1.13%
11/14/16	USACE delays decision on the easement.[108]	Significant	7.47%	-1.86%
12/5/16 (Market closed, significanc e tested for 12/5)	USACE denies the Lake Oahe crossing easement to ETP and announces plans to conduct an Environmental Impact Statement on 12/4/16.[109] At least 2000 veterans come to camp to	Significant Significant on 12/6	3.93% 12/6: -5.29%	-0.70%

[105] Minute Order, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 33.

[106] Press Release No. 16-1034, U.S. Dep't of Justice, Office of Pub. Affairs, Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016), https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing [https://perma.cc/PTW4-VCZY].

[107] *President Obama Remarks at Tribal Nations Conference*, C-SPAN (Sept. 26, 2016), https://www.c-span.org/video/?415843-101/president-obama-addresses-white-house-tribal-nations-conference.

[108] Press Release, U.S. Dep't of the Interior, Dep't of the Army, Statement Regarding the Dakota Access Pipeline (Nov. 14, 2016), https://www.doi.gov/pressreleases/statement-regarding-dakota-access-pipeline [https://perma.cc/6W6E-6GQT].

[109] Memorandum from Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) to Commander, U.S. Army Corps of Eng'rs, No. 1:16-cv-01534-JEB (D.D.C. Dec. 4, 2016), ECF No. 65-1.

	show support for water protectors.[110]			
6/14/17	Judge Boasberg rules that the USACE "did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial."[111]	Not significant Significant on 6/19; 6/23; 6/27	-0.36% 6/19: -4.63% 6/23: -3.12% 6/27: 2.91%	-6.46%

On April 1, 2016, the first date tested with the event study methodology, initial protest activities were beginning at the camp.[112] On this date, ETP's stock against the S&P 500 had a significantly negative abnormal return at negative 6.6%.[113] While ETP's stock price recovered quickly over the next ten days, the dip suggests that the social unrest registered at some level in the market.

On August 2, 2016, ETP announced the successful completion of project-level financing for DAPL.[114] The press release stated that DAPL was expected to be ready for service by the end of 2016.[115] Following this announcement, ETP's stock price rose by 8.15% and closed at $30.15 on August 3, 2016.[116] The Standing Rock Sioux Tribe had already filed a lawsuit on July 27, 2016 and had shared their concerns

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110 Taryn Finley, *2,000 Veterans To Form 'Human Shields' To Protect Standing Rock Protesters*, HUFFINGTON POST (Nov. 30, 2016, 4:06 PM), https://www.huffingtonpost.com/entry/veterans-protect-standing-rock-protesters_us_583ee73fe4b0ae0e7cdaf766.

111 Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 255 F. Supp. 3d 101, 112 (D.D.C. 2017).

112 *About*, SACRED STONE CAMP, http://sacredstonecamp.org/about/ (last visited Sept. 15, 2018).

113 *See* data linked in Appendix A.

114 Press Release, Energy Transfer, Energy Transfer, Sunoco Logistics and Phillips 66 Announce Successful Completion of Project Financing for Bakken Pipeline Joint Ventures (Aug. 2, 2016), http://ir.energytransfer.com/phoenix.zhtml?c=106094&p=irol-newsArticle&ID=2192121 [https://perma.cc/XR7J-KPLK].

115 *Id*.

116 *See* data linked in Appendix A.

about the pipeline and surrounding negotiations widely.[117] All of this information was available to investors through media reports and other publicly-available sources, but none of it was disclosed in ETP's securities filings until November 9, 2016.[118]

Court documents from this time period do indicate, however, that ETP was aware that a delay could have serious financial consequences. On August 18, 2016, the company filed a motion in opposition to the Standing Rock Sioux Tribe's request for a preliminary injunction stating that, "the cost of an injunction during the first year would approach $1.4 billion and would exceed that amount each successive year, with none of the loss being compensable… The cost of even a temporary project delay is $430 million. Demobilization costs alone are $200 million."[119] This information did not initially appear in ETP's securities filings.[120]

By August 19, 2016 the situation at Standing Rock was being covered by multiple nation-wide media outlets as the protests grew in intensity and the camp attracted hundreds of supporters. The Standing Rock Sioux Tribe also filed a legal case to request a temporary halt to construction, and all of these events prompted North Dakota Governor Jack Dalrymple to declare a state of emergency.[121] The positive abnormal return on ETP's stock on that day was not statistically significant at only .91%, however in the next ten days ETP's stock continued down.[122] During the month following the announcement of project-level financing, from August 2, 2016 to September 2, 2016, ETP's stock price averaged $30.01.[123]

At this point, several significant social actions occurred and precipitated ETP's long-term downward trend. On September 2, the Standing Rock Sioux Tribe filed an affidavit in court identifying 82 stone features, cairns, burial sites, stone rings and archeological sites along the pipeline corridor.[124] On September 3, 2016, ETP bulldozed that same area and demonstrators were pepper sprayed and attacked by

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117 Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-01534-JEB (D.D.C. July 27, 2016).
118 Energy Transfer Partners, L.P., Quarterly Report (Form 10-Q), at 55 (Nov. 9, 2016).
119 Dakota Access, LLC's Opposition to Plaintiff's Motion for Preliminary Injunction at 29, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-CV-01534-JEB (D.D.C. Aug. 18, 2016).
120 ETP did not mention the opposition to DAPL in any of its SEC filings until November 9, 2016. *See* Energy Transfer Partners, L.P., Quarterly Report (Form 10-Q), at 55 (Nov. 9, 2016).
121 Grueskin, *Governor issues emergency declaration, supra* note 104.
122 *See* data linked in Appendix A.
123 *Id.*
124 Supplemental Declaration of Tim Mentz, Sr. in Support of Motion for Preliminary Injunction at 6, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-01534, (D.D.C. Sept. 2, 2016).

guard dogs.[125] On September 8, 2016 the Governor mobilized the National Guard to assist Dakota Access, LLC with security, thereby escalating the tension between both sides.[126] Already, on Friday, September 9, 2016, tensions were high and media reports were streaming out of the camp when the three federal agencies asked ETP to voluntarily halt construction at the Lake Oahe crossing so that they could review the issues being raised by the Standing Rock Sioux Tribe.[127]

ETP's stock price dipped only slightly between August and September 8, 2016 but the cumulative effects of social pressure were beginning to show and ETP's stock price reached its tipping point. On Thursday, September 8, 2016 ETP's stock price peaked at $31.04. Closely following the announcement asking ETP to voluntarily halt construction on September 9, 2016, ETP's stock price fell by 3.01% and closed at $29.42 on September 12, 2016, the following Monday.[128] On that date, the abnormal return against the S&P 500 were – 5.02%. From this point forward, ETP's stock price trends downward as social pressure continued to build.

On September 12, the Standing Rock Sioux Tribe appealed the court's decision and requested a preliminary injunction but on September 13, 2016, ETP issued a statement to Partnership Employees indicating construction would continue.[129] Three days later, on September 16, 2016, the court issued an administrative injunction to halt construction while it considered the Standing Rock Sioux Tribe's request.[130]

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[125] Emergency Motion for Temporary Restraining Order at 4, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (No. 1:16-cv-01534-JEB), ECF No. 30. Also *see* Alan Taylor, *Tempers flare during protest against the Dakota Access Pipeline*, ATLANTIC (Sept. 6, 2016), https://www.theatlantic.com/photo/2016/09/tempers-flare-during-protest-against-the-dakota-access-pipeline/498809/.

[126] *Gov. Dalrymple calls on ND National Guard to assist with Dakota Access Pipeline protest security*, KFYRTV (updated Sept. 8, 2016, 6:53 PM), http://www.kfyrtv.com/content/news/Gov-Dalrymple-calls-on-ND-National-Guard-to-assist-with-Dakota-Access-Pipeline-protest-security-392768331.html.

[127] Press Release No. 16-1034, U.S. Dep't of Justice, Office of Pub. Affairs, Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016), https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing [https://perma.cc/PTW4-VCZ.

[128] *See* data linked in Appendix A.

[129] Memorandum from Kelcy Warren, Chairman and Chief Executive Officer to All Partnership Employees, Energy Transfer (Sept. 13, 2016), *available at* http://media.graytvinc.com/documents/ETP+Internal+Memo+9+13+16+final+to+employees.pdf [hereinafter Warren Memo].

[130] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-01534-JEB (D.D.C. Sept. 16, 2016) (order granting administrative injunction).

On September 26, 2016, President Obama addressed the Standing Rock Sioux Tribe at the White House Tribal Nations conference committing to "redouble our efforts to make sure that every federal agency truly consults and listens and works with you, sovereign to sovereign."[131] The follow day, ETP's abnormal return against the S&P 500 was -6.69%. The drop also occurred all other indices tested, confirming that ETP's performance was abnormal as against the markets and within the industry.

SIGNIFICANT ABNORMAL RETURN VALUES ON SEPTEMBER 27, 2016			
ETP v. SPX	ETP v. Russell FTSE4Good	ETP v. SPX/SPGSSINR	ETP v. SPX/AMZI
-6.69%	-6.32%	-4.59%	-4.01%

The event studies for this time period (September 9, 2016; September 26, 2016; and November 14, 2016) coincide with the peak of social conflict and ETP's returns jumped between positive and negative abnormal return within the ten-day range of testing for each date. The range in the abnormal return as compared against the S&P 500 shows the considerable volatility of ETP's stock price during this moment in time despite their assurances to investors.

ETP's stock price spiked after the election of President Trump on November 8, 2016 and there was positive significant abnormal return, but ETP's price remained only to $26.01.[132] On November 9, 2016, ETP published its third quarterly report stating how "protests and legal actions against DAPL have caused construction delays and may further delay the completion of the pipeline project."[133] The report does not include the specific dollar amounts that were stated in the court documents, but it nonetheless constitutes the first time that social risks related to DAPL are mentioned in ETP's securities filings.

Social pressure continued to build through November. On November 20 and 21, water protectors were met with water guns, rubber bullets and tear gas and over 160 people were sent to the hospital.[134] By this time more than 400 people had been

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131 *President Obama Remarks at Tribal Nations Conference*, C-SPAN (Sept. 26, 2016), https://www.c-span.org/video/?415843-101/president-obama-addresses-white-house-tribal-nations-conference.
132 *See* data linked in Appendix A.
133 Energy Transfer Partners, L.P., Quarterly Report (Form 10-Q), at 55 (Nov. 9, 2016).
134 Julia Carrie Wong, *Standing Rock protest: hundreds clash with police over Dakota Access Pipeline*, GUARDIAN (Nov. 21, 2016, 12:08 AM), https://www.theguardian.com/us-news/2016/nov/21/standing-rock-protest-hundreds-clash-with-police-over-dakota-access-pipeline.

arrested.[135] The Standing Rock Sioux Tribe also called on the federal government to deny the Lake Oahe crossing.[136] On this day, the abnormal return for ETP was significantly negative across all indices tested.

SIGNIFICANT ABNORMAL RETURN VALUES NOVEMBER 21, 2016			
ETP v. SPX	ETP v. Russell FTSE4Good	ETP v. SPX/SPGSSINR	ETP v. SPX/AMZI
-7.67%	-7.42%	-9.13%	-7.77%

The abnormal return from this point until the end of the year shows a picture of incredible volatility with significant shifts following timeline points. On November 25, 2016, the federal government closed access to the camp and on Monday, November 28, 2016 the Water Protectors Legal Collective filed a lawsuit against the Morton County Sheriff's office alleging excessive force towards peaceful protesters.[137] On Thursday, November 30, 2016 the abnormal return for ETP was positive for both single –factor studies, but the next day, on Friday, December 1, 2016 the abnormal return was significantly negative for three of the four tests.

SIGNIFICANT ABNORMAL RETURN VALUES				
Dates	ETP v. SPX	ETP v. Russell FTSE4Good	ETP v. SPX/SPGSSINR	ETP v. SPX/AMZI
11/30/16	4.99%	4.95%	--	--
12/1/16	-4.45%	-4.70%	-4.92%	--

On December 4, 2016, the USACE denied the Lake Oahe crossing easement to ETP and announced plans to conduct and Environmental Impact Statement.[138] At least

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135 *Id.*

136 Press Release, Standing Rock Sioux Tribe, Tribes call on President Obama to deny easement, investigate pipeline safety and protect tribal sovereignty (Nov. 21, 2016), http://standwithstandingrock.net/press-release-tribes-call-president-obama-deny-easement-investigate-pipeline-safety-protect-tribal-sovereignty/ [https://perma.cc/7H5P-GFL3].

137 Letter from John W. Henderson to Chairman Dave Archambault II (Nov. 15, 2016), *available at* https://d3n8a8pro7vhmx.cloudfront.net/honorearth/pages/2283/attachments/original/1481745612/Army-Corps-eviction-notice-Standing-Rock-on-December-5.pdf?1481745612 [https://perma.cc/AVC6-7TKB]. Press Release, Water Protector Legal Collective, WPLC Files Suit for Excessive Force Against Peaceful Protesters (Nov. 28, 2016), https://waterprotectorlegal.org/water-protector-legal-collective-files-suit-excessive-force-peaceful-protesters/ [https://perma.cc/GL88-M8MT].

138 Memorandum from Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) to Commander, U.S. Army Corps of Eng'rs, No. 1:16-cv-01534-JEB (D.D.C. Dec. 4, 2016), ECF No. 65-1.

2,000 veterans went to the camp that day to show support for the water protectors.[139] On December 5, 2016, ETP filed a motion for summary judgment in the legal proceedings and made claims as to financial damage.[140] Then, on December 6, 2016 which is in the ten day range of our event tested date of December 5, the abnormal return was significantly negative at -5.29%.[141] ETP's price was $22.75 on that day.[142]

On December 30, 2016, when the pipeline was supposed to be ready for service, operation was delayed as approvals were stuck in regulatory limbo. ETP's stock price closed at $24.02 on this date and averaged $24.68 during the following month.[143]

ETP's stock price spiked after President Trump's executive action ordering the USACE to fast track approval of DAPL in January 2017.[144] However, this spike was still not enough to bring ETP's stock price to its peak levels in August or September 2016.[145]

DAPL was finally placed into service five months later than originally projected on June 1, 2017, and ETP's stock price closed at $21.95 on this date, averaging only $20.20 during the following month.[146]

The final date tested with event study was June 14, 2017 when Judge Boasberg ruled that the USACE did not adequately consider the impacts of the project on fishing rights, hunting rights or the impacts as to broader environmental justice concerns.[147] Following that decision, ETP's price dropped and had a statistically significant negative abnormal return on two of the following ten days in the single-factor test against the S&P 500. That there is one date with a significant positive abnormal return shows the continued volatility of the stock even after the peak of social unrest had subsided. At this point the stock price ranged between $18.46 and only $21.95.[148]

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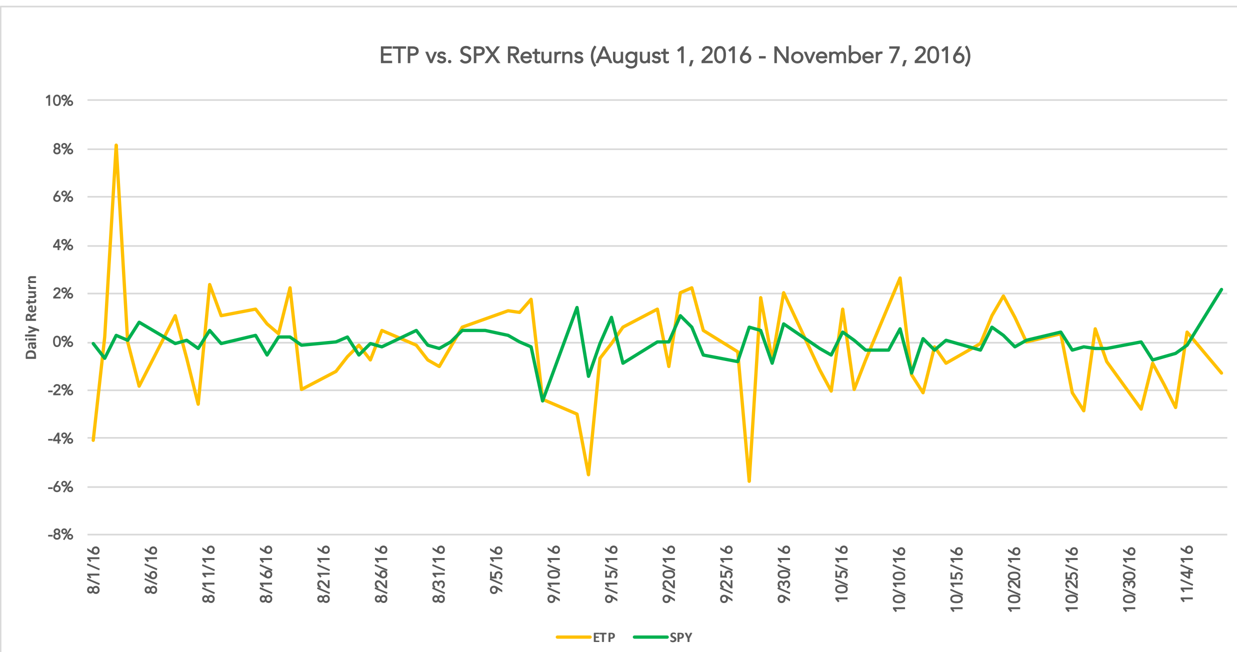
[139] Taryn Finley, *2,000 Veterans To Form 'Human Shields' To Protect Standing Rock Protesters*, HUFFINGTON POST (Nov. 30, 2016, 4:06 PM), https://www.huffingtonpost.com/entry/veterans-protect-standing-rock-protesters_us_583ee73fe4b0ae0e7cdaf766.
[140] Memorandum in Support of Motion for Summary Judgment at 31, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-1534-JEB (D.D.C. Dec. 5, 2016), ECF No. 66-1.
[141] *See* data linked in Appendix A.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 112 (D.D.C. 2017).
[148] *See* data linked in Appendix A.

C. OIL PRICE FLUCTUATION

Oil prices were another factor that influenced ETP's stock price. Oil prices experienced some volatility during the event study period, but their overall trend was an upward climb.[149] They averaged $44.88 per barrel in August 2016.[150] They climbed slowly over the course of the DAPL controversy and continued to climb after construction was completed. Not once did they fall below $44.88 and eventually reached $73.43 as of May 31, 2018.[151] However, while oil prices have recovered from the downturn commodity era between December 2015 to March 2016,[152] ETP's stock price has not.[153]

D. TIMELINE AND EVENT STUDY FINDINGS

The following graph shows ETP's returns against the S&P 500 for the period August 1, 2016 through November 7, 2016.



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149 *Id.*

150 *Id.*

151 *Id.*

152 Matthew DiLallo, *What Happened to Oil Prices in 2016?*, MOTLEY FOOL (Dec. 16, 2016, 9:00 AM), https://www.fool.com/investing/2016/12/17/what-happened-to-oil-prices-in-2016.aspx. *See* data linked in Appendix A.

153 *See* data linked in Appendix A.

Several conclusions can be drawn from the timeline and event study analysis. First, ETP's poor management of social risks, combined with its lack of disclosure during its initial announcement of DAPL, created a much more volatile and therefore much riskier investment than originally projected. As noted earlier in this report, there are many different resources available to companies to better understand the impacts of operating on and near indigenous lands, many of which work to operationalize FPIC and integrate human rights standards into their calculus. The timeline shows that ETP made few good faith efforts to understand and integrate the Standing Rock Sioux Tribe's concerns about the environmental, social and cultural risks into their operations and that ETP did not disclose known risks to investors until a later date. As a result, investors were not aware of the potential for delays and it is possible that this resulted in the overvaluation of ETP's stock price.

Second, investors must conduct additional due diligence on social risks related to human rights due to those risks' potentially material impact. In this case, investors who conducted due diligence on social risks - using sources independent from those provided by the company or the USACE - might have been able to reach a more accurate assessment of DAPL's viability. The change in the oil market was not entirely foreseeable, but the delays pushed operations into an unknown future which, in this case, reduced profits enormously for investors. The lessons learned here are clear. If each of the parties - firms and investors - conduct due diligence and make good faith disclosure, then the social risks that materially increase the total risk in a project are known and can be mitigated from the earliest stages of project design. Similarly, as this case study asserts, these processes can be quantified and integrated so that corporate officers are able fulfill their fiduciary duties to the company to account for all material risks.

E. OTHER SIGNIFICANT EVENTS

The social unrest and legal challenges coincided with other significant events that affected ETP's unitholders.

Though outside of the scope of the timeline for this case study, on February 8, 2016 Energy Transfer Equity's CFO resigned suddenly and was replaced by ETP's CFO.[154] At that point ETP's share price dipped significantly.[155] Of note, the dates coincided

[154] Amey Stone, *Energy Transfer CFO Exit Spooks MLP Investors; ETE Down 40%,* BARRON'S (Feb. 8, 2016, 3:33 PM), https://www.barrons.com/articles/energy-transfer-cfo-exit-spooks-mlp-investors-ete-down-40-1454963647.
[155] *Id.*

with lows reflecting investor concern over a deal to buy another company, as well as lows in the oil and gas sectors.[156] One article noted that Energy Transfer, and an affiliate of the company they were buying, led a decrease in the Alerian MLP Index and other media reports suggested avoiding Energy Transfer Partners in favor of other MLPs.[157]

On November 21, 2016, ETP announced that it had entered a merger agreement with Sunoco Logistics Partners (SXL).[158] Under the agreement, ETP unitholders received 1.5 common units of SXL for each common unit of ETP that they own.[159] The press release stated that the merger would "increase scale and diversification across multiple producing basins" and "strengthen the balance sheet of the combined organization by utilizing cash distribution savings to reduce debt and to fund a portion of the growth capital expenditure programs of the two partnerships."[160] While there is no explicit connection between the merger and DAPL's construction delays, the timing of the merger—which faced initial consideration in October 2016 and was finalized in April 2017— coincided with the peak of social pressure challenges facing the project.[161]

Between January 6 and February 8, 2017, seven shareholders filed class action lawsuits challenging the merger against ETP on behalf of the company's unitholders.[162] The complaint pointed to investor unrest as to the low share prices.[163]

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156 Paul O'Donnell, *Shares tumble 42 percent after Energy Transfer Equity replaces CFO,* DALLAS MORNING NEWS (Feb. 2016), https://www.dallasnews.com/business/energy/2016/02/08/shares-tumble-42-percent-after-energy-transfer-equity-replaces-cfo.

157 *Id.; See also* Adam Galas, *3 Reasons to Avoid Energy Transfer Partners and Buy These 2 High-Yield MLPs Instead,* MOTLEY FOOL (Feb. 10, 2016, 2:15 PM), https://www.fool.com/investing/general/2016/02/10/3-reasons-to-avoid-energy-transfer-partners-and-bu.aspx.

158 Press Release, Energy Transfer, Sunoco Logistics to Acquire Energy Transfer Partners (Nov. 21, 2016), http://ir.energytransfer.com/phoenix.zhtml?c=106094&p=irol-newsArticle&ID=2224891 [https://perma.cc/KTE9-D65X].

159 *Id.*

160 *Id*.

161 Press Release, Energy Transfer, Sunoco Logistics Partners and Energy Transfer Partners Announce Successful Completion of Merger (Apr. 28, 2017), http://ir.energytransfer.com/phoenix.zhtml?c=106094&p=irol-newsArticle&ID=2267001 [https://perma.cc/CLF9-8GEE].

162 Energy Transfer Partners, L.P., Quarterly Report (Form 10-Q), at 41 (May 4, 2017).

163 Liam Denning, *Energy Transfer and the Art of Transference: Ordinary investors bear the brunt of its Sunoco Logistics deal*, BLOOMBERG OPINION (Nov. 22, 2016, 6:00 AM), https://www.bloomberg.com/gadfly/articles/2016-11-22/energy-transfer-partners-sunoco-logistics-deal-transferring-pain.

The lawsuit alleged that conflicts of interest in the merger negotiations resulted in a flawed sales process.[164] The merger agreement contained a "no solicitation" provision that restricted ETP from considering alternative acquisition proposals.[165] The plaintiffs claimed that the single bidder process with no market check undervalued ETP to the detriment to the company's unitholders, citing a Bloomberg article that reported that ETP's unitholders would see their quarterly payout drop from $1.06 to 77 cents—a cut of 27 percent.[166] The lawsuit also accused ETP of failing to disclose or disclosing materially misleading misstatements regarding the merger and management's financial projections in the days leading up to the merger but the lawsuit was voluntarily dismissed without providing further information on November 21, 2017.[167]

IV. ESTIMATED COST TO BANKS

This section assesses the costs incurred by the banks financing DAPL, which accrued in several ways. First, through direct account closures on the part of individuals and local governments who wished to stand in solidarity with those opposing DAPL via a divestment strategy. Second, several banks sold their shares in the project-level loan to show support for the Standing Rock Sioux Tribe's efforts to halt the pipeline. Finally, as a result of these events, several banks and the Equator Principles Association have renewed dialogue as to the best ways to quantify social risks when considering financing of projects on and near indigenous peoples' lands.

A. DIRECT ACCOUNT CLOSURES

ETP received financing for DAPL from a consortium of 17 banks resulting in a $2.5 billion project level loan to the company.[168] Additional banks were tied to DAPL because of their provision of financing to ETP at the corporate level.

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164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*; *See also* Notice of Voluntary Dismissal, In Re Energy Transfer Partners L.P. Shareholder Litigation, No. 1:17-cv-00044-CCC (D.D.Del. Nov. 21, 2017).
168 Press Release, ING, ING and the Dakota Access pipeline (updated Mar. 21, 2017), https://www.ing.com/Newsroom/All-news/Features/ING-and-the-Dakota-Access-pipeline.htm [https://perma.cc/6QBT-KZ92].

BANK NAME	AMOUNT INVESTED IN DAPL[169]
The Bank of Tokyo-Mitsubishi (UFJ)	$235 million
BayernLB	$120 million
BBVA Spain	$120 million
BNP Paribas	$120 million
Citigroup	$235 million
Credit Agricole	$120 million
DNB	$331 million
ICBC	$120 million
Intesa SanPaolo	$120 million
ING	$120 million
Mizuho Bank	$235 million
Natixis	$120 million
Société Générale	$120 million
Sumitomo Mitsui Banking Corporation	$120 million
SunTrust Bank	$120 million
TD bank Financial Group	$235 million
Wells Fargo	$120 million

As lenders, these banks would not be materially impacted by the behavior of ETP's stock price but they faced financial impacts in other ways. First, many individual and institutional consumers closed their checking and savings accounts as a means of protesting their banks' financial support for DAPL.[170] A coalition of water protectors created a "Defund DAPL" campaign and website where consumers uploaded data on

[169] *Dakota Access Pipeline*, BANKTRACK, *https://www.banktrack.org/project/dakota_access_pipeline#popover=financiers* (last visited Sept. 7, 2018); BNP information *available at BNP Paribas exits Dakota Access Pipeline*, GLOBE NEWSWIRE (Apr. 5, 2017, 11:42 AM), https://globenewswire.com/news-release/2017/04/05/954842/0/en/BNP-Paribas-exits-Dakota-Access-Pipeline.html [https://perma.cc/SQ7K-V8WM]; DNB information *available at Norwegian bank DNB sells its share of Dakota pipeline funding*, REUTERS (Mar. 26, 2017, 2:28 PM), https://www.reuters.com/article/us-north-dakota-pipeline-banks/norwegian-bank-dnb-sells-its-share-of-dakota-pipeline-funding-idUSKBN16X10G; ING information *available at* Valerie Volcovici, *Dutch bank ING sells Dakota pipeline loan share to 'send message,'* REUTERS (Mar. 21, 2017, 3:45 PM), https://www.reuters.com/article/us-north-dakota-pipeline-banks/dutch-bank-ing-sells-dakota-pipeline-loan-share-to-send-message-idUSKBN16S2U5.

[170] *Home,* DEFUNDDAPL, http://www.defunddapl.org/defund (visited May 2018).

how much money they withdrew from their banks.[171] The resulting data indicates that personal account closures alone accounted for a loss of $86.2 million.[172]

Several city governments also took up divestment as a strategy to stand in solidarity with those at Standing Rock, which costed banks over $4.3 billion in closed city accounts.[173] In fact, over 90% of the $4.4 billion lost via city account closure occurred to Wells Fargo alone. Seattle, Santa Monica, and Davis all ended their established relationships with Wells Fargo withdrawing $3 billion, $1 billion, and $124 million respectively.[174] Divestment campaigns also took place in San Francisco, Los Angeles, New York, Bellingham, Raleigh, and Albuquerque, among other cities.[175] The financial impacts of these divestments are compounded by damages to reputation, brand, and customer goodwill that banks suffered as a result of DAPL.

Overall, the Defund DAPL website reported total account closures valued at $4.4 billion.[176] This figure includes 150,000 personal account closures valued at $86.2 million and city divestment valued at $4.3 billion.[177] The numbers, though crowdsourced, serve as important indicators of the strength and reach of the divestment campaigns. For example, protests at Wells Fargo branches occurred across the country and the availability of internet banking made personal account closure an easy way for consumers nationwide to participate in the Defund DAPL movement.[178]

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171 *Defund,* DEFUNDDAPL, http://www.defunddapl.org/defund (visited May 2018).

172 Mark Fogarty*, DAPL Fallout Continues: Defund Movement Passes $5 Billion*, INDIAN COUNTRY TODAY (Apr. 5, 2017), https://newsmaven.io/indiancountrytoday/archive/dapl-fallout-continues-defund-movement-passes-5-billion-nndtarF2pki5C4oiHSjujQ/. *Defund: Personal Finances,* DEFUNDDAPL, http://www.defunddapl.org/defund (last visited Sept. 7, 2018). The data is crowdsourced and cannot be fully verified as individual consumers entered their account information.

173 *Home*, DEFUNDDAPL, *http://www.defunddapl.org/ (*visited May 2018).

174 *See* Jimmy Tobias, *These Cities are Pulling Billions from the Banks that Support the Dakota Access Pipeline*, The NATION (Mar. 20, 2017), https://www.thenation.com/article/these-cities-are-divesting-from-the-banks-that-support-the-dakota-access-pipeline/.

175 *Id*.

176 *Defund,* DEFUNDDAPL, http://www.defunddapl.org/defund (visited May 2018).

177 DEFUNDDAPL, http://www.defunddapl.org/ (visited May 2018). Vanessa Green and Matt Remle, *150,000 People Representing more than $4 Billion Call on Banks to DeFund Tar Sands Pipelines*, LAST REAL INDIANS (June 28 2017), https://lastrealindians.com/150000-people-representing-more-than-4-billion-call-on-banks-to-defund-tar-sands-pipelines/.

178 *DAPL Protesters Close Accounts with Wells Fargo, US Bank*, CBS MINN. (Dec. 1, 2016, 7:51 AM), https://minnesota.cbslocal.com/2016/12/01/dapl-protesters-close-accounts/.

DIVESTMENT FROM DAPL AFFILIATED BANKS	
Personal Account Closures	$86,202,675.25
City Divestment	$4,324,000,000.00
Total Account Closures	$4,410,202,675.25

B. SELLING SHARES IN THE PROJECT-LEVEL LOAN

Second, banks cut ties with DAPL by selling shares in the original loan. Three of the 17 banks that partook in the original project level loan sold their shares in the loan: BNP Paribas, DNB, and ING.[179] Each bank issued a public statement in support of the Standing Rock Sioux Tribe.[180] While the terms of the sales are not public, it is likely that each of the banks took a loss. None of these sales deprived ETP of valuable capital, but these actions underscored and amplified the tribe's concerns to investors and financial institutions worldwide at the same time as they demonstrated the reputational burden that the DAPL controversy placed on its investors.

Finally, while not demonstrated in this case, it is important to note that additional costs could easily accrue to banks from delayed loan repayments.

C. SUBSEQUENT ACTIONS

Once again, disclosure and due diligence surface as key themes to guard against future losses. Information is not available at this writing as to whether ETP disclosed information on social risks during negotiations with financial institutions for the project loan. However, if ETP's disclosures to banks mirrored its disclosure to shareholders during this timeframe, information about social risks was likely sparse.

Conversely, the lack of proper risk disclosures by companies does not automatically relieve banks of the need to adequately factor social risks into their own due

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[179] *Six banks step away from Dakota Access Pipeline (DAPL) and backers*, BANKTRACK, *available at* https://www.banktrack.org/article/three_banks_step_away_from_dakota_access_pipeline_backers_v (last visited Sept. 7, 2018).

[180] *See BNP Paribas exits Dakota Access Pipeline*, GLOBE NEWSWIRE (Apr. 5, 2017, 11:42 AM), https://globenewswire.com/news-release/2017/04/05/954842/0/en/BNP-Paribas-exits-Dakota-Access-Pipeline.html [https://perma.cc/SQ7K-V8WM]; Press Release, DNB, DNB has sold its part of Dakota Access Pipeline loan (Mar. 26, 2017), http://feed.ne.cision.com/client/dnbnorasa/Commands/Release.aspx?js=0&releaseID=1286360 [https://perma.cc/584W-53KS]; Press Release, ING, ING has sold its stake in Dakota Access pipeline loan (Mar. 21, 2017), https://www.ing.com/Newsroom/All-news/ING-has-sold-its-stake-in-Dakota-Access-pipeline-loan.htm [https://perma.cc/2BZZ-XP4R].

diligence prior to committing financing. In fact, the Equator Principles (EP) were specifically created as an environmental and social risk management framework for this purpose and signatories have access to information and standards through the Equator Principles Association to focus their risk assessment.[181]

Notably, in this case, 13 of the 17 banks that committed funding were signatories to the EPs and their support for DAPL directly contradicted their commitments to FPIC under the EPs.[182] Furthermore, their willingness to forgo enhanced due diligence, as promised, elicited extensive dialogue among banks, indigenous peoples, and others about how effectively the EPs are being implemented. Those losses to banks, either through direct account closures or through selling their shares of loans or tarnishing their reputation as responsible community lenders, could possibly have been avoided had a more thorough social risk assessment been conducted. In the reverse, banks that insist that projects be conducted with the highest degree of integrity as to solicitation of FPIC and understanding the complex impacts of projects on indigenous lands will mark themselves as responsible and more financially viable for having accounted for the risks and costs of operating therein.

In November 2017, the Equator Principles Association announced plans to start a process of updating the Equator Principles in order to "reflect ongoing learning and emerging good practice."[183] The aim of the process is on a targeted update that gives particular attention to scope of applicability, human rights (inclusive of the rights of indigenous peoples), climate change, and others issues.[184] The Equator Principles Association's desire to glean information and understanding from the DAPL controversy will hopefully give financial institutions a more focused understanding of how to apply due diligence as to indigenous communities and ensure that there is no reason for financial institutions *not* to apply these frameworks during all stages of project consideration and financing.

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[181] EQUATOR PRINCIPLES, http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf (last visited Sept. 6, 2019).
[182] Johan Frijns, *An open letter to the Equator Principles Association*, BANKTRACK (Nov. 7, 2016), https://www.banktrack.org/news/an_open_letter_to_the_equator_principles_association.
[183] EP Secretariat, *EP Association Annual Meeting 2017* Outcomes, EQUATOR PRINCIPLES (Nov. 2, 2017), http://equator-principles.com/2017/11/.
[184] *Id.*

V. ESTIMATED COSTS TO FIRMS

Each of the following sections quantify different costs that accrued to ETP and other firms with an ownership stake on DAPL. The project was originally slated to cost $3.8 billion.[185] But, the total cost of DAPL is likely closer to $7.5 billion. As noted before, this case study suggests that the delay is directly correlated with the cumulative social pressure opposing DAPL that began in April of 2016. The next section details each of the components of the total estimated costs to firms: the additional operating costs including what is known about the costs of lost revenue; the costs associated with protests; and costs that are substantiated but not quantified.

While this section estimates costs to firms with ownership stake in DAPL, it does not seek to assess how these costs were allocated across the firms. As stated above, ETP owned DAPL jointly with Enbridge, Phillips 66, and Marathon Petroleum. As the largest stakeholder and operator of the project, it is reasonable to suggest that the largest share of these costs was incurred by ETP.

A. ADDITIONAL OPERATING COSTS

At the outset of the project DAPL was slated to cost $3.8 billion overall, however this total quickly escalated as social pressure mounted and construction was delayed.[186]

ETP reported information on estimated additional costs resulting from the delay in a motion filed on August 18, 2016 opposing the Standing Rock Sioux Tribe's request for a preliminary injunction to halt construction.[187] The motion stated that:

> "If the Court grants an injunction and Dakota Access ultimately prevails in this action, or it otherwise is determined that Dakota Access has been wrongfully enjoined or restrained, the damages to Dakota Access will be substantial. The damages Dakota Access will sustain as a result of the

[185] Jonathan Thompson, *The twisted economics of the Dakota Access Pipeline*, HIGH COUNTRY NEWS (Dec. 12, 2016), https://www.hcn.org/issues/48.21/the-twisted-economics-of-the-dakota-access-pipeline.
[186] Jonathan Thompson, *The twisted economics of the Dakota Access Pipeline*, HIGH COUNTRY NEWS (Dec. 12, 2016), https://www.hcn.org/issues/48.21/the-twisted-economics-of-the-dakota-access-pipeline.
[187] *Dakota Access, LLC's Opposition to Plaintiff's Motion for Preliminary Injunction* at 29, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-CV-01534-JEB (D.D.C. Aug. 18, 2016).

requested injunction, even for a temporary shutdown, would total approximately $1.4 billion in the first year."[188]

ETP breaks down this $1.4 billion figure as follows:

ADDITIONAL OPERATIONAL COSTS[189]	
Renew Easements	$70,000,000.00
Remobilization Costs	$200,000,000.00
Maintenance of Work Sites	$18,000,000.00
Capital Expense	$36,000,000.00
Loan Renewal Fees	$15,500,000.00
Dakota Access' 2017 Lost Revenue	$913,000,000.00
Specialty Seed Payment	$4,500,000.00
Duck Lease Payment	$3,000,000.00
"Completed-by" breach payments	$4,300,000.00
Deviations from construction schedule	$100,000,000.00
Total Additional Operational Costs	**$1,364,300,000.00**

ETP stated the $1.4 billion estimate of additional in August of 2016, and the pipeline was placed into service on June 1, 2017. Thus, this case study assumes that most, if not all, of these expenses were incurred over the ten-month intervening time-period given security costs, legal fees and other costs associated with the delay.

In the same court document, ETP also stated that:

> "Halting DAPL construction, even if temporary, would result in substantial job losses and other local benefits, and will additionally cause [Dakota Access, LLC] to lose profits that are unlikely to be recoverable. Specifically, DAPL expects to lose (and not just delay the receipt of) $900 million dollars every month the pipeline construction is delayed."[190]

A minimum estimate for construction delays alone would be for about two months, beginning on December 4, 2016 when the USACE denied the easement to cross Lake Oahe and ending on February 8, 2017, when the easement was granted. This

[188] *Id.* at 29.
[189] *Id.* at 42.
[190] *Id.* at 32.

represents a minimum because there were several other delays that spanned multiple-day periods but likely do not add up to a month in aggregate. And, to the best of our knowledge, this number does not include the final costs of construction from February 9, 2017 to June 1, 2017 nor does it include fees for maintenance, remobilization, or loan renewal. But, the total delay for even two months could be as high as $1.8 billion just for construction. This estimate is far higher than the $1.4 billion estimate that includes such costs over the year. We therefore used $1.8 billion to estimate a maximum bound.

There is a paucity of publicly available information that shows exactly how much of these anticipated costs were actually incurred. ETP did state, however, on November 15, 2016, that "the delay has already cost Dakota Access more than $450 million. Further delay will cost Dakota Access tens of millions of dollars per month thereafter, none of which can be recovered."[191] This number ("tens of millions") appears to be less than the $900 million given in the document above, but captures the drain of millions of dollars due to delays.

There is little public information as to whether the estimate above accounts for changes in the company's contracts with shippers, which resulted from the delay. According to ETP's statements to the courts, "in connection with its long-term transportation contracts with 9 committed shippers, Dakota Access has committed to complete, test and have DAPL in service by January 1, 2017. The long-term transportation contracts give shippers a right to terminate their commitments if DAPL is not in full service per the contract deadline."[192] Given that DAPL was not in service by January 1, 2017, shippers were likely given the right to terminate their contracts, or at least to renegotiate them.

If shippers did not outright terminate their contracts with the company, they may have had the option of seeking concessions on contracted volumes, prices, or contract duration. To the extent that it figured into price negotiations, the price of oil changed dramatically between the time the pipeline was proposed in 2014 to 2017. When

[191] Dakota Access, LLC's Answer To Intervenor-Plaintiff Cheyenne River Sioux Tribe's First Amended Complaint For Declaratory and Injunctive Relief, and Cross-Claim Against Defendant U.S. Army Corps Of Eng'rs at 54, Standing Rock Tribe v. U.S. Army Corps of Eng'rs, 205 F.Supp. 3d 4 (D.D.C 2016) (No. 1:16-cv-1534-JEB), ECF No. 57.

[192] *See* Cathy Kunkel & Clark Williams-Derry, *The High Risk Financing Behind the Dakota Access Pipeline*, IEEFA (Nov. 2016), http://ieefa.org/wp-content/uploads/2016/11/The-High-Risk-Financing-Behind-the-Dakota-Access-Pipeline_-NOV-2016.pdf which details the possibility that shippers exercised that right, or renegotiated their contracts under conditions considerably less favorable to ETP.

DAPL was first proposed in 2014, oil prices averaged $96 per barrel.[193] Production in the Bakken and Three Forks areas had reached record highs at that time, with the U.S. Energy Information Administration predicting continued growth through 2020.[194] Then the market crashed. Oil prices between January 2015 and September 2016 averaged only $45 per barrel.[195] Production in the Bakken and Three Forks consequently declined, and the region found itself faced with a glut of energy transportation infrastructure, with 60 percent of its capacity underutilized.[196] Thus, if ETP had to renegotiate its contracts with shippers, it did so at a time when both oil prices and need for Bakken energy infrastructure were significantly lower than when DAPL was first proposed.

Given these changes in oil prices and the delay in placing DAPL online, it is possible that lost revenue from renegotiations or changed shipping fees is significant especially since the tariffs charged by ETP to shippers likely represents a large portion of their revenue from the pipeline. While not included in the calculations for this study, Enbridge stated in an affidavit to the court that for each day of delay to the in-service date of the Bakken Pipeline System, Enbridge would suffer losses of $600,000 per day in 2017.[197] This was based on Enbridge's own 27.6% interest in the tariff revenues generated by the pipeline companies.[198] Similar costs would be distributed to each of DAPL's owners with interest in the tariff revenues, and the additional costs of renegotiations would be accrued by ETP.

This case study estimates maximum and minimum additional costs based on the different statements made by ETP regarding their own estimate of costs due to delay. In the same document ETP stated that the cost could be $1.4 billion over one year, and stated that ETP could lose $900 million per month of delayed construction time. While there are different time periods associated with each statement, the additional costs are still significant.

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193 *Average Crude Oil Spot Price Historic Data: 5 Years*, YCHARTS, https://ycharts.com/indicators/average_crude_oil_spot_price (last visited Sept. 6. 2018).

194 U.S. ENERGY INFO. ADMIN, U.S. CRUDE OIL PRODUCTION TO 2025: UPDATED PROJECTION OF CRUDE TYPES 12 (May 28, 2015).

195 *Average Crude Oil Spot Price Historic Data: 5 Years*, YCHARTS, https://ycharts.com/indicators/average_crude_oil_spot_price (last visited Sept. 6. 2018).

196 Kunkel, *supra* note 192 at 7.

197 *Dakota Access, LLC's Opposition to Plaintiff's Motion for Preliminary Injunction*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-CV-01534-JEB, Exh. G (D.D.C. Aug. 18, 2016).

198 *Id.*

ADDITIONAL OPERATING COSTS TO FIRMS	
A. Cost of delays up to Nov. 15, 2016	$450,000,000.00
B. Cost of construction delays (2 months)	$1,800,000,000.00
C. Additional Operating Costs (full year 2017)	$1,400,000,000.00
TOTAL (A+C)	**$1,850,000,000.00**
TOTAL (A+B)	**$2,250,000,000.00**

It is likely that DAPL cost ETP and other associated firms far more than these estimates. While some of the costs to ETP were made public through court documents, there was little disclosure to investors otherwise and most of it was reactive to the social pressure. Had any of the firms associated with DAPL completed an independent due diligence process rooted in human rights and indigenous rights policies at any point prior to the announcement of project-level financing on August 2, 2016, it is likely they would have found many of the indicators of social unrest that ultimately cost the project in time and money.

B. COSTS OF PROTEST

The costs of protest differ from lost revenue and operating costs in that the latter were caused by government actions that delayed approvals needed to finish construction, while the former were caused by the presence of the camp itself and the social actions generated therein.

On August 22, 2017, ETP filed a lawsuit against several environmental organizations that were involved with the protests against DAPL, including Greenpeace, Banktrack and Earth First!, among others (herein referred to as 'environmental organizations').[199] The lawsuit alleged that these organizations participated in "campaigns of misinformation to target legitimate companies and industries with fabricated environmental claims and other purported misconduct, inflicting billions of dollar in damage."[200] The company sought financial damages as compensation for the following:

> "impaired access to the capital markets and increased cost of capital; decreased market capitalization; lost profits; lost relationships with investors, lending partners, and other contractual relationships; business

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[199] Complaint, Energy Transfer Equity v. Greenpeace, et al., No. 1:17-cv-00173-CSM (D.N.D. Aug. 22, 2017), ECF No. 1.
[200] *Id.*at 1.

> disruption losses and expenses; substantial damages to Plaintiffs' property, brand, goodwill, business reputation, and standing in the global marketplaces, communities, and government agencies critical to Plaintiffs' business; and the expenditure of substantial resources and management time to mitigate the damage caused by the [environmental organizations'] illegal campaign, including legal fees."[201]

The complaint further stated that "estimates of increased cost as a result of the [environmental organization's] conduct were not less than $300 million, with the full extent of damage that Energy Transfer has suffered can only be determined at trial."[202]

On July 24, 2018, ETP's claims against Bank Track were dismissed by a federal judge, who stated that the company's attempts to connect public criticism to remote criminal activities represented in attempt to "curtail almost any disagreeable, arguably protected speech."[203] While not legally substantiated, the damages outlined in ETP's claim provide additional insight into the financial impacts of failing to maintain positive relationships with indigenous peoples. However, like the other costs that ETP claims to have suffered in court, none of these costs appeared in the company's disclosures to investors at any time.

This case study assumes ETP's stated cost of protests at $300 million.

C. COSTS THAT ARE SUBSTANTIATED BUT NOT QUANTIFIED

Finally, there are other significant costs that can be reasonably inferred, but are not quantifiable using publicly available data. For example, ETP was somewhat insulated by any boycott efforts because it is primarily involved in the distribution rather than the sale of energy. However, DAPL affiliate companies Enbridge, Phillips 66, Marathon Petroleum, and Sunoco sell gasoline on the retail level and some efforts to

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201 *Id.* at 387.
202 *Id.* at 388.
203 Press Release, Earth Rights Int'l, Court Dismisses Frivolous and "Dangerously Broad" Lawsuit against NGO BankTrack for Opposing Dakota Access Pipeline (July 25, 2018), https://www.commondreams.org/newswire/2018/07/25/court-dismisses-frivolous-and-dangerously-broad-lawsuit-against-ngo-banktrack [https://perma.cc/B2EY-5VFZ].

boycott these companies were made, though these efforts were not as well-organized or as well-recorded as the efforts to boycott banks.[204]

D. TOTAL COSTS TO FIRMS

The minimum and maximum values for the total costs to firms were computed by adding the different Additional Operating Costs numbers, added to the other numbers covered in Section V.

Additionally, the total cost of losses to firms includes ETP's loss in market capitalization as covered in Section III.A. From August 2, 2016 to June 14, 2017, the time period with the most intense social pressure, the change in ETP's market capitalization amounted to a loss of $1.6 billion.[205]

This number is included in the total costs as it is indicative of all losses that ETP experienced. Because of the merger with Sunoco Logistics Partners, L.P., completed on May 1, 2017, the number does not capture volatility due to social pressure alone. However, it does quantify the losses that ETP carried as it placed the pipeline into service.

TOTAL COST OF PROJECT TO FIRMS	
A. Projected Total Costs	$3,780,000,000.00
B. Additional Operating Costs min.	$1,850,000,000.00
C. Additional Operating Costs max.	$2,250,000,000.00
D. Costs of Protests	$300,000,000.00
E. Loss of Market Cap (ETP)	$1,600,000,000.00
TOTAL (A+B +D+E)	**$7,920,000,000.00**
TOTAL (A+C+D+E)	**$7,520,000,000.00**

The costs of protests speak for themselves. The delay in placing the pipeline into operation can be directly attributed to the protests, social unrest, and legal

[204] *For example, see* Scap (@scapelliti), Twitter Post (Feb. 10, 2017, 6:00 PM), https://twitter.com/scapelliti/status/830234934484824065.
& Rachel Fixsen, Nordea cuts three firms involved in protest-hit Dakota Access Pipeline, IPE Reference Hub (Feb. 13, 2017), https://hub.ipe.com/news/esg/nordea-cuts-three-firms-involved-in-protest-hit-dakota-access-pipeline/www.ipe.com/news/esg/nordea-cuts-three-firms-involved-in-protest-hit-dakota-access-pipeline/10017541.fullarticle.

[205] The analysis of market capitalization assumes that historical data sourced from stockrow.com was accurate at all dates pulled. All information is available via the link in Appendix A.

challenges. This delay may have precipitated renegotiations with shippers at oil prices that were far less favorable. These estimates represent minimums and still, the total cost of DAPL was likely much greater than $7.5 billion.

VI. COSTS TO LOCAL COMMUNITY STAKEHOLDERS

The primary focus of this study is assessing costs that companies face when they do not respect the human rights of indigenous peoples. However, a full assessment of the costs of DAPL also requires examining costs to local community stakeholders. Below is a summary of these costs. Additional analysis and quantification is the subject of ongoing research by FPIEP.

A. COSTS OF UNWANTED DEVELOPMENT

All development comes with benefits and costs, but they are not always evenly distributed.[206] The benefits of DAPL—which primarily took the form of jobs and corporate profits—did not flow to communities along the pipeline route.[207] And, the Standing Rock Sioux Tribe incurred significant additional costs to manage the activities related to construction of the pipeline, as separate from the costs associated with the influx of people to the camp, by documenting the environmental and cultural impacts of the pipeline in the absence of comprehensive reports by another entity.[208]

The most glaring cost to the local community as a result of DAPL would be in the event of an oil spill.[209] At first, the data surrounding the impacts of an oil spill from DAPL was not initially disclosed by ETP, which prevented the Standing Rock Sioux Tribe from fully understanding the risks and bolstering their opposition. [210] Further, no mitigation plan was proactively put forward to the tribes directly impacted.[211] On December 4, 2017, Judge Boasberg ordered USACE and Dakota Access, LLC to work with the listed tribes to complete oil spill response plans.[212] On August 31, 2018 the

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[206] Standing Rock Sioux Tribe, *Impacts of an Oil Spill from the Dakota Access Pipeline on the Standing Rock Sioux Tribe* at 75-82 (Feb. 21, 2018), https://www.standingrock.org/sites/default/files/uploads/Standing Rock Sioux Tribe_impacts_of_an_oil_spill_2.21.2018.pdf [hereinafter *Impacts of an Oil Spill*].
[207] Editorial Board, *North Dakota's Pipeline Payoff*, WALL ST. J. (Dec. 29, 2017), https://www.wsj.com/articles/north-dakotas-pipeline-payoff-1514591716.
[208] *Impacts of an Oil Spill,* supra note 206, at 85.
[209] *Id.*
[210] *Id.* at 2.
[211] *Id.* at 3.
[212] Memorandum Opinion at 6, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-

USACE submitted a Memorandum stating that their review of the potential impacts of an incident did not reveal any significant impacts to hunting and fishing resources.[213] This document stands in direct contrast to information compiled by the Standing Rock Sioux Tribe.[214]

In February of 2018, the Standing Rock Sioux Tribe issued a report, *Impacts of an Oil Spill from the Dakota Access Pipeline on the Standing Rock Sioux Tribe*.[215] The report has several findings, notably that an Environmental Impact Statement is necessary to properly understand and evaluate the impacts of an oil spill from DAPL on the fish and wildlife on the Standing Rock Sioux Indian Reservation as well as on the local communities.[216] The report refers extensively to a 2017 report prepared by the Standing Rock Sioux Tribe Department of Game and Fish that documents what the impacts of an oil spill would be from DAPL on wildlife and sensitive wetlands.[217] The report measures the specific effects of Bakken crude oil, the rates of spillage and leak detection in underground pipelines such as DAPL, and the timelines for emergency response procedures, among other factors.[218] Among other findings, the reports note that the USACE's findings are based on unrealistic assumptions about the environmental impacts of an oil spill and that the effects of a worst case oil discharge would be far worse than currently documented by the USACE and Dakota Access, LLC.[219]

The significant cultural and spiritual uses of the land would further compound the economic and environmental losses due to an oil spill along the pipeline route.[220] As the Standing Rock Sioux Tribe report details, subsistence hunting and fishing are integral to the Lakota and Dakota way of life and flow into cultural and spiritual practices held sacred by many.[221] An oil spill would jeopardize the wetlands and habitat that link these communities to their cultural heritage.[222] The costs of an oil spill on the cultural and spiritual uses of the lands are difficult to quantify because they are

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01534-JEB (D.D.C. 2017), ECF No. 304.

[213] U.S. Army Corp of Eng'rs Status Report Regarding Remand, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:15-cv-01534-JEB (D.D.C. 2018), ECF. No. 362.

[214] *See generally Impacts of an Oil Spill,* supra note 206.

[215] *Id*. at 85.

[216] *Id*. at 5.

[217] *Id*. at 1.

[218] *Id*. at 29-64.

[219] *Id*.

[220] *Id*. at 1.

[221] *Id*. at 1.

[222] *Id*. at 6-13.

mathematically somewhat intangible, but still need to be considered for when assessing benefits and costs of the project.[223]

Finally, the costs of pipeline placement and management must be carried forward as there are risks attendant to an oil spill or pipeline break far into the future.[224] This fact underscores the need for further research to quantify for current use the future costs associated with environmental and cultural values as impacted by an oil spill.[225]

B. COSTS OF PROTEST

The presence of the camp delivered clear benefits to indigenous peoples around the world by heightening global attention to their fight against unwanted development.[226] At the same time, the Standing Rock Sioux Tribe itself incurred significant costs. The Standing Rock Sioux Tribe has a little over 8,000 members who live on the reservation.[227] Yet during the protests, the total amount of people on Standing Rock increased to 15,000.[228] The tribal government thus spent valuable time and energy to manage the large influx of people.[229] The demands and responsibilities imposed on tribal officials and staff extended well beyond the normal range. In the words of Dave Archambault II, the Chairman of the Standing Rock Sioux Tribe during the protests, "The tribal government takes great honor and pride from the support received by all nations. The Tribe did its best to welcome and thank everyone. As a host, the tribal government has to ensure that all of the supporter's basic waste management needs and clean-up costs were covered."[230] To do so, the Tribe spent around $60,000 a month for organic waste management and $12,000 a month for roll-off dumpsters.[231] This detracted from the tribal government's ability to provide usual services to tribal citizens in a community that is already under-

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[223] *Id.* at 29-64.
[224] *Id*. at 87.
[225] *See id*. at 85 referring to future research to quantify the discount rates of reduced revenue of future profits. This same idea can be applied more broadly to ensure that all costs of an oil spill, or of an event associated with social risks, can be accurately quantified and incorporated into a risk management calculus.
[226] Zoë Jackson, *"For the future": Doing indigenous history after Standing Rock*, Historians (Mar. 9, 2018), https://www.historians.org/publications-and-directories/perspectives-on-history/march-2018/for-the-future-doing-indigenous-history-after-standing-rock.
[227] *Statistics*, STANDING ROCK SIOUX TRIBE, https://www.standingrock.org/content/statistics.
[228] Natasha Lennard, *supra* note 28.
[229] *Impacts of an Oil Spill,* supra note 218, at 84-85.
[230] Statement by Dave Archambault II to authors (August 31, 2018).
[231] *Id.*

resourced and experiences higher than average levels of poverty, unemployment, and attendant social issues. [232]

The camp was closed on February 22, 2017. At that point, both the Standing Rock Sioux Tribe, the state and the federal government via the USACE coordinated clean-up at the site of the camp, including hauling away garbage and basic remediation.[233] The Tribe estimated their share of expenses for basic clean-up to be between $200,000.00 and $500,000.00.[234] While the exact amount that all entities spent to clean-up the camp is not available, the USACE reportedly spent $1.1 million.[235]

Residents of the Standing Rock reservation were among those that participated in frontline activities and some were arrested at the camp.[236] Any person detained, even for a short period of time, is likely to incur some costs whether they be legal fees, time spent away from work and other responsibilities, emotional trauma, or physical injuries.

Additional costs resulted from the closure of Highway 1806, which is the main throughway between the reservation and larger cities such as Mandan and Bismarck.[237] From October 2016 to March 2017, authorities shut down the road due to public safety concerns. [238] Others expressed the view that authorities were attempting to limit the mobility of persons participating in protest activities. Either

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[232] *Impacts of an Oil Spill,* supra note 206, at 84-85.

[233] Press Release, N.D. Joint Information Center, Gov. Burgum, Chairman Archambault discuss need to clean up, evacuate camp (Feb. 20, 2017), https://www.ndresponse.gov/archive/2016/dakota-access-pipeline/press-releases/february-2017/gov-burgum-chairman-archambault.

[234] Sara Berlinger, *Standing Rock Sioux Tribe says donations will pay for DAPL protest camp cleanup costs*, KFYRTV (Feb. 7, 2017), https://www.kfyrtv.com/content/news/Standing-Rock-Sioux-Tribe-says-donations-will-pay-for-DAPL-protest-camp-cleanup-costs-413093813.html. Numbers also sourced from informal interviews with the authors.

[235] Valerie Richardson, *Dakota Access protest camps cleared after $1.1 million federal cleanup; four more dogs rescued,* WASHINGTON TIMES. (March 13, 2017), https://www.washingtontimes.com/news/2017/mar/13/dakota-access-case-army-finishes-11-million-cleanu/

[236] Lauren Donovan, *Standing Rock Sioux Chairman Dave Archambault arrested at Dakota Access Pipeline protest*, BISMARCK TRIB. (Aug. 12, 2016), https://bismarcktribune.com/news/state-and-regional/standing-rock-sioux-chairman-dave-archambault-arrested-at-dakota-access/article_fb12da36-3e84-5694-8eba-000013930cb2.html.

[237] *Impacts of an Oil Spill,* supra note 206, at 84.

[238] Mark Charter, *Highway 1806 completely reopens after closure due to DAPL protests*, KFYRTV (Mar. 21, 2017, 1:21 PM), http://www.kfyrtv.com/content/news/Highway-1806-completely-reopens-after-closure-due-to-DAPL-protests-416744203.html.

way, the closure caused hardship to residents of the Standing Rock Sioux reservation that commute to Bismarck for work, school, and other purposes; as well as residents of Bismarck who work on the reservation.[239] It required drivers to travel an additional 20 miles each way, adding fuel costs and extending the travel time between the reservation and Bismarck from forty to sixty minutes.[240] The Standing Rock Sioux Tribe's report on oil impacts also noted the stress associated with those closures, namely the psychological impact of having a main artery closed in the event of a medical emergency, as a tangible cost suffered by the community.[241]

The closure also had long-term negative effects on the tribal economy by cutting off access to recreational sites on or near the reservation, most notably the Prairie Knights Casino, which sources most of its customers from Bismarck.[242] The estimates for the casino's loss of revenue are between $6 million and $10 million.[243] The *Impacts of an Oil Spill Report* states that revenues were reduced by two thirds as a result of the road closures which hindered the tribal government's ability to provide critical social services to tribal citizens.[244] As of a report in February of 2018, the revenues to the casino had not recovered.[245]

C. COSTS TO WATER PROTECTORS

Water protectors, as protesters at the camp were known, came from all over the United States and around the world to express their support.[246] Indigenous peoples worldwide supported the movement and the Standing Rock Sioux Tribe.[247] Each of these individuals incurred costs including, but not limited to, travel expenses, food and supplies, and time spent away from work and other responsibilities. Those who participated in frontline activities and/or were arrested would have incurred

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[239] *Impacts of an Oil Spill,* supra note 206, at 84.
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] Caroline Grueskin and Jessica Holdman, *Struggling casino aims to revive business,* BISMARCK TRIB. (Feb. 18, 2017), https://bismarcktribune.com/business/local/struggling-casino-aims-to-revive-business/article_d629e2fe-3795-55b9-94f3-aaedd9de57e0.html. Informal interviews with the authors suggest that the number is much higher, as much as $10 million in revenue loss.
[244] *Id.*
[245] *Impacts of an Oil Spill,* supra note 206, at 85.
[246] Saul Elbein, *These Are the Defiant "Water Protectors" of Standing Rock*, NAT'L GEOGRAPHIC (Jan. 26, 2017), https://news.nationalgeographic.com/2017/01/tribes-standing-rock-dakota-access-pipeline-advancement/.
[247] *Id.*

additional legal costs (see previous section) not to mention travel costs associated with their legal cases. In total, 761 people, residents and visitors, were arrested during the protests.[248]

The costs to the individuals at the camp, whether from outside or within the Standing Rock Sioux community, underscores a number of themes. First, the costs themselves accumulate when considering the sheer number of people who attended the camp which then culminated in increased marches as well as increased social media attention and catalyzed global divestment campaigns. Second, the number of individuals willing to assume these costs also demonstrates the resonance of the issues with indigenous peoples globally who are increasingly subjected to development impacts for which they were not consulted. In short, the water protectors assumed great cost to participate and their willingness, and the willingness of supporters globally, will continue to build and must therefore be addressed through engagement conducted with the highest degree of respect, integrity and transparency.

D. COSTS TO TAXPAYERS

Taxpayers incurred a major expense due to the heavy presence of law enforcement at the camp. The Morton County Sheriff's Department deployed significant resources and received assistance from 1,300 personnel spanning 24 counties, 16 cities, and 9 states.[249] In March 2017, the state of North Dakota reported that it spent $38 million on associated law enforcement.[250] ETP wired the state $15 million to defray these costs, and the state also received assistance from the U.S. Department of Justice, however the impact of the costs remains.[251] For example, it remains unclear whether the $38 million for law enforcement includes the costs of prosecution of the over 700

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[248] Caroline Grueskin, *47 DAPL cases closed in March, 33 dismissed*, BISMARCK TRIB. (Apr. 21, 2017), https://bismarcktribune.com/news/local/crime-and-courts/dapl-cases-closed-in-march-dismissed/article_a59ebf7e-8a52-53f0-aa64-4f9c81ef761a.html.

[249] Thomas Dresslar, *How Many Law Enforcement Agencies Does It Take to Subdue a Peaceful Protest?*, ACLU (Nov. 30, 2016), https://www.aclu.org/blog/free-speech/rights-protesters/how-many-law-enforcement-agencies-does-it-take-subdue-peaceful.

[250] Press Release, N.D. Joint Information Center, *By the Numbers (07)* (March 7, 2017), https://www.ndresponse.gov/archive/2016/dakota-access-pipeline/press-releases/march-2017/numbers-07; *First DAPL Oil Shipment Set for This Week, Enforcement Costs Remain*, VALUEWALK (Mar. 20, 2017, 9:00 PM), https://www.valuewalk.com/2017/03/dapl-oil-shipmesnts/.

[251] Blake Nicholson, *North Dakota seeks US$38 million from Washington to reimburse it for pipeline protest* costs, THE ASSOCIATED PRESS (JULY 20, 2018), https://www.theglobeandmail.com/business/article-north-dakota-seeks-us38-million-from-washington-to-reimburse-it-for/.

people arrested, which would be an additional cost.[252] As of July 2018, North Dakota's Attorney General was requesting further reimbursement from the federal government, on the grounds that the USACE was to blame for letting protesters camp without permits and failing to maintain law and order.[253] North Dakota's Attorney General has stated the possibility of suing the USACE if their request is not granted or settled within six months.[254] If it occurred, the associated legal costs would be passed on to taxpayers. The costs came as a result of the county and state's direct response to protests at the camp. In this way, taxpayers bore the financial burden of a long history of missed opportunities for dialogue, consultation, and resolution on the part of the corporations, financial institutions, and government alike.

As noted above, ongoing qualitative and quantitative research is needed to properly assess the costs to community stakeholders, however this case study demonstrates three pressing and transferable themes regarding community costs. First, community costs generally occur in response to and after a break-down in consultation, negotiation and dialogue between high-level stakeholders such as governments and companies. Second, local community members, who are often those with the fewest resources and receive the fewest long-term benefits from development projects like pipelines, incur a significant financial loss that can be unknown for years as, for example, business recovers, or as the state incurs and assesses legal or contract fees. Finally, this case study demonstrates that indigenous peoples and supporters are eager to voice their support with their time and money and, therefore, social risks must be integrated into a comprehensive risk analysis to better understand needs at a local level and then to partner with local communities to build a sustainable development infrastructure.

CONCLUSION

The correlation between ETP's stock price and the timeline of events surrounding the #NoDAPL movement are clear. ETP's stock started at $30.15 on August 3, 2016 after announcing project-level financing, but was trading around $19 in August 2017.[255] And, ETP's stock prices have never returned to their original numbers despite the return of oil and gas prices to their previous numbers. In fact, the value of the S&P 500 has increased by nearly 35% from August 2, 2016 to September 28, 2018 but

252 *Id.*
253 *Id.*
254 *Id.*
255 ETP's stock price averaged $19.19 for the month of August 2017. *See* data linked in Appendix A.

ETP's value has sunk by almost 20%.[256] While there are many pressures that factor into ETP's stock price, the losses are coincident with major events in the DAPL timeline, shedding light on the materiality of social risks. ETP didn't produce high returns for investors via DAPL, in large part due to the social risks they failed to analyze and disclose, which is now having a long-term negative impact on their stock returns and their reputation.

In fact, a full and rigorous analysis of human rights and social risks falls immediately within an officer's fiduciary duties because of those risks' potential material impact on project success and, therefore, on the company. This case study asserts, in part, that those social risks can be quantified and gives investors a starting point to quantitatively and qualitatively, through the due diligence questionnaire and use of international human rights instruments, integrate the "S" in ESG into a full due diligence and disclosure process.

Though stock price volatility alone triggers a fiduciary obligation to create due diligence specific to social risks, this was just one aspect of a the much larger material impact of social pressure exerted against DAPL. The cost for the entire project for ETP and other firms with an ownership stake was not less than $7.5 billion and the banks that financed DAPL incurred an additional $4.4 billion in costs. Further, at least $38 million accrued to taxpayers and other local stakeholders. These estimates do not include the long-term financial impacts that are still being experienced, such as the fact that the Prairie Knights Casino, a critical source of revenue for the Standing Rock Sioux Tribe, still has not recovered the volume of business it averaged prior to the DAPL controversy. These costs came after a series of missed opportunities for ETP, the government, and investors to understand, to consult and to address the social risks of DAPL that became apparent as early as September 2014.

Conversely, the #NoDAPL movement galvanized worldwide support from indigenous peoples and advocates alike because of the resonance of its issues – the lack of consultation, minimal adherence to government policies as to consent from indigenous peoples, and the lack of due diligence by companies as to the social and cultural impacts of development on and near indigenous territories. Indigenous governments will continue to push for true partnership and community advocates will keep voicing the need to respect rights with strategies drawn from the wider movement.

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[256] *See* data linked in Appendix A.

At the time of publication of this study, indigenous peoples are continuing to mobilize against development that is not conducted in line with their rights to free, prior and informed consent. First, on November 8, 2018 a federal judge blocked construction of the controversial Keystone XL pipeline for failure to adequately consider all of the risks attendant to construction.[257] Second, Enbridge Energy's Line 3 has been subject to protests and, on August 8, 2018, 3 two environmental groups and four tribes filed appeals to challenge the approvals given by the Minnesota Public Utilities Commission on the grounds that the Environmental Impact Statement prepared for the pipeline did not adequately consider the tribes' concerns for their lands and territories.[258]

This case study draws out the clear need for due diligence and disclosure as to human rights and social risk to assist all entities at every phase of project planning, construction, operation, closure and mitigation. Financial entities that adhere to the standards enumerated in the Equator Principles and take independent steps to assess social risks are more able to finance projects that not only do no harm, but create true partnerships with indigenous communities and local communities globally. Companies that create due diligence steps beyond the bare government standards and proactively consult with indigenous peoples can diminish negative impacts and create a template for long-term economic stability for their company and for the community. Companies can then use that due diligence to disclose a more accurate risk analysis to their investors that better protects their financial returns. As investors integrate human rights into their analysis, they are better positioned to influence markets to do good and to create strong local economies in partnership with indigenous peoples.

At the very least the controversy surrounding DAPL made one thing clear – investors must proactively recognize that the "S" in ESG is material and that failing to integrate

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[257] Fred Barbash, Allyson Chiu & Juliet Eilperin, *Federal judge blocks Keystone XL pipeline, saying Trump administration review ignored 'inconvenient' climate change* facts, WASHINGTON TIMES (Nov. 9, 2018) https://www.washingtonpost.com/nation/2018/11/09/keystone-xl-pipeline-blocked-by-federal-judge-major-blow-trump-administration/?utm_term=.1407c193199f; Order, Indigenous Environmental Network, et al. v. U.S. Dep't of State and Trasncanada Keystone Pipeline and Transcanada Corp., No. 4:17-cv-00029-BMM (D.D. Mont. Nov. 8, 2018).

[258] Brooks Johnson & Jimmy Lovrien, *State approves Enbridge Line 3 replacement pipeline,* DULUTH NEWS TRIBUNE (Jun. 28, 2018) http://www.duluthnewstribune.com/business/energy-and-mining/4466207-state-approves-enbridge-line-3-replacement-pipeline; John Enger & Dan Kraker, *Bemidji Line 3 pipeline protest indicates renewed opposition after regulatory approval,* MPRNEWS (Aug. 29, 2018) https://www.mprnews.org/story/2018/08/29/bemidji-line-3-protest-indicates-renewed-opposition-after-regulatory-approval.

human and indigenous rights into a comprehensive social risk analysis may create unduly high levels of risk, ultimately resulting in material loss.

APPENDIX A: DATA

The data used for this case study can be found in its electronic format at: https://www.dropbox.com/sh/zg54gh3fhqx82dq/AADLkYvEgI8NqOg4o-Ks-Oc2a?dl=0.