IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

CIVIL NO. 1:18-CV-00212

Cissy Thunderhawk; Waste'Win Young; and Reverend John Floberg on behalf of themselves and all similarly-situated persons,

Plaintiffs,

vs.

County of Morton, North Dakota; Sheriff Kyle Kirchmeier; Governor Doug Burgum; Former Governor Jack Dalrymple; Director Grant Levi; Superintendent Michael Gerhardt Jr.; TigerSwan LLC; and Does 1 to 100,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF COUNTY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiffs, self-described Water Protectors, allege Defendants violated their federal constitutional rights of assembly, speech, religion and travel by denying them use of Highway 1806 from Fort Rice south to the Backwater Bridge[1], which spans the North Branch of the

[1] Although the North Dakota Department of Transportation declared closed portions of Highway 1806 located south of the Backwater Bridge, including south to the intersection of Highway 24 in Sioux County from October 24 through October 27, 2016, and south of the Backwater Bridge to the Cannonball River (the boundary between Morton and Sioux Counties) from and after October 28, 2016, no physical effort was made by defendants to prevent travel south of the Backwater Bridge. Plaintiffs allege, and it is not disputed, the area located south of the Backwater Bridge was occupied by several encampments of protesters numbering in the thousands throughout the time periods at issue in this case, and said encampments were at all times prior to the Governor-ordered mandatory evacuation thereof accessible via Highway 1806, and otherwise, from the south. Plaintiffs complain about their being deprived access to areas located north of the Backwater Bridge in Morton County. *See e.g.* Amended Complaint (doc. 44) at ¶ 104(a) (alleging government defendants "[i]mplemented [except Burgum] an absolute

Cantepeta Creek ("Cantepeta Creek") in southern Morton County, North Dakota, and by depriving them access to private property upon which the Dakota Access pipeline ("DAPL") was being constructed. Between April of 2016 and February 22, 2017, individuals calling themselves Water Protectors engaged in protests against completion of the DAPL project, principally in Morton County. By August of 2016, large numbers of protesters were actively obstructing completion of the DAPL project. This Court has previously commented in other litigation on the widespread mayhem caused by these protest activities, including in the vicinity at issue in this case.

Matters dramatically escalated on or about October 23, 2016 when the protesters established a large encampment ("North Camp") on private property in southern Morton County adjacent to Highway 1806 owned by the company building the DAPL and upon which a drill pad was located from which the DAPL was to pass beneath the Missouri River. The North Camp was placed in the direct path of the DAPL project, and the protester's established a barricade across Highway 1806 near the encampment. It is not disputed the protesters aim in engaging in these activities was to prevent completion of the lawful DAPL project by any means necessary. These unlawful activities posed a serious risk to the health and safety of DAPL construction workers, the general public and of the protesters themselves, and infringed upon private property rights of those with whom the protesters disagreed, warranting closure of Highway 1806 for reasons unrelated to the content of the protesters' speech. The closure of Highway 1806 in this vicinity was implemented to protect the health and safety of the public and protesters from unlawful and dangerous activities of individuals protesting upon Highway 1806 and adjacent lands.

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prohibition on all travel by the Tribe and its supporters on Highway 1806 over an approximately nine-mile stretch running from the Backwater Bridge to Fort Rice.").

Matters only got worse thereafter. On October 27, 2016, after law enforcement's efforts to secure the protesters' voluntary evacuation of the North Camp proved unsuccessful, law enforcement proceeded to remove the protester-built barricades across Highway 1806 and to remove the protesters from the North Camp. A riot ensued. During the October 27 riot, protesters caused substantial damage to private property, including, among other things, burning heavy construction equipment utilized on the DAPL project, burning public and private vehicles and NDDOT electronic signage upon the Backwater Bridge causing substantial damage thereto, and burning private vehicles at other locations in the vicinity. Protesters also engaged in illegal conduct and direct physical assaults upon law enforcement and DAPL workers by, among other things, throwing objects, evading and resisting arrest, hindering the progress of the police line by securing themselves to vehicles utilized by law enforcement, firing live rounds of ammunition at law enforcement, and twice stampeding bison toward law enforcement and other protesters. Law enforcement was ultimately able to remove the protesters to locations south of the Backwater Bridge. The Cantepeta Creek and Cannonball River formed a natural barrier between several large protester camps established south thereof (housing several thousand protesters), and the DAPL project location to the north.

On October 28, 2016, Law Enforcement erected a barricade across the north end of the Backwater Bridge to prevent protesters from once again unlawfully obstructing work on the DAPL project, assaulting DAPL workers, and trespassing upon and damaging private property. The Backwater Bridge was closed to all access by the North Dakota Department of Transportation on October 28, 2016 due to the heavy fire damage thereto caused by the protesters' activities. The complete disregard for the rule of law by a large number of protesters was repeatedly evidenced thereafter by protester attempts to unlawfully access the private property upon which the DAPL

project was proceeding, including but not limited to, during the large scale Backwater Bridge riot of November 20, 2016. Highway 1806 was fully reopened to travel on March 21, 2017 shortly following the mandatory evacuations of the protester camps located south of the Backwater Bridge.

Against this backdrop, Plaintiffs essentially argue their constitutional rights to allegedly "peaceably" assemble, speak, worship and travel at this specific location and time was violated by law enforcement's preventing them from accessing this secured area. Defendants Morton County and Morton County Sheriff Kirchmeier ("County Defendants") request the Court dismiss Plaintiffs' claims against all Defendants, in their entirety, as the premise underlying all of Plaintiffs' claims – namely Plaintiffs' alleged right to engage in their constitutional rights in the vicinity, and at the times at issue, is wholly without merit. Plaintiffs have failed to allege a violation of their constitutional rights. Even assuming, arguendo, a constitutional violation has been alleged, the individual government official defendants are entitled to qualified immunity as their alleged conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

II. MATTERS WHICH MAY BE CONSIDERED BY THIS COURT IN CONSIDERING A MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move the Court to dismiss a claim if, on the pleadings, a party has failed to state a claim upon which relief may be granted. In reviewing a motion to dismiss, the court takes all facts alleged in the complaint to be true. *Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. Thus, although a complaint need not include detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Id. (citations omitted). The Court need not accept as true wholly conclusory allegations, *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999), or legal conclusions that the plaintiff draws from the facts pled. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Well-pleaded facts, not legal theories or conclusions, determine the adequacy of the complaint. *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009). The facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Id*. "[A] plaintiff 'must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims, . . ., rather than facts that are merely consistent with such a right.'" *Gregory v. Dillard's, Inc*., 565 F.3d 464, 473 (8th Cir. 2009), quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). "[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.E.2d 868 (2009).

> In this circuit, Rule 12(b)(6) motions are not automatically converted into motions for summary judgment simply because one party submits additional matters in support of or in opposition to the motion. *See Martin v. Sargent*, 780 F.2d 1334, 1336-37 (8th Cir. 1985). Some materials that are part of the public record or do not contradict the complaint may be considered by a court in deciding a Rule 12(b)(6) motion to dismiss. *See Papasan v. Allain*, 478 U.S. 265, 268 n. 1, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Hollis v. United States Dep't of Army*, 856 F.2d 1541, 1543-44 (D.C. Cir. 1988).

State v. Coeur D'Alene Tribe, 164 F.3d 1102, 1107 (8th Cir. 1999); *see Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record, such as documentation of the history of the Mississippi and other school lands grants.").

> While courts primarily consider the allegations in the complaint in determining whether to grant a Rule 12(b)(6) motion, courts additionally consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public

> record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned;" without converting the motion into one for summary judgment. 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004).

Miller v. Redwood Toxicology Laboratory, Inc., 688 F.3d 928, 931 n.3 (8th Cir. 2012) (taking into consideration, in relation to Rule 12(b)(6) motion, plaintiff's initial and amended complaints, and the record created as a result of the plaintiff's motion for temporary restraining order, preliminary injunction and expedited discovery filed by plaintiff after the motion to dismiss was filed); *see, also Williams v. Employers Mutual Casualty Company*, 845 F.3d 891, 903-04 (8th Cir. 2017) (citing *Miller* for proposition "courts may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items that appear in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned" without converting a motion for judgment on the pleadings into a motion for summary judgment.)

In the event the Court determines any material presented with this motion may not properly be considered by the Court under Federal Rule of Civil Procedure 12(b)(6), County Defendants request the Court disregard such material and decide the motion without consideration of such material, rather than deciding the motion on a summary judgment standard.

A. Allegations In Plaintiffs' Complaint

Plaintiffs' Amended Complaint (doc. 44) is comprised of 45 pages and 180 paragraphs[2]. The majority of the pleading is comprised of legal conclusions, often cast in the form of factual

[2] In response to comprehensive motions to dismiss filed by both the State and County Defendants in this action, Plaintiffs have dropped numerous claims against individual State defendants, have dropped their request for declaratory and injunctive relief, and have increased the length of their pleading by 14 pages (36 paragraphs).

allegations – all of which this Court may disregard for purposes of this motion to dismiss. Summarizing, and relevant to this motion, Plaintiffs' allege, in material part, as follows:

> 1. From April 2016 to February 2017, tens of thousands of individuals, known as 'Water Protectors,' united in support of the Standing Rock Sioux Tribe in opposition to the construction of the Dakota Access Pipeline (DAPL) at camps located near the intersection of Highway 1806 and the Cannonball River in south-central North Dakota.
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> 36. "The Dakota Access Pipeline is a 30" pipeline designed to transport up to 570,000 barrels a day of crude, fracked oil from the Bakken shale fields in North Dakota to refineries in Pakota, Illinois. The pipeline was originally planned to cross the Missouri River north of Bismarck. But due to concern over the risk of contamination to the water supply, the pipeline company, Dakota Access LLC, rerouted the pipeline to cross the Missouri River less than one mile north of the Standing Rock Reservation boundary.
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> 37. The area through which DAPL now runs includes a number of sites of significant cultural, historical, and spiritual value to the Lakota people. The Missouri River is also the sole water source for the two neighboring Lakota tribes, the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, and for many other indigenous and non-indigenous people throughout the region.
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> 38. The tribes and their supporters opposed the construction of the pipeline through this area, expressing numerous concerns with the risks presented by the pipeline and with the process by which it was approved at its current route.
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> 39. Moreover, DAPL's route, including the entirety of the Lake Oahe crossing, traverses land over which the tribes still claim ownership. The tribes and their supporters opposed the construction of the pipeline for this reason as well: the 1851 and 1868 treaties [of Fort Laramie] both recognize the land in question as being part of the territory of the Oceti Sakowin (otherwise known as the Great Sioux Nation) and guarantee the territory against intrusions by the United States and outsiders. The tribes have alleged that the pipeline – approved by the Federal Government against the express wishes of the tribes of the Oceti Sakowin – therefore violates these treaties.
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> 40. Starting in April 2016, representatives of more than 300 indigenous nations and numerous other supporters gathered in increasing numbers near the construction route in spiritually based movement demanding that construction of the pipeline be halted. The locus of this movement was a group of camps located where Highway 1806 intersects the Cannonball River at the current border of the Standing Rock Sioux Reservation.
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> 41. One of the primary functions served by the camps was symbolic, with the very act of staying at or visiting the camps representing the primary means by which numerous individuals expressed their support for the movement. Central to this symbolism

was the resettlement of lands over which the Oceti Sakowin continues to claim ownership, with hundreds of Water Protectors becoming legal residents of the camps located on federally and tribally owned land during the time period in question. These camps were only accessible via Highway 1806, which is also the principal route between the Standing Rock Sioux Reservation and Bismarck/Mandan – the closest major cities to Standing Rock.

42. Although, during the period in question, the majority of individuals at these camps were out-of-state visitors to the region, there remained at all times a strong contingent of North Dakota locals.

43. By September 2016, these camps reached a sustained population of approximately 7,000-10,000 individuals.

44. From April 2016 through October 2016, one of the primary location of speech, assembly, and prayer for these individuals was Highway 1806's wide curtilage near where the pipeline was slated to cross the highway, an area that has long been open to the public for, among other things, use as a thoroughfare, and that could be (and routinely was) visited safely without impeding or disrupting traffic. Plaintiffs regularly engaged in a range of expressive and religious conduct on this land, including hanging prayer ties and signs within sight of passing drivers, as well as speaking and praying individually and in small, medium and large groups.

45. This was in keeping with the longstanding use of this road and other similar roads in the region: the road and curtilage in question have historically been used not only for travel by cars, trucks, horseback, ATVs, and pedestrians but also, as the only public space throughout much of this area, for a range of expressive activity. This has long included traditionally indigenous expressive practices, such as hanging prayer ties and undertaking horseback 'rides' (like the Bigfoot Ride and the Dakota 30+8 Ride, which each occur in the broader region). Most recently prior to the challenged road closure, for example, this specific right-of-way hosted a spiritual ride from Cannon Ball to Tioga, ND and a similarly expressive youth 'run' from Standing Rock to Washington D.C.

46. In addition to hosting expressive activity and travel, Highway 1806's wide curtilage has historically been used for runoff control during the spring melt and fro the occasional highway repair. The wide shoulders in question slope gradually from the paved road surface and are flanked by fence lines delineating the private property that abuts the public thoroughfare.

47. The importance of this specific stretch of road and curtilage for speech, assembly, and prayer increased dramatically in early-September after Tim Mentz Sr., the Standing Rock Historic Preservation Officer, identified ancient burial and ceremonial sites and other significant cultural artifacts in the area; after Dakota Access LLC immediately subsequently attempted to destroy these sites; and after a resulting confrontation between DAPL-employed security officers and Water Protectors led to the officers unleashing dogs against Water Protectors. These events drew local, national, and international attention to not only the NoDAPL movement but this specific stretch of highway; it is possible that no

public right-of-way in North Dakota history has been the topic of international discourse to the extent that this several-hundred-yard tract of Highway 1806 has.

48. Additionally, in September, local spiritual leaders and tribal elders confirmed the appropriateness and desirability of praying in the public area immediately abutting Highway 1806 and these specific sites.

49. The vast majority of the speech, assembly, prayer, and travel in this area was completed in a peaceful and lawful manner.

50. Thousands of Water Protectors prayed, marched, sang, waved placards, and chanted on thousands of occasions over the course of a nearly year-long period without any incident.

51. Nevertheless, Defendants, and the agencies and individuals operating under their control, engaged in a determined and concerted campaign to suppress the speech, assembly, and prayer of the tens of thousands of individuals who traveled, or who intended to travel, through this area to oppose the construction of DAPL.

52. One of the primary methods used by Defendants to chill constitutionally protected conduct associated with the NoDAPL movement was by controlling the roads in a manner designed to discourage NoDAPL travel, speech, assembly, and prayer.

53. On October 17, 2016, Sheriff Kirchmeier publicly announced that blocking roads “affects people’s rights.”

54. Then, beginning on October 24, 2016 exactly one week later – Morton County and the NDDOT, in consultation with Governor Dalrymple and Superintendent Michael Gerhart Jr., closed a significant portion of Highway 1806 to the Tribe and its supporters – including the entire stretch of Highway 1806 abutting the specifically identified sacred and ceremonial site as well as the DAPL construction that had been the primary center of Plaintiffs’ speech, prayer, and assembly for the past several months.

55. In the months leading up to the discriminatory road closure, this thoroughfare was overwhelmingly used by three distinct groups: (1) the Tribe and its supporters; (2) non-tribal residents of the area; and (3) DAPL and its associates. These groups were clearly divided along racial, religious, and viewpoint-based lines: on the one hand, the Tribe and its supporters were predominantly indigenous, practitioners of indigenous religious beliefs, and anti-DAPL; on the other hand, the non-tribal residents of the area and DAPL and its associates were almost exclusively non-indigenous, not practitioners of indigenous religious beliefs, and supporters of DAPL.

56. This discriminatory closure immediately followed the Cheyenne River Sioux Tribe’s declaration of eminent domain over a small portion of the land adjacent to Highway 1806 (and the resulting relocation of approximately 100 Water Protectors to this land). The effect of the closure was to freeze travel throughout much of the region for the

Tribe and its supporters, and, therefore, to substantially and materially burdened Plaintiffs' speech, worship, travel and associative rights.

57. On October 27, following a violent police and private-security-led raid on a camp located on the land declared as eminent domain by the Cheyenne River Sioux Tribe, Defendants [except Burgum] used several trucks to block the Backwater Bridge, a small bridge on Highway 1806 crossing Cantapeta Creek less than a mile north of the northern boundary of the Standing Rock Sioux Tribe.

58. On October 28, Defendants [except Burgum] erected a heavily reinforced concrete barricade on and immediately north of the Backwater Bridge.

59. Defendants have given varying reasons for the need for this barricade but acknowledge that its target was the Water Protectors. For example, Maxine Herr, a spokesman with the Morton County Sheriff's Department, stated, about this barricade: "We are trying the create a barrier between the protesters and that private property." On the other hand, two press releases on October 28 and October 31, gave a different reason for the barricade: the bridge would remain closed "until all damage to the structure is evaluated by bridge engineers."

60. Although such an evaluation would have been safe and feasible as earlyas October 28, 2016, the North Dakota Department of Transportation (NDDOT) delayed conducting a full investigation of the bridge until December 22, 2016 – nearly two months after it was closed. Plaintiffs and the Standing Rock Sioux Tribe reached out to the State and Local Defendants on numerous occasions between October 28 and December 22 to arrange the safe inspection of the bridge (and in any other way necessary facilitate its reopening), but were rebuffed.

61. On January 12, the NDDOT revealed the results of its inspection: the bridge was and had been structurally sound. Nevertheless, Defendants [except Dalrymple] continued to maintain the closure of the nine-mile stretch of Highway 1806 in question for 68 additional days, stating that the bridge would remain closed "[u]nder the authority of the North Dakota Governor and the Morton County Sheriff's Department" until there was an "assurance no criminal activity will take place and federal law enforcement has been introduced into the protest camp to restore law and order."

62. On February 10 and 13, 2017, the NDDOT completed several non-structural repairs to the Backwater Bridge, declaring afterwards that its Backwater Bridge repairs had been completed.

63. On February 23, 2017, the last Water Protectors were removed from the state or federal land in the area. On February 27, 2017, the last Water Protectors were removed from *any* of the camps in the area, including those located on the Standing Rock Reservation.

64. Highway 1806 was partially reopened to the Tribe and its supporters on March 17, 2017, with only pilot car-led travel allowed. The Tribe and its supporters continued to be prohibited from speaking or worshiping on the curtilage of the road, however, until it was fully reopened on March 21, 2017.

65. The effect of Defendants' discriminatory closure of Highway 1806 was to prevent travel past the Backwater Bridge from the camps or Reservation, thereby requiring those traveling between the camps/Reservation and Bismarck/Mandan to take a detour on worse maintained small roads that added significant time, stress, and danger to the trip and imposed additional costs on Plaintiffs in gas, car maintenance, etc. For instance, for a Plaintiff in the vicinity of Cannon Ball, ND hoping to visit the Huff Hills Ski Area, the detour not only more than doubled the length and time of the trip, but required travel on roads that were far more susceptible to winter closures or unsafe driving conditions. Likewise, for a reporter leaving the Bismarck Tribune's office to report on a fast-developing story at the Backwater Bridge, the detour added 17 miles and, in good weather conditions, approximately 20 minutes of driving time in each direction. In icy or snowy conditions (which persisted throughout most of the duration of the discriminatory closure), the detour added substantially more in travel time—often an hour or more—and, on numerous occasions, the detour was impassable even when Highway 1806 would not have been.

66. Ironically, given State and Local Defendants' justification regarding the need for the barricade to protect the potentially damaged bridge, the barricade did not actually prevent access onto the bridge from the various camps or the Reservation: it only prevented travel past the bridge.

67. Moreover, Defendants used the bridge itself to maintain its barricade, placing numerous concrete blocks that added substantial sustained concentrated weight to the bridge that they claimed might be damaged—imposing more stress than an occasional passing car or ambulance would.

68. Additionally, the barricade extended significantly to each side of Highway 1806, thereby preventing those traveling on foot, horseback, or ATV who safely circumvented the bridge from continuing north along Highway 1806.

69. Given these circumstances, State and Local Defendants' expressed concerns about the need to maintain the discriminatory road closure to protect the structural integrity of the bridge appear to have at all times been a pretext.

70. Plaintiffs' expressive and associational rights were not merely burdened because of Defendants' blockade-related restrictions on Highway 1806: at the same time as they closed Highway 1806 to the Tribe and its supporters, Defendants began implementing a de facto cordon of the construction area and of the nearby sacred and ceremonial sites. Defendants enforced this cordon not only with several checkpoints around Fort Rice and, on the southern-most end, with the heavily reinforced barricade immediately north of the Backwater Bridge, but by preventing any travel in the general

vicinity. On November 2, hundreds of Water Protectors, including indigenous elders, held a prayer ceremony across a river located approximately one mile from the pipeline construction site – and apparently on the edge of Defendants' unstated, but strictly enforced, cordon of the area. When a few Water Protectors entered the frigid water, Defendants [except Burgum] reacted with significant force. Such conduct not only chilled expressive and associational rights, but had the effect of barring the symbolic speech of entering the river and crossing to the opposite bank – while demonstrating Defendants' [except Burgum] adherence to such a broad cordon. Defendants aggressively enforced this cordon, using significant force when necessary to prevent Water Protectors from so much as walking around their barricade by the Backwater Bridge.

71. The purpose and effect of Defendants' discriminatory road closure was to keep Plaintiffs *miles* away (very well out of line-of-sight or earshot) from the construction workers, security guards, and sites that had for months prior been a primary focus of Plaintiffs' First Amendment activity. This effectively left Plaintiffs without any other means of communicating with one of their principal desired audience (construction workers and security officers) or in one of their most symbolically important forums (Highway 1806's curtilage abutting the identified sacred and ceremonial sites near to where the pipeline would and eventually did cross).

72. For the vast majority of the duration of this discriminatory road closure, there was no active construction in the area. The construction of DAPL where it intersects with Highway 1806 was completed in early-November. On December 4, 2016, the Army Corps announced that it would not be granting DAPL the easement necessary for DAPL to drill under the Missouri River at the nearby Lake Oahe crossing. The decision (and therefore a legal prohibition on the only remaining construction in the area) remained I place until the Army Corps of Engineers reversed this determination on February 8, 2017 (and drilling was completed within two weeks of that date). Throughout this time, Plaintiffs, nevertheless, continued to desire to speak, assemble, and pray in public areas at or near the sacred and ceremonial sites and the site of DAPL's crossing that they were unable to access given Defendants' absolute prohibition on travel by the Tribe and its supporters on this stretch of highway.

73. Given that the decision on the Lake Oahe crossing (and, ultimately, the operation of the pipeline) had an uncertain outcome, Plaintiffs and the tribes had a compelling and vital First Amendment need to be able to speak and assemble on the curtilage of the closed portion of the highway near to the site of completed construction to express their ongoing opposition to the potential construction and operation of the pipeline.

74. Access to the public land abutting the neighboring sacred sites was also vital to Plaintiffs' First Amendment right to physically pray at their traditional religious lands and to demonstrate by their physical presence both the sacredness of such lands to the Oceti Sakowin and their continuing claims to such lands.

75. This prohibition on travel on nine miles of Highway 1806 had the effect of preventing Plaintiffs from engaging in constitutionally protected conduct within the

proximity of the construction site or the nearby sacred or ceremonial sites, and it deterred others from joining or supporting Plaintiffs.

76. On the other hand, during the time in question, State and Local Defendants permitted DAPL and its employees and its contractors, as well as others residing in the area not affiliated with the Tribe and its supporters, to use the road – including, if they wished, for purposes related to expression. This policy was either controlled by guidelines that were specifically tailored to exclude the Tribe and tis supports, while impacting as few others as possible; or, in the alternative, it was controlled by guidelines or a system of exemptions that were so vague as to give officers nearly unlimited discretion in determining who was permitted use of this forum.

77. Regardless, although the overwhelming majority of the impacted population (the Tribe and its supporters) had legitimate and lawful reasons to use the road—including, for many, business reasons—during the time in question, the effect of any guidelines or exemptions here was to only exclude those who Defendants associated with the Tribe and its supporters; any broader impacts were incidental and marginal.

78. As a result, the effect and intent of Defendants' conduct was to severely burden residents of the Reservation by limiting access to and from the Reservation. This region of North Dakota experienced severe winter weather for much of the period of the discriminatory road closure, including multiple major blizzards and prolonged periods of sub-zero temperatures. In conjunction with Defendants' closure of the quickest and safest route to the nearest major hospital in Bismarck and to the nearest source of many life-saving supplies, this weather greatly increased the risk of serious bodily injury and death to those gathered by the Cannonball River, as well as those who resided on the nearby Reservation. Altogether, the emotional and financial costs of this discriminatory closure, measured in, among other things, additional gas, car wear and tear, time, stress, and lost business revenues, were substantial, and disproportionately impacted the Standing Rock Sioux Tribe and tribal members.

79. Indeed, these grave burdens reflect Defendants' true purpose for discriminatorily closing the road in question (in addition to hindering Plaintiffs' exercise of their constitutional rights): to extort political concessions from the Standing Rock Sioux Tribe. The concessions Defendants demanded of the Tribe include the Tribe changing its position vis-à-vis Water Protectors in North Dakota and the existence of the camps under its jurisdiction.

80. This is supported by the extent and duration of the discriminatory closure itself, which was substantially broader and longer than necessary to accomplish any other goals, and by Defendants' own statements.

81. First, in a formal report completed prior to the discriminatory road closure, the North Dakota State and Local Intelligence Center first concluded that this stretch of Highway 1806 "is the primary access for those traveling between the Bismarck/Mandan metro area and the SRR [(Standing Rock Reservation)]" and, therefore, that the Backwater

Bridge specifically is "imperative to the flow of commerce and emergency responders to and from the Standing Rock Reservation." The report then contemplates "the potential for barricades to be setup on or near the [Backwater or Cannonball] bridges to prevent travel of . . . protestors (by law enforcement)."

82. Second, a strategic plan similarly circulated in the weeks before the discriminatory closure details closing Highway 1806 with a "[b]arricade." This "[t]raffic [c]ontrol," the plan notes, would be used to obtain political concessions from the Tribe. The plan lists several of these concessions explicitly: the Standing Rock Tribal Council would "[f]ormally request[] law enforcement assistance from the federal and state government to aid in restricting access to the camps" and "publicly decree[] that all camps must be vacated by January 31, 2017, and no new occupation can be attempted." The strategic plan in question was circulated to, at the very least, the State Highway Patrol, and bears the official insignia of North Dakota, North Dakota Department of Emergency Services, North Dakota State Patrol, and Morton County.

83. Third, State and Local Defendants made public statements throughout the duration of the discriminatory road closure stating that the road's re-opening was conditioned on, among other things, Defendants achieving their political objective of dismantling the camps located on Army Corps and tribally owned land in the region (2/3 of which were under the jurisdiction of the Tribe). Sheriff Kirchmeier, for example, stated on January 12, 2017 that "the ND Highway 1806 roadway north of the bridge will remain closed until federal law enforcement is introduced into the protest camp to restore law and order." On January 30, 2017, a North Dakota Joint Information Center release describes "ongoing talks between the state, Morton County and the Standing Rock Sioux Tribe" for purposes of, among other things, "potentially reopening State Highway 1806 in a conditions-based, phased approach. . . . The reestablishment of rule of law is the key condition." Sheriff Kirchmeier added, in the same document, "Highway 1806 will not be completely re-opened until rule of law in the area is restored." A January 31, 2017 press release from the Morton County Sheriff's Department notes that the NDDOT "removed the top layer of jersey barriers from the Backwater Bridge in a good faith effort in response to work done by the protest camp to clean up and clear out." In a February 2, 2017 statement, Sheriff Kirchmeier noted that because "[t]he actions of [a] rogue group of protestors have been condemned by the Standing Rock Sioux Tribe and cleanup efforts seem to be progressing in order to clear the main camp before spring flooding, [] I am willing to take the next steps to open the Backwater Bridge. . . . However, rule of law in the area must be restored prior to a full re-open." On March 15, 2017, Sheriff Kirchmeier stated that "[t]he conditions were met to continue our phased approach to reopening Highway 1806. . . . We understand that opening this road is important to facilitate the routine business and commutes that take place along the 1806 corridor." Governor Doug Burgum added: "With the camps and roadway cleared, we can now move toward re-establishing traffic on Highway 1806."

84. Fourth, State and Local Defendants made these same demands in private meetings on numerous occasions: Morton County would only re-open the road if the Tribe complied with Defendants' demands. A non-exclusive list of these meetings include a

December 19, 2016 meeting between Governor Burgum and various tribal officials; a January 25, 2017 meeting between Governor Burgum, Michael Gerhart Jr, and various state and tribal officials (where, among other things, Governor Burgum explicitly made clear his, Michael Gerhart Jr.'s, Sheriff Kirchmeier's, and Morton County's responsibility for maintaining the discriminatory road closure); and a February 16, 2017 meeting between representatives from Governor Burgum's office, including Scott Davis, a representative from Morton County, and several Water Protectors.

85. Throughout the time period in question, state and local law enforcement judged a number of alternative strategies effective for ensuring traffic and public safety with respect to the NoDAPL movement. This includes maintaining a non-militarized police presence near demonstrators in public areas, arresting and detaining lawbreakers (but not those peacefully and lawfully gathered), maintaining slower speed limits on the roadways, implementing cautionary road signage and traffic safety checkpoints, implementing speed bumps and other similar traffic mitigation measures, and even non-discriminatorily closing short—several-hundred feet—stretches of the road to traffic for only the minutes or hours during which a large demonstration was occurring. Had Defendants used such alternative strategies in a targeted and limited fashion in lieu of the discriminatory road closure in question, the result would have been to substantially improve public safety in the area while decreasing the cost of policing to State and Local Defendants. Such an approach, moreover, would have left open public forums in the area to substantially more speech and free exercise, to substantially more effective speech (as the Tribe and its supporters could have reached one of their key audiences—DAPL employees) and meaningful exercise (as the Tribe and its supporters could pray along identified sacred sites), to substantially decreased burdens on interstate and intrastate travel, and on substantially decreased burdens on commerce.

(Amended Complaint [Doc. 44].)

B. Matters Of Public Record Or Of Which Judicial Notice May Be Taken Or Which Do Not Contradict Plaintiffs' Complaint

As discussed above, a district court may also consider matters of public record, matters for which judicial notice may be taken, and matters which do not contradict the plaintiffs' complaint without converting a motion to dismiss to a motion for summary judgment. Adjudicative facts which may be judicially noticed by the Court are governed by Rule 201 of the Federal Rules of Evidence, which provides, in part:

(a) **Scope**. This rule governs judicial notice of an adjudicate fact only, not a legislative fact.

> **(b) Kinds of Facts That May Be Judicially Noticed**. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> **(1)** is generally known within the trial court's territorial jurisdiction; or
>
> **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(a), (b) (bold in original). "[C]ourts may take judicial notice of any fact which is capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary." *United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (quotation omitted). "Under Federal Rule of Evidence 201(b), a court may take judicial notice of a 'fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Williams v. Employers Mut. Cas. Co.*, 845 F.3d at 903 (taking judicial notice of well-established scientific theory and principles). A court may take judicial notice of, and give effect to, its own records in another, but interrelated, proceeding. *Freshman v. Atkins*, 269 U.S. 121, 124 (1925); *State of Florida Board of Trustees of Internal Improvement Trust fund v. Charley Toppino and Sons, Inc*., 514 F.2d 700, 704 (5th Cir. 1975) ("It is not error . . . for a court to take judicial notice of related proceedings and records in cases before that court." (*citing National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 335 (1930)). Court records are public records. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007) (*citing Nixon v. Warner Communications, Inc*., 435 U.S. 589, 597–98, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)).

County Defendants request the Court take judicial notice of the following facts, or otherwise consider the following facts to the extent they do not contradict the Plaintiff's pleadings.

1. On August 15, 2016, the Morton County Board of Commissioners declared a state of emergency due to protester activity occurring at the DAPL project site which threatened

the health, well-being and safety of Law Enforcement and the public, and required additional manpower, resources and other expenditures to protect life and property. (*Dundon et al v. Kirchmeier et al*, Case No. 1:16-cv-406, 2017 WL 5894552 *1 (D.N.D. February 7, 2017) (hereinafter "*Dundon*"); doc. 32-1.)

2. On August 19, 2016, North Dakota Governor Jack Dalrymple signed Executive Order 2016-04 (doc. 32-2) authorizing total utilization of the North Dakota State Emergency Operations Plan to respond to the situation. (*Dundon,* at *8.)

3. On September 8, 2016, Governor Dalrymple activated a military police unit to support Law Enforcement efforts with primary responsibilities to be with traffic control points and administrative duties. (*Dundon*, at *8; doc. 32-3.)

4. The State of North Dakota made an Emergency Management Assistance Compact request to other states for law enforcement assistance on October 7, 2016 due to the escalated unlawful tactics by individuals protesting the construction of the DAPL. (*Dundon*, at *8; doc. 32-4.)

5. During the course of the prolonged DAPL protest, protesters principally occupied three areas: the Sacred Stone Camp and the Rosebud Camp located south of the Cannonball River, and the Seven Council Fires Camp (i.e. Oceti Sakowin) located between the north bank of the Cannonball River and the south bank of the North Branch of the Cantapeta Creek, a tributary of the Cannonball River. (*Dundon*, at *1.)

6. The Sacred Stone Camp and Rosebud Camps were located in Sioux County, whereas the Seven Council Fires Camp was located in Morton County. (*Dundon*, at *1.)

7. The Backwater Bridge is located on North Dakota Highway 1806 approximately 35 miles south of Mandan, North Dakota and crosses the north branch of the Cantapeta Creek, north

of where the Seven Council Fires Camp was located during the time frames at issue in this case. (*Dundon*, at *1.)

8. The Backwater Bridge and North Dakota Highway 1806 in the vicinity at issue in this lawsuit are located in an isolated rural area of Morton County.

9. A Site Map depicting the locations of protester camps and related areas of interest during the time frames at issue has been incorporated into the *Order Denying Plaintiffs' Motion for Preliminary Injunction* issued by this Court in *Dundon*, document 99, 2017 WL 5894552 *1 (D.N.D. February 7, 2017). A copy of that map is provided in this case as document 32-15.

10. The Backwater Bridge is comprised of two driving lanes with no sidewalks thereon in a 65 mile per hour zone. (*Dundon*, at *17.)

11. It is commonly known the location where the Seven Council Fires camp was located floods each spring.

12. The drill pad from which the Dakota Access pipeline was to pass under the Missouri River was located approximately one mile to the northeast of the Backwater Bridge. (*Dundon*, at *1.)

13. The Dakota Access pipeline drill pad, and the location of the North Camp, were on land privately owned by Dakota Access, LLC, an affiliate of the company building the DAPL at the time of the events at issue in this lawsuit. (Corrective Warranty Deed to Dakota Access, LLC effective September 20, 2016 [doc. 32-5].)

14. The Backwater Bridge and Highway1806 in the vicinities at issue in this lawsuit were not traditional public fora at any time <u>prior to</u> the DAPL protests in 2016.

15. The Backwater Bridge and Highway1806 in the vicinities at issue in this lawsuit were not traditional public fora at any time during the DAPL protests in 2016.

16. The Backwater Bridge was deemed unsafe and closed to all access on October 28, 2016 by the North Dakota Department of Transportation, and under the authority granted pursuant to N.D.C.C. § 39-10-21.1 and the Governor's Executive Order 2016-04, signed August 19, 2016. (NDDOT Press Release issued October 28, 2016 [doc. 32-6]; NDDOT Press Release dated October 31, 2016 [doc. 32-7]; *Dundon*, at *10.)

17. As of October 28, 2016, law enforcement had made 411 arrests in relation to the DAPL protests, with 141 protesters being arrested on October 27, 2016 alone during their removal from private lands located in the direct route of the DAPL project. (*Dundon*, at * 9.)

18. The United States Army Corps of Engineers ("Corps") manages lands upon which all three camps were located, as well as additional federal lands in Morton County located along the north bank of the North Branch of the Cantapeta Creek extending from the Bridge and eastward to and then along the north bank of the Cannonball River, all the way eastward to the Missouri River. (Letter from Corps District Commander Col. Henderson to Morton County Sheriff Department dated November 1, 2016, with attached map [doc. 32-8]**;** Corps Release no. 20160916-002 [doc. 32-9]; Corps Release No. 20161127-001 [doc. 32-10]; (*Dundon*, at * 1.)

18. The Corps-managed land located along the north banks of the Cantepeta Creek and Cannonball River, as well as privately owned property north thereof, encompassed the DAPL project route and the location from which the DAPL project then planned to cross the Missouri River via horizontal directional drilling. (Letter from Corps District

Commander Col. Henderson to Morton County Sheriff Department dated November 1, 2016, with attached map [doc. 32-8]; *Dundon*, at *1.)

19. The Corps had not granted anyone any permits or permission with respect to public use of Corps managed lands located north of the Cantapeta Creek or north and east of the confluence of the Cantepeta Creek and Cannonball Rivers, extending to the Missouri River. (Letter from Corps District Commander Col. Henderson to Morton County Sheriff Department dated November 1, 2016, with attached map [doc. 32-8]; *Dundon*, at *2.)

20. Pursuant to a lease with a private party, said Corps-managed lands located on the north banks described were at all times relevant herein subject to private grazing rights. (Corps Release no. 20161127-001 [doc. 32-10]; Corps Release no. 20160916-002 [doc. 32-9]; Department of the Army Lease for Agricultural or Grazing Purposes to Dave Meyer dated April 8, 2014 [doc. 32-11].)

22. On November 1, 2016, the Corps requested the Morton County Sheriff's Department's assistance in removing what the Corps described to be trespassing protesters from federal lands located on the north side of the Cantapeta Creek. (Letter from Corps District Commander Col. Henderson to Morton County Sheriff Department dated November 1, 2016, with attached map [doc. 32-8]; (*Dundon*, at *10.)

23. On November 27, 2016, the Corps issued Release no. 20161127-001 (doc. 32-10) advising, in part, that on November 25, 2016, the Corps, after coordination with Tribal leaders involved in the ongoing DAPL protests, the Corps notified Tribal leaders throughout the Missouri River basin by letter that areas of Corps-managed federal property located north of the Cannonball River, including the land upon which the Seven Council Fires Camp was located, would be closed to the public effective December 5, 2016, and that those who

chose to stay would be considered unauthorized and may be subject to citation under federal, state, or local laws. The stated reason for the decision was due to a pre-existing grazing lease between the Corps and a local rancher on the affected property, concern for the safety of the occupants of the land during the winter, and to protect the general public from the dangerous confrontations between demonstrators and law enforcement officials which had occurred in the area. The Corps encouraged protesters to relocate south of the Cannonball River to an established free speech zone.

24. On November 28, 2016, Governor Jack Dalrymple issued Executive Order 2016-08 (doc. 32-12) ordering the mandatory evacuation of all persons located in areas identified in the Executive Order 2016-08 and attachments thereto, which encompassed, among other areas, lands located along the north bank of the Cannonball River, including, but not limited to the Seven Council Fires camp located immediately south of the Backwater Bridge, and lands located along the north bank of the Cantepeta Creek and encompassing the area of the Backwater Bridge. (*Dundon*, at *13.) The evacuation was ordered, in part, due to severe winter weather storm conditions and anticipated harsh winter conditions which had the potential to endanger human life, especially when exposed to such conditions without proper shelter, dwellings, or sanitation for prolonged periods of time. The evacuation order was effective immediately, and persons were not to return to the evacuation area.

25. On January 24, 2017, United States President Donald Trump, signed a presidential memorandum regarding construction of the Dakota Access pipeline (doc. 32-13 [3 C.F.R., 2017 Comp., p. 437-439]) which provides, in part, "I believe that construction and operation of lawfully permitted pipeline infrastructure serve the national interest." (*Dundon*, at *14.)

26. On February 15, 2017, Governor Doug Burgum issued Executive Order 2017-01 (doc. 32-14), noting Governor Dalrymple's November 28, 2016 Executive Order 2016-08 had not been heeded by protesters, and ordered all persons in the evacuation order to leave the area no later than February 22, 2017, and to immediately begin efforts to remove their personal property and possessions from the evacuation area. The Governor also directed state and the agencies of the state's political subdivisions to restrict access to the evacuation area to all parties not authorized by the Superintendent of the Highway Patrol. The evacuation order was issued, in part, due to a threat of ice jams and overland flooding due to unseasonably warm temperatures, and the fact the evacuation area routinely experiences spring flooding and was historically subject to flash flooding. The evacuation order noted months of accumulated debris, including human waste generated by populations that had occupied the evacuation areas of Morton and Sioux Counties posed a significant and increasingly environmental threat to the waters of the Missouri River if cleanup and removal efforts were not quickly accelerated and completed before flooding began.

27. All inhabitants of the Seven Council Fires Camp were officially cleared on February 23, 2017 to, in part, create an environment conducive to clean up. Camp site cleanup efforts continued after February 23, 2017. (Doc. 32-16.)

28. A phased approach to the reopening of Highway 1806 was implemented, and by March 17, 2017 pilot cars were being used to escort vehicles between Fort Rice to a point south of the Cannonball Bridge. (Doc. 32-17.)

29. North Dakota Highway 1806 was completely reopened from Fort Rice to the Cannonball Bridge effective at noon on March 21, 2017. (Doc. 32-18.)

30. Between August 10, 2016 and February 13, 2017, there were over 700 arrests of individuals in the Morton County and Bismarck region due to protest events and related illegal activity, with 620 of them being protesters against the DAPL project. (Doc. 32-19.)

31. Not accounting for numerous arrest warrants still outstanding in Morton County for individuals alleged to have engaged in unlawful conduct during the DAPL protests in 2016 and 2017, and not accounting for prosecutions in federal court, in Morton County alone there have been criminal prosecutions of more than 130 DAPL protesters resulting in either criminal convictions, deferred sentences or pretrial diversion agreements for conduct occurring between August 11, 2016 and February 23, 2017. This conduct included, among other things, disorderly conduct, preventing arrest or discharge of other duties, refusing to halt, physical obstruction of government function, obstructing highways, reckless endangerment, criminal trespass, engaging in a riot, fleeing or attempting to allude a police officer, tampering with a public service, striking attended vehicle, carrying concealed firearm or weapon, false reports to law enforcement, disobedience of safety orders during a riot, inciting a riot, and criminal mischief. (Docs. 35-40; spreadsheet indexes found at Docs. 40-18 through 40-20).

These facts cannot reasonably be disputed as they are established by public records, have been the subject of voluminous media reports and law enforcement press releases (i.e. generally known within the trial court's territorial jurisdiction), and have been established and recognized by the Court in other litigation before this Court. *See* this Court's August 16, 2016 *Order Granting Plaintiff's Motion for Temporary Restraining Order* (doc. 7) and September 15, 2016 *Order Cancelling Hearing and Dissolving Temporary Restraining Order* (doc. 45) in an action entitled *Dakota Access, LLC v. Archambault, et al.*, Case No. 1:16-cv-296 (discussing unlawful and violent

activities of DAPL protesters-reproduced below), and this Court's *Order Denying Plaintiffs' Motion for Preliminary Injunction* in *Dundon v. Kirchmeier, et al*., 2017 WL 5894552 (D.N.D. Feb. 7, 2017) (discussed below).

<u>Prior Determinations by This Court in Interrelated Cases – Context/Background</u>

This Court has issued orders in at least two other cases involving facts interrelated with the facts at issue in the present case, including *Dakota Access, LLC v. Archambault, et al*., Case No. 1:16-cv-296 (hereinafter "*Dakota Access*"), and *Dundon et al v. Kirchmeier et al*, Case No. 1:16-cv-406 (hereinafter "*Dundon*"). A court may take judicial notice of, and give effect to, its own records in another, but interrelated, proceeding. *Freshman v. Atkins*, 269 U.S. 121, 124 (1925); *State of Florida Board of Trustees of Internal Improvement Trust fund v. Charley Toppino and Sons, Inc*., 514 F.2d 700, 704 (5th Cir. 1975) ("It is not error . . . for a court to take judicial notice of related proceedings and records in cases before that court." (*citing National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 335 (1930)); *Enterprise Bank v. Magna Bank of Missouri*, 894 F.Supp. 1337, 1341 (E.D. Mo. 1995) (taking judicial notice of records of two earlier actions before the same court for the purpose of establishing the facts leading up to the action then before the court).

The unlawful and violent activities of the DAPL protestors was previously noted in this Court's August 16, 2016 *Order Granting Plaintiff's Motion for Temporary Restraining Order* (doc. 7) and September 15, 2016 *Order Cancelling Hearing and Dissolving Temporary Restraining Order* (doc. 45) in an action entitled *Dakota Access, LLC v. Archambault, et al*., Case No. 1:16-cv-296. In that civil action, and in response to the protester defendants' assertion the Court's temporary restraining order had a chilling effect on the exercise of the protesters rights to

engage in the protected exercise of their constitutional rights in the path of the DAPL project (i.e. same location at issue in the present case), this Court stated, in part:

> With respect to the assertion the movement has been a peaceful protest, one need only turn on a television set or read any newspaper in North Dakota. There the viewer will find countless videos and photographs of the "peaceful" protestors attaching themselves to construction equipment operated by Dakota Access; vandalizing and defacing construction equipment; trespassing on privately-owned property; obstructing work on the pipeline; and verbally taunting, harassing, and showing disrespect to members of the law enforcement community. The State of North Dakota has estimated the cost for law enforcement to date at $2 million dollars. The estimated damage to construction equipment and loss of work on the project is far in excess of several million dollars. The Morton County Sheriff reported that 22 protestors were arrested on September 13, 2016, just a few days ago. To suggest that all of the protest activities to date have been "peaceful" and law-abiding defies common sense and reality. Nearly every day the citizens of North Dakota are inundated with images of "peaceful" protestors engaging in mindless and senseless criminal mayhem.
>
> The Court fully recognizes the unlawful and violent protestors arrested to date constitute a very small percentage of the entire entourage. The Court also recognizes that many of the troublesome "peaceful protestors" are from out-of-state who have political interests in the pipeline protest and hidden agendas vastly different and far removed from the legitimate interests of Native Americans of the Standing Rock Sioux Tribe who are actually impacted by the pipeline project. But for anyone to suggest the protests have been entirely peaceful and prayerful is less than forthright and ludicrous at best.

(*Dakota Access,* docket 45 at pp. 3-4.)

In denying DAPL protesters' request for a preliminary injunction on the use of specific types of force by law enforcement, this Court in *Dundon v. Kirchmeier, et al*., 2017 WL 5894552 (D.N.D. Feb. 7, 2017) also made the following determinations, among many others:

> **It is clear and undisputed that on November 20, 2016, the Backwater Bridge and Highway 1806 near Cannonball, North Dakota, were closed to the general public and to all of the pipeline protesters**. The Backwater Bridge is comprised of two driving lanes with no sidewalks in a 65 mile-per-hour zone. The DOT closed the Backwater Bridge immediately following the October 27, 2016, riot and prior to November 20, 2016, for safety reasons due to damage to the bridge caused by fires started by protesters. See N.D.C.C. § 24-03-05 (authorizing DOT to close any portion of a highway by posting same with suitable signs and placement of barricades, and making it unlawful to remove, pass through, over, or around any such barricade). It is undisputed the Backwater Bridge remained closed on November 20, 2016. No public access on the bridge was allowed on November 20, 2016, for any purpose. **The Backwater Bridge was heavily barricaded, manned by law enforcement officers, and the bridge and surrounding areas were**

> **secured areas. All persons, other than authorized law enforcement or government officials who entered upon the Backwater Bridge, or any location north of the bridge in the vicinity of the events on November 20, 2016, were trespassing and in violation of the law**.
>
> The United States Supreme Court has said the control of traffic on public bridges, highways, and streets is a clear example of governmental responsibility to ensure peace, order, and the rule of law. **Even "peaceful and prayerful" protesters cannot insist upon marching, picketing, or protesting on public bridges, streets, and highways as a form of freedom of speech or assembly, or a means of social protest, at any time or place they choose without restrictions. Even the demonstrations by DAPL protesters on the streets of downtown Bismarck were unlawful without the proper permits and permission of city officials. No one has a constitutional right to insist upon protesting on public bridges or highways whenever they unilaterally decide to do so, and without any permission to do so.**
>
> The Court finds that law enforcement officials had the clear authority to direct the Plaintiffs and other protesters to disperse and remove themselves from the Backwater Bridge and land located along the north bank of the North Branch of the Cantapeta Creek on November 20, 2016. . . . .

Order Denying Plaintiffs' Motion for Preliminary Injunction, Dundon v. Kirchmeier, at *17 (bold added).

> The Court finds that the harm to the public interest in maintaining law and order, preserving the peace, protecting the lives and safety of law enforcement officers when upholding the rule of law, and preserving private and public property, far outweighs the Plaintiffs' claim of entitlement to protest in locations where they have no legal right to be, and while engaging in unlawful behavior. **The rights of free speech and assembly do not mean the Dakota Access pipeline protesters can trespass on public or private property, or protest on public bridges, streets, and highways without permission, whenever they choose to do so under the guise of such activity being a "peaceful and prayerful protest." Simply stated, those who protest on city streets while failing to obtain proper permits and permission from city authorities, or protest on public bridges or rural highways closed to the general public, are in violation of the law. Such persons are subject to prosecution in the courts of the cities, counties, or states where the unlawful activity occurs.** . . . .

Id. at *20 (bold added).

Plaintiffs' claim in the present case are all premised upon arguments previously made by other protester plaintiffs and expressly rejected by this Court. Dismissal of all of Plaintiffs' claims is warranted on this basis alone.

III. LAW AND ARGUMENT

A. Plaintiffs' Have Not Alleged A Violation Of Their Constitutional Rights

Plaintiffs' claims all fail as Plaintiffs' have not alleged a violation of their constitutional rights[3]. Plaintiffs cannot circumvent the authority and responsibility of State and local government officials to protect the health and safety of the public and the protesters themselves, and private and public property rights of others with whom the protesters disagree under the pretext of the protesters engaging in alleged First Amendment activity. By the time of the closure of Highway 1806 south of Fort Rice, the protesters had already clearly demonstrated a willingness to engage in, and in fact engaged in, unlawful activities in the vicinity at issue in this lawsuit, including, among other things: blockading Highway 1806 in violation of N.D.C.C. § 24-12-02; building a large encampment on private property owned by the company building the DAPL project, and in the direct path of the DAPL project despite repeated warnings by law enforcement, constituting criminal and civil trespass in violation of N.D.C.C. § 12.1-22-03; terrorizing, assaulting and battering DAPL employees and contractors in violation of N.D.C.C. § 12.1-17-02 and § 12.1-17-04; and repeated disregard for the authority of law enforcement by, among other things, failing to heed lawful commands by law enforcement in violation of N.D.C.C. § 12.1-08-01. This does not even account for the very long list of unlawful, and often times violent conduct by the protesters

[3] Courts have a "constitutionally proscribed role . . . to vindicate [only] the individual rights of the people appearing before it." *Gill v. Whitford*, __ U.S. __, 138 S.Ct. 1916, 1933 (2018). Plaintiffs in this case lack standing to pursue claims on behalf of the Standing Rock Sioux Tribe or others.

throughout Morton County prior to the closure of Highway 1806, most of which was reported daily in the media and generally known to the public. Voluminous records concerning criminal prosecutions in this regard have been filed under seal in this case for the Court's consideration. Such records conclusively establish protesters engaged in unlawful conduct during the time periods and in the vicinity at issue, including: disorderly conduct, preventing arrest or discharge of other duties, refusing to halt, physical obstruction of government function, obstructing highways, reckless endangerment, criminal trespass, engaging in a riot, fleeing or attempting to allude a police officer, tampering with a public service, striking attended vehicle, carrying concealed firearm or weapon, false reports to law enforcement, disobedience of safety orders during a riot, inciting a riot, and criminal mischief. Briefing in support of the State Defendants' pending motion to dismiss, incorporated herein by reference, discusses numerous specific instances of unlawful conduct in this regard occurring prior to, at the time of, and following the closure of Highway 1806.

1. Government Defendants' Alleged Actions Were Lawful

The alleged actions of the government defendants were authorized by law.

On August 15, 2016, pursuant to N.D.C.C. § 37-17.1-10 of the North Dakota Disaster Act of 1985 ("Disaster Act"), the Morton County Board of Commissioners declared a state of emergency and implemented its emergency plans and processes in response to anticipated and ongoing "civil unrest occurring at the location of the Dakota Access Pipeline construction site which will require extraordinary manpower and other resource expenditures." (Doc. 32-1.) The County's emergency declaration expressly noted "the impact of civil unrest could threaten the health, well-being, and safety of responders and the public; and . . . all available resources remain committed to protecting life and property." (Doc. 32-1.)

On August 19, 2016, Governor Jack Dalrymple, noting an emergency had been declared by the Morton County Board of Commissioners on August 15, 2016, issued Executive Order 2016-04 (doc. 32-2), ordering total utilization of the North Dakota State Emergency Operations Plan in response to the situation. The Governor's executive order noted, in part, "the impact of continuing unlawful activity could threaten the health, safety and well-being of the general public, protesters and first responders who are committed to protecting life and property", and "the rule of law must be enforced to protect the general public, protesters, and first responders from those who engage in illegal activity."

The Governor is the chief executive of the state, and has the responsibility to see that its laws are faithfully executed. N.D. Const. art. 5, § 7. In addition to the Governor's constitutional and inherent executive powers, the Governor has been granted broad powers to address disasters and emergencies under the North Dakota Disaster Act of 1985, codified at chapter 37-17.1 of the North Dakota Century Code ("Disaster Act"). Under the Disaster Act, "[t]he governor is responsible to minimize or avert the adverse effects of a disaster or emergency . . . and may issue executive orders and proclamation of the governor if the governor determines a disaster has occurred or a state of emergency exists." N.D.C.C. § 37-17.1-05 (1), (2). "An executive order or proclamation of a state of disaster or emergency shall activate the state and local operational plans applicable to the political subdivision or area in question and be authority for the deployment and use of any forces to which the plan or plans apply . . . ." N.D.C.C. § 37-17.1-05(4). Among other powers, the Disaster Act empowers the Governor to: "[u]tilize all available resources of the state government as reasonably necessary to manage the disaster or emergency and of each political subdivision of the state[]"; "commandeer or utilize any private property if the governor finds this necessary to manage the disaster or emergency[]"; "[d]irect and compel the evacuation of all or

part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster or emergency mitigation, response, or recovery[]"; "[p]rescribe routes, modes of transportation, and destinations in connection with an evacuation[]"; and "[c]ontrol ingress and egress in a designated or emergency area, the movement of persons within the area, and the occupancy of premises therein." N.D.C.C. § 37-17.1-05(6)(b), (d)-(g).

On Monday October 24, 2016, the North Dakota Highway Patrol and the Morton County Sheriff's Department declared closed Highway 1806 from a checkpoint established near Fort Rice and south to the intersection with Highway 24. (Doc. 44 [Amended Complaint] at ¶ 6; docs 32-6 and 32-7.) This occurred shortly following the protesters establishment of a roadblock across Highway 1806 just north of the location where the DAPL project was to cross the state highway, and after protesters had established the North Camp (a large encampment with assorted structures) on private property owned by the company building the pipeline the day before, and in the pipeline's direct path, and following a declaration by protesters from the Cheyenne River Sioux Tribe that they were exercising their alleged right of eminent domain over the occupied property. (Doc. 44 [Amended Complaint] at ¶ 56.)

The declared closure was modified on October 28, 2016 to encompass Highway 1806 from Fort Rice to the Cannonball River. (Doc. 32-7.) Although the North Dakota Department of Transportation declared closed portions of Highway 1806 located south of the Backwater Bridge, no effort was made by defendants to prevent travel south of the Backwater Bridge. The area located south of the Backwater Bridge was occupied by several encampments of protesters numbering in the thousands, thereby establishing conclusively there was access south of the

Backwater Bridge. In addition, locations located south of the Cannonball River are located in Sioux County, outside the jurisdiction of Morton County and Sheriff Kirchmeier.

In addition to the Governor, the North Dakota Department of Transportation and Sheriff Kirchmeier had the power and authority to close the affected portion of Highway 1806 (and subsequent closure of the Backwater Bridge) in the interests of public safety. N.D.C.C. § 24-01-03 ("The director [of the department of transportation] is responsible for the construction, maintenance, and operation of the state highway system . . . ."); N.D.C.C. § 24-03-05 ("Whenever, during the construction on any state highway or at any other time, it may be necessary to prevent traffic from passing over any portion of such highway, the department may close such portion of the highway to all traffic . . . ."); N.D.C.C. § 39-10-21.1 ("The highway patrol or local law enforcement authorities having jurisdiction over a road may close a road temporarily due to hazardous conditions for the protection and safety of the public. . . . ."). In addition, Morton County Sheriff Kirchmeier had an obligation[4] to enforce the law by taking action to protect the general public, and public and private property – all of which had already suffered injury from the protesters in this vicinity. The Disaster Act also directs "the governor and the executive officers or governing bodies of the counties and cities of the state are directed to utilize the services, equipment, supplies, and facilities of existing department, offices, and agencies of the state and of the counties and cities thereof to the maximum extent practicable, and the officers and personnel of all such departments, offices, and agencies are required and directed to cooperate with and

[4] A Sheriff shall, in part, "preserve peace", and "prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to the sheriff's knowledge." N.D.C.C. § 11-15-03. Conduct engaged in by a public servant in the course of their official duties is justified when it is required by law. N.D.C.C. § 12.1-05-02. "Every person while within this state is subject to its jurisdiction and entitled to its protection." N.D.C.C. § 54-01-18.

extend such reasonable services and facilities to the governor and to the emergency management organizations upon request." N.D.C.C. § 37-17.1-09.

On October 27, 2016, following unsuccessful efforts to get the protesters to voluntarily remove themselves from the path of the DAPL project and the private property on which they were encamped, the Morton County Sheriff's Department and North Dakota Highway Patrol formed a police line and removed the protesters from the vicinity to a location south of the Backwater Bridge. The protesters resisted and a riot ensued, resulting in the protesters burning DAPL project heavy construction equipment located on privately owned property, and other acts of violence and disregard for the authority of law enforcement. As a result of protesters burning NDDOT electronic signage and multiple vehicles on the Backwater Bridge, the Backwater Bridge was closed on October 28, 2016 by the NDDOT due to damage thereto and questions regarding the structural integrity of the bridge. (Docs. 32-6 and 32-7.) The legal authority for the closure of the Backwater Bridge was the same as applied to the closure of Highway 1806, discussed above.

On November 28, 2016, Governor Jack Dalrymple issued Executive Order 2016-08 (doc. 32-12) ordering the mandatory evacuation of all persons located in areas identified in Executive Order 2016-08 and attachments thereto, which encompassed, among other areas, lands located along the north bank of the Cannonball River, including, but not limited to the Seven Council Fires camp located immediately south of the Backwater Bridge, and lands located along the north bank of the Cantepeta Creek and encompassing the area of the Backwater Bridge. The evacuation was ordered, in part, due to severe winter weather storm conditions and anticipated harsh winter conditions which had the potential to endanger human life, especially when exposed to such conditions without proper shelter, dwellings, or sanitation for prolonged periods of time. The

evacuation order was effective immediately, and persons were not to return to the evacuation area. Despite the evacuation order, protesters remained in the evacuation area.

Government defendants continued to enforce closure of Highway 1806 from the Backwater Bridge north to Fort Rice until March 15, 2017, when the material threat posed by the unruly protesters had abated as a result of the mandatory evacuations of the protester camps located south of the Backwater Bridge pursuant to Governor Burgum's February 15, 2017 Executive Order 2017-01. (Doc. 32-14.) The Governor ordered the evacuation of the camps due to impending spring flooding of the lands upon which the camps were located and anticipated harm to the protesters as a result, and likely environmental disaster resulting from camp refuse and debris being washed into the Missouri River.

On January 24, 2017, United States President Donald Trump, shortly after taking office, signed a presidential memorandum regarding construction of the Dakota Access pipeline, in which he expressly stated "I believe that construction and operation of lawfully permitted pipeline infrastructure serve the national interest." (Doc. 32-13, 3 C.F.R., 2017 Comp., pp. 437-39.)

All of the actions taken by the government defendants in this action were pursuant to lawful authority. All such actions were also consistent with compelling state interests in protecting the health and safety of the general public and the protesters themselves, as well as in protecting both private and public property rights and interests in the vicinity. "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent . . . is obvious." *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940). .Further, actions taken to protect individuals working on the DAPL project, and private property associated with such activity, was also in furtherance of the nation's interest in constructing and operating pipeline infrastructure.

No reasonable juror could possibly conclude the actions taken by government officials in closing Highway 1806 and restricting access to the DAPL project site was not warranted or reasonable under the undisputable circumstances.

2. Plaintiffs Had No Lawful Right To Exercise Their Constitutional Rights At The Locations In Question During The Time Periods In Question

Plaintiffs and other protesters had no constitutional right to express their views, assemble, exercise their religious beliefs, or travel at any location at issue while that area was secured by law enforcement. *See Wood v. Moss*, 134 S.Ct. 2056, 2066, 188 L.Ed.2d 1039 (2014) ("[T]he fundamental right to speak secured by the First Amendment does not leave people at liberty to publicize their views "'whenever and however and wherever they please.'" (quoting *United States v. Grace*, 461 U.S. 171, 177-178, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), quoting *Adderley v. Florida*, 385 U.S. 39, 48, 87 S.Ct. 242, 17 L.Ed 2d 149 (1966)). The Supreme Court has clearly indicated the First Amendment cannot be utilized as a justification for trespass and that the government has the right to enforce trespass laws in relation to both private and public property. *See Adderley v. State of Florida*, 385 U.S. at 48, (rejecting protesters' argument they had a constitutional First Amendment right to remain in the curtilage of a jailhouse over the objection of the sheriff, concluding "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."). As explained by the Supreme Court in *Cox v. State of Louisiana*:

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would

> not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.
>
> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. [] We reaffirm the statement of the Court in Giboney v. Empire Storage & Ice Co., supra, 336 U.S., at 502, 69 S.Ct., at 691, that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

379 U.S. 536, 554-55, 85 S.Ct. 453, 464-65, 13 L.Ed.2d 471 (1965) (citations omitted).

The Backwater Bridge and Highway1806 at the locations at issue were not traditional public fora at any time prior to the DAPL protests. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983) (what makes a street or road a traditional public forum is whether it has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). The locations in question are located in an isolated rural area. It is commonly known the location where the Seven Council Fires camp was located floods each spring. The Backwater Bridge is comprised of two driving lanes with no sidewalks thereon in a 65 mile per hour zone.

In addition, although the protesters engaged in demonstrations in the path of the DAPL project route in the area at issue in 2016, law enforcement quickly took action to address that unlawful conduct by first trying to get the protesters to voluntarily evacuate the unlawful encampment and to clear the protester blockade of Highway 1806, and when those efforts proved unsuccessful, law enforcement cleared the protesters from the vicinity on October 27, 2016. The

protesters' engagement in unlawful protest activity in this regard at this location cannot realistically transform the character of this vicinity into a "traditional public fora." *See Hodge v. Talkin*, 799 F.3d 1145, 1162 (D.C. Cir. 2015) (The "government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."). Plaintiffs do not allege any prior use of Highway 1806 and its curtilage in the secured vicinity at issue for purposes of speech and assembly occurring prior to the DAPL protests in 2016. Of the four examples cited by Plaintiffs (i.e. Bigfoot Ride, Dakota 38+2, youth run, and indigenous spiritual ride [doc. 44 at ¶ 45], only the single event indigenous spiritual ride traversed the vicinity at issue in this case, and that single event merely involved travel on or along Highway 1806. Utilizing Highway 1806 or its curtilage for purposes of travel does not transform a rural highway into a traditional public forum.

The North Dakota Department of Transportation closed the Bridge following the October 27 riot, on October 28, 2016, for safety reasons due to damage to the bridge caused by fires started thereon by protesters, calling the structural integrity of the bridge into question. *See, e.g.* N.D.C.C. § 24-03-05 (authorizing NDDOT to close any portion of a highway by posting same with suitable signs and placement of barricades, and making it unlawful to remove, pass through, over, or around any such barricade). As a matter of law, anyone other than an authorized governmental employee who entered upon the Bridge were engaging in trespass, and otherwise present upon public property closed to the public without authorization or privilege. While the Plaintiffs criticize the timing of the reopening of the Bridge, it was the protesters' activities in the vicinity which prevented the NDDOT from accessing the Bridge for testing its structural integrity, and subsequent repair of the fire-damaged surface. Protester' complaints about the timing of Bridge repairs should

not be entertained when the damage was caused by the protesters themselves, and it was the unlawful activities of the protesters which delayed the inspection and repair of the Bridge.

Highway 1806 from Fort Rice south to the Backwater Bridge remained closed until March 15, 2017 when it was partially opened to traffic, and was fully reopened to travel on March 21, 2017. Anyone present upon Highway 1806 in the vicinity in question, other than authorized government employees and individuals with a legitimate reason for being present in the vicinity, were also engaging in trespass upon public property, in violation of N.D.C.C. § 24-03-05. Anyone without government authorization utilizing Highway 1806 during the time-period in question was engaging in trespass within this secured area. The only persons who were given government authorization to travel upon Highway 1806 in this vicinity were persons who had a legitimate business being in the secured area, such as those who owned or lived upon private property located within the affected area, employees or agents of said persons, and government employees who had a legitimate reason for being in the vicinity. *See United States v. Grace*, 461 U.S. at 178 ("There is little doubt that in some circumstances the Government can ban the entry onto public property that is not a 'public forum' of all persons except those who have legitimate business on the premises."). This, of necessity, included individuals working on or providing security for, the DAPL project. The protesters encampment north of the Backwater Bridge upon the privately owned property of the company building the DAPL project, and located in the direct path of the DAPL project for the purpose of impeding its lawful construction ("North Camp"), was itself unlawful.

Plaintiffs' argument, or strong implication, the protesters' occupation of the public and private property at issue was allegedly justified due to the tribe's claim of ownership over the lands at issue (i.e. alleged exercise of eminent domain by Cheyenne River Sioux Tribe) should be

rejected outright by this Court. The United States Supreme Court in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374-75 (1980) discussed the treaty history between the United States and the Sioux Nation, including with respect to the lands located north of the reservation at issue in this lawsuit (the case dealt primarily with the effects of the treaties in relation to the Black Hills, but the same result would apply in this case). The Court noted the 1851 Fort Laramie Treaty was replaced by the 1868 Fort Laramie Treaty (which still included the tribe's use of lands north of the reservation for hunting), and noted Congress' subsequent abrogation of the 1868 treaty in relation to the Black Hills and the lands to the north (at issue) through enactment of the 1876 "Agreement" via Act of Feb. 28, 187, 19 Stat. 254 (1877). *Id*. at 380, 418-419, 422-423. Pursuant to the "Agreement", the Sioux relinquished the Black Hills and the lands to the north (at issue). *Id.* The Supreme Court noted Congress had plenary power in relation to treaties, and had the right to unilaterally abrogate past treaties. *Id.* However, while Congress had the right to terminate the treaty and to exercise eminent domain over the affected lands, the Court concluded such still constituted a taking for which the tribe was awarded compensation, plus interest from 1877. Although the Sioux Nation has not accepted the awarded compensation, which remains in trust for the tribe's benefit, such fact does not negate the holding of the Supreme Court. Any claim of ownership by the tribe to the public and private lands located north of the Cannonball River are wholly without merit, as a matter of law.

In addition, the Plaintiffs' argument, or strong implication, of a right to access to the private property at issue due to the alleged presence of sacred burial sites on the lands at issue should also be rejected outright by the Court. The mere presence of alleged sacred burial sites, even if true, would not grant the protesters license, privilege or any other right to enter upon privately-owned property upon which those sites are alleged to exist. *See Employment Division, Dep't of Human*

Resources of Oregon v. Smith, 494 U.S. 872, 878-79 (1990) ("We have never held that an individual's religious beliefs excuse him for compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 U.S. 439, 441-42 (1988) (determining government's proposed construction of timber road which would undisputedly have severe adverse effects on the practice of Native American's religion did not violate Free Exercise Clause, which "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with religious beliefs of particular citizens.").

Any claim by Plaintiffs that Defendants lacked a substantial or compelling state interest to prevent access to the project site (i.e. closing Highway 1806), aside from those involved in working on the project and local land owners who needed access to get home, should be dismissed on the basis of President Trump's Memorandum For the Secretary of the Army issued January 24, 2017, reproduced in the District Court's decision in *Dundon* denying the protestors requested preliminary injunction. Such Memorandum provides in part, "I believe that construction and operation of lawfully permitted pipeline infrastructure serve the national interest" and noting DAPL was important to the "Nation's energy infrastructure." 3 C.F.R., 2017 Comp., pp. 437-39. The North Dakota legislature has also specifically declared that the development and production of oil and gas is in the public interest. N.D.C.C. § 38-08-01 (stating it is "in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state."). The President's statement that completion of the DAPL project was in the nation's interest, and the North Dakota legislature's declaration of public interest are dispositive of this issue.

Plaintiffs had no constitutional right to exercise their rights to speech, assembly, worship, travel or commerce in the vicinity, and at the times, at issue, and such claims, including Plaintiffs' derivative claims of unconstitutional policies, customs, or practices, and inadequate training, supervision or discipline, fail as a matter of law. Plaintiffs' claim of retaliation similarly fails as a matter of law as the vicinity at issue was secured not as a result of the content of Plaintiff's alleged First Amendment activities, but due to the unlawful activities of protesters in the vicinity committed for the purpose of preventing completion of the DAPL project by any means necessary. *See Weed v. Jenkins*, 2016 WL 4420985 *6 (E.D. Mo. 2016) (rejecting First Amendment violation claim by protesters arrested by police, noting protesters were arrested for engaging in trespass, blocking traffic, and creating hazards for others, not for the content of their speech); *Caravalho v. City of New York*, 732 Fed.Appx. 18, 23 (S.D.N.Y 2018) (rejecting Occupy Wall Street protesters' claim of retaliation upon their arrest, concluding law enforcement had probable cause to believe they were violating the law by refusing to obey law enforcements commands to leave, and that such probable cause defeated the protesters' First Amendment claim).

3. Plaintiffs' First Amendment Claims, Whether Analyzed Under A Time, Manner And Place Theory, Or Under A Prior Restraint Theory, Should Be Dismissed

It is unclear from Plaintiffs' pleadings whether they are claiming the actions of the defendants constituted an alleged improper time, place and manner restriction upon the exercise of Plaintiffs' First Amendment rights, or whether they are claiming the defendants' actions constituted an alleged improper prior restraint upon their First Amendment rights, or both. Irrespective of which theory Plaintiffs' allege, dismissal is appropriate, as discussed below.

a. ANY TIME, PLACE AND MANNER CLAIM FAILS

The facts of the present case, and claims involved, are very similar to those addressed by the United States Court of Appeals for the Ninth Circuit in *United States v. Griefen*, 200 F.3d 1256 (9th Cir. 2000). In *Griefen*, protesters seeking to prevent the construction of a logging road in the Nez Perce National Forest (Idaho) alleged the temporary closure of a portion of the national forest to allow road construction to proceed unhindered by protester activity violated their First Amendment rights. *Id*. at 1258. The roads were being lawfully constructed in accordance with contracts entered into between the United States Forest Service and private logging companies. *Id*. Just prior to commencement of road construction activities, officials from the Forest Service flew over the area where the project was to proceed and observed:

> . . . recent damage consisting of obstructive trenches dug across the existing roadbed, removed and plugged culverts, and a pit in the road containing large amounts of human waste. The trenches, which were hand-dug, had been hooked up to dams designed to divert water into them. Water was seen running across the road. The officials also observed barriers running across the road. The officials also observed barriers on the roadbed consisting of piles of slash logs, debris, and large pole and log structures. The official observed numerous protesters in the area.

Id. The Forest Service "officials considered the damage they observed to be violations of Forest Service Regulations as well as impediments to the construction project that was about to begin." *Id*. To address this situation, the Forest Supervisor issued a Special Restriction, known as a "closure order" pursuant to applicable federal law for "an area limited to the immediate site of the planned new road construction and the repair of the existing roadbed and culverts." *Id*. The closure order stated its purposes were for "public health and safety and to protect property." *Id*. "[T]he closure order was designed specifically to allow the contractor to enter the area and conduct road building activities without interference and in a safe manner" and "[t]he closure order exempted (1) persons with a permit specifically authorizing entry, (2) law enforcement, rescue, or firefighting officers in the performance of an official duty, and (3) [the private logging companies']

employees and officials while performing their contractual obligations." *Id.* The closure order restricted access to an area extending one hundred and fifty feet from each side of the center of constructed and unconstructed portions of the project, and was understood to expire when the construction work was completed and accepted by the Forest Service. *Id.*

The protesters asserting First Amendment claims were those who refused to comply with the closure order, engaged in unlawful activities aimed at hindering progress of the road construction project, and had been arrested. *Griefen,* at 1259. These protesters were convicted of violating federal law for being in "an area closed for the protection of (e) public health or safety [and] (f) property" and for "maintaining a structure on National Forest system land without authorization." *Id*. The convicted protesters appealed. The appellate court rejected the protesters' First Amendment claims under both time, manner and place, and prior restraint theories.

With respect to the time, manner and place claim, the court noted:

> "[W]hen expressive conduct occurs on public grounds, like a national forest, the government can impose reasonable time, place, and manner restrictions." *United States v. Johnson*, 159 F.3d 892, 895 (4th Cir. 1998) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 789, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Such restrictions are constitutionally valid if they are (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternatives for communication." *United States v. Linick*, 195 F.3d 538, 543 (9th Cir. 1999) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992)). As Justice Roberts said in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939):
>
>> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.
>
> *Id.* at 515-16, 59 S.Ct. 954.
>
> "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *see also Wright v. Chief of*

> *Transit Police*, 558 F.2d 67, 68 n.1 (2d Cir. 1977) ("Whether or not a particular forum is a 'public forum' akin to a public street is merely a variant of the compelling interest test.").

U.S. v. Griefen, 200 F.3d at 1259-60. The *Griefen* court concluded the closure order satisfied all three prongs of this First Amendment test. It was content-neutral as the clear purpose of the order was for reasons of health and safety, for protection of property, and to enable work involving dangerous heavy construction equipment to take place, which the court deemed compelling government interests. *Id*. at 1260. The court noted the protesters had already demonstrated their destructive conduct and presented "a clear and present danger to the safe completion of the construction project, both to other persons as well as to themselves." *Id*. The court also deemed the closure order to be narrowly tailored by extending only 150 feet to each side of the project route, and only for the duration of the project, which the court deemed "imminently reasonable" under the circumstances. *Id*. at 1260-61. The court also concluded that although the protesters could not continue their illegal and physically obstructive activities, they could still continue their protest activities, but at a distance of 150 feet. *Id.* at 1261. The court rejected the protesters' argument the 150-foot zone was not sufficiently narrowly tailored, noting that where there is "a tangible threat to security" or a "clear and present threat to health and safety and property", the spatial area of a restricted area can be adjusted as necessary to address the specific threat. *Id.* The *Griefen* court also noted:

> The area occupied by the protesters, and from which they were ejected, was an area temporarily subject to construction and repair. The immediate area of a construction zone is not an area that has the attributes of a public forum, or even a limited public forum, where people are entitled to exercise their rights of free speech. As the Supreme Court observed in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Id.* at 44, 103 S.Ct. 948.

Griefen, at 1261.

Concluding its rejection of the protesters' time, manner and place claim, the *Griefen* court noted that "[h]aving to move 150 feet from a construction area made dangerous by illegal destructive behavior did not substantially burden the [protesters'] rights." *Id.* at 1262. "[R]easonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid." *Id.* (*quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

There are numerous obvious similarities between the facts and issues in *Griefen* and the present case. As in *Griefen*, access to public property (i.e. Highway 1806) was restricted to facilitate lawful construction activity being unlawfully hindered by protester activity, and in the interests of health, safety and protection of property, all compelling government interests. The restriction was content-neutral, narrowly tailored to address the unique circumstance presented, and left open ample alternatives for communication.

First, the restrictions upon travel upon Highway 1806 and the Backwater Bridge were content neutral. Both were closed to the general public. Access to the secured area was limited to law enforcement, first responders, property owners in the vicinity, and individuals involved with the construction or security of the DAPL project.

In addition, the secured area was narrowly tailored to protect the health, safety and property of the public, including of the protesters themselves. A material difference between the present case and *Griefen* impacting the scope of the restricted area is the fact that in *Griefen*, all of the land upon which the construction activities were taking place, as well as all surrounding property, was public land (i.e. national forest). In the present case, the only public land located in close proximity to the DAPL construction activities at issue was Highway 1806 itself. The land on both the east and west sides of Highway 1806 across which the DAPL project was being constructed, was

private property upon which the protesters were trespassing and damaging private property. The private property is not properly taken into consideration under a time, manner and place restriction analysis as the Plaintiffs and other protesters had no lawful right to be on the private property to begin with. With respect to Highway 1806, it must be kept in mind the protester encampments located south of the Backwater Bridge were inhabited by several thousand protesters, a large number of which had already engaged in unlawful trespass on the private property located north of the Backwater Bridge in the direct path of the DAPL project (i.e. North Camp), built structures and damaged private property thereon, and claimed ownership thereof via alleged eminent domain, all for the undisputed purpose of preventing completion of the lawful DAPL project by any means necessary. Under these circumstances, law enforcement's utilization of the natural water barriers presented by the Cannonball River and Cantepeta Creek which separated the protester encampments from the DAPL project (roughly one-mile distance) was wholly justified. Query how the limited law enforcement resources available to Morton County could have possibly prevented the ongoing protester interference with the DAPL project had law enforcement allowed travel north of the Backwater Bridge. The November 20-21, 2016 Backwater Bride riot at issue in *Dundon*, during which a large number of protesters (at least several hundred) attempted to dismantle, breach and/or flank law enforcement's barricade built across the north end of the Backwater Bridge is but one example of what law enforcement had to deal with in its efforts to protect the health, safety and property of the public.

Further, plaintiffs had ample alternatives for communication, including at the protester camps located on lands managed by the U.S. Corps of Engineers located south of the Backwater Bridge. Again, it would not have been reasonably feasible under the circumstances to allow access

on Highway 1806 north of the Backwater Bridge, and the surrounding property at issue was private land, much of which owned by the company building the DAPL project.

Any time, manner or place claim alleged by plaintiffs should be dismissed, as a matter of law.

b. <u>ANY PRIOR RESTRAINT CLAIM FAILS</u>

The *Griefen* appellate court also rejected the protesters' attack on the closure order under the theory Forest Service officials had too much discretion in issuing and administering the closure order – specifically, in determining who would have access to the closed area. *U.S. v. Griefen*, 200 F.3d at 1262. The protesters relied upon case law involving the government's authorization and issuance of permits as constituting prior restraints on the exercise of First Amendment activities. *Id.* The *Griefen* court noted such permit cases were distinguishable and inapposite to the facts at issue in *Griefen* as "[t]he case before us, . . . does not deal with the use of a portion of a forest generally open for public expression, but one temporarily and lawfully closed for repair and construction. Simply put, this is not a typical permit case. If a closure of a public forum is for a valid rather than a disguised impermissible purpose, the potential for self-imposed or government censorship . . . does not exist." *Id.* The *Griefen* court elaborated further:

> We have no doubt that a government entity may close areas of public forests under construction and repair, as it could temporarily close for good reasons a forest during a forest fire, a washed-out road or bridge, a crime scene during an official investigation, a street engulfed in a riot or an unlawful assembly, a terrorist-bombed public square, or the plaza surrounding the Washington Monument while the Monument is undergoing refurbishing. We also have no doubt that areas of a national forest may be closed to the public for reasons pertaining to the normal management requirements of a national forest as well as to honor contracts, the execution of which is temporarily incompatible with expressive behavior. The [protesters'] arguments amount to a claim that they be allowed to continue their activities during construction in the construction area. To articulate their proposition in this way is to reveal its lack of reason.

As the Supreme Court has said,

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. *Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection*. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

> *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (emphasis added).

> **A highway, a bridge, a public plaza, or any similar location that is occupied by bulldozers, cranes, roadgraders, earthmoving equipment, scaffolding, and other construction paraphernalia need not be open to the public during construction and repair, period, for expressive purposes or otherwise. The First Amendment does not command public entry under such circumstances. Indeed, for the government to allow the public into a dangerous area would be clearly a violation of the duty to protect the public from known risks. The repair of a public facility, the construction of a new one, and the protection of citizens from dangers are manifestly valid and important purposes.**

Griefen, at 1263 (bold added). In rejecting the protesters' prior restraint claim, the *Griefen* court concluded **"[i]n First Amendment terms, the fact that discretion to authorize entry to a closed area may be unfettered during construction is of no concern**. The process of granting authority to enter a lawfully closed zone differs markedly from the process of licensing expressive activity. Such a process does not 'engender identifiable risks to free expression . . . .'" *Id*. (bold added) (*quoting City of Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)).

In the present case, Plaintiffs allege that the closure of Highway 1806 was directed only at protesters, as "residents of Fort Rice were allowed to drive southbound on Highway 1806, as were employees of DAPL . . . [who were] permitted to use the closed portion of the road for the duration of the discriminatory closure." (Doc. 44 at ¶ 6.) These allegations, even if true, do not allege a constitutional violation. As explained in *Griefen*, even unfettered discretion to authorize entry to a lawfully closed area during construction activities is of no concern under the First Amendment. In addition, the DAPL construction zone (inclusive of Highway 1806 which DAPL was in the process of crossing) was not a traditional public forum, or even limited public forum, and the government had a duty to protect the public from known risks posed by the construction activity.

The United States Court of Appeals for the Eighth Circuit has also rejected a claim by protesters that law enforcement's alleged selective enforcement of the law which allegedly chills future First Amendment activity the protesters may be contemplating is unconstitutional. In *Cross v. Mowka*, 547 F.3d 890 (8th Cir. 2008), a conference of The World Agricultural Form (WAF) was planned for May 2003 in St. Louis. The Federal Bureau of Investigation briefed the St. Louis Police Department about the history of violent demonstrations surrounding prior WAF conferences, the tactics violent protesters had previously used, and the likelihood potentially violent out-of-town protesters would stay illegally in unoccupied or condemned buildings. *Id.* at 893. To prevent the unlawful occupation of vacant and condemned buildings, the City adopted a Building Code Violation Enforcement Plan ("Enforcement Plan"). *Id.* Pursuant to the Enforcement Plan, the City Building Inspector and law enforcement officers, in relevant part, forcibly entered a condemned building and arrested five persons for occupying a condemned building, and a search of the building revealed "a slingshot, a sign saying 'Kill Police,' a bottle with a rag protruding, PVC pipes, a gasoline container, and two cans of flammable camper stove

fuel." *Id*. at 894. The five were jailed for twenty hours, entered Alford please to those charges, and were placed on probation. *Id*. at 893. The arrested individuals, and other protesters, brought suit against the City of St. Louis and its Mayor, the Board of Police Commissioners, the Building and Zoning Commission, the City Inspector, the Police Chief, and several police officers, asserting a variety of federal and state law claims. Relevant to the pending motion in this case was the protesters' claim of violation of their First Amendment right to protest on the alleged basis the Enforcement Plan was devised and executed as a prior restraint on protester activities. *Id*. at 896. The police officers' defense of qualified immunity as to this claim was denied by the district court on the basis "reasonable police officers should have known that 'selective and disproportionate use of police power to prevent the occurrence of a protest' would violate clearly established First Amendment rights, and that [protesters] presented sufficient evidence that 'a person of ordinary firmness would be deterred by this State action.'" *Id*. The appellate court disagreed and reversed the district court's denial of qualified immunity on the First Amendment claims. *Id*. at 896-97.

The *Mowka* appellate court noted that violent protest is not protected speech. *Cross v. Mowka*, 547 F.3d at 896 (*citing NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 933 (1982) ("violent conduct is beyond the pale of constitutional protection")).

> Plaintiffs claim, in general terms, that their protected right to protest was chilled by defendants' pre-protest prior restraint. But plaintiffs carefully avoid the question whether the police actions in question were aimed at deterring, and in fact chilled, only unprotected violent protest activity. This distinction, ignored by the district court, is obviously critical.
>
> Plaintiffs [] were lawfully arrested for illegally occupying a condemned building, and their property was properly removed from that structure. In these circumstances, their First Amendment claims fail for the same reason that the Supreme Court reversed a First Amendment overbreadth decision in *Virginia v. Hicks*, 539 U.S. 113, 123, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003):
>
> > Neither the basis for the [trespass] sanction . . . nor its purpose . . . has anything to do with the First Amendment. Punishing its violation by a person who wishes to engage in free speech no more implicates the First Amendment than would the

> punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is Hick's nonexpressive *conduct* . . . not his speech, for which he is punished as a trespasser. (Emphasis in original.)

Mowka, 547 F.3d at 896. The *Mowka* court determined that although the district court correctly stated the law by concluding the protesters could not succeed on a claim of "selective enforcement" under the First Amendment with respect to proper code enforcement actions of officers, the *Mowka* court disagreed with the district court's determination that a "'disproportionate police response' was sufficient to raise a genuine First Amendment issue of 'selective enforcement'." *Id*. at 897. The appellate court noted there was no legal authority for the "proposition that a policeman's decision to enforce a traffic law or a provision of the housing code, for example, is unconstitutional if it can be shown that he has enforced that law in a 'selective' manner, not to retaliate for the violator's prior First Amendment protected activity, but to 'chill' future First Amendment activity that the violator *may* be contemplating." *Id* (emphasis in original).

In the present case, to the extent Plaintiffs' Complaint could be construed as alleging the government defendants selectively enforced the restriction on travel into the restricted area to "chill" future First Amendment activity the Plaintiffs and other protesters may have been contemplating (i.e. prior restraint), any such claim should be dismissed under *Mowka* as failing to state a claim upon which relief may be granted. *See Brewer v. Hoxie Sch. Dist. No. 46 of Lawrence County, Arkansas*, 238 F.2d 91, 102 (8th Cir. 1956) (upholding preliminary injunction enjoining planned protest to prevent continuation of acts and speech previously indulged in which was "calculated and intended, at the times and under the circumstances in which they were made, to incite disobedience of the law and the overthrow of law and order and to coerce, intimidate, and compel the school board to cease and desist from the performance of its sworn and lawful duty,

and to engage in unlawful conduct[,] … [activities which] present no legitimate issue of free speech or assembly.")

4. Plaintiffs' Retaliation Claim should be Dismissed

Plaintiffs allege the closure of Highway 1806 and the Backwater Bridge was undertaken in retaliation for Plaintiffs' exercise of their First Amendment rights. This claim also fails and should be dismissed.

"To establish a claim for First Amendment retaliation under § 1983, the plaintiff must show that [he] 1) 'engaged in a constitutionally protected activity'; 2) that the government official's adverse action caused [him] to suffer an injury which would 'chill a person of ordinary firmness from continuing . . . in that activity'; and 3) 'that the adverse action was motivated in part by . . . the exercise of [his] constitutional rights.'" *Palmore v. City of Pacific*, 851 F.Supp.2d 1162, 1172 (E.D. Mo. 2010) (citing *Naucke v. City of Park Hills*, 284 F.3d 923, 927-28 (8th Cir. 2002)). A retaliatory motive must have been a "but-for" cause of the alleged injury, "i.e., that the plaintiffs were 'singled out' because of their exercise of constitutional rights." *Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010).

In relation to their retaliation claim, Plaintiffs allege as follows:

> 167. Plaintiffs were prevented from engaging in constitutionally protected activity, including First, Fifth, and Fourteenth Amendment activity, and Commerce between the states and tribes, when Defendants, acting or purporting to act in the performance of their official duties as law enforcement officers and state officials, or under color of law, completely closed a nine-mile portion of Highway 1806 to Plaintiffs. Defendants prevented Plaintiffs from speaking, assembling, praying, or traveling anywhere on this public nine-mile stretch of Highway 1806—an area that includes known and identified sites sacred and ceremonial to Plaintiffs, and which serves as an important thoroughfare for business and safety. Defendants' adverse actions were substantially motivated as a response to Plaintiffs' exercise of constitutionally protected conduct.
>
> 168. Indeed, in meetings with the Tribe and its supporters and in public statements Governor Burgum and Sheriff Kirchmeier conditioned the re-opening of the road on the

> cessation of constitutionally protected conduct in the area, such as speech occurring on tribally owned land, directing, among others, Grant Levi and Michael Gerhart Jr. to ensuring this.
>
> 169. Defendants' retaliation was motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' First, Fifth, and Fourteenth Amendment rights, as well as Plaintiffs' rights under the Commerce Clause, secured by the U.S. Constitution, or was wantonly or oppressively done.

(Doc. 44 [Amended Complaint] at ¶¶ 167-169.)

In this case, Plaintiffs' retaliation claim fails as Plaintiffs' have not alleged an actual injury to their constitutional rights, as discussed above. In addition, as discussed above, materials which this Court is permitted to consider in the context of a motion to dismiss establish the closure of Highway 1806 and the Backwater Bridge were for the purpose of protecting the health and safety of the public and to protect property rights in the vicinity at issue – all of which constitute substantial and compelling government interests as a matter of law – unrelated to protected speech. *See Bernini v. City of St. Paul*, 665 F.3d 997, 1006-07 (8th Cir. 2012) (determining plaintiffs had failed to allege a submissible First Amendment retaliation claim where the only reasonable inference from the facts was that the unlawful conduct of the group within which the plaintiffs were a part, not protected speech, motivated the officer's challenged conduct). The closure of Highway 1806 occurred after and in response to widespread unlawful activity in the vicinity at issue which threatened the safety and health of the public, and which threatened private and public property rights. Plaintiffs' retaliation claim therefore also fails as retaliatory animus was not the "but for" cause of Plaintiffs' alleged injury. Dismissal of Plaintiffs' retaliation claim is therefore warranted and requested.

5. Plaintiffs' Commerce Clause Claims Should Be Dismissed

Plaintiffs allege Defendants violated the Commerce Clause, as follows:

157. Defendants' five-month absolute prohibition on any Plaintiff travel on Highway 1806 was not rationally related to any purported interest in protecting the integrity of the bridge (or any other reasonable state interests). 158. The intent and effect of Defendants' restriction on travel was to sanction and substantially burden travel and therefore commerce to/from the Standing Rock Reservation: as state and local officials themselves recognized just weeks before implementing the discriminatory closure, the thoroughfare in question is "imperative to the flow of commerce and emergency responders to and from [the] Standing Rock Indian Reservation."

159. Defendants sought, through the road closure's disproportionate economic impact on Standing Rock-related commerce, to punish the Standing Rock Sioux Tribe for its support of the NoDAPL movement and to improve the State's negotiating position with tribal leaders and elders vis-à-vis this movement. Moreover, the economic force of the road closure was intended to, and did, have a substantial and material impact on the Standing Rock Sioux Tribe's ultimate decisions around the NoDAPL movement, in part due to the significant economic losses experienced by businesses on the Reservation, including the Tribe's casino and Plaintiff Cissy Thunderhawk's restaurant, as a direct result of this closure.

160. Moreover, because the Standing Rock Reservation straddles North Dakota and South Dakota, any commerce restriction directed at the Reservation was also necessarily directed at South Dakota; the Tribe's economic resources, consisting in large part of income derived from its casino, are distributed to each of its members, including widely throughout its South Dakota communities. Defendants' efforts to economically injure the Tribe, therefore, were intended to and did extend beyond North Dakota's borders and into South Dakota.

161. Additionally, by design, the impact of this closure on purely North Dakota businesses, including the Morton County hospitality industry, was relatively minimal. This was ensured through not only the placement of the closure, but in the disparate way in which it treated customers of on-Reservation and off-Reservation businesses: Defendants made efforts to focus the closure's impacts on the Tribe and its supporters (who, although regular customers of on-Reservation businesses, were relatively less likely to engage in commerce off of the Reservation); more frequent customers of Mandan- and Bismarck-area businesses, like residents of Fort Rice, were permitted to use most of the road—at least for traveling to and from these Mandan and Bismarck businesses.

162. The closure also directly and disproportionately impacted non-Reservation-related commerce between North Dakota and South Dakota. Because Highway 1806 is a key thoroughfare connecting North Dakota to South Dakota, and with the South Dakota border located just 35-miles south of the closure on the road in question, the effect of this discriminatory closure was to burden travel and therefore commerce to/from South Dakota.

163. For the reasons detailed throughout this Complaint, the public benefits of the discriminatory road closure were slight at best. On the other hand, its burden on commerce between North Dakota, South Dakota, and the Standing Rock Reservation

> totaled in the millions of dollars. Indeed, even only considering its direct burdens on South Dakota (and other state) commerce unrelated to the Standing Rock Reservation's South Dakota communities, its minimal local benefits were nevertheless exceeded by the costs that it imposed on interstate commerce.
>
> 164. Defendants' actions and inactions were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' Commerce Clause rights secured by the U.S. Constitution, or were wantonly or oppressively done.

(Doc. 44 at ¶¶ 157-162.)

The Commerce Clause (Article I, Section 8, Clause 3 of the United States Constitution) provides the Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As summarized by the United States Court of Appeals for the Eighth Circuit:

> The Commerce Clause, of course, grants Congress the authority to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce. *Quill Corp. v. North Dakota,* 504 U.S. 298, 312, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). The recognition of the dormant Commerce Clause carries out "the Framers' purpose to 'preven[t] a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.' " *Fulton Corp. v. Faulkner,* 516 U.S. 325, 330–31, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996) (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 180, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)) (alteration in *Fulton Corp.*). The vision of the Framers was that "every farmer ... shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949).
>
> A state law that is challenged on dormant Commerce Clause grounds is subject to a two-tiered analysis. First, the court considers whether the challenged law discriminates against interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). Discrimination in this context refers to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* If [the challenged law] is indeed discriminatory, it is "*per se* invalid" unless the Defendants "can demonstrate, under rigorous scrutiny, that [they have] no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 392, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). If the law is not discriminatory, the second analytical tier provides that the law will be struck down only if the burden it imposes on interstate commerce "is clearly excessive in

> relation to its putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). . . . .
>
> In the first tier of analysis, the Supreme Court has recognized three indicators of discrimination against out-of-state interests. First, discrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose. *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 270, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). Alternatively, a law could facially discriminate against out-of-state interests. *See, e.g., Chem. Waste Mgmt. v. Hunt,* 504 U.S. 334, 342, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992). Third, even if a state law responds to legitimate local concerns and is not discriminatory either in its purpose or on its face, the law could discriminate arbitrarily against interstate commerce, that is, it could have a discriminatory effect. *Maine v. Taylor,* 477 U.S. 131, 148 n. 19, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). . . . .
>
> The Plaintiffs have the burden of proving discriminatory purpose, *see Hughes v. Oklahoma,* 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), and can look to several sources to meet that burden. . . . .

South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592–93 (8th Cir. 2003). Plaintiffs' Commerce Clause claim should be dismissed as a matter of law.

First, Plaintiffs' claim concerning the effects upon commerce to and from the Standing Rock Reservation fails on its face as the dormant Commerce Clause only pertains to commerce between the States, and has no application to commerce between the States and Indian tribes. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("It is well established that the Interstate Commerce and Indian Commerce Clauses have different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." (citations omitted)).

Second, Plaintiffs' claim concerning alleged effects on commerce to and from South Dakota also fails. There was no differential treatment between in-state versus out-of-state economic interests which benefited the former and burdened the latter, and Plaintiffs' legal

conclusions to the contrary may be disregarded for purposes of a motion to dismiss. The closed portion of Highway 1806, and the secured area generally, lay entirely within the boundaries of North Dakota, did not restrict the flow of commerce across the North Dakota/South Dakota border which lay more than 30 miles away and on the opposite side of the Standing Rock Reservation, and the Court may take judicial notice of the undeniable fact there were alternate routes of travel around the secured area, including, but not limited to, via Highway 6 and 24 to the west, and via Highway 1804 to the east. *See South Pacific Company v. State of Arizona ex rel. Sullivan*, 325 U.S. 761, 767, 770 (1945) (Unless a state action "impede[s] substantially the free flow of commerce from state to state," the dormant Commerce Clause is not implicated because there has been "left to the states wide scope for the regulations of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines[.]").

Third, a threshold requirement for a viable dormant Commerce Clause claim is the identification of in-state and out-of-state competitors in the same market. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (The notion of discrimination under the dormant Commerce Clause assumes a comparison of substantially similar in-state and out-of-state entities). Plaintiffs have failed to do so.

The government Defendants' closure of the stretch of Highway 1806 and surrounding area encompassing the DAPL construction zone was not directed at interstate commerce, but rather directed at protecting the health and safety of the public, and the property located within the secured area, which courts have uniformly held constitute compelling government interests. Again, Plaintiffs ignore the mayhem which was occurring throughout Morton County during this period of time (a fact generally known in Morton County and North Dakota and commented upon

by this Court in other litigation), and the necessity for law enforcement intervention to quell large scale riots, to address general lawlessness and a complete disregard for the lawful commands of law enforcement officers, and to otherwise restore the peace.

Dismissal of Plaintiffs' Commerce Clause claims is appropriate and is requested.

6. Plaintiffs' Privileges and Immunities Claims Should Be Dismissed

Plaintiffs' claim under the Privileges and Immunities Clause of Article IV of the United States Constitution fails to state a claim as Plaintiffs allege they are all residents of North Dakota. (Doc. 44 at ¶¶ 14 (during time period in question, Plaintiff Thunderhawk resided in Mandan, North Dakota); 15 (during time period in question, Plaintiff Young resided in Fort Yates, North Dakota); ¶ 16 (during the time period in question, Plaintiff Floberg resided in Bismarck, North Dakota); 17 (during the time period in question, Plaintiff Zhagany established legal residency in North Dakota). The United States Supreme Court has repeatedly stated the Privileges and Immunities Clause provides no protection for citizens/residents of the State whose regulation is challenged. *See United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 217, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984) (noting New Jersey residents disadvantaged by ordinance of municipality located in New Jersey have no claim under the Privileges and Immunities Clause (*citing The Slaughter House Cases*, 83 U.S. 36, 16 Wall. 36, 77, 21 L.Ed.394 (1872)). As explained by the United States Supreme Court in *The Slaughter House Cases* in 1872, the Privileges and Immunities Clause did not create rights, which the clause refers to as privileges and immunities of citizens of the States, and provides no security for the citizen of the State in which they were claimed or exercised, nor does it control the power of the State governments over the rights of its own citizens.

> Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on

> their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

83 U.S. at 77. As alleged residents of North Dakota, the Privileges and Immunities Clause provides no protections to Plaintiffs relative to the laws and regulations of North Dakota. *See United Bldg. & Constr. Trades Council of Camden County and Vicinity*, 465 U.S. at 216 (terms "citizen" and "resident" are essentially interchangeable for Privileges and Immunities Clause analysis).

In addition, for the same reasons why the government Defendants actions were justified under a First Amendment analysis, discussed above, they were similarly justified under a Privileges and Immunities Clause analysis. Dismissal of Plaintiffs' Privileges and Immunities Clause claim is warranted as a matter of law.

As Plaintiffs have failed to alleged a violation of their constitutional rights, dismissal of all of Plaintiffs' claims as against all Defendants is warranted at this time.

7. Plaintiffs' Municipal and Supervisory Claims, and Request for Class Certification, Should Be Dismissed

Plaintiffs allege all Defendants, acting under of state law, "promulgated and/or maintained policies, customs, or practices" and maintained "inadequate training supervision, or discipline" permitting, implementing, carrying out or deliberately indifferent to, and the moving force behind, the violation of, Plaintiffs' First, Firth, and Fourteenth Amendment, and Commerce and Privileges and Immunities Clause rights, secured by the U.S. Constitution. (Doc. 44 at ¶¶ 172, 177.) These municipal and supervisory claims, as well as Plaintiffs' request for class certification, are derivate of, and dependent upon Plaintiffs' establishing an actual violation of their constitutional rights. As explained by the United States Court of Appeals for the Eighth Circuit in *Speer v. City of Wynne, Arkansas*, 376 F.3d 960, 986 (8th Cir. 2002), neither a political subdivision or its employees can be held liable in a § 1983 action absent an actual violation of a plaintiff's constitutional rights.

See also Monell v. Dept. of Social Services of City of New York, 436 U.S. 658, 691 (1978) (municipality cannot be held liable under § 1983 official municipal policy theory absent such policy actually causing a constitutional tort – a municipality cannot be held liable under § 1983 simply for employing a tortfeasor and cannot be held liable on a respondeat superior theory); *Schulz v. Long*, 44 F.3d 643, 650 (8th Cir. 1995) ("It is the law in this circuit . . . that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located."); *Miller v. Redwood Toxicology Laboratory, Inc.*, 688 F.3d at 937 (dismissing class certification claim due to dismissal of underlying claims). As discussed above, taking into consideration the material permitted under Rule 12(b)(6), Plaintiffs have failed to allege a violation of their constitutional rights. As a result, these derivative claims should be dismissed.

B. Individual Government Defendants Are Entitled to Qualified Immunity

Even assuming, arguendo, Plaintiffs have alleged a violation of their constitutional rights, individually named government Defendants would be entitled to qualified immunity as their alleged conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. As explained by the United States Supreme Court:

> The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 818 ... (1982). Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." [citation omitted].
>
> * * *
>
> Because qualified immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." ... Indeed, we have made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' against government officials

> [will] be resolved **prior to discovery**." .... Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."

Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (bold added). The Supreme Court has instructed that the issue of qualified immunity be resolved "at the earliest possible stage of the litigation." *Pearson v. Callahan*, 555 U.S. at 231 (quotation omitted); *see Mathers v. Wright*, 636 F.3d 396, 399 (8th Cir. 2011). This is because the defense is "an immunity from suit rather than a mere defense to liability" and "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Mathers v. Wright*, 636 F.3d at 399 (citing *Mitchell v. Forsyth*, 472 U.S. at 526). In addition, a "driving force behind the creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials be resolved prior to discovery." *Pearson v. Callahan*, 555 U.S. at 231 (quotation omitted).

> Qualified immunity protects government officials from liability under § 1983 when their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 Led.2d 666 (2002). The test for whether an officer is entitled to qualified immunity is twofold: (1) whether the facts alleged, taken in the light most favorable to the injured party, show that the officer's conduct violated a constitutional right; and (2) whether the constitutional right was clearly established at the time of the deprivation so that a reasonable officer would understand his conduct was unlawful. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 815-16, 172 L.Ed.2d 565 (2009); *Henderson v. Munn*, 439 F.3d 497, 501-02 (8th Cir. 2006). If no reasonable factfinder could answer yes to both of these questions, the officer is entitled to qualified immunity. *See Plemmons v. Roberts*, 439 F.3d 818, 822 (8th Cir. 2006).

Nance v. Sammis, 586 F.3d 604, 609 (8th Cir. 2009).

Defendants are entitled to qualified immunity as Plaintiffs' have not alleged a plausible violation of their constitutional rights by Defendants as discussed above, and even if Plaintiffs have alleged a plausible claim for violation of a constitutional right, such right was not so clearly established at the time of the deprivation so that a reasonable officer would have understood his

conduct was unlawful under the circumstances presented. The undersigned Counsel for County Defendants have not located a single case involving circumstances similar those at issue in this case in which a court has found a constitutional violation by government officials. On the other hand, there are reported cases involving law enforcement lawfully preventing protester access to closed areas to protect the health and safety of the public and to protect property threatened by protesters. *See, e.g. Bernini v. City of St. Paul*, 655 F.3d 997 (8th Cir. 2012) (involving law enforcement's cordoning off downtown St. Paul, Minnesota as a no-go zone during Republican National Convention in 2008 due to prior heavy property damage by protesters in the vicinity, and utilizing less-lethal munitions to hold back aggressive protesters attempting to breach barricades); *United States v. Griefen*, 200 F.3d 1256 (9th Cir. 2000) (discussed above). There simply is no existing precedent which establishes beyond debate the unconstitutionality of Defendants' alleged conduct in this case. *See Kisela v. Hughes*, 138 S.Ct. 1148, 1151 (2018) (per curiam) ("Although this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate."). Individual government defendants are therefore entitled to qualified immunity.

IV. CONCLUSION

The Court should dismiss Plaintiffs' claims, in their entirety as against all Defendants, as the premise underlying all of Plaintiffs' claims – namely Plaintiffs' alleged right to engage in their constitutional rights in the vicinity, and at the times, at issue is wholly without merit. Plaintiffs have not alleged a violation of their constitutional rights. Even assuming, arguendo, Plaintiffs have alleged a violation of their constitutional rights, the individually named government official defendants are entitled to qualified immunity as their alleged conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Dated this 15th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 15th, 2019, a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF COUNTY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** was filed electronically with the Clerk of Court through ECF.

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