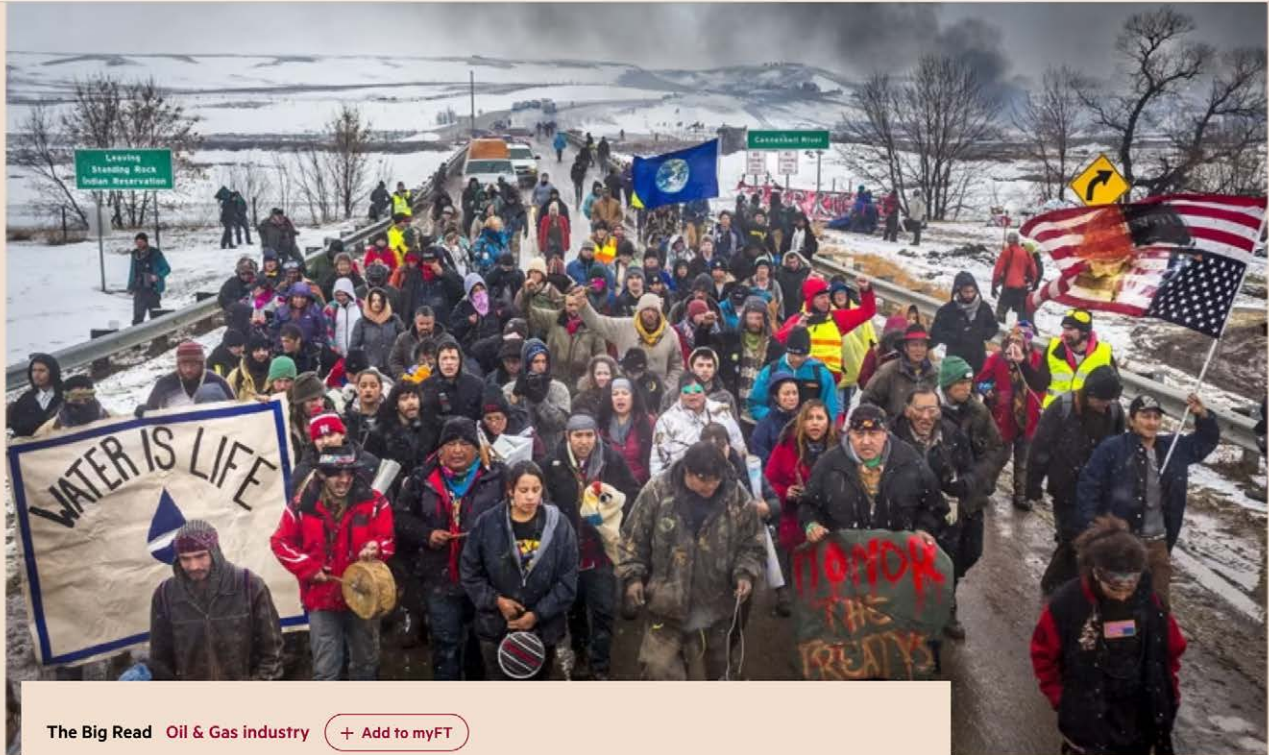




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The North Dakota court battle testing free speech in Donald Trump's America

Greenpeace is being sued by oil group over demonstrations a decade ago. Campaigners say the future of legal protest is at stake

Protesters against the Dakota Access pipeline mobilise at the Standing Rock reservation in early 2017 © Michael Nigro/Pacific Press Via Zuma Wire/Shutterstock

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Amanda Chu in Mandan, North Dakota and Jamie Smyth in Houston

Published 8 HOURS AGO



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Most years, the biggest event in Mandan, a prairie town of less than 25,000 in North Dakota's oil country, is Buggies-n-Blues — the second weekend in June, when Main Street fills with classic cars and live music.

This year is turning out to be somewhat different. The courthouse in Mandan is currently hearing a case that has become one of the first judicial showdowns over free speech and protest in the second term of Donald Trump.

On trial is the environmental campaign organisation Greenpeace, which is being sued over its role in the Dakota Access pipeline protests by the company that developed the project. Nearly a decade after the demonstrations, the case is finally being heard in front of a jury.



Energy Transfer, the US pipeline group co-founded by the billionaire Kelcy Warren, a donor to President Trump, has accused Greenpeace of fostering the protests — which became one of the largest indigenous and environmental demonstrations in US history — as well as damaging property and injuring its relationship with investors.

Greenpeace denies the allegations, insisting that it played only a minor role and did not take part in any violence. It has claimed that, if it loses, costs could run up to \$300mn and bankrupt its US operations.



Pumpjacks at the Bakken oilfield in Williston, North Dakota. Protests that lasted from April 2016 to February 2017 transformed the state into a battleground over indigenous rights and environmental protections that made headlines around the world © Daniel Acker/Bloomberg



Morton County courthouse in Mandan, North Dakota. Greenpeace is being sued over its role in the Dakota Access pipeline protests by the company that developed the project, Energy Transfer © Colby Lysne/FT

Aimed at preventing the construction of this 1,72-mile conduit transporting crude from the state's rich Bakken oilfield to the midwest, the protests lasted almost a year, from April 2016 to February 2017, and transformed this quiet town into a battleground over indigenous rights and environmental protections that made headlines around the world.

While the case has been in the works for eight years, the trial is taking place at a moment of acute political sensitivity. Trump's return to the White House has transformed the political landscape, emboldening the oil and gas sector while also, critics allege, eroding judicial independence and cracking down on dissent.

The case is part of a renewed push by the oil industry to use legal systems to advance infrastructure projects and put opponents on the defensive. It follows recent high-profile litigation by ExxonMobil, which targeted activist investors and Democratic politicians, as well as new state laws aimed at stopping protests near pipelines.



As a result, the North Dakota trial has become a high-profile judicial test of free speech under Trump, who has repeatedly lambasted the media and has started to target activists and political opponents. The president has vociferously championed the fossil fuel industry and called for more pipelines to be built to unleash US “energy dominance”.

Energy Transfer argues that Greenpeace’s actions caused it to suffer considerable losses. “They didn’t think that there would be a day of reckoning. That day of reckoning starts today,” Trey Cox, the lead attorney for Energy Transfer, told the nine-person jury in opening statements in late February.

Lawyers and activists argue that, if Energy Transfer is successful, it could set a dangerous precedent for freedom of speech, discouraging not just activism about energy and the climate, but in many other areas too.



“This is one of the most important cases in American history,” says Martin Garbus, a renowned civil rights lawyer who has been monitoring the trial in the Mandan courthouse.

“The law that can come down in this case can affect any demonstration, religious or political,” he says. “It’s far bigger than the environment.”

The \$3.8bn Dakota Access pipeline was designed to enable oil to flow from the Bakken shale formation — which is one of the country’s largest oilfields, straddling the Canadian border. Energy Transfer first submitted plans to the federal government for the project in late 2014, but tensions escalated in April 2016, when members of the Standing Rock Sioux tribe started protesting the plans, at an area about a 45-minute drive from Mandan.

They feared the pipeline, which travelled beneath Lake Oahe on the Missouri River, would endanger their main source of drinking water and violate their sovereignty and sacred sites. A series of legal and regulatory disputes during the Obama administration followed.

When Trump first took office in January 2017, he ordered officials to “take all actions necessary and appropriate” to expedite construction of the pipeline. It finally opened that June, following a five-month delay.

A few months later, Mandan became the site of Trump’s first presidential visit to North Dakota. “We opened [the pipeline] despite so many people that were on the other side calling and asking for this not to happen,” Trump boasted, standing in front of the town’s refinery.

Energy Transfer first sued Greenpeace and its US entities in federal court that year, seeking hundreds of millions of dollars in damages. After the case was dismissed, it filed a similar lawsuit against the organisation in state court, where it is now being tried.

The company argues that Greenpeace was instrumental to the protests, responsible for spreading misinformation, training “thousands” of protesters, donating money and supplies and costing the company millions of dollars because of delays, security measures, and reputational and physical damages.



Greenpeace activists hang a banner on a crane near the White House in 2017 that reads 'Resist', a day after the Trump administration issued a memorandum supporting the completion of the Dakota Access pipeline © Andrew Harrer/Bloomberg



US President Donald Trump visits the Andeavor Refinery in Mandan, North Dakota, in September 2017 © Brendan Smialowski/AFP/Getty Images

Greenpeace has fought back, arguing that its US arm, Greenpeace USA, was merely one of numerous organisations opposing the pipeline and that, far from it being involved in violence, peaceful protest is a “core principle” for the organisation. It also denied that it was responsible for delaying the project. “The delay that they had had nothing to do with Greenpeace,” Everett Jack Jr, lead attorney for Greenpeace USA, told the jury in his opening statement.

The environmental group has made multiple unsuccessful petitions to change the venue of the proceedings, arguing it is impossible to get a fair trial in the county where the protests occurred and where many residents have ties to the fossil fuel industry. As well as the refinery, there are two gas-fired power stations outside Mandan, and some jurors have acknowledged familial ties to the oil and gas sector, or to law enforcement who policed the protests. In 2019, Energy Transfer donated \$3mn to upgrade the town’s library and parks.

The state’s former governor, Doug Burgum, now Trump’s interior secretary, has made little secret of his support for Big Oil, nor his lack of patience with protests against the industry. In 2019, he signed into state law a bill that would make protesting near a pipeline punishable by up to five years in prison.

He has also pushed oil and gas projects hard. Speaking at his congressional confirmation hearing last month, Burgum said, “We’ve got to get to work in permitting reform and speeding permitting . . . whether it’s a transmission line, a pipeline, whatever it happens to be trying to get built, it just takes too long in our country.”

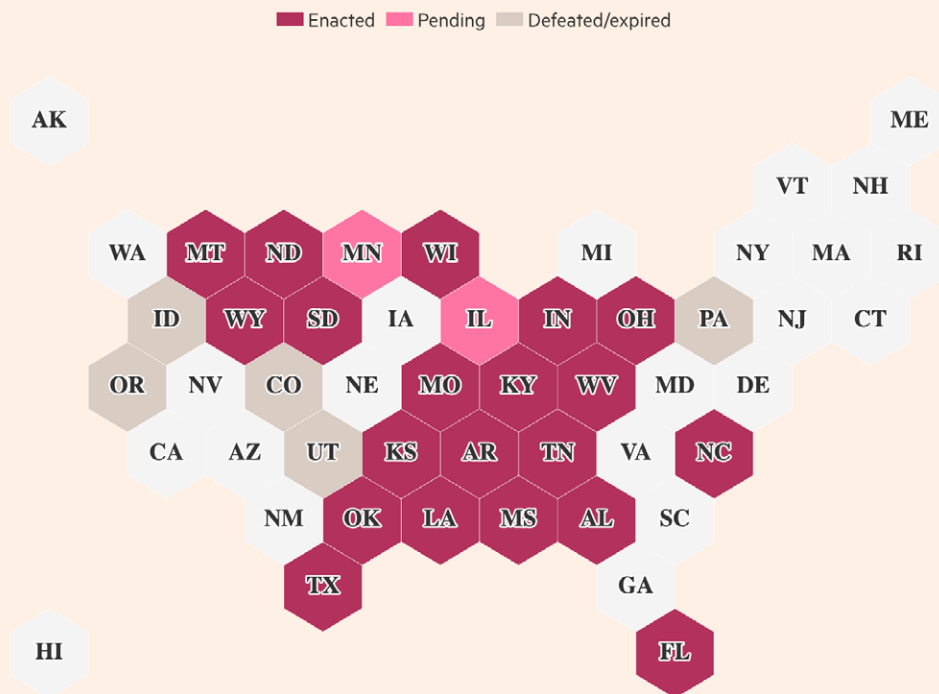
The case has sparked debate over the limits of free speech and the litigation strategies of the fossil fuel industry — particularly the use of burdensome and costly legal actions seen by many to be strategic lawsuits against public participation, or “Slapps” for short.

Slapps are lawsuits filed by powerful individuals, corporations and governments to silence critics and exhaust their time and resources. According to some activists and lawyers, Energy Transfer’s pursuit of Greenpeace is a particularly blatant example. Energy Transfer has denied this, saying the case is “legitimate and justified”.

Some 35 US states have laws restricting the use of Slapps, according to the Institute for Free Speech, and bipartisan legislation is pending in Congress to establish Slapp protections at the federal level. But North Dakota has no anti-Slapp laws in place.

Nearly two dozen US states have moved to restrict protests near oil and gas pipelines and equipment since Dakota Access

Restrictions on peaceful protest near pipelines and other energy infrastructure or oil and gas equipment by state and status since January 2017



Source: ICNL
FT graphic: Amanda Chu

FINANCIAL TIMES

“Big Oil wants to silence its critics. We will not be silenced,” Sushma Raman, interim executive director of Greenpeace USA, said in a press briefing in February.

Vicki Granado, vice-president of corporate communications at Energy Transfer, says the case is “not about free speech”. “Our lawsuit is about recovering damages for the harm Greenpeace caused our company,” she wrote in a statement to the Financial Times.

In a 2017 television interview, Warren insisted: “What [environmental groups] did to us is wrong, and they’re going to pay for it.”

The case has been heard in comparative secrecy, with recording devices and cameras banned in the courtroom. Last month, media organisations including the New York Times and the Wall Street Journal filed a petition to the North Dakota Supreme Court to request that a livestream, video and photography be allowed. The petition, along with a similar effort from Garbus and his group of lawyers, has been denied.

Both environmental activists and indigenous groups have been shocked by the case. “It’s unnerving,” says Waniya Locke, a grassroots organiser at Standing Rock and one of the first people to protest the pipeline. “They can target anyone.”

Other energy companies have attempted to use lawsuits that critics have dubbed Slapps in the US and worldwide. Since 2015, more than 520 alleged Slapp lawsuits have been filed globally, according to a database from the Business & Human Rights Resource Centre, with about a third coming from the oil, gas and mining sectors.

One of the most controversial examples critics refer to is Chevron’s three-decade-long pursuit of Steven Donziger, an American human rights lawyer who won an \$18bn award in Ecuador against the oil major for pollution in the country in 2010. Chevron refused to pay, then launched a legal counteroffensive, alleging Donziger used underhand methods. After refusing to hand over information to Chevron related to the case, Donziger was eventually sentenced to six months in prison by a US judge.

The case has become a cause célèbre for environmental activists, with protest group Amazon Watch arguing that Chevron used “every dirty trick in the book” to avoid paying damages. The company rejects these claims, saying that a US court found overwhelming evidence that Donziger obtained the Ecuadorean judgment against Chevron “by corrupt means”. This finding was affirmed by an appeals court, said the oil group, adding that its legal action cannot be considered a Slapp suit.

Donzinger, who is attending the North Dakota trial as an observer, says litigation from oil and gas companies is often “not about the money. It is about sending a message.”

The industry has also targeted investors. Last year Exxon sued investor Arjuna Capital and activist shareholder group Follow This to stop a proposal, requesting that Exxon adopt targets to reduce pollution produced by people who use its products, from going to a vote.

The activists dropped the resolution, but Exxon continued litigation, saying it wanted to put “a spotlight on the abuse of the shareholder-access system”. Citing jurisdictional issues, a federal judge dismissed the case against Follow This in May. The following month he dismissed the case against Arjuna when it agreed not to pursue future proxy filings.



Steven Donziger, right, an American human rights lawyer, won an \$18bn award in Ecuador against Chevron for pollution in the country in 2010. Chevron refused to pay, then launched a legal counteroffensive, alleging Donziger used underhand methods © Paul Chinn/San Francisco Chronicle via Getty Images



In January Exxon sued California's attorney-general Rob Bonta, alleging he defamed the company when he launched a state lawsuit against it over claims it had made about recycling © Shannon Stapleton/Reuters

Even senior politicians risk becoming ensnared. In January Exxon sued California's attorney-general Rob Bonta, alleging he defamed the company when he launched a state lawsuit against it over claims it had made about recycling. A spokeswoman for Bonta says that Exxon's lawsuit was an attempt to deflect from its own "unlawful deception". Exxon was not immediately available for comment about whether their lawsuit was a Slapp case.

Some critics insist that protest itself is coming under legal threat in the US. In 2018, in the wake of the Dakota Access pipeline protests, Louisiana passed a law making it a felony punishable by up to five years in prison to be on or near any of the state's pipelines without authorisation. At least 18 states have enacted similar laws, according to the International Center for Non-Profit Law.

"You have a two-sided attack," says Elly Page, senior legal adviser with the US programme at the INCL. "Authorities have extensive discretion to use [these laws] against protest movements on the one hand, and then you have the potential for private actors to bring potentially damaging and draining civil suits on the other."

The oil and gas industry, which has often criticised environmentalists for using what it considers to be strategic litigation or "lawfare", says its use of the courts is justified.

"This isn't about shutting down debate. This is about extreme activists who are trying to shut down oil and gas production in the United States and throughout the world," says Mike Sommers, chief executive of the American Petroleum Institute.

Anne White Hat, a Sicangu Lakota activist who was arrested in 2018 and charged under the Louisiana law for protesting against the construction of a pipeline in the state, the Bayou Bridge pipeline — another Energy Transfer project and the terminus of the Dakota Access pipeline — says she is anxious that activists now face greater threats to their freedoms. “We’re at this apex,” she says.

Although the charges against her were dropped in 2021, White Hat and other activists are currently challenging Louisiana’s anti-protest law in federal court.

In his first week in office, the president rescinded more than 70 climate and [clean energy initiatives](#), ending bans on offshore drilling, reversing the withdrawal of the permit to the Keystone XL pipeline and lifting the pause on new liquefied natural gas terminals. Declaring a “national energy emergency”, he also ordered federal agencies to expedite giving permits for new energy infrastructure.

He has also shown little tolerance for what many consider to be free speech issues. Last week, Trump warned that the arrest of Mahmoud Khalil, a Columbia University graduate, for taking part in pro-Palestinian protests was “the first of many to come”. The president has also banned the Associated Press from White House press briefings for refusing to use the term “Gulf of America”.

Last week, Trump also turned his fire on people protesting against Tesla, suggesting that anyone using violence should be labelled a domestic terrorist. “You do it to Tesla and any company, we’re going to catch you and you’re going to go through hell,” he said.

Lawyers and activists warn that a win for Energy Transfer in North Dakota would deter protests of any kind, especially by small groups that lack resources. The trial, which has gone on for three weeks, is nearing its end, with closing arguments heard on Monday.

“If Energy Transfer is successful, it will have a chilling effect on other advocates . . . because they realise they could face significant liability,” says Jennifer Safstrom, a professor at Vanderbilt Law School. “Even if Greenpeace ultimately prevails, this type of litigation is itself a deterrent to other advocates.”

70+

Number of climate and clean energy initiatives that Trump rescinded in his first week in office

Last month, Greenpeace International sued Energy Transfer in the Netherlands, [accusing](#) the pipeline company of violating its rights to freedom of expression by bringing its US lawsuit. The case, the first test of a new European directive intended to limit the use of Slapps, is aimed at recouping legal funds if the environmental group does indeed lose in North Dakota. While Energy Transfer's response in the Dutch court is pending, it has previously said it considers Greenpeace's argument to be "wholly without merit" and denies its US case is a Slapp suit.

In Mandan itself, local people — even those otherwise supportive of the fossil fuel industry — are sceptical that Greenpeace was solely responsible for the pipeline protests and unsure of the merits of this case.

"Do I think they were part of it and did wrong? Yes. Do I think they should be slammed for everything? No," says Shaun Olson, who recently took a job at the refinery.

Trish Camisa, a life-long resident and owner of the Cappuccino on Collins coffee shop, says the protests "still leave a bad taste in the mouth of a lot of citizens". But she too has doubts about what is happening in court. "I don't know if you can blame it on one single group or person," she says.

Meanwhile Locke, of the Standing Rock Sioux tribe, is continuing to oppose the operation of the Dakota Access pipeline. "It is not just an environmental justice issue . . . This is human rights on the line," she says.

Cartography by [Cleve Jones](#)