U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., SW
Washington, DC 20591

JUN 12 2017

Lee Rowland
ACLU
125 Broad Street
New York, NY 10004

Dear Ms. Rowland:

I write in response to your December 16, 2016 letter regarding temporary flight restrictions (TFR) in the vicinity of Cannonball, North Dakota. In that letter, you shared your view that the Federal Aviation Administration (FAA) failed to consult with the Standing Rock Sioux Tribe; initially denied exemption requests from the media; and failed to sufficiently tailor the TFRs, preventing essential media coverage in possible violation of the First Amendment. Thank you for the opportunity to clarify both the facts and the FAA's safety-driven TFR decision-making process.

The FAA is the steward of the National Airspace System, responsible for both providing access to airspace and for ensuring the safety of airspace users and people/property on the ground. At times, conditions on the ground and in the sky require temporarily restricting access to airspace by issuing TFRs in the interest of safety. TFRs can be issued pursuant to 14 C.F.R. §91.137 whenever it is necessary to:

(a) Protect persons and property on the surface or in the air from a hazard associated with an incident on the surface;
(b) Provide a safe environment for the operation of disaster relief aircraft; or
(c) Prevent an unsafe congestion of sightseeing and other aircraft above an incident or event which may generate a high degree of public interest.

Although the conditions giving rise to TFRs are varied, they often arise with little warning and require expeditious FAA action based on available information. When issuing TFRs, the FAA strives to set the least-restrictive, yet effective, flight restriction. To that end, TFRs are purposefully short in duration as this allows for the development and reassessment of facts and restriction parameters. It bears repeating that the Agency's paramount loadstar is safety.

As your letter notes, the FAA issued a series of TFRs in the vicinity of Cannonball, North Dakota from October through December 2016. Protesters congregated in Standing Rock Sioux Tribe lands near Cannon Ball to oppose construction of the Dakota Access Pipeline. North Dakota law enforcement officials contacted the FAA to report that several unmanned aircraft systems (UAS) flying above the protest site approached law enforcement helicopters too closely, risking collision. These incidents, and the potential for future similar events, posed a serious safety risk to both helicopter operators and protesters given that even a small UAS can cause a helicopter crash. For that reason, the FAA issued a 7-mile TFR in the

vicinity of Cannon Ball, North Dakota on October 25, 2016. Within 3 days of issuing the TFR, FAA officials were in contact with attorney Heather Thompson, a representative for the United Tribes of North Dakota and the Rosebud Economic Development Corporation, to answer questions and address tribal concerns related to the TFR.

In response to the tribal concerns presented by Ms. Thompson, and consistent with FAA practice to establish the least restrictive, yet effective TFR, the FAA reduced the size of the next TFR issued on November 4, 2016. The agency not only reduced the TFR from 7 to 4 miles, it also excluded a circular area .6 nautical miles in diameter to allow UAS operations immediately over the protest site. In addition, the FAA made arrangements to allow access to media aircraft by deeming them "participating aircraft" under the TFR regulation. Media merely had to contact the agency as instructed in the Notice to Airmen[1] (NOTAM) to request access and were approved as long as they satisfied all other standard operating and licensing requirements.

On November 7, 2016, the FAA reached out to Dave Archambault II, Chairman of the Standing Rock Sioux Tribe, to explain the TFR changes made in response to the TFR intended to address tribal concerns. Agency officials highlighted changes to the restricted airspace boundaries to allow UAS operations immediately over the protest site. The notice also noted changes allowing media access within the restricted airspace. The FAA continued its tribal outreach through December of 2016, maintaining open lines of communication between the Agency and many tribal parties. The FAA's outreach culminated in a December 2, 2016 meeting. FAA representatives flew to North Dakota to meet in person with tribal leaders and address remaining TFR concerns. The following tribal parties attended the meeting:

- Dave Archambault II, Standing Rock Sioux Tribe;
- Tree Affiliated Tribes of Mandan, Hidatsa, & Arikara Nation;
- Turtle Mountain Band of Chippewa Indians;
- Spirit Lake Nation;
- Sisseton-Wahpeton Oyate Nation of the Lake Traverse Reservation;
- Rosebud Sioux Tribe;
- Cheyenne River Sioux Tribe; and
- Crow Creek Sioux Tribe.

Tribal leaders asked FAA officials to expand the area carved-out of the TFR for UAS operations. FAA officials explained their safety concerns arising from the many violations of UAS regulations, including night operations, flying over people, unsafe/reckless operations, flying beyond line of sight, and flying within the restricted airspace. Nevertheless, FAA officials agreed to further loosen the TFR restrictions for UAS operators provided a UAS operators fully complied with FAA regulations for a 4-day period.[2] The

[1] A Notice to Airmen (NOTAM) contains information (not known sufficiently in advance to publicize by other means) concerning the establishment, condition, or change in any component (facility, service, or procedure of, or hazard in the National Airspace System) the timely knowledge of which is essential to personnel concerned with flight operations. The FAA notifies interested parties of TFRs using the NOTAM system.

[2] From December 6 to December 10, 2016.

FAA's last TFR in the vicinity of Cannonball, North Dakota, expired on December 16, 2016.

As the above information shows, the FAA began an ongoing dialogue with tribal leaders shortly after issuing the TFR over Cannonball in October 2016 and continued until the last TFR expired on December 16, 2016. FAA officials answered questions and responded to tribal concerns. To be clear, at no point did the FAA officials look to abridge anyone's First Amendment rights. Rather, FAA officials followed established protocols to establish the least restrictive, yet effective, restriction that ensured safety in the air and on the ground. Nevertheless, I assure you that the agency will consider your feedback as we continue to improve our TFR processes. If you have any further questions, please contact Lorelei Peter, Assistant Chief Counsel for Regulations, at (202) 267-3073.

Sincerely,

Patricia A. McNall
Acting Chief Counsel

LEGAL DEPARTMENT

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Reggie Govan, Chief Counsel
Office of the Chief Counsel
Federal Aviation Administration
800 Independence Avenue SW
Washington, DC 20591

December 16, 2016

Dear Mr. Govan,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET,
18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

On behalf of the American Civil Liberties Union, the ACLU of North Dakota, and the Floyd Abrams Institute for Freedom of Expression, we write to express our profound concern over the Federal Aviation Administration's repeated enactments of a no-fly zone over the protests occurring in response to construction of the Dakota Access Pipeline ("DAPL") in close proximity to the Standing Rock Sioux Tribe's lands near Cannon Ball, North Dakota ("Standing Rock").

The Federal Aviation Administration ("FAA") instituted at least three such air bans. Although the bans prevented essential media coverage of unfolding news, the FAA initially refused any media requests for exemptions,[1] including at least one from an indigenous videographer who has been on the ground for months.[2] The FAA apparently reversed course for one photographer who only traveled to North Dakota upon receiving the exemption.[3] In addition, the FAA granted all three bans without consulting the Standing Rock Sioux Tribe. We ask you to correct these errors and to take this opportunity to demonstrate that the FAA recognizes and respects the rights of protestors, reporters, and indigenous people.

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[1] April Glaser, *The FAA banned drones from flying at the Standing Rock oil pipeline protest*, Recode, Nov. 28, 2016, http://www.recode.net/2016/11/28/13767216/faa-bans-drones-standing-rock-dakota-access-pipeline-video ("No requests from media have been granted yet, according to an FAA spokesperson.").

[2] Jason Koebler, *The Government Is Using a No Fly Zone to Suppress Journalism At Standing Rock*, Vice News, Nov. 30, 2016, http://motherboard.vice.com/read/the-government-is-using-a-no-fly-zone-to-suppress-journalism-at-standing-rock (one indigenous journalist recalls being denied an exemption after being told by the FAA that "their hands are tied").

[3] John Goglia, *FAA Reverses Course, Grants Drone Journalist Permission To Fly In No-Fly Zone Over Standing Rock*, Forbes, Dec. 2, 2016, http://www.forbes.com/sites/johngoglia/2016/12/02/faa-reverses-course-grants-drone-journalist-permission-to-fly-in-no-fly-zone-over-standing-rock/#325348057724.

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As the ACLU previously expressed in response to the no-fly zone the FAA instituted over Ferguson, Missouri in August 2014, a total ban on media aircraft is an unacceptable abridgement of the rights of a free press.[4] A no-fly zone is particularly alarming when implemented during high-profile news events—and even more so when those events reportedly involve unconstitutional government practices that demand oversight and newsgathering. By instituting a broad no-fly zone above hotly-contested law enforcement operations, the FAA is complicit in denying members of the public their right to gather and access media information about a matter of immense public debate and concern.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET,
18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

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Factual Background

Since large-scale protests began against the DAPL, the FAA has instituted three no-fly zones over the protest encampments near Standing Rock. The first ban spanned a seven-mile radius and lasted from October 25 through November 4, 2016.[5] The second spanned a four-mile radius and lasted from November 26, 2016 through December 2, 2016.[6] The third ban, instituted on December 2, 2016, covered the same four-mile radius and, though initially set to expire on December 16, 2016, appears to have been rescinded prior to that date.[7]

These air bans directly coincided with significant and troubling law enforcement activity near Standing Rock. For example, on October 27, 2016, law enforcement used armored vehicles, automatic rifles, sound cannons, concussion grenades, pepper spray, beanbag bullets, riot gear, and other offensive military weapons and equipment against protesters on the ground.[8] On November 25, 2016, the Army Corps of Engineers sent an eviction notice to the chairman of the Standing Rock Sioux Tribe, stating that the protest encampments near Standing Rock would be

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[4] ACLU Letter to FAA Protesting No-Fly Zone for Media in Ferguson, Nov. 4, 2014, https://www.aclu.org/other/aclu-letter-faa-protesting-no-fly-zone-media-ferguson.

[5] Forum News Service, *Showdown at hand between law enforcement, pipeline protestors*, Oct. 26, 2016, http://www.inforum.com/news/government/4145254-jesse-jackson-joins-pipeline-protest-effort-faa-issues-no-fly-restriction.

[6] TFR 6/1887, Nov. 21, 2016, enclosed as Appendix A.

[7] TFR 6/5932, Dec. 2, 2016, enclosed as Appendix B.

[8] Ben Norton, *Dakota pipeline protesters say they were detained in dog kennels; 268 arrested in week of police crackdown*, Salon, Oct. 31, 2016, http://www.salon.com/2016/10/31/dakota-pipeline-protesters-say-they-were-detained-in-dog-kennels-268-arrests-in-week-of-police-crackdown/. *See also* ACLU Standing Rock Letter to Justice Department, Nov. 4, 2016, https://www.aclu.org/letter/aclu-standing-rock-letter-justice-department.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET,
18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

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closed to public access on December 5.[9] After the Army Corps of Engineers backed down from this position, North Dakota Governor Jack Dalyrmple issued an executive order requiring the "mandatory evacuation of all persons" from Standing Rock on November 28, 2016.[10] The following day, law enforcement claimed it would institute a system for fining anyone bringing supplies, including food, to the protest encampments near Standing Rock.[11]

Over this time, the FAA has failed to consult with the Standing Rock Sioux Tribe, and journalists have been severely hampered in their reporting. Law enforcement has subjected reporters to physical attacks in retaliation for their coverage. In September 2016, Morton County police issued a warrant for the arrest of journalist Amy Goodman after she reported that DAPL security guards were using dogs and pepper spray against protesters.[12] That same month, police arrested two journalists wearing press passes during a live broadcast as they stated "I'm press."[13] On November 3, 2016, police shot journalist Erin Schrode with a rubber bullet while she was conducting an interview.[14]

Media drones and their operators—including indigenous journalists in particular—have also been targets of police activity. On October 8, 2016, Morton County police detained an indigenous reporter and confiscated his video-equipped drone.[15] Later that month, police shot down the drone of another

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[9] James MacPherson, *Dakota Access Pipeline Protesters Told to Leave by Dec. 5*, Associated Press, Nov. 28, 2016, https://www.washingtonpost.com/national/dakota-access-pipeline-protesters-told-to-leave-by-dec-5/2016/11/28/a14c0e9a-b530-11e6-939c-91749443c5e5_story.html?utm_term=.30fb792bfed3. .

[10] Wes Enzinna, *The Governor of North Dakota Has Ordered the Eviction of Thousands of Anti-Pipeline Protestors*, Mother Jones, Nov. 28, 2016, http://www.motherjones.com/environment/2016/11/governor-north-dakota-eviction-pipeline-protesters.

[11] Terray Sylvester, *North Dakota officials hope to quell pipeline protests with fines*, Reuters, Nov. 30, 2016, http://www.reuters.com/article/us-north-dakota-pipeline-idUSKBN13O2FD.

[12] Erin McCann, *Judge Rejects Riot Charge Against Amy Goodman of 'Democracy Now' Over Pipeline Protest*, New York Times, Oct. 17, 2016, http://www.nytimes.com/2016/10/18/us/judge-rejects-riot-charge-against-amy-goodman-of-democracy-now-over-pipeline-protest.html?_r=0.

[13] Unicorn Riot, *Four Unicorn Riot Journalists Face Charges For Covering #NoDAPL*, Oct. 17, 2016, http://www.unicornriot.ninja/?p=10071.

[14] CBS News, *Journalist shot with rubber bullets during N.D. pipeline protests,* Nov. 4, 2016, http://www.cbsnews.com/news/erin-schrode-journalist-shot-with-rubber-bullets-during-dakota-access-pipeline-protests/.

[15] National Lawyers Guild, *Law Enforcement Arrest 29 Water Protectors on Indigenous*

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET,
18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

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indigenous videographer and detained him.[16] This interference with aerial newsgathering is troubling given the uniquely powerful role of drone footage in the kind of rural, widespread, and sparsely-populated area where the protests are occurring. Drones enable video coverage that would be impossible to obtain on the ground, and that would otherwise require expensive aircraft.

While we understand that diverse and complex considerations factor in to a decision to close any airspace, the FAA must consult the Tribe and weigh the fact that such a decision will obstruct the media.

Necessity of Tribal Consultation

Federal agencies have a unique obligation to consult with a sovereign tribe before taking any action that directly affects the tribe, including instituting a no-fly zone in tribal air space.[17] Several courts have invalidated agency decisions that were made without adequate consultation.[18]

The process of consultation is just as important as its substance. Consultation is about communication, respect, and partnership. Through consultation, the FAA can respect tribal sovereignty, learn and appreciate tribal values, avoid misguided errors and false presumptions, and make informed decisions. Yet the FAA has failed to consult with the Standing Rock Sioux Tribe thus far.

Peoples' Day, Continue to Target Journalists Covering DAPL, Oct. 14, 2016, http://www.commondreams.org/newswire/2016/10/14/law-enforcement-arrest-29-water-protectors-indigenous-peoples-day-continue.

[16] Paul Spencer, *Native Americans Are Resisting the Dakota Pipeline With Tech and Media Savvy,* Vice News, Oct. 29, 2016, http://motherboard.vice.com/read/tech-behind-the-dakota-access-pipeline-protests; Morton County Sheriff's Department, *News Release: Drone Operator Attacks Helicopter Using Unmanned Aircraft,* October 23, 2016, https://drive.google.com/drive/folders/0BzEKNLJqG3cwUFV4ZEdVTGRzaUU.

[17] *See* President William F. Clinton, "Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies" (April 29, 1994); Exec. Order No. 13084 (May 14, 1998); Exec. Order No. 13175 (Nov. 6, 2009).

[18] *See Pueblo of Sandia v. United States*, 50 F.3d 856, 862 (10th Cir. 1995); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979); *Klamath Tribes v. United States,* No. 96-381-HA, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996); *Lower Brule Tribe v. Deer*, 911 F. Supp. 395, 400 (D.S.D. 1995); *Mescalero Apache Tribe v. Rhoades*, 804 F. Supp. 251, 261-62 (D.N.M. 1992); *Attakai v. United States*, 746 F. Supp. 1395, 1407-08 (D. Ariz. 1990).

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AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET,
18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

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Significant First Amendment Concerns

The FAA also appears to have failed to consider the First Amendment implications of the no-fly zones near Standing Rock—specifically, that they preclude aerial footage and obstruct media reports. The FAA may properly and constitutionally exercise its extraordinary federal power to shut down airspace *only* insofar as extraordinary circumstances require—and the *suppression* of a free press is absolutely not among such extreme circumstances.[19]

An analogy to the ground exemplifies the FAA's overreach: while a residential police raid may properly shut down vehicular traffic on a street directly adjacent to the targeted house, it may absolutely not require a total shut-down of all foot and vehicular traffic in a 2-mile radius for a solid week.[20] Yet, the FAA's aerial TFRs have extended for miles and weeks around enforcement operations without specific justification of their breadth and length. This open-ended blackout on access to critical airspace is simply not tailored to the government's interest in air safety, and belies an attempt to create an oversight-free zone for law enforcement operations. Such an intent or effect would violate the First Amendment.

We ask that the FAA sufficiently tailor any future no-fly zones near Standing Rock by ensuring that no-fly zones are not physically larger or longer in duration than strictly necessary to preserve public safety; that flight variances are available and granted to media entities whenever consistent with public safety; and that any no-fly zones are based on supported facts that justify such an extreme measure. In light of the above, we request that the FAA immediately adopt these procedures:

- The FAA should require incident reports or other documented evidence to support any TFR request in the Standing Rock area based on public safety

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[19] *See* 14 C.F.R. § 91.137 (listing proper reasons for enacting a TFR above an event of "public interest," including "to [p]rotect persons and property," permit disaster relief aircraft, or "[p]revent unsafe congestion."). *See also* 14 C.F.R. § 91.139 (emergency air traffic rules); Dep't. of Transportation Order JO 7210.3Y §19-1-3 (Eff. April 3, 2014) available at https://www.faa.gov/documentLibrary/media/Order/7210.3Y_with_CHG_2.pdf (listing possible causes including "toxic gas leaks or spills," "volcanic eruptions," "hijacking," "wildfire suppression.").

[20] *See, e.g., Coal. to Mar. on the RNC & Stop the War v. The City of St. Paul, Minn.*, 557 F. Supp. 2d 1014, 1025 (D. Minn. 2008) (upholding limitations on parade route because they "*directly* served the substantial government interest in securing the [relevant] site") (emphasis added); *see also Menotti v. City of Seattle*, 409 F.3d 1113, 1133–34 (9th Cir. 2005) (A security zone covering "*only* enough territory for the [delegates] . . . to move safely from their hotels to the convention" was narrowly tailored) (emphasis added).

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET,
18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

needs, including, specifically, why the documented incidents justify a TFR of a particular breadth or duration;[21]

- The FAA should institute a consultation process with the Standing Rock Sioux Tribe any time it receives a TFR request in the Standing Rock area. Specifically, the FAA should (1) inform the Tribe of all relevant facts, and do so as early in the decision-making process as possible; (2) give the Tribe sufficient time to consider the situation, and provide technical assistance and additional data if the Tribe requests it; (3) maintain a dialogue with the Tribe, address the Tribe's concerns in a timely manner, keep the Tribe informed of developments, and be open to looking at things from the Tribe's perspective; (4) document the consultation process by notifying the Tribe in writing of developments and potential plans, and request written comments from the Tribe; (5) accept the Tribe's recommendation unless compelling reasons require otherwise; and (6) when the Tribe's recommendation is not accepted, send a written and detailed explanation of the reasons for that decision;

- The Office of Chief Counsel should review any TFR requested in the vicinity of Standing Rock before its enactment to ensure that the First Amendment's prohibition on banning media from accessing and reporting on newsworthy events is respected;

- The FAA should balance the public interest in accurate and thorough news reporting on events near Standing Rock with any request for closure, and ensure that TFR limits (in terms of height, circumference, and duration) are no larger than strictly necessary to protect public safety based on identifiable and fact-based needs;

- The FAA should document and report to the public and to the Department of Justice any future requests for TFRs in or around Standing Rock; the reasons offered for any request, along with the supporting documentation or evidence; and the FAA's determination thereof;

- The FAA should archive all TFRs granted in or around Standing Rock and make them publicly accessible at http://tfr.faa.gov/.

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[21] We understand that TFR 6/1887was requested after authorities said a drone approached a helicopter monitoring the protest in a "threatening manner." However, there is no incident report, property damage, or other recorded evidence that supports the truth, or extent, of such concern. A broad TFR encompassing weeks and aerial miles should not have been enacted based on this summary and singular claim by local police.

LEGAL DEPARTMENT

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In addition, we ask the FAA to take this opportunity to demonstrate that the purpose of the TFRs is not, in fact, to quell protests or reporting. To that end:

- The FAA should affirmatively exempt registered aircraft used for newsgathering or reporting in future TFRs near Standing Rock in the same way that it excludes law enforcement, provided such craft commit to adherence with other neutral FAA rules;

- The posting for each TFR should explicitly identify how reporters can apply for an exemption from a TFR, and disclose the standards the FAA applies to such requests;

- The FAA should document and report to the public any future requests for variances or exemptions from TFRs in or around Standing Rock, as well as the FAA's determination thereof.

Any attempt to suppress reporting on the events near Standing Rock or to prevent the public from hearing about those events raises grave First Amendment concerns, and the failure to consult with the Tribe violates consultation requirements. Much like the ACLU did following the implementation of a no-fly zone over Ferguson, we ask that you refuse any attempt to enlist the FAA in restricting the rights of protestors, reporters, and indigenous people.

Thank you for your time and attention to this request. Please do not hesitate to contact us if you wish to discuss the contents of this letter.

Sincerely,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET,
18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Lee Rowland
Vera Eidelman
ACLU
125 Broad Street
New York, NY 10004
(212) 549-2500

Jennifer Cook
ACLU of North Dakota
PO Box 1190
Fargo, ND 58107
(701) 478-9924

David Schulz
Abrams Institute for
Freedom of Expression
40 Ashmun Street
New Haven, CT 06511
(203) 436-5827

LEGAL DEPARTMENT



CC: Allen Koppy
Morton County States Attorney
210 2nd Avenue NW
Mandan, ND 58554

Leslie Bakken Oliver
General Counsel, North Dakota Office of the Governor
600 East Boulevard Avenue
Bismarck, ND 58505-0100

David Cooper, Chief Counsel
Office of the Chief Counsel
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314-1000

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET,
18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

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PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

APPENDIX A: FDC Temporary Flight Restriction 6/1877 (Cannon Ball, ND)

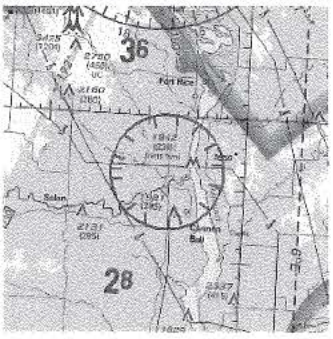
Federal Aviation Administration

TFR List | TFR Map | Map Airports | TFR Help | PilotWeb | SUA

NOTAM

Number :	FDC 6/1887 Download shapefiles
Issue Date :	November 21, 2016 at 2012 UTC
Location :	CANNONBALL, North Dakota near BISMARCK VOR/DME (BIS)
Beginning Date and Time :	November 26, 2016 at 0000 UTC
Ending Date and Time :	December 02, 2016 at 2359 UTC
Reason for NOTAM :	Temporary flight restrictions
Type :	Hazards
Replaced NOTAM(s) :	N/A
Pilots May Contact :	MINNEAPOLIS (ZMP) ARTCC, 651-463-5580, 202-267-3333

Jump To: **Affected Areas** **Operating Restrictions and Requirements** **Other Information**



Click for Sectional
NOTAM Text

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Affected Area(s) Top

Airspace Definition:

Center: On the BISMARCK VOR/DME (BIS) 164 degree radial at 19.6 nautical miles. (Latitude: 46°26'10"N, Longitude: 100°37'52"W)
Radius: 4 nautical miles
Altitude: From the surface up to and including 3500 feet MSL

Effective Date(s):

From November 26, 2016 at 0000 UTC
To December 02, 2016 at 2359 UTC

Operating Restrictions and Requirements Top

No pilots may operate an aircraft in the areas covered by this NOTAM (except as described).

Other Information: Top

ARTCC:	ZMP - Minneapolis Center
Point of Contact:	NORTH DAKOTA TACTICAL OPERATION CENTER Telephone 701-667-3224
Authority:	Title 14 CFR section 91.137(a)(1)

APPENDIX B: FDC Temporary Flight Restriction 6/5932 (Cannon Ball, ND)

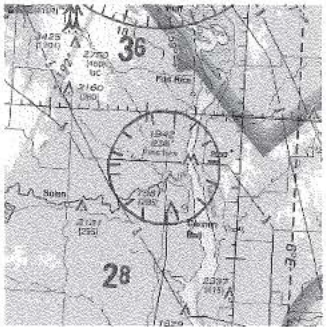
Federal Aviation Administration

TFR List | TFR Map | Map Airports | TFR Help | PilotWeb | SUA

NOTAM Number: FDC 6/5932 Download shapefiles

Issue Date:	December 02, 2016 at 2220 UTC
Location:	CANNONBALL, North Dakota near BISMARCK VOR/DME (BIS)
Beginning Date and Time:	December 02, 2016 at 2359 UTC
Ending Date and Time:	December 16, 2016 at 2359 UTC
Reason for NOTAM:	Temporary flight restrictions
Type:	Hazards
Replaced NOTAM(s):	N/A
Pilots May Contact:	MINNEAPOLIS (ZMP) ARTCC, 651-463-5580, 202-267-3333

Jump To: Affected Areas
Operating Restrictions and Requirements
Other Information



Click for Sectional
NOTAM Text

Affected Area(s)

Top

Airspace Definition:

Center:	On the BISMARCK VOR/DME (BIS) 164 degree radial at 19.6 nautical miles. (Latitude: 46°26'10"N, Longitude: 100°37'52"W)
Radius:	4 nautical miles
Altitude:	From the surface up to and including 3500 feet MSL

Effective Date(s):
From December 02, 2016 at 2359 UTC
To December 16, 2016 at 2359 UTC

Operating Restrictions and Requirements

Top

No pilots may operate an aircraft in the areas covered by this NOTAM (except as described).

Other Information:

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ARTCC:	ZMP - Minneapolis Center
Point of Contact:	NORTH DAKOTA TACTICAL OPERATION CENTER Telephone 701-580-7235
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