



# Decision to exclude Energy Transfer Partners, Phillips 66, Enbridge Inc., and Marathon Petroleum Corporation

March 2017

## Introduction

KLP has decided to exclude Energy Transfer Partners ("ETP"), Enbridge Energy Partners, Phillips 66 and Marathon Petroleum from investments by KLP and the KLP Mutual funds ('KLP') as of 13 March 2017 due to an unacceptable risk of contributing to serious or systematic human rights violations.

**Energy Transfer Partners ("ETP")**, a subsidiary of Energy Transfer Equity L.P.,<sup>1</sup> is a pipeline and energy infrastructure operator based in the United States.<sup>2</sup> The Dakota Access LLC is the joint venture organized to carry out construction of the Dakota Access Pipeline. ETP is the project operator. KLP had fixed income investments in ETP of approximately 56 million NOK.

**Phillips 66** is a US-based refining and logistics company.<sup>3</sup> Phillips 66 has a 25 percent ownership stake in the Dakota Access Pipeline. KLP had investments in Phillips 66 (equity and fixed income) of approximately 190 million NOK.

**Enbridge Inc.** ("Enbridge") is a Canada-based energy infrastructure company.<sup>4</sup> On February 15, 2017, Enbridge closed on its agreement to purchase a 27.6 percent stake in the Dakota Access Pipeline. On February 27<sup>th</sup>, Enbridge acquired Spectra Energy. KLP had investments in both entities (equity and fixed income) of approximately 273 million NOK.

**Marathon Petroleum Corporation** is a US-based refiner, retailer and distributor of oil and gas products.<sup>5</sup> On February 15<sup>th</sup>, 2017, Marathon Petroleum acquired a 9.2 percent

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<sup>1</sup> Energy Transfer, *Ownership Overview*. URL: [http://www.energytransfer.com/ownership\\_overview.aspx](http://www.energytransfer.com/ownership_overview.aspx).

<sup>2</sup> Energy Transfer Partners, *Company Overview*. URL: [http://www.energytransfer.com/company\\_overview.aspx](http://www.energytransfer.com/company_overview.aspx).

<sup>3</sup> Phillips 66, *About Us*, <http://www.phillips66.com/EN/about/Pages/index.aspx>.

<sup>4</sup> Enbridge Inc., *Our Company*. URL: <http://www.enbridge.com/about-us/our-company>.

<sup>5</sup> Marathon Petroleum, *About Us*, [http://www.marathonpetroleum.com/About\\_MPC/](http://www.marathonpetroleum.com/About_MPC/).



ownership stake in the Dakota Access Pipeline.<sup>6</sup> KLP had investments in Marathon Petroleum (equity and fixed income) of approximately 59 million NOK.

The Dakota Access Pipeline (DAPL) is approximately 1900 kilometers long, designed to transport unconventional oil from the Bakken formation in North Dakota through four US states: North Dakota, South Dakota, Iowa, and Illinois. Opposition to the project has focused primarily on questions of tribal sovereignty as well as the risk of water contamination at the Lake Oahe pipeline crossing, located less than a kilometer north of the Standing Rock Sioux Reservation. The Tribe currently derives its drinking water supply partly from an intake valve downstream. The crossing itself is located on federal land, but this is a source of dispute as well.

The Standing Rock Sioux Tribe lost title to the land in 1889, despite a previous treaty with the United States that recognized the area as tribal land. Protesters have also criticized the construction of fossil fuel infrastructure more generally.

Faced with massive protests, the US Army Corps of Engineers, which must approve pipeline water crossings, announced in December 2016 that it would delay approval of the final easement for construction underneath Lake Oahe, pending completion of a comprehensive environmental impact statement.<sup>7</sup> An executive order issued January 24, 2017 reversed that decision, demanding the US Army Corps issue the final easement with all haste within the boundaries of US law.<sup>8</sup> On February 7, the US Army Corps formally approved the easement.<sup>9</sup>

On March 3, 2017, the UN Special Rapporteur on the Rights of Indigenous Peoples in her statement following a fact-finding mission to the United States, concluded that approval of the Dakota Access Pipeline was granted "without an adequate social, cultural or environmental assessment" and in "the absence of meaningful consultation or

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<sup>6</sup> Marathon Petroleum Corporation Form 10-K to the US Securities and Exchange Commission (24 February 2017). URL: <https://www.sec.gov/Archives/edgar/data/1510295/000151029517000017/mpc-20161231x10k.htm> (p. 5).

<sup>7</sup> Reuters, "US Army Corps of Engineers denies easement for Dakota Access Pipeline – Sioux" (4 December 2016). URL: <http://www.reuters.com/article/north-dakota-pipeline-ruling-idUSL1N1DZ0MI>. The original link on the US Army website to the full announcement has been removed since early February.

<sup>8</sup> The White House Office of the Press Secretary, *Executive Order: Construction of the Dakota Access Pipeline* (24 January 2017). URL: [https://cdn3.vox-cdn.com/uploads/chorus\\_asset/file/7864391/Construction\\_of\\_the\\_Dakota\\_Access\\_Pipeline.0.pdf](https://cdn3.vox-cdn.com/uploads/chorus_asset/file/7864391/Construction_of_the_Dakota_Access_Pipeline.0.pdf).

<sup>9</sup> Gaffen, David and Simon Webb, "Controversial Dakota pipeline to go ahead after Army approval", *Reuters* (8 February 2017). URL: <http://www.reuters.com/article/us-north-dakota-pipeline-idUSKBN15M2DU>.



participation by the tribes".<sup>10</sup> KLP places significant weight on the UN Special Rapporteur's assessment of the situation in this decision.

KLP expects the companies to:

- Develop policies and practices designed to address flaws in the consultation process that the UN Special Rapporteur has outlined – in particular, by aligning company policies with international standards.
- Cooperate fully in the pending lawsuit filed by the Standing Rock Sioux Tribe.
- Develop a plan for addressing concerns related to the risk of water contamination from a pipeline spill that also includes collaboration with the affected tribes and communities.
- Conduct a full accounting of any deficiencies in the Dakota Access Pipeline human rights due diligence process and develop a plan for future collaboration with affected stakeholders that addresses deficiencies identified.

## Background on the Dakota Access Pipeline ("DAPL")

The planned DAPL route crosses Lake Oahe about 800 meters from the borders of the Standing Rock Sioux Reservation. Oahe is a manmade lake at the junction of the Missouri and the Cannonball Rivers, created when the Kennedy Administration opened the Oahe Dam in Pierre, South Dakota.<sup>11</sup> The dam was designed to stabilize flood areas and generate hydropower, but also resulted in flooding of large areas of land that were previously owned by the Standing Rock Sioux Tribe under the Treaty of Fort Laramie of 1851.<sup>12</sup> In 1889, the US government unilaterally pushed back the boundaries of the Standing Rock Sioux Reservation – an action the Tribe still views as illegal. In 1980, the US Supreme Court ruled that the Sioux tribes were not sufficiently compensated for the 1889 land grab. Out of principle, the tribes to this day refuse to accept the money. For this reason, the United States holds title to the land bordering the planned pipeline crossing, with construction approval required from the US Army Corps of Engineers.

The pipeline route was planned in such a way that it did not give rise to any requirement under US law to conduct a full environmental impact statement (EIS). Rather, US law

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<sup>10</sup> 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 (3 March 2017). URL: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21274&LangID=E>

<sup>11</sup> President John F. Kennedy, *Remarks at the Dedication of the Oahe Dam*, Pierre, South Dakota (17 August 1962). URL: <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHA-120-002.aspx>.

<sup>12</sup> North Dakota State Government Portal, *The History and Culture of the Standing Rock Oyaate*, "Tribal Historical Overview - Lakota Migration - The 1851 Fort Laramie Treaty", URL: <http://www.ndstudies.org/resources/IndianStudies/standingrock/1851treaty.html>.



required a more narrow environmental *assessment*, which does not contain the same requirements to evaluate handling of any potential oil spill or public hearings concerning the social impacts of the project. Admittedly, the environmental assessment for DAPL is over 1,000 pages long, but the mandate is narrower than would be required of a full EIS.<sup>13</sup>

In an early phase of the project, the companies planned a route that would have crossed the Missouri River north of the state capital, Bismarck. According to an early draft of the US Army Corps of Engineers' environmental assessment, this route was avoided both because it would have added an additional 15 kilometers of pipeline, and due to concerns about pollution of the city's drinking water supply.<sup>14</sup> The Standing Rock Sioux Tribe naturally perceives this as deeply offensive: why was the risk for drinking water pollution unacceptable for Bismarck, but not a barrier for construction near the Tribe's drinking water source? Moreover, the Tribe notes that the pipeline crosses the Missouri River twice in North Dakota, indicating that it is theoretically – if not practically – possible to avoid crossing the Missouri at all.

Since 2016, the Standing Rock Reservation has obtained some of its drinking water from a new treatment facility in Mobridge, South Dakota, 70 miles from the planned pipeline crossing.<sup>15</sup> This reduces the risk for pollution of the Tribe's drinking water, assuming any spill were discovered within the approximately 9 to 14 hours it would take for any polluted water to reach the intake valves. From the perspective of the Standing Rock Sioux Tribe, this does not change the fundamental evaluation. Their argument is not that the risk of pollution is particularly high, but rather, who is best able to bear that risk? From KLP's perspective, applying the divestment criterion related to severe environmental damage requires an assessment both that the risk of future oil spills is unacceptably high *and* that it would lead to large and irreversible negative consequences for human life and health. The project's environmental assessment does not support that conclusion.<sup>16</sup> The planned environmental impact statement that was cancelled earlier this year would have addressed the risk of severe environmental

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<sup>13</sup> US Army Corps of Engineers, *Dakota Access Pipeline Environmental Assessment* (9 December 2015). URL: <http://www.nwo.usace.army.mil/Missions/Civil-Works/Planning/Project-Reports/Article/633496/dakota-access-pipeline-environmental-assessment/>.

<sup>14</sup> US Army Corps of Engineers, *Draft environmental assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands* (November 2015), URL: <http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2426>.

<sup>15</sup> Scheyder, Ernest, "For Standing Rock Sioux, new water system may reduce oil leak risk", *Reuters* (22 November 2016). URL: <http://www.reuters.com/article/us-north-dakota-pipeline-water-idUSKBN13H27D>.

<sup>16</sup> US Army Corps of Engineers, *Environmental assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands* (July 2016), URL: <http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2801>.



damage in greater detail, with input from affected stakeholders, including the Standing Rock Sioux Tribe. Regardless, the outcome of that assessment is not necessary for the conclusions reached in this document.

## Existing infrastructure near the Lake Oahe pipeline route

The first point that the companies point to when discussing the Lake Oahe crossing is that the pipeline route runs parallel with existing infrastructure. As documented in the appellate case from September 2016 in which the Standing Rock Sioux lost a motion for a preliminary injunction, there is, *inter alia*, a gas pipeline already in the area near the DAPL route.<sup>17</sup>

From the perspective of the Standing Rock Sioux Tribe, the response is simple: according to the Tribe, the consultation process for those infrastructure projects was not sufficient either. Moreover, the pipeline route does not track the existing gas pipeline directly. According to the Tribe, construction of the Dakota Access Pipeline has already destroyed several cultural sites, including tribal burial grounds.<sup>18</sup> Several of the United States' foremost archeologists supported the concerns in the Tribe's affidavit in a joint letter to the Obama Administration.<sup>19</sup> In the federal case, however, the court dismissed these claims for lack of jurisdiction and KLP has not been able to find independent verification of whether such destruction took place. The areas in question have since been razed for pipeline construction.

## Violence connected to the protests

A significant share of news reports regarding the DAPL protests have focused on the use of force by local police. There is no doubt that individual protesters have suffered, in some cases, serious injuries. It is, however, extremely difficult to find independent documentation of exactly what has occurred. For example, the police state that they

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<sup>17</sup> *Standing Rock Sioux Tribe et. al. v. U.S. Army Corps of Engineers, et. al.* (United States District Court for the District of Columbia), 9 September 2016, p. 14. URL: <http://earthjustice.org/sites/default/files/files/order-denying-PI.pdf>.

<sup>18</sup> It is important to note that in Sioux culture, a burial ground does not necessarily indicate the presence of human remains. Rather, rock cairns may mark the site of cremation. Their significance is thus not obvious to those outside the Tribe and the markers may be difficult to identify. Supplemental Declaration of Tim Mentz, Sr. in Support of Motion for Preliminary Injunction (2 September 2016). URL: <http://earthjustice.org/sites/default/files/files/Suppl-Dec-of-T-Mentz-Sr.pdf>.

<sup>19</sup> Archaeologists & Museums Denounce Destruction of Standing Rock Sioux Burial Grounds (21 September 2017). URL: <http://thenaturalhistorymuseum.org/archaeologists-and-museums-respond-to-destruction-of-standing-rock-sioux-burial-grounds/>.



discovered improvised explosives that they believe could have led to the type of injuries observed if mishandled by protesters.<sup>20</sup> Court proceedings currently underway in North Dakota<sup>21</sup> will presumably shed light on these cases and provide an independent assessment of whether human rights violations have occurred. The main protest camp near Lake Oahe is now cleared, such that the risk of future confrontations is low. More broadly, however, in order to conclude that violence perpetrated by national or local authorities would merit divestment, there must be documentation that a company knew or should have known that the authorities would violate human rights and that the company by its acts or omissions was directly linked to that violation. KLP has not discovered sufficient independent documentation to support this allegation.

## Consultation

The Standing Rock Sioux Tribe has a lawsuit pending in federal court arguing that the consultation process prior to issuing the easement did not comply with the requirements of, *inter alia*, the National Historic Preservation Act and the National Environmental Protection Act. The Tribe filed a motion for a temporary restraining order to halt construction immediately, but lost that challenge in September 2016 in a decision that referred to "dozens" of attempts to consult with the Tribe, as well as several instances in which the Tribe seemingly cancelled meetings on short notice.<sup>22</sup> In its brief in opposition to the Tribe's motion, the Army Corps counted over 300 meetings and interactions between the Army Corps and the Tribe.<sup>23</sup> For its part, the Tribe argues that the Army Corps has overstated the extent of its initiative by documenting every outgoing email or telephone call as an example of consultation. Moreover, the Tribe objected to the Corps'

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<sup>20</sup> Moynihan, Colin, "Cause of Severe Injury at Pipeline Protest Becomes New Point of Dispute", *The New York Times* (24 November 2016). URL: [https://www.nytimes.com/2016/11/24/us/dakota-pipeline-sophia-wilansky.html?\\_r=2](https://www.nytimes.com/2016/11/24/us/dakota-pipeline-sophia-wilansky.html?_r=2).

<sup>21</sup> Associated Press, "Federal grand jury looks into violent clash at Dakota Access pipeline protest", *Los Angeles Times* (4 January 2017). URL: <http://www.latimes.com/nation/nationnow/la-na-north-dakota-protest-probe-20170104-story.html>.

<sup>22</sup> *Standing Rock Sioux Tribe et. al. v. U.S. Army Corps of Engineers, et. al.* (United States District Court for the District of Columbia), 9 September 2016, p. 33. URL: <http://earthjustice.org/sites/default/files/files/order-denying-PI.pdf>.

<sup>23</sup> United States Army Corps of Engineers' Opposition to Plaintiff's Motion for Preliminary Injunction, *Standing Rock Sioux Tribe et. al. v. U.S. Army Corps of Engineers, et. al.* (United States District Court for the District of Columbia), 18 August 2016, p. 40. URL: <https://dapipelinefacts.com/wp-content/uploads/2017/01/USACE-Brief-8-18-16.pdf>.



use of in some instances less senior employees to speak to another sovereign government.<sup>24</sup>

The court decision denying the request for a temporary restraining order was based on a more stringent standard of review than applies to the ultimate decision on the merits. In other words, the Tribe may ultimately win on its claims, although the pipeline will almost certainly be completed before a judgment can be rendered.

### **March 3<sup>rd</sup>, 2017 statement of the UN Special Rapporteur on the Rights of Indigenous Peoples**

On March 3, 2017, the UN Special Rapporteur on the Rights of Indigenous Peoples issued an end of mission statement after conducting a fact-finding mission to the United States. The UN Special Rapporteur focused on indigenous rights in connection with the development of energy projects in particular, and intends to include her observations in a report to the UN Human Rights Council in September.<sup>25</sup> The UN Special Rapporteur highlighted challenges for the rights of indigenous peoples to consultation for several energy projects in the United States, but also commented specifically on the Dakota Access Pipeline, which bears quoting at length:

*In the context of the Dakota Access Pipeline, the potentially affected tribes were denied access to information and excluded from consultations at the planning stage of the project. Furthermore, in a show of disregard for treaties and the federal trust responsibility, the Army Corps approved a draft environmental assessment regarding the pipeline that ignored the interests of the tribe. Maps in the draft environmental assessment omitted the reservation, and the draft made no mention of proximity to the reservation or the fact that the pipeline would cross historic treaty lands of a number of tribal nations. In doing so, the draft environmental assessment treated the tribe's interests as non-existent, demonstrating the flawed current process. Although the final environmental assessment recognized the presence of the Standing Rock Sioux Tribe five hundred meters away, it dismissed the risks to the reservation and failed to mention any of the other tribes that traditionally used the territory. Without an adequate social, cultural or environmental assessment, and the absence of*

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<sup>24</sup> Standing Rock Sioux Tribe, *Setting the Record Straight: Standing Rock's Engagement in the Dakota Access Pipeline*, <http://earthjustice.org/sites/default/files/files/Setting-the-Record-Straight-2.23.17.pdf>.

<sup>25</sup> 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 (3 March 2017). URI: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21274&LangID=E#sthash.Kltz9WWI.dpuf>.



*meaningful consultation with or participation by the tribes, the Corps gave multiple domestic authorizations permitting the construction of DAPL.*<sup>26</sup>

In identifying the above flaws in the environmental assessment, the UN Special Rapporteur reserved specific criticism for the decision to terminate the planned environmental impact statement, which would have addressed many of these outstanding concerns:

*Given the impacts on indigenous peoples of the Dakota Access Pipeline, I am deeply concerned by the January 24, 2017 presidential memorandum, granting the last easement necessary to begin construction of the Dakota Access Pipeline under Lake Oahe, and the Notice of Termination of the Intent to Prepare an Environmental Impact Statement.*<sup>27</sup>

KLP places significant weight on the UN Special Rapporteur's assessment of the situation. The companies involved have not announced any intention to halt construction in response to the UN Special Rapporteur's comments.

## National and international frameworks relating to consultation

### UN Declaration on the Rights of Indigenous Peoples

In 2010, the Obama Administration announced United States support for the UN Declaration on the Rights of Indigenous Peoples ("UN DRIP"), while cautioning that it does not recognize the Declaration as "legally binding or a statement of current international law."<sup>28</sup> KLP notes with concern that the link to this announcement has been removed from the US State Department website since KLP published a blog post on DAPL at the beginning of February.<sup>29</sup>

In its statement of support for UN DRIP, the United States commented specifically on the concept of "free, prior and informed consent," stating:

*(T)he United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for*

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> US Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, <http://aippnet.org/wp-content/uploads/2010/12/153223-20101217121356.pdf>.

<sup>29</sup> Previously available at:

<https://www.state.gov/documents/organization/184099.pdf?ref=driverlayer.com/web>.



*a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.*<sup>30</sup>

For comparison, Article 32(2) of UN DRIP provides:

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

US law incorporates certain protections of indigenous rights, including the requirement to engage in "government-to-government" consultations regarding projects on tribes' traditional lands. Recognizing room for improvement in the existing consultation process, the US Departments of the Interior, Army and Justice published a report in January 2017, on "Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions."<sup>31</sup> The UN Special Rapporteur on the Rights of Indigenous Peoples specifically commended the report for outlining measures that, if undertaken, would more closely align US law to the UN DRIP framework.<sup>32</sup> Changes in the US administration since the report's release suggest, however, that implementing the joint report may no longer be a key priority for the respective departments.

## UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights, while not an absolute guideline for KLP's divestment analysis, are nonetheless instructive. The Guidelines provide that "business enterprises should respect human rights."<sup>33</sup> The Commentary to the Guidelines elaborates that "enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention,

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<sup>30</sup> US Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, <http://aippnet.org/wp-content/uploads/2010/12/153223-20101217121356.pdf>.

<sup>31</sup> US Department of the Interior, US Department of the Army, US Department of Justice, *Improving Tribal Consultation and Tribal involvement in Federal Infrastructure Decisions* (January 2017). URL: <https://www.bia.gov/cs/groups/public/documents/document/idc2-060030.pdf>.

<sup>32</sup> 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 (3 March 2017). URI: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21274&LangID=E#sth.ash.Kltz9WWI.dpuf>.

<sup>33</sup> UN Guiding Principles on Business and Human Rights, Principle 11.



where they may have adverse human rights impacts on them," naming the rights of indigenous peoples in particular.<sup>34</sup> Furthermore, Principle 18(b) provides:

*In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should...Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.*<sup>35</sup>

In this case, the US Army Corps of Engineers conducted the consultation process, as provided for under US law. The Standing Rock Sioux Tribe's demands regarding consultation relate specifically to deficiencies in the government-to-government consultation process, which recognizes federal tribes as sovereign nations. The Tribe's claims do not include consultation with the companies directly. Nevertheless, the Guiding Principles envision an *independent* responsibility for the companies to ensure adequate consultation as a means of determining any potential adverse human rights impacts. On that score, there is no evidence that the companies have undertaken any additional measures to ensure adequate consultation with affected tribes. Rather, they have announced that construction will resume despite serious concerns from the UN Special Rapporteur and others about the adequacy of the process.

## Company dialogue

KLP has attempted to contact ETP individually on three separate occasions, including in advance of KLP's fact-finding trip to North Dakota.<sup>36</sup> KLP additionally signed a joint investor letter to the company in an attempt to initiate dialogue.<sup>37</sup> KLP's service provider also attempted to contact the company. ETP maintains a regularly updated website on the project: <https://dapipelinefacts.com/>. However, the company has not responded to any of the above investor inquiries.

KLP has spoken directly with Enbridge and Phillips 66, respectively, regarding the Dakota Access Pipeline.<sup>38</sup> As a general matter, both companies expressed their confidence in the operator, ETP's, handling of the project in relation to consultation of affected stakeholders. Both companies also pointed to the US federal court decision from September 2016 denying a preliminary injunction as evidence of a satisfactory consultation process in compliance with US law. Until February 2017, Enbridge did not

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<sup>34</sup> Commentary to the UN Guiding Principles on Business and Human Rights, Principle 12.

<sup>35</sup> UN Guiding Principles on Business and Human Rights, Principle 18(b).

<sup>36</sup> E-mails on file with KLP.

<sup>37</sup> Letter on file with KLP.

<sup>38</sup> Notes on file with KLP.



have an ownership stake in the project, but rather, was party to an agreement announcing its intention to purchase following the completion of certain specified criteria. After closing the transaction in February, Enbridge pledged to use its influence as a minority investor to encourage the project to uphold international human rights standards going forward.<sup>39</sup>

KLP has engaged in a brief exchange with Marathon Petroleum in November in which the company stated that, at the time, it did not have an ownership stake in the project. Moreover, the company emphasized that its ownership stake (since realized) would not exceed 9.2%.<sup>40</sup> In February 2017, Marathon Petroleum announced it had completed the transaction.

## Analysis

According to KLP's guidelines for responsible investment, based, *inter alia*, on the UN Global Compact and the Ethical Guidelines for the Norwegian Pension Fund – Global, companies that do not fulfill a minimum standard for social responsibility shall be excluded from KLP's investment universe. This includes cases in which there is an unacceptable risk that a company will contribute to serious or systematic human rights violations, including severe violations of indigenous rights. As the Council on Ethics has stated previously, it is unnecessary to consider whether a state has violated human rights in order to conclude that a company faces an unacceptable risk of contributing to a human rights violation, so long as the conduct in question falls below the minimum standards outlined in international human rights instruments.<sup>41</sup>

## Serious or systematic

The "systematic" criterion applies to violations that individually do not constitute a serious violation, but which form a broader pattern of abuses. That is not the case here. Rather, the question for the Dakota Access Pipeline is whether failing to engage in sufficient consultation with indigenous peoples, without more, is a serious violation of human rights. This is a novel question for KLP's divestment analysis. The KLP guidelines for responsible investment enumerate specific serious human rights violations, e.g. the right to life and to freedom from torture. This was, however, never intended to be an exhaustive list. Further complicating this analysis, there is an ongoing legal dispute over whether the US Army Corps engaged in sufficient consultation under

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<sup>39</sup> Notes on file with KLP.

<sup>40</sup> E-mail on file with KLP.

<sup>41</sup> Council on Ethics, Recommendation regarding Wal-Mart Corporation (15 November 2005), p. 4-5. URL: <http://www.regjeringen.no/pages/1661427/Tilråkning%20WalMart.pdf>.

US law, as well as disagreement over whether the US legal framework fulfills the consultation standard outlined in relevant international legal frameworks.

Recommendations from the Council on Ethics for the Government Pension Fund Global (GPF), with which the KLP guidelines are aligned, provide some guidance. In the recommendation to exclude Tahoe Resources, the Council acknowledged disagreement over whether the company conducted sufficient consultation with the local population, including indigenous peoples.<sup>42</sup> The Council nonetheless relied on the assessment of the UN Special Rapporteur on the Rights of Indigenous Peoples that violence conflicts surrounding the company's operations resulted from a lack of consultation.<sup>43</sup> Moreover, the Council determined that national legislation was not relevant for determining a violation if the applicable national framework falls short of international standards:

*The Council on Ethics is of the opinion that it is insufficient for a consultation process to satisfy formal legal requirements if the legislation does not accord with international guidelines.*<sup>44</sup>

Admittedly, the Tahoe case involved far more violent conflicts than the protests involving the Dakota Access Pipeline, and the Council's recommendation leaves room for interpreting whether lack of effective consultation alone was sufficient to recommend exclusion or whether it was an aggravating factor combined with the violent conflict. That case also described court evidence documenting company officials' contacts with the authorities to incite violence – a link absent from the Dakota Access Pipeline case. KLP believes nevertheless that the above quote from the Council stands on its own and that *an insufficient consultation process under international guidelines can therefore constitute a serious violation of human rights*. Additionally, although disagreement exists over the precise legal status of the UN Declaration on the Rights of Indigenous Peoples in the United States, KLP places significant weight on the statement of the UN Special Rapporteur for the Rights of Indigenous Peoples in determining whether consultation is consistent with international standards.

The question of whether the consultation process for the construction of the Dakota Access Pipeline under Lake Oahe met US legal requirements remains the subject of ongoing litigation between the Standing Rock Sioux Tribe and the US Army Corps of Engineers. Although the Tribe did not succeed in its request for a preliminary injunction, (which would have halted construction pending the final decision) the Tribe's legal claim nevertheless remains valid. US courts have not yet issued a decision on the merits in the

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<sup>42</sup> Council on Ethics, Recommendation to exclude Tahoe Resources Inc. from the investment universe of the Government Pension Fund Global (8 April 2014), p. 15. URL: [http://nettsteder.regjeringen.no/etikkradet/files/2015/01/Tilr%C3%A5dning\\_Tahoe-Resources\\_endelig\\_engelsk-26-4-2014\\_pv.pdf](http://nettsteder.regjeringen.no/etikkradet/files/2015/01/Tilr%C3%A5dning_Tahoe-Resources_endelig_engelsk-26-4-2014_pv.pdf).

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

question of whether the consultation process complied with US law. Moreover, the US Army Corps of Engineers approved the easement under Lake Oahe,<sup>45</sup> while simultaneously cancelling the planned environmental impact statement (EIS).<sup>46</sup> The EIS would have provided affected tribes and stakeholders with the opportunity to comment on the process and to ensure the Army Corps reviewed all relevant information before making a final decision on the easement.

Without the benefit of a full environmental impact statement or waiting for a decision on the merits in the Standing Rock Sioux Tribe's legal challenge, the companies plan to continue construction of the pipeline. Given serious questions about whether the consultation process met international standards, as documented in the UN Special Rapporteur's March 3<sup>rd</sup> statement, the decision to begin immediate construction is, at a minimum, inconsistent with the responsibility to respect human rights under the UN Guiding Principles on Business and Human Rights. KLP will not grant the companies the benefit of the doubt as to whether a serious violation of human rights occurred when ongoing construction effectively presents critics of the pipeline with a *fait accompli*.

## Evaluation of contribution

For the purposes of exclusion, in evaluating whether it is reasonable to conclude that a company contributes to a violation of KLP's guidelines for responsible investment, KLP considers the following factors:

- Whether there is a clear connection between the company's activities and the violation
- Whether the violations were undertaken to benefit the company's interests or to "facilitate conditions" for the company
- Whether the company took an active role in the violations, or was aware of the violations but failed to act to prevent them.<sup>47</sup>

More generally, KLP considers whether the violations are ongoing or otherwise expected to occur in the future.<sup>48</sup>

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<sup>45</sup> Department of the Army, *Memorandum for Record: Compliance with Presidential Memorandum (January 24, 2017)*, (7 February 2017). URL: <http://earthjustice.org/sites/default/files/files/Memo-Feb7-0.pdf>.

<sup>46</sup> Letter from the Department of the Army to the Director of the Office of the Federal Register (7 February 2017). URL: <http://earthjustice.org/sites/default/files/files/EIS-termination0.pdf>.

<sup>47</sup> Council on Ethics, Recommendation regarding Total (14 November 2005), p. 11. URL: <http://www.regjeringen.no/pages/1662906/Tilråkning%20Total%2014.pdf>. These factors are based on the Norwegian Government White Paper that recommended the first Ethical Guidelines for the Norwegian Pension Fund – Global. See, *ibid.*, p. 8-9.

<sup>48</sup> *Ibid.*



All of the above criteria are met in this case. The process for granting the easement formed a precondition for the companies' construction of the pipeline. As the operator, ETP was most directly involved, while Phillips 66 was a significant minority shareholder throughout the events described. Marathon Petroleum and Enbridge only recently became minority shareholders in the project, but entered with full knowledge of the process that preceded, including criticism regarding the lack of consultation. As ETP has not responded to KLP's inquiries, it is not clear what actions the company may have taken in response to criticism of the consultation process. The minority shareholder partners have been limited in responding directly to stakeholder concerns due to the project ownership structure, but remain involved with the project and have expressed confidence in ETP's approach going forward.

Although the consultation process in this specific case has concluded, ETP, Enbridge, Phillips 66 and Marathon Petroleum cannot point to any effort undertaken to evaluate the elements that would have formed part of the planned EIS, nor do they intend to wait for the outcome of pending litigation contesting the consultation process under US law. Moreover, the companies have not announced plans to alter their guidelines to ensure future projects would require the application of international standards for consultation. As a result, the risk of contributing to serious human rights violations remains unacceptably high.

## Conclusion

For all of the above reasons, Energy Transfer Partners, Enbridge Energy Partners, Phillips 66 and Marathon Petroleum are excluded from KLP's and the KLP Mutual Funds' investments as of March 2017.