

Solving Transboundary Pollution Disputes Locally: Success in the Crown of the Continent

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The unheralded line that separates Canada and the United States is the longest unfortified border in the world today, and perhaps in all of history. It says to mankind: Let not the cartographers rule, elevate nature and human friendship.

Stewart L. Udall
United States Secretary of the Interior, 1967

INTRODUCTION¹

A stride the Continental Divide, the Crown of the Continent is one of the largest jewels of our natural inheritance.² It spans both sides of the international border, is embellished by majestic peaks, and is home to the most diverse array of wildlife in the Northern Rockies, including many species on the brink of extinction. Despite widely recognized ecological values of international importance,³ the pristine qualities of the area remain threatened and its governance fractured. While the core reservations of the Glacier and Waterton Lakes National Parks provide for the protection of portions of the region, much of the adjacent land in both Canada and the United States remains open to extractive uses, despite public ownership. These unprotected lands are smaller jewels of the Crown and a vital part of its unique and diverse ecosystem.

Beyond land and ecological benefits, the Crown is also rich in natural resource commodities—principally timber, metals, coal, oil, and gas. Indeed, Canada's second oil well was drilled in Waterton near the turn of the century.⁴ Coal mining occurs in the Elk River Valley in Canada, while coal bed methane natural gas drilling has also

¹ This Article has its genesis in a presentation given by Jack Tuholske at McGill University in June 2011 at the Vermont Law School/McGill University Sustainability Conference. The authors want to acknowledge Professor of Law and former Dean Kinvin Wroth for his long-standing promotion of cross-border sustainability and for encouraging the development of this Article.

² The term "Crown of the Continent" was first coined by the naturalist William Bird Grinnell, one of Glacier National Park's early explorers and champions. *About the Crown of the Continent*, CROWN OF THE CONTINENT, <http://www.crownofthecontinent.net/about.php> (last visited Jan. 7, 2014). The term is now widely used to describe the ecosystem that extends along the Rocky Mountain spine from the Bob Marshall Wilderness Complex in Montana to the Elk Valley in British Columbia.

³ As The Nature Conservancy explains, "[t]he Crown enfolds over 18-million acres of some of the *most intact wildland on the entire continent*. All the plants and animals seen here during the expedition of Lewis and Clark still survive here. It is essential home range for wildlife and a key intersection connecting vital habitat in Glacier National Park, the Bob Marshall and the Salmon-Selway wilderness areas." *Montana: The Crown of the Continent*, THE NATURE CONSERVANCY, <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/montana/placesweprotect/crown-of-the-continent.xml> (last visited Jan. 7, 2014).

⁴ *National Historic Sites in the Mountain National Parks: First Oil Well in Western Canada National Historic Site of Canada*, PARKS CAN., http://www.pc.gc.ca/docs/v-g/pm-mp/lhn-nhs/puits-well_e.asp (last modified Sept. 11, 2009).

been proposed in Canada.⁵ And not to be left behind, the United States has oil and gas deposits on both sides of the Continental Divide.

Governance of the Crown is complex: international treaties, a United Nations World Heritage Site designation, First Nation rights, Federal U.S. and Canadian environmental laws, and state and provincial laws all affect management of the area in a dizzying array of overlapping jurisdictions. To add to this complexity, the resources that make the area unique are elusive in their transboundary nature, in that rivers, wildlife, and oil and gas deposits are not confined to national borders.

For the past thirty years, energy development proposals in Canada framed the legal and political difficulties inherent in managing this transboundary resource. The North Fork of the Flathead River⁶—home to endangered bull trout while simultaneously underlain by rich coal deposits—has provided the setting for several transboundary environmental disputes. The river originates in Canada, where the coal deposits occur, and flows south through Glacier National Park in the United States. Proposed Canadian mining would provide jobs, tax revenue, and corporate profit in Canada, but send mining pollution downstream into U.S. and Montana waters. With the threat of development looming, the conflict over coal mining very nearly erupted into an ugly international environmental dispute. However, and unlike other transboundary environmental disputes, this one has a happy and prompt ending: coal mines have not been built, mining rights have been retired on hundreds of thousands of acres on both sides of the border, and state and provincial politicians have led the way in working towards ecologically sustainable governance even in the absence of any hard legal obligation to do so.

What can be learned from the positive resolution of a complex international environmental dispute?

Part I of this Article examines the Crown as both a rich ecological commons and source of commodity resources, while explaining that

⁵ See Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 *ECOLOGY L.Q.* 207 (1987) (highlighting the myriad of threats facing Glacier National Park in 1987).

⁶ Originating along the western flank of the Crown in an undisturbed area of southeastern British Columbia, the North Fork flows south into Montana, forming the west boundary of Glacier National Park. It eventually flows into Flathead Lake, the largest freshwater lake west of the Mississippi. *Flathead Lake*, WIKIPEDIA, http://en.wikipedia.org/wiki/Flathead_Lake (last modified Dec. 17, 2013).

management of these resources is inherently fractured due to the nineteenth-century political compromise drawing the international boundary at the 49th parallel.⁷ Part II outlines relevant international, national, and subnational legal principles, both hard and soft law, that could potentially bear on resolving transboundary environmental disputes in the Crown. Part III provides an overview of U.S. and Canadian environmental law that is relevant to both the dispute in the North Fork of the Flathead and to the larger issue of ecosystem governance. Part IV provides a summary of the factors that led to a successful resolution of this dispute, including the role of international law and norms, the importance of subnational political actors, the principle of subsidiarity, and the development of a nonbinding Memorandum of Agreement that has been successfully implemented on both sides of the border. We conclude in Parts V and VI that a “soft-law” based subnational resolution of this transboundary dispute was far more effective than using traditional international law. In Part V we show how subnational actors negotiated a nonbinding agreement with reciprocal responsibilities that would protect the North Fork and lead to more sustainable, transboundary governance of the entire Crown. The provincial and state governments spurred action to retire coal leases and protect vast swaths of additional lands within the Crown. The subnational actors were able to spur the U.S. federal government to act where international law failed to stimulate any substantive action. That subnational agreement, embodied as a Memorandum of Understanding, was guided by important emerging norms of international law such as the need for transboundary ecosystem management, the critical importance of impact assessment, and precautionary approaches, as well as founded on the principle of subsidiarity. In Part VI we highlight the important soft law norms that influenced the subnational agreement, and conclude by showing how

⁷ The Convention of 1818 between the United States and Great Britain first established the 49th parallel as the boundary between Canada and the United States. *Rush-Bagot Pact, 1817 and Convention of 1818*, U.S. DEP'T ST.: OFF. HISTORIAN, <http://history.state.gov/milestones/1801-1829/rush-bagot> (last visited Jan. 7, 2014). At this time, the United States had recently acquired a vast swath of lands through the Louisiana Purchase and from Great Britain, which still claimed Canada as its own. This boundary was reaffirmed in the Oregon Treaty of 1848 between the same parties. *The Oregon Territory, 1846*, U.S. DEP'T ST.: OFF. HISTORIAN, <http://history.state.gov/milestones/1830-1860/oregon-territory> (last visited Jan. 4, 2014). The 49th parallel boundary stretches from Manitoba and Minnesota all the way to the West Coast.

British Columbia and Montana created a “win-win” scenario at the local level by creating reciprocal promises that provided local benefits.

I

SETTING THE STAGE

A. The Biological Setting: A Rich and Diverse Ecosystem

The Crown is among North America’s most ecologically rich and pristine ecosystems, resulting from its location at the convergence of a variety of ecosystems.⁸ As discussed below, the region’s biological richness is confounded by its economic bounty—coal, oil and gas, timber, and now recreation. The push for development of economic resources conflicts with ecosystem protection and governance.

Strategically situated at the transition zone between continental and pacific maritime climates, the Crown sends its waters to the Pacific, Atlantic, and Arctic Oceans and contains environments ranging from prairie to alpine. It hosts high levels of biodiversity, including 1,200 species of vascular plants, more than 300 bird species, 65 species of native mammals, and a number of rare and endemic species.⁹ In a distance of less than 100 kilometers, one can experience old-growth cedar forests, alpine tundra and glaciers, and semi-arid sagebrush steppe.¹⁰ No other place in North America rivals the Crown’s diversity.

Because of its diversity, the Crown hosts the greatest large mammal assemblage in North America, including sixteen carnivore

⁸ According to UNESCO’s Statement of Significance, the Crown “occupies a pivotal position in the Western Cordillera of North America resulting in the evolution of plant communities and ecological complexes that occur nowhere else in the world.” *Waterton Glacier International Peace Park*, UNESCO, <http://whc.unesco.org/en/list/354> (last visited Jan. 7, 2014) [hereinafter UNESCO Description]. Because the Crown lies at the triple divide of the Pacific, Atlantic, and Arctic Oceans, and has nearly 8000 feet of vertical relief, an incredible array of ecosystems are found in a relatively confined area. *Id.*

⁹ See generally KATHERINE DEUEL ET AL., CROWN OF THE CONTINENT CONSERVATION INITIATIVE, *A Climate-Impacts Assessment of the Crown of the Continent* (2010), available at http://cpaws-southernalberta.org/upload/Crown_Impacts_Assess_FINAL.pdf (last visited Jan. 7, 2014).

¹⁰ See UNESCO Description, *supra* note 8. One of the ironies of Glacier National Park is that its famous glaciers are rapidly disappearing and will likely be gone by mid-21st century. Of the roughly 150 glaciers in the park in 1850, more than two-thirds were gone by 1980. Myrna H.P. Hall & Daniel B. Fagre, *Modeled Climate-Induced Glacier Change in Glacier National Park, 1850-2100*, 53 *BIOSCIENCE* 131, 131 (2003), available at http://www.nrm-sc.usgs.gov/files/norock/products/GCC/Bioscience_Hall_03.pdf.

and six ungulate species.¹¹ Capstone species such as grizzly bears, wolves, wolverines, and lynx reside in this setting, creating a haven for wildlife lovers.¹² The Crown is especially important for grizzly bears because it constitutes part of the Northern Continental Divide Ecosystem population—the most robust population of grizzly bears remaining in the lower forty-eight states and the only population with a strong link to Canadian grizzlies.¹³

The ecological richness of this ecosystem has been the impetus behind conservation efforts on both sides of the international border, at the national, subnational, and local levels. As discussed in the following section, these well-intended efforts are hampered by the complex system of public land management that has emerged over the last century.

B. The Economic Riches of the Crown

Economic pressures to develop the natural resources of the Crown come from two sources: commodity resources and amenity/recreational resources. The Crown has significant commodity resources, such as vast stands of merchantable timber; coal, oil, and conventional coal bed methane natural gas; and hard rock minerals including gold and copper. Full utilization of these resources conflicts with the Crown's other natural resources: amenity values such as clean air and water, pristine natural beauty, and abundant outdoor

¹¹ Convention Concerning the Protection of the World Cultural and Natural Heritage, art 4, *opened for signature* Nov. 16, 1972, 15 U.N.T.S. 511 (entered into force Dec. 17, 1975).

¹² In the United States, grizzly bears and lynx are protected under the Endangered Species Act (ESA). Information about the history of grizzly and lynx listing and current information about the species can be found at the U.S. Fish and Wildlife website. *Grizzly Bear (Ursus Arctos Horribilis)*, U.S. FISH & WILDLIFE SERVICE (Nov. 22, 2013), <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A001> (grizzly bears); *Canada Lynx (Lynx Canadensis)*, UNITED STATES FISH & WILDLIFE SERVICE, <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A073> (last modified Jan. 22, 2014) (lynx). But wolverines, which have been determined to be warranted for protection, are precluded because of a listing backlog. *Environmental Conservation Online System*, U.S. FISH & WILDLIFE SERVICE, http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp (last visited Jan. 7, 2014). Finally, the U.S. Fish and Wildlife Service has proposed removing the gray wolf from the ESA's protective mandate. Elizabeth Shogren, *After Major Comeback, is the Gray Wolf Still Endangered?*, NPR (Dec. 27, 2013, 3:25 PM), <http://www.npr.org/2013/12/27/257654599/after-major-comeback-is-the-gray-wolf-still-endangered>.

¹³ Katherine C. Kendall, *Northern Divide Grizzly Bear Project 2002-2008*, USGS, <http://www.nrmisc.usgs.gov/research/NCDEbeardna.htm> (last visited Jan. 7, 2014).

recreation. These amenities attract millions of tourists annually in both the United States and Canada¹⁴ and thousands of new residents who want these values preserved. Burgeoning population growth and ever-expanding recreational opportunities add an additional layer to the resource/amenity conflict.¹⁵

The Crown has large stores of carbon resources, increasingly attractive in an era of high energy prices. Historically, Native Americans used the oil that seeped to the surface long before Waterton was designated a national park. Early settlers on both sides of the border drilled for oil; Canada tapped wells as early as 1897 in the Waterton region, while drilling at Kintla Lake, now Glacier National Park, began in 1901.¹⁶ And today, the United States has long-producing commercial oil fields just east of Glacier.¹⁷ The value of oil and gas reserves along the Rocky Mountain Front, which extends south from Glacier and east of the Continental Divide, is significant, with natural gas reserves alone estimated in excess of two trillion cubic feet.¹⁸ The development of hydraulic fracturing technology has spurred renewed interest in natural gas development along the Front.¹⁹

¹⁴ Glacier National Park alone receives about two million visitors annually. *Glacier National Park Fact Sheet*, NAT'L PARK SERVICE, <http://www.nps.gov/glac/parknews/fact-sheet.htm> (last visited Jan. 7, 2014).

¹⁵ Robert Keiter documents population growth on the U.S. side, noting that Flathead County grew at an extraordinary rate of twenty-six percent in the decade of 1990–2000 alone. Sax & Keiter, *supra* note 5. Recreational pursuits can have serious environmental impacts, just like commodity extraction. Recreational impacts are an increasingly contentious subject of litigation in the United States from many different angles, including recent litigation over snowmobiling in the Crown. *See, e.g.*, *Swan View Coalition v. Barbouletos*, 639 F. Supp. 2d 1187 (D. Mont. 2009); *Montanans for Multiple Use v. Barbouletos*, 542 F. Supp. 2d 9 (D.D.C. 2008).

¹⁶ Glacier Nat'l History Ass'n, *Man in Glacier: Explorers and Exploiters*, NAT'L PARK SERVICE, http://www.nps.gov/history/history/online_books/glac2/chap3a.htm (last visited Jan. 7, 2014).

¹⁷ *Compare Montana Counties*, MONTANA.GOV, <http://nris.mt.gov/gis/gisdata/lib/downloads/county2.gif> (last visited Jan. 7, 2014) (depicting Flathead and Glacier counties in the northwest corner of the state), with *Montana/Dakotas Oil and Gas Producing Areas*, U.S. DEPARTMENT OF THE INTERIOR: BUREAU OF LAND MGMT., http://www.blm.gov/pgdata/etc/medialib/blm/mt/blm_programs/energy/oil_and_gas.Par.36589.File.dat/ogproducingareas.pdf (last visited Jan. 7, 2014) (depicting gas and oil production to the east of Glacier County).

¹⁸ Hal Herring, *In Montana, the Next Artic Refuge Debate*, THE CHRISTIAN SCIENCE MONITOR (Oct. 30, 2003), <http://www.csmonitor.com/2003/1030/p16s01-sten.html>.

¹⁹ Anschutz Exploration Corp. recently drilled fourteen new test wells on the Blackfeet Indian Reservation just east of Glacier National Park. Tristan Scott, *Anschutz Exploration to Halt Oil, Gas Drilling on Blackfeet Reservation*, MISSOULIAN (Mar. 20, 2013, 6:10 AM), <http://missoulian.com/news/local/anschutz-exploration-to-halt-oil-gas-drilling-on>

On the northern side of the border, coal mining near Sparwood, British Columbia, provides high quality coking coal for export. The East Kootenai Coalfield, which underlies the headwaters of both the Elk and Flathead Rivers in British Columbia, contains high-quality bituminous coal useful for specialized metallurgical processes; current mining operations produce about twenty-six million tons annually for shipment overseas, primarily to Asia.²⁰ Tech Coal Ltd. has five active mines that constitute the world's second-largest source of seaborne metallurgical coal,²¹ and the Canadian coal industry touts the largest reserves and growth potential for British Columbia coal.²² Indeed, more than 500 million tons of high quality metallurgical coal have been produced since 1898.²³ Most of the coal is owned by the provincial government, which provides licenses to mining companies for exploration and production.²⁴

In addition to coal, some of Canada's richest natural gas fields are in production in Alberta just north of the Crown. However, the natural gas resource on the Canadian side of the Crown is coal bed methane—methane gas trapped in coal seams. Coal bed methane ("CBM") is already a significant source of natural gas in the United States and Alberta, as well as in northeastern British Columbia. No CBM-producing wells are in operation in the Crown; however, British Petroleum (BP) estimates that there are 250 billion cubic meters of gas underneath one 300 square kilometer BP leasehold.²⁵

The Crown holds one other significant commodity resource: timber. Valuable stands of timber span both sides of the border, especially west of the Continental Divide. For example, in the 1990s,

-blackfeet-reservation/article_62382910-910c-11e2-85d1-0019bb2963f4.html. The drilling was controversial, and the company recently suspended further new development, though it operates several producing wells on the reservation. *Id.*

²⁰ MINISTRY OF ENERGY AND MINES & MINISTRY OF FORESTS, LANDS AND NATURAL RES. OPERATIONS, BRITISH COLUMBIA COAL INDUSTRY OVERVIEW 2011, at 3 (2012), available at http://www.mining.bc.ca/sites/default/files/resources/icoal2012-2_1.pdf.

²¹ *Id.*

²² *Id.*

²³ *East Kootenay Coalfield*, B.C. GEOLOGICAL SURV., <http://webmap.em.gov.bc.ca/mapplace/Coal/kootenay.cfm?map=Kootenay> (last visited Jan. 7, 2014). The British Columbia government provides extensive data about these coalfields. It also notes that the coal seams contain up to six trillion cubic feet of recoverable natural gas. *Id.*

²⁴ *Energy Policy in Canada: History of Coal in Canada*, WIKIPEDIA, http://en.wikipedia.org/wiki/Energy_policy_of_Canada#Coal (last modified Jan. 12, 2014).

²⁵ *BP Explores B.C. Coal Methane Reserves*, CBCNEWS (July 14, 2010, 12:59 PM ET), <http://www.cbc.ca/news/technology/story/2010/07/14/cp-coal-bed-methane-bc.html>.

the Flathead National Forest determined that it could sustainably harvest up to 100 million board feet per year.²⁶ And Crown lands in Canada west of Waterton are also under intensive timber management as part of the Cranbrook Timber Supply Area, making it a significant component of the local economy.²⁷

The considerable economic value of these commodities must be weighed against the significant contributions of recreational and amenity values of the area. Glacier National Park alone receives about two million visitors per year, generating an estimated one billion dollars to the local economy.²⁸ Beyond the scenic grandeur, tourists are attracted to hiking and wildlife-watching opportunities in the national parks while the surrounding lands have world-class fishing, hunting, downhill and cross-country skiing, biking, backpacking, and mountaineering.²⁹ Two world-class destination ski and summer resorts at Fernie and Whitefish have expanded steadily over the past three decades. Not counting the value of the ecological services provided by this largely intact ecosystem, the tourism and recreation industries spawned by the region's amenity values contribute hundreds of millions of dollars to state and provincial coffers.³⁰

²⁶ The 100 million board feet objective was never realized, as it was overturned in litigation because of inadequately-considered impacts to grizzly bears. *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304–05 (9th Cir. 1993). In response to continued litigation over timber harvest impacts on bears and other wildlife, the Flathead eventually lowered its allowable sale quantity to fifty-four million board feet. *FLATHEAD NAT'L FOREST, U.S. DEP'T OF AGRIC., FOREST PLAN AMENDMENT #19: ALLOWABLE SALE QUANTITY AND OBJECTIVES AND STANDARDS FOR GRIZZLY BEAR HABITAT MANAGEMENT* 26 (1995).

²⁷ See, e.g., *FORSITE CONSULTANTS LTD., CRANBROOK TIMBER SUPPLY AREA TIMBER SUPPLY REVIEW #3: ANALYSIS REPORT VERSION 3.0* (2004), available at http://www.for.gov.bc.ca/hts/tsa/tsa05/tsr3/05ts04ar_v3.pdf. The analysis report details harvest quotas for the area, which extends west beyond the Crown. The report shows that forestry accounts for 13.0% of the area's employment income while mining accounts for 21.1% of income, demonstrating the importance of resource extraction to the economy. *Id.* at 63 tbl.10.

²⁸ Nicholas K. Geranios, *Uncertain Future for Glacier*, NBC NEWS.COM (May 17, 2010, 10:50:29 AM ET), http://www.nbcnews.com/id/37189235/ns/travel-active_travel/t/uncertain-future-glacier/#.UsT2B3nubBA.

²⁹ Skiing, for example, is booming in the Crown. The ski resort at Fernie has mushroomed in size and number of skiing visitors. Its legendary powder garners the resort top rankings among North American ski resorts. See *FERNIE STANFORD RESORT*, <http://www.ferniestanfordresort.com/in-fernie-bc> (last visited Jan. 7, 2014). The Whitefish Mountain Resort (formerly The Big Mountain) had another record season in 2011–12. Matt Baldwin, *Resort Posts Record Numbers Despite December Drought*, WHITEFISH PILOT (Apr. 18, 2012, 10:09 AM), http://www.whitefishpilot.com/hungryhorsenews/article_6379a40b-ec2a-5de4-9217-0bb3c215b0ae.html.

³⁰ For example, a study by the National Parks Service found that in 2010 Glacier National Park alone contributed over \$110 million to the local economy. Jim Mann, *Park*

Towns on both sides of the border—Fernie in British Columbia, and Kalispell and Whitefish in Montana—have boomed from eco-tourism in the last three decades.³¹

The economic wealth brought through resource extraction and development in the Crown inevitably leads to environmental degradation. Coal mining causes a host of adverse impacts including land alteration, significant water pollution, and air quality issues.³² Logging and its requisite road infrastructure can disturb wildlife habitat, increase stream sedimentation, and alter undisturbed ecosystems.³³ Amenity-based recreation has impacts too. For example, modern ski resorts and second-home communities consume tens of thousands of acres of wild lands and hordes of tourists disrupt wildlife.³⁴ If unchecked, love of the Crown's beauty and wildlife through housing and recreation development could further its demise every bit as much as coal mining and logging. In tandem, these pressures pose a threat to the very benefits that distinguish the Crown. At the same time, these amenity resources can drive efforts to protect the area from conventional resource development.

Visitors Spend \$110 Million in 2010, DailyInterLake.com (Feb. 29, 2012), http://www.dailyinterlake.com/news/local_montana/article_2ca37dbe-6358-11e1-a8c6-0019bb2963f4.html.

³¹ For example, Fernie, British Columbia, has morphed from a quaint mining and logging town to an international year-round resort featuring skiing, mountain biking, fly-fishing, and other adventure-based recreation activities, *About Fernie: Established in 1898*, FERNIE BRITISH COLUMBIA, <http://tourismfernie.com/about> (last visited Jan 22, 2014).

³² The environmental impacts of coal mining are well documented on both sides of the border. Coal mining in the Crown has already caused significant water pollution. A 2003 study of water quality in the Elk River found “alarming” levels of selenium, which can be toxic to native fish. Tristan Scott, *UM Research: Mining Pollutants Entering Elk River Drainage in Southeast B.C.*, MISSOULIAN (Mar. 24, 2013, 8:15 AM), http://missoulain.com/news/state-and-regional/um-research-mining-pollutants-entering-elk-river-drainage-in-southeast/article_85fd4768-9436-11e2-8848-0019bb2963f4.html.

³³ See, e.g., AYESHA ERCELAWN, *END OF THE ROAD: THE ADVERSE ECOLOGICAL IMPACTS OF ROADS AND LOGGING: A COMPILATION OF INDEPENDENTLY REVIEWED RESEARCH* (1999), available at <http://www.nrdc.org/land/forests/roads/eotrinx.asp>.

³⁴ The National Ski Area Association, in recognition of the significant impacts caused by ski areas, as well as their dependence on a “natural” environment to attract customers, instituted a Sustainable Slopes environmental charter in 2000 to encourage more environmentally sensitive practices at ski areas. See generally NAT'L SKI AREA ASS'N, *SUSTAINABLE SLOPES: THE ENVIRONMENTAL CHARTER FOR SKI AREAS* (2005), available at <http://www.nsaa.org/media/20665/charter.pdf>.

C. The Geo-Political Setting—a Patchwork of Conflicting Land Management Mandates

1. The National Parks

The Crown centers on the Glacier and Waterton National Parks—two of the oldest national parks in the United States and Canada. Glacier National Park was established in 1910 as the United States' tenth national park.³⁵ The federal National Park Service, under the U.S. Department of the Interior, manages the land under the protective mandate of the Organic Park Service Act of 1916.³⁶ In the southwestern corner of Alberta, Waterton Lakes National Park stretches 505 square kilometers northeast from the U.S. border at Glacier. It was dedicated in 1895 as Canada's fourth national park and is managed under the Canadian National Parks Act of 1930, which also embodies a protective mandate similar to that of U.S. national parks.³⁷ These parks share a common boundary and were jointly declared an International Peace Park in 1932,³⁸ a designation with no legal mandate,³⁹ but one that carries considerable political and moral weight on both sides of the border.

³⁵ *A Brief History of Glacier*, NAT'L PARK SERVICE, <http://www.nps.gov/glac/history/culture/historical-overview.htm> (last modified Dec. 24, 2013).

³⁶ Glacier National Park is governed by the Organic Act of 1916, which requires that the lands be managed "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." Organic Park Service Act of 1916, 16 U.S.C. § 1 (2012). The inherent contradiction in providing for human enjoyment and protecting natural integrity has been oft litigated in the United States, with courts generally favoring preservation.

³⁷ Canada National Parks Act, S.C. 2000, c. 32 (Can.). The basic mandate of the Act is contained in Section 4 and is similar to the U.S. Organic Act in that it provides for both public enjoyment and long-term protection. "The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations." *Id.* § 4.

³⁸ The symbolic union of the parks was achieved through the efforts of Rotary International members from Montana and Alberta. In 1932 the national governments of both Canada and the United States passed legislation declaring the area an International Peace Park, the first such designation in North America and perhaps the world. *Waterton-Glacier International Peace Park*, PARKS CAN., <http://www.pc.gc.ca/pn-np/ab/waterton/natcul/inter.aspx> (last visited Jan. 7, 2014). A small Peace Park was dedicated thirty years earlier along the Swedish-Norway border at Morokulien, but such a designation does not appear to have an ecological basis and did not connect two existing reserves and consists of a small monument. *Jan S. Krogh's Geosite: Morokulien*, MOROKULIAN, <http://geosite.jankrogh.com/borders/morokulien> (last updated May 4, 2012).

³⁹ Prime Minister R.B. Bennett, upon passing the legislation to designate the Peace Park in Canada in 1932, stated that the two parks are "to be known as one international

The Crown has been the subject of two additional international designations under programs developed by the United Nations Education, Scientific and Cultural Organization (UNESCO).⁴⁰ First the parks were dedicated as a World Biosphere Reserve in 1976 (Glacier) and 1979 (Waterton), formally including the area in the United Nations Biosphere Reserve Program. Biosphere reserves are area designations under UNESCO's Man and the Biosphere Program, which recognizes areas "where new and optimal practices to manage nature and human activities are tested and demonstrated."⁴¹ While there are now approximately 621 such designations in 117 countries, only 12 of them span international borders.⁴²

In December 1995, the two parks were also jointly designated as a UNESCO World Heritage Site.⁴³ World Heritage Sites differ from biosphere reserves in that they include both natural and human-created sites, and are governed under the auspices of the 1972 World Heritage Convention. World Heritage Sites are sites of cultural, historical and natural importance. Sites can include cities (e.g., Venice, Italy), archeological areas (the Mayan ruins at Copan) and natural areas (Yosemite and Yellowstone National Parks).⁴⁴

These designations elevate the stature of the Crown as an internationally important ecological resource. While largely symbolic, and lacking in an enforceable legal mandate, these designations provide enough soft law to provide important background principles to affect the outcome of the transboundary resource disputes studied below.

peace park for the purpose of indicating that a boundary line passes through the park and divides two great countries and two great peoples who have lived in peace for many years and who, we all hope, will continue ever to live in terms of amity, goodwill and peace." *Waterton-Glacier International Peace Park*, PARKS CAN., <http://www.pc.gc.ca/pn-np/ab/waterton/natcul/inter.aspx> (last visited Jan. 7, 2014). The designation, while purely symbolic, embodies a powerful statement about the relationship between peaceful coexistence and transboundary ecological preservation.

⁴⁰ See generally UNESCO Description, *supra* note 8.

⁴¹ *Biosphere Reserves—Learning Sites for Sustainable Development*, UNESCO, <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves> (last visited Jan. 7, 2014).

⁴² *Id.*

⁴³ See *Waterton Glacier International Peace Park*, UNESCO, <http://whc.unesco.org/en/list/354> (last visited Jan. 7, 2014).

⁴⁴ See generally *World Heritage List*, UNESCO, <http://whc.unesco.org/en/list/> (last visited Jan. 7, 2014).

2. Land Management Below the 49th Parallel

Federal statutory environmental law in the United States also offers protection for federal lands below the 49th Parallel in the Crown. The Flathead and Lewis and Clark National Forests manage over 2.3 million acres of federal public lands under a “multiple-use” mandate and are susceptible to political pressures for resource extraction.⁴⁵ Some of these national forest lands are protected under the 1964 Wilderness Act, perhaps the most protective designation for public lands in the United States.⁴⁶ Logging, coal mining, oil and gas extraction, and road construction are generally prohibited under the Wilderness Act.⁴⁷ However, much of the non-wilderness portions of these national forests were originally designated for natural resource development under Forest Service land management plans.⁴⁸ In addition, flowing along the western flank of Glacier is the North Fork of the Flathead River, protected as a wild river under the federal Wild and Scenic Rivers Act.⁴⁹

In addition to these federal land and water designations, the Blackfeet Indian Reservation encompasses 1.5 million acres along Glacier’s eastern border.⁵⁰ The tribal government, in conjunction with

⁴⁵ The Multiple-Use Sustained-Yield Act is a nebulous statute requiring management of national forests for grazing, logging, recreation, fish and wildlife and wilderness. Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. §§ 528–31 (2000)). The National Forest Management Act requires protection of soils, watersheds and species diversity, but is still very much a utilitarian mandate for national forests. National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600–14 (2000)).

⁴⁶ The Wilderness Act allows Congress to set aside areas that are “area[s] where the earth and its community of life are untrammelled by man.” 16 U.S.C. § 1131(c) (2012). With very limited exceptions, once Congress designates an area of federal land as Wilderness, permanent structures, resource development roads and any type of mechanized or motorized vehicles are prohibited. *Id.* § 1131(b), (c). About forty-five percent of the Flathead National Forest has been designated as Wilderness, including the famed Bob Marshall Wilderness, one of the first in the United States.

⁴⁷ 16 U.S.C. § 1133(c). While there are some exceptions to these prohibitions, large scale coal, oil and gas extraction and commercial logging are prohibited in areas designated as Wilderness under the Act.

⁴⁸ See Sax & Keiter, *supra* note 5, at 246–47, 256.

⁴⁹ The Wild and Scenic Rivers Act, 16 U.S.C. § 1271 (1968). The Act is a federal law that protects free-flowing rivers under a three-tier classification system. See *id.* “Wild rivers” are the most protected classification. See *id.* Wild rivers are protected from dams, mining, and large-scale commercial development. See *id.* However, the classification generally includes only a narrow corridor, less than a mile wide, along the wild river. See *id.*

⁵⁰ *Welcome to Blackfeet Country!*, BLACKFEET COUNTRY, <http://www.blackfeetcountry.com/> (last visited Jan. 22, 2014).

the U.S. Department of the Interior, manages the natural resources found here. While resource management in Indian Country is complex and beyond the scope of this Article, the relevant factor here is the addition of yet another sovereign into the management fray.⁵¹

Adding to the complicated management structure for lands within the Crown ecosystem are Montana school-trust lands, managed by the Montana state government under a revenue-for-schools mandate.⁵² Montana state lands include both the Swan and Stillwater State Forests, which adjoin the Flathead National Forest but which the state manages foremost to produce revenue for Montana public schools. Resource extraction, not preservation, is the dominant mandate for Montana state lands.

The patchwork of federal, state, tribal, and county jurisdictions make ecosystem-based resource planning and protection a daunting task in the United States; each jurisdiction has a separate management plan, sometimes with conflicting goals and standards. While there are efforts to coordinate, different government agencies are subject to wide-ranging political influences and bureaucratic agendas.⁵³ To date, a shared, binding common vision for managing the Crown has been elusive. Different legal mandates and political agendas for the various

⁵¹ Tribal reservations are created by treaty between two sovereign governments. The relationship between tribal governance and the role of the federal government is legally complex. However, resource development is not constrained as it may be on other federal lands. The Blackfeet, for example leased over 600,000 acres of their reservation for oil and gas exploration in 2011, despite concerns over ecosystem impacts. Howard Pankratz, *Anschutz Oil Firm Ends Exploration on Blackfeet Reservation in Montana*, DENVER POST (Mar. 20, 2013, 9:29:28 AM MDT), http://www.denverpost.com/breakingnews/ci_22830823/anschutz-oil-firm-ends-exploration-blackfeet-reservation-montana. The lessee, Anschutz Exploration Co., relinquished the leases in 2013 after test well results did not yield opportunities for commercial extraction. *Id.*

⁵² Montana currently manages about 5.1 million acres of surface lands and about 6.1 million acres of mineral estate. *Overview of School Trust Lands*, MONTANA.GOV, <http://dnrc.mt.gov/Trust/AboutUs/Overview.asp> (last visited Jan. 22, 2014). School trust lands were federal lands granted to the newly created State of Montana by the federal government as part of the Enabling Act of 1889 and are managed to provide long-term income to support public education. *Id.*

⁵³ For example, the conservative local government in Flathead County has promoted resource development and subdivision, including approving a new gravel pit mine practically on the banks of the North Fork, across the river from Glacier. Park officials vehemently objected to Flathead County's actions, and local residents tried to defend what they thought was a protective land use plan in court after the mining company sued to obtain a permit, all to no avail. See *Spoklie & Hoover v. Flathead Cnty.*, Mont. Eleventh Judicial Dist., Flathead Cnty., DV-06-152A; see also *Gravel Pit Near Glacier National Park May Grow*, FLATHEAD BEACON (Mar. 30, 2009), http://www.flatheadbeacon.com/articles/article/gravel_pit_near_glacier_national_park_may_grow/9249.

bureaucracies in charge of land management stymie more holistic approaches.⁵⁴

3. *Canadian Land Management*

Canada's land management system and environmental laws are less complex than those in the United States. While Waterton National Park is part of a large spine of the Canadian Continental Divide protected by a spectacular array of provincial and national parks running north to Jasper Townsite, the park itself is quite small.⁵⁵ It is governed by the Canadian National Parks Act, legislation akin to the U.S. National Parks Organic Act.⁵⁶ Beyond Waterton, two provincial governments, Alberta and British Columbia, retain large swaths of Crown lands that can be made available for resource extraction. Immediately west of Waterton, the recently created Akamina-Kishinena Provincial Park protects additional lands in British Columbia adjacent to Waterton. Farther west are large sections of provincial Crown lands, which are subject to licenses for timber harvesting and mining with relatively little protection for the environment. In addition, the Canadian national government owns coal reserves in this area that are subject to disposition by the federal government.⁵⁷

The complicated mix of international, national, state, provincial, tribal, and municipal governments creates a difficult legal framework for managing the Crown as an ecosystem and addressing transboundary issues. Moreover, each of the government stakeholders is subject to different and ever-changing political agendas, some pro-extraction and others pro-preservation. For example, Montana has been governed by relatively liberal, and sometimes strongly pro-

⁵⁴ The patchwork quilt of federal, state, tribal, and local jurisdictions is by no means unique to the Glacier Park area. The ad hoc nature of land disposition and retention schemes that persisted throughout the nineteenth and twentieth centuries has left vast swaths of the American West in mixed ownership patterns, creating widely differing management schemes on adjacent lands.

⁵⁵ The park consists of roughly 505 square kilometers. *Waterton Lakes National Park: A Quick Guide*, PARKS CAN., <http://www.pc.gc.ca/eng/pn-np/ab/waterton/visit/visit6.aspx> (last visited Jan. 7, 2014).

⁵⁶ Canada National Parks Act, S.C. 2000, c. 32 (Can.).

⁵⁷ See Rob Chaney, *Coal Mining Again a Concern in Canadian Flathead*, MISSOULIAN (Nov. 28, 2012, 6:00 AM), http://missoulian.com/news/local/coal-mining-again-a-concern-in-canadian-flathead/article_101be164-390d-11e2-bcb6-001a4bcf887a.html. The Canadian federal government also owns coal reserves in the Crown that are not subject to the authority of the British Columbia government. A recent article chronicled the impact that development of these federal lands could have for the entire Crown. *Id.*

environment, democratic governors for the past twelve years,⁵⁸ while the Montana Legislature is Republican-controlled and decidedly anti-conservation.⁵⁹ The Blackfeet Nation has strong factions both opposed to and in favor of resource development.⁶⁰ Canadian provincial politics shift as well. British Columbia was decidedly pro-development in the 1980s. In 1991, a more left-of-center party came into power, only to lose power to the more conservative Liberal Party in 2001.⁶¹ The shift in British Columbia politics continues today as citizens witnessed the rapid demise of Premier Gordon Campbell and the election of pro-development Premier Christy Clark in 2011.

II

THE LEGAL ARCHITECTURE TO PROTECT THE CROWN

In an ideal world, the Crown would be managed by a legally enforceable management plan agreed upon by all the stakeholders. The plan would encompass the entire Crown ecosystem on both sides of the border and provide for sustainable economic development while preserving the ecological richness of the area. The present reality is far different from such an ideal.

To start with, the legal landscape is complex. As discussed below, international treaties, conventions, and norms of international law certainly affect, but do not control, the management of the Crown. These international legal mechanisms are the primary focus of this paper. At the national level, the United States has particularly strong federal laws to protect endangered species and water quality, and to manage forests. However, those laws cannot easily reach across the

⁵⁸ Democrat Brian Schweitzer, who became a key player in the North Fork of the Flathead dispute, served from 2004–2012. Steve Bullock was elected in 2012 and will serve at least until 2016. Both are generally considered to be pro-conservation and enjoy broad support in the environmental community.

⁵⁹ For example, the Legislature amended the Montana Environmental Policy Act in 2003, 2007, 2009, and 2011, and each change weakened the statute. Changes included creating a higher burden of proof for plaintiffs and the relief a court can provide, MONT. CODE. ANN. § 75-1-201(6)(a)–(c) (2013), and eliminating the ability of NGOs to collect attorney fees. *Id.* § 75-1-201(6)(f).

⁶⁰ Tristan Scott, *Oil, Gas Dilemma for Blackfeet Tribe: Revenue Versus Environment*, MISSOULIAN (Aug. 7, 2011, 7:00 AM), http://missoulian.com/news/local/article_51a5d936-c0ab-11e0-a26e-001cc4c002e0.html.

⁶¹ Nadia Souchek, *Trading Off the Benefits and Burdens: Coal Development in the Transboundary Flathead Valley River Valley* (Spring 2012) (unpublished M.S. thesis, University of Montana) (on file with authors) (providing extensive background on the politics of resource development in the Flathead on both sides of the border).

border. Meanwhile, Canada's federal environmental laws are far less stringent. And on both sides of the border, subnational actors have considerable discretion to address issues that arise in the context of development and conservation, as we shall see below.

A. Hard and Soft Law in International Environmental Law

A brief digression into some background principles of international environmental law will help frame the transboundary issue in the Crown. Both hard law (legally binding treaties and conventions) and soft law (norms or customs, nonbinding agreements) are relevant to understanding the North Fork dispute. While hard law in the form of an international treaty was available to address the transboundary pollution issue in the Flathead, successful environmental protection was ultimately achieved through soft law in the form of a nonbinding memorandum of understanding predicated on nonbinding emerging norms.

We consider two related aspects of soft law in the area of transboundary pollution. Mutual policy statements, such as agreements to cooperate, may have the appearance of a binding hard law treaty, but are ultimately not legally enforceable. One scholar finds that the vast majority of international environmental treaties and conventions fit into this realm of soft law.⁶² A second aspect of soft law buffets the precatory nature of these agreements: the adoption of environmental law principles in the international context, which thereby establishes and expands international environmental law—transforming what may begin as a principle into a norm or custom. While these norms cannot be enforced in the traditional sense of imposing liability—through a binding judicial decision holding a party accountable—they nonetheless operate as important background principles that can lead to action.

Scholars and practitioners have addressed the dichotomy between hard and soft law in the international context for many years. Much of the literature in this field focuses on one mechanism as a spur to the other. For instance, soft law mechanisms that allow the initial statement of principles later become binding international agreements; or hard law mechanisms that utilize soft law expand the

⁶² Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 933 (1997) (“And with isolated exceptions, the transboundary treaties that do exist are largely devoted to encouraging information-sharing and consultation, rather than establishing liability regimes or prescribing substantive limitations on polluting activity.”).

impact of a binding agreement.⁶³ And while criticism has been levied at soft law for the nonbinding nature of these norms or agreements, soft law has a role of growing importance for international environmental law. For instance, in addressing the varied interaction of international agreements, one scholar, Pierre-Marie Dupuy, noted that

[a]lbeit indirect, the legal effect of “soft” law is nevertheless real. “Soft” law is not merely a new term for an old (customary) process; it is both a sign and product of the permanent state of multilateral cooperation and competition among the heterogeneous members of the contemporary world community.

The existence of “soft” law compels us to re-evaluate the general international law-making process and, in doing so, illuminates the difficulty of explaining this phenomenon by referring solely to the classical theory of formal sources of public international law.⁶⁴

Of note in Dupuy’s characterization of soft law is the parenthetical aside to customary law, thereby subtly referencing the emergence of norms of international law through the substantiation of customs. This view of soft law evokes the classical role of nonbinding agreements, or the hortatory language of early agreements, whereby early principles could transition to norms of international law through wide recognition and like implementation.

But turning to the descriptors themselves, scholars have addressed the unique implementation of hard and soft law—that is, the effects of international agreements have been delineated into those that require strict action (or no action) versus those agreements that allow discretion on the part of the signatory. One simple way to distinguish the two concepts is through a comparison of binding and nonbinding agreements.⁶⁵ In terms of hard law, in the international law context these agreements are generally seen as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for

⁶³ Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 721 (2010).

⁶⁴ Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT’L L. 420, 435 (1991). Dupuy classifies this soft law concept as “a trouble maker because it is either not yet or not only law.” *Id.* at 420. This characterization is especially appropriate in the current context, where an international agreement binds the parties while simultaneously providing the parties the framework to create the actual legal mechanisms independent of the agreement that would fulfill each party’s obligation.

⁶⁵ Shaffer & Pollack, *supra* note 63, at 713.

interpreting and implementing the law.”⁶⁶ On the other hand, the concept of soft law contains more amorphous mechanisms—amorphous in the varied and nonbinding nature of the agreements. For instance, a soft law agreement can simply be precatory without any binding language.⁶⁷ Or, the agreement can simply be so vague that complete discretion is left with the parties to implement as they see fit.⁶⁸

Of course, while the scholars Shaffer and Pollack recognize the traditional definitions afforded these categories, they also recognize the gray area existing in the reality of implementation. They set a sliding continuum upon which an outside observer may assess any agreement to determine its distinct binding nature.⁶⁹ That is not to say that hard law agreements occur as more substantial documents or more practical agreements in the international context. Indeed, the benefits of both soft and hard law are well documented.⁷⁰ Picturing a state action upon this continuum, rather than one of two categories of action, allows a person to recognize influences affecting the agreement and the individuality of situations requiring such agreements. Additionally, and most importantly, is the intent of parties in entering into any agreement. If the purpose, as taken from surrounding evidence, demonstrates an intention to be bound, then even a soft law agreement can provide an impetus for achieving notable accomplishments and requiring specific action.

Especially in the context of international environmental law, the ability to address transboundary issues jointly while constructing individualized solutions to a shared problem requires unique and novel avenues.

B. International Treaties Available to Protect the Crown

International law offers three avenues for addressing transboundary pollution. Specific treaties relevant to U.S.-Canadian international

⁶⁶ *Id.* at 714–15 (internal quotations omitted).

⁶⁷ *Id.* at 715.

⁶⁸ *Id.* Shaffer and Pollack also point out that the omission to delegate any authority to a party outside the agreement turns the law into soft law, “because there is no third party providing a ‘focal point’ around which parties can reassess their positions.” *Id.*

⁶⁹ *Id.* at 716.

⁷⁰ See, e.g., Martin Köppel, *The Effectiveness of Soft Law: First Insights from Comparing Legally Binding Agreements with Flexible Action Programs*, 21 GEO. INT’L ENVTL. L. REV. 821 (2009).

resource disputes include the Boundary Waters Treaty of 1909;⁷¹ the North American Free Trade Agreement (NAFTA),⁷² with its subcomponent the North American Agreement on Environmental Cooperation (NAAEC);⁷³ and the conventions pertinent to the Crown's partial designation as a UNESCO World Heritage Site.⁷⁴ The first two constitute hard law, as they contain binding obligations with a mechanism for enforcement. The latter is decidedly soft law. Each is outlined below.

1. *The Boundary Waters Treaty of 1909*

The most important international law governing water disputes between the United States and Canada is the Boundary Waters Treaty of 1909.⁷⁵ Originally negotiated between the United States and Great Britain, the Treaty has specific, enforceable mechanisms and a long history of mutual respect on both sides of the border. This relic of the Progressive Era, a period when the concept of water as a public resource was more widely understood than it is today, retains vitality. The Treaty is designed to resolve conflicts over all transboundary waters along the nations' 3,000-mile border⁷⁶ and contains several substantive provisions. Further, the Treaty sets up the International Joint Commission (IJC), an adjudicatory body comprised of six commissioners, three appointed by each country,⁷⁷ to resolve disputes.

⁷¹ Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Can., Jan. 11, 1909, 36 Stat. 2448 [hereinafter Boundary Waters Treaty], available at http://ijc.org/en/_BWT (courtesy of the International Joint Commission).

⁷² North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1993, 107 Stat. 2057 [hereinafter NAFTA].

⁷³ NAFTA includes the North American Agreement on Environmental Cooperation. *Id.* at Section 532, 19 U.S.C. § 3472, Dec. 8, 1993, U.S.-Can.-Mex., Sept., 107 Stat. 2164 [hereinafter NAAEC], available at <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567>.

⁷⁴ Convention Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 11.

⁷⁵ Boundary Waters Treaty, *supra* note 71. The scope of transboundary waters is vast, and includes the entire Great Lakes, St. Lawrence River, the Columbia River, and a host of smaller streams and lakes, including of course the North Fork of the Flathead.

⁷⁶ *Id.* pmb., 36 Stat. at 2448.

⁷⁷ As another author has explained:

[T]he Treaty provides for referrals to the IJC for non-binding recommendations "whenever either the Government of the United States or the Government of the Dominion of Canada shall request." The nations may also refer a dispute to the

Article III of the Treaty requires that decisions on proposed uses, obstructions, or diversions “affecting the natural level or flow” of the boundary waters or waters crossing the boundary must be approved by the IJC. Public works for navigation and commerce can continue but cannot “affect the flow and level of the boundary waters of the other” or “interfere with the ordinary use of such waters for domestic and sanitary purposes.”⁷⁸ The Treaty further requires that “boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”⁷⁹ The Treaty also has mandatory provisions for IJC jurisdiction over activities that affect the flow of water across the borders. Article VIII extends mandatory IJC jurisdiction over “cases involving the use or obstruction or diversion of the waters.”⁸⁰ Without the IJC’s approval, Article III prevents “uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line.”⁸¹ Thus the Boundary Waters Treaty contains substantive hard law provisions. These provisions can be used to create IJC jurisdiction over water disputes involving both changes to water quality and quantity, and could potentially be invoked in the dispute over coal mining in the Crown.

However, only the signatories to the Treaty—national sovereigns—may bring complaints to the IJC.⁸² Thus the Treaty is hard law, with a twist. Submission of pollution-related disputes to the IJC requires the approval of both sovereigns, no matter how serious the pollution. Furthermore, the Treaty lacks a citizen initiated petition process that would allow citizens or other subnational governmental bodies to seek IJC jurisdiction. These elements can leave enforcement of the Treaty to the whims of national politics.

However, the Treaty is far from impotent. Implementation of the Boundary Waters Treaty has been imbued with a long history of

IJC in which the bi-national body would have the “power to render a decision or finding upon any of the questions or matters so referred,” but this procedure requires the consent of both Parties.

Shiloh Hernandez, *Mountaintop Removal at the Crown of the Continent: International Law and Energy Development in the Transboundary Flathead River Basin*, 32 VT. L. REV. 547, 560 (2008) (citations omitted).

⁷⁸ Boundary Waters Treaty, *supra* note 71, art. III.

⁷⁹ *Id.* at art. IV.

⁸⁰ *Id.* at art. VIII.

⁸¹ *Id.* at art. III.

⁸² *Id.* at art. X.

recognizing public values in transboundary waters. For example, in 1918, the nascent IJC prepared a formal report at the behest of both governments on the growing transboundary industrial water pollution problem, particularly in the Great Lakes. In its report, the IJC determined that Article IV's prohibition on transboundary pollution included not only actual pollution, but also the "potential" of injury to health or property.⁸³ Such an approach is precautionary, not remedial. The IJC further noted that "while private rights . . . may be overridden by the acquisition of a prescriptive right, public rights can not."⁸⁴ Public rights in the eyes of the IJC included swimming, recreational boating, and fishing. Such a statement reflects the overarching recognition that transboundary waters are a common-pool resource, and that governments have an obligation to protect public uses. The report was harshly critical of the heavily polluted status of many transboundary waters, especially those in the Great Lakes. The recognition of public rights in clean water for a multitude of public purposes a century ago is an important foundation to understanding why the Treaty played an important role in the resolution of the Flathead dispute.

The IJC has been involved in several transboundary water pollution disputes over the last century. Of note was the IJC's initial involvement in the *Trail Smelter* dispute, a case involving noxious fumes from a Canadian smelter drifting south into the United States and damaging farm land near the international border. Both countries agreed to the IJC's jurisdiction, which in 1931 led to an award of \$350,000 in damages but no injunctive relief.⁸⁵ The United States rejected the decision, and the matter was eventually settled via binding international arbitration.⁸⁶ The *Trail Smelter* case is a landmark transboundary pollution case, widely discussed in scholarly

⁸³ International Joint Commission, *Final Report of the International Joint Commission in the Matter of the Reference by the United States and the Dominion of Canada Relative to the Pollution of Boundary Waters*, at 30, Doc. 4 (Sept. 10, 1918), available at http://bwt.ijc.org/docket_table/attachments/Docket%204/Docket%204%20Final%20Report.pdf.

⁸⁴ *Id.* at 31. In this Report, the IJC expressed strong concerns about the deleterious effects of transboundary pollution, and extolled the public virtues of the vast water resources shared by the two nations.

⁸⁵ INT'L JOINT COMM'N, REPORT OF THE INTERNATIONAL JOINT COMMISSION IN THE TRAIL SMELTER REFERENCE 1-2 (1931), available at <http://www.ijc.org/files/dockets/Docket%2025/Docket%2025%20IJC%20Report%201931-02-28.pdf>.

⁸⁶ See *Trail Smelter Arbitration*, United Nations, *Reports of International Arbitral Awards*, Vol. III, 1905-81 (1941), available at legal.un.org/riaa/cases/vol_III/1905-1982.pdf.

literature as the first important international environmental law case.⁸⁷ The decision established the principle of international environmental law that a sovereign has no right to cause transboundary pollution and can be held legally responsible for such pollution.⁸⁸ *Trail Smelter* is an important prelude to the North Fork dispute both for the principles it established and the fact that the dispute occurred between, and was successfully resolved by the United States and Canada. However, the *Trail Smelter* case demonstrates the basic problem of the Boundary Waters Treaty. While the Treaty focused the parties on a solution, ultimate resolution required a more binding forum. As discussed below, the Treaty failed to provide a forum for complete resolution of the North Fork dispute, albeit for different reasons.⁸⁹

Nonetheless, the Boundary Waters Treaty remains an important source of international law between the United States and Canada. The IJC has been proactive in addressing transboundary watershed pollution, even as it lacked power to prevent it. In 1997 the Commission proposed an International Watersheds Initiative to encourage proactive cooperation and prevent transboundary pollution.⁹⁰ A key premise of the Initiative is to establish local joint management boards on specific waterways that can make decisions without undue interference from national governments or even the IJC.⁹¹ Several watersheds, including the St. Croix, Red River, and Rainy River already have functioning boards that are addressing transboundary pollution and water flow issues on a local level. However, the North Fork of the Flathead does not yet have such a watershed board. And more recently, a petition has been submitted to

⁸⁷ Merrill, *supra* note 62, at 947 (“By far the most influential decision on transboundary pollution in international law is the *Trail Smelter* arbitration.”).

⁸⁸ *Id.* at 948–50.

⁸⁹ Professor Noah Hall characterizes *Trail Smelter* as resolution of an international issue in the “Westphalian tradition” of sovereign-to-sovereign negotiation. Noah D. Hall, *The Evolving Role of Citizens in United States-Canadian International Environmental Law Compliance*, 24 PACE ENVTL. L. REV. 131, 135 (2007). Professor Hall highlights a theme that proves prescient in the North Fork debate, namely the role of subnational entities in resolving environmental disputes. *Id.*

⁹⁰ INT’L JOINT COMM’N, THE INTERNATIONAL WATERSHED INITIATIVE: IMPLEMENTING A NEW PARADIGM FOR TRANSBOUNDARY BASINS (2009), available at <http://www.ijc.org/files/publications/ID1627.pdf>; see also INT’L JOINT COMM’N, THE IJC AND THE 21ST CENTURY 27–32 (1997).

⁹¹ INT’L JOINT COMM’N, THE INTERNATIONAL WATERSHED INITIATIVE: IMPLEMENTING A NEW PARADIGM FOR TRANSBOUNDARY BASINS (2009), available at <http://www.ijc.org/files/publications/ID1627.pdf>. The IJC states that “the underlying premise is that water resource and environmental problems can be anticipated, prevented or resolved at the local level before developing into international issues.” *Id.* at 1.

the IJC to recognize the Great Lakes as international waters subject to the Public Trust Doctrine based on the recognition of this common law precautionary principle in both the U.S. and, to a lesser extent, in the Canadian legal systems.⁹²

In sum, the Boundary Waters Treaty is a strong hard law mechanism that addresses transboundary pollution. The IJC, under this treaty, has a century-long tradition of taking a proactive approach to water quality protection. It carries a strong commitment on both sides of the border that exceeds its actual adjudicative reach. Ultimately the jurisdiction of the IJC is subject to the whims of national politics. The Commission does not have power to resolve disputes brought by subnationals or even citizens affected by pollution. But while the Treaty did not direct the outcome of the mining dispute in the Canadian Flathead, its presence was important to the resolution of the dispute.

2. NAFTA as a Means of Protecting the Crown

The North American Free Trade Agreement (NAFTA) is a binding international treaty that bears on the present development-conservation in the Crown. Part of NAFTA includes the North American Agreement on Environmental Cooperation (NAAEC), which was included in the trade agreement to secure the commitment of Canada and Mexico to the NAAEC as a way to ease domestic fears over NAFTA.⁹³

The NAAEC promotes two relevant objectives: “the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations” and the promotion of “sustainable development based on cooperation and mutually supportive environmental and economic policies.”⁹⁴ The NAAEC also established a Commission for Environmental Cooperation

⁹² Keith Schneider, *Water Law: Public Trust May be Fresh Approach to Protecting Great Lakes*, CIRCLEOFBLUE.ORG (Jan. 17, 2012, 2:09 PM), <http://www.circleofblue.org/waternews/2012/world/water-law-public-trust-may-be-fresh-approach-to-protecting-great-lakes/>.

⁹³ Hernandez, *supra* note 77, at 551 (citing Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 U. COLO. L. REV. 443, 460–62 (2005)).

⁹⁴ NAAEC, *supra* note 73, at art. 1(a)–(b). As this Article will describe later, the Memorandum of Understanding between Montana and British Columbia incorporated these concerns into its language, thereby balancing the preservation against energy development and job creation in the Flathead region.

(CEC),⁹⁵ which handles submissions from both signatories⁹⁶ and citizens⁹⁷ alleging non-enforcement of environmental laws. While it would appear from its stated policies and organization that the NAAEC and CEC could be used to protect transboundary resources in the Crown, this has not been the case.

As noted above, the NAAEC and CEC, unlike proceedings before the IJC, allow for complaints from affected citizens. However, the procedures under NAAEC do not provide a means for a precautionary approach to protection of transboundary resources threatened by pollution. The citizen submission procedure functions as a reactionary device and “requires that there first be an enforcement failure.”⁹⁸ One commentator explained that, in the context of the North Fork debate, the consultation procedure is ineffective:

[T]he consultation procedure would not likely be an effective preventative measure that interested parties from Montana could use. While any party to the Agreement may unilaterally invoke the consultation procedure, the consultation must be based on a “persistent pattern of failure” of another Party to enforce its environmental laws. This retrospective requirement of the consultation procedure would not be applicable to potential future environmental harm associated with coal mining in the Canadian Flathead.⁹⁹

Coal mines not yet built cannot constitute a “persistent pattern of failure” of enforcement. Furthermore, any violation on the part of British Columbia would mean that Montana (or interested citizens) would first have to petition—or at the minimum request—the U.S. federal government to lodge a complaint upon the state’s behalf.¹⁰⁰ The political problems are obvious: if the federal executive is dominated by one political party and Montana by the other, politics could easily thwart initiating NAAEC’s protective provisions. Moreover, CEC is not a sustainable planning body, and has no power to develop international environmental impact statements or provide guidance regarding potential transboundary conflicts before they occur.¹⁰¹ In sum, NAFTA, NAAEC, and the CEC fail to provide a

⁹⁵ *Id.* art. 8(1).

⁹⁶ *Id.* art. 22(1).

⁹⁷ *Id.* art. 14(1), (1)(f).

⁹⁸ Hernandez, *supra* note 77, at 556 (citing NAAEC, *supra* note 73, at art. 14(1)).

⁹⁹ *Id.* at 556 (citations omitted).

¹⁰⁰ Recall that NAAEC is an agreement between the nation state bodies, those signatories being the United States, Mexico, and Canada. NAAEC, *supra* note 73, at pmb1.

¹⁰¹ See Hernandez, *supra* note 77, at 558.

meaningful or viable solution to the problem of threatened environmental impact.¹⁰²

3. UNESCO World Heritage Site Status

The United Nations enacted the World Heritage Convention in 1972 to allow the designation of World Heritage Sites.¹⁰³ World Heritage Sites are deemed irreplaceable ecological and cultural sites of profound significance to all of humanity. Currently, 936 sites in 153 member states have been so designated and span cultural, historical, and natural areas. However, designation does not provide substantive international law mechanisms to protect the site from further encroachment. The Convention most closely aligns with the soft law designation, as it lacks a means for enforcement; notably, management of World Heritage Sites resides with the state where they are located and that management is basically voluntary. On the other hand, Article XI, subsection 4 does allow parties to petition UNESCO to designate listed sites as endangered from environmental threats.¹⁰⁴ Despite the lack of substantive law underlying an UNESCO World Heritage Site designation, in the forty years since the Convention was adopted, “the World Heritage concept is so well understood that sites on the List are a magnet for international cooperation.”¹⁰⁵ Indeed, the purpose of designating a place as a heritage site is to highlight the international importance of a specific location—an importance that extends beyond the site’s local renown. The Crown’s designation as a World Heritage Site was often lauded by parties involved in the development dispute over the Flathead.

C. Customary International Law

Apart from binding treaties, customary international law or norms can play an important role in addressing transboundary pollution.

¹⁰² Of course, this inability is in the nature of the agreement, which focuses on the non-enforcement of environmental laws. While the goals are preservation of a natural environment and sustainable development, the legal device operates in a reactionary manner: the focus is on violations, not protection or precautions.

¹⁰³ Convention Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 11.

¹⁰⁴ *Id.* at art. XI(4).

¹⁰⁵ *The World Heritage Convention*, UNESCO, <http://whc.unesco.org/en/convention> (last visited Jan. 7, 2014).

Several soft law principles in the context of transboundary pollution are relevant to this case study.

1. Host Country Liability for Transboundary Pollution

The *Trail Smelter* decision, discussed above in the context of the Boundary Waters Treaty, has had a far-reaching influence in international environmental law. Considered the first major international law case, the decision is widely cited as establishing the principle that the host country is liable for the transboundary pollution caused by its residents.¹⁰⁶ The arbitration panel articulated that principle in bold terms: “Canada is responsible in international law for the conduct of the Trail Smelter.”¹⁰⁷ As Professor Merrill notes, whatever the precedential effect of the *Trail Smelter* decision may be, the decision is “extremely influential” in the development of many other international environmental accords.¹⁰⁸

The principle that the host country is liable for transboundary pollution emanating within its borders, part of the broader “polluter pays” principle, was carried forth in the two major declarations of international environmental law principles in the last half of the twentieth century, the Stockholm and Rio Declarations. Among the many principles articulated in the 1972 Stockholm Declaration, Principle 21 provides for both a sovereign right to develop resources and a concomitant responsibility to prevent transboundary pollution.¹⁰⁹ That dichotomy—the right to develop and the responsibility to prevent harm to other nations—remains an important principle in international environmental law. Twenty years later, the Rio Declaration affirmed the same principle.¹¹⁰

¹⁰⁶ Merrill, *supra* note 62, at 947.

¹⁰⁷ *Trail Smelter Arbitration*, *supra* note 86.

¹⁰⁸ Merrill, *supra* note 62, at 951.

¹⁰⁹ U.N. Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, princ. 21 (1972) [hereinafter Stockholm Declaration], available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

¹¹⁰ See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter Rio Declaration]. Principle 2 of the Rio Declaration states:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not

2. *The Precautionary Principle and Intergenerational Equity*

The 1992 Rio Declaration elucidated two other important norms of international environmental law beyond Principle 21 of the Stockholm Declaration: the precautionary principle and intergenerational equity.¹¹¹ The precautionary or prevention principle stands for the proposition “that no nation may undertake activities within its borders that will cause significant injury to another nation.”¹¹² Principle 15 of the Rio Declaration offers a qualified endorsement of the precautionary approach, stating that, “[i]n order to protect the environment, the precautionary approach shall be widely applied.”¹¹³

While the precautionary principle can be difficult to define precisely,¹¹⁴ it is nonetheless important in the context of international environmental law.¹¹⁵ The precautionary principle is thoroughly embedded in European Union environmental law, and while not uniformly part of U.S. environmental law, it influences international environmental decisions in a myriad of ways.¹¹⁶ Unlike remedial

cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Id. at princ. 2.

¹¹¹ See generally Jutta Brunnee, *The Stockholm Declaration and the Structure and Process of International Environmental Law*, in *THE FUTURE OF OCEAN REGIME-BUILDING: ESSAYS IN TRIBUTE TO DOUGLASS M. JOHNSTON* 41 (Aldo Chircop, Ted L. McDorman & Susan J. Rolston eds., 2009). Professor Brunnee notes that the Rio Declaration advanced several other important norms, not directly applicable here, such as common but differentiated responsibilities.

¹¹² Hernandez, *supra* note 77, at 569.

¹¹³ Rio Declaration, *supra* note 110, at princ. 15.

¹¹⁴ Consider the principle counsel’s restraint in the face of scientific uncertainty regarding harm. However, what constitutes harm and what constitutes uncertainty are themselves widely debated in scientific circles.

¹¹⁵ See Hernandez, *supra* note 77, at 570–72 (chronicling the cases and international documents explaining the import of the principle and where it is appropriate to apply the principle). The precautionary principle is more widely accepted in Europe as a norm of environmental law. For example, the Helsinki Commission that governs transboundary pollution issues in the Baltic Sea adopted it as a guiding principle. Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992, art. 3, § 2.

¹¹⁶ In the authors’ opinion, based on thirty years of experience litigating against, working with, and teaching federal agencies about the statute, The National Environmental Policy Act’s look-before-you-leap mandate is precautionary in nature because it requires information gathering and public involvement before environmental impacts can be addressed by government actions. Thus NEPA can lead to the prevention or mitigation of environmental impacts before they occur. NEPA is, of course, procedural and not substantive, and thus prevents “uninformed—rather than unwise—agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

approaches, such as NAFTA, where liability is assessed for environmental damage after it occurs, the precautionary principle asks “whether the dispute involves potential for significant harm, and whether this can be shown by clear and convincing evidence.”¹¹⁷ Under the precautionary principle, environmentally damaging activity is foregone until its effects are fully known, and can be mitigated or otherwise addressed.¹¹⁸

Related to the precautionary principle is the norm of state responsibility for intergenerational equity. The Rio Declaration captures this concept in Principle 3; simply put, intergenerational equity means that subsequent generations have a right to the same natural heritage that we presently enjoy.¹¹⁹ To preserve that right, current generations essentially serve as trustees for future generations.¹²⁰ However, intergenerational equity is possible only if the use of natural resources is sustainable.

3. Sustainability

Thus, sustainability is a third hallmark of the Rio Declaration that has emerged as a key soft law principle. While the precautionary principle, intergenerational equity, and sustainability are interrelated, the principle of sustainability is often the buzzword for creating a more ecologically-based governance. As one scholar notes, the term is used in twelve of Rio’s twenty-seven principles.¹²¹

In sum, the precautionary principle, intergenerational equity, and sustainability are important soft law principles, and while offering guidance, they do not necessarily bind a party to one course of action.

The United States and Canada are both parties to the Stockholm and Rio Declarations, where these principles emerged and were essentially codified as soft law. Whether they are recognized as

¹¹⁷ Hernandez, *supra* note 77, at 574.

¹¹⁸ *See id.* at 578 (noting that while the North Fork controversy was still unresolved, the precautionary principle was perhaps the best vehicle for the prevention of transboundary pollution in the context of protecting the Crown: “the likelihood that significant cross-border harm will result from the proposed Cline Mine requires Canada to take affirmative action to assure that such harm does not occur”).

¹¹⁹ *See* Rio Declaration, *supra* note 110, at princ. 3.

¹²⁰ *See, e.g.*, BURNS H. WESTON & TRACY BACH, RECALIBRATING THE LAW OF HUMANS WITH THE LAWS OF NATURE: CLIMATE CHANGE, HUMAN RIGHTS, AND INTERGENERATIONAL JUSTICE 60 (The Climate Legacy Initiative, Vt. Law Sch. & The Univ. of Iowa eds., 2009), available at http://www.vermontlaw.edu/Documents/CLI%20Policy%20Paper/CLI_Policy_Paper.pdf.

¹²¹ *See* Brunnee, *supra* note 111, at 46–47.

customary practices or enforceable norms of international law is a matter of scholarly debate. Yet, these norms permeated the controversy regarding transboundary pollution in the Flathead region and are thus important to bear in mind. For example, the concept of intergenerational equity is often espoused, perhaps unknowingly, by politicians waxing eloquently on the values of the Crown.¹²²

Beyond the precautionary principle, some scholars argue for an enforceable human right to a clean and healthy environment.¹²³ Such a right can be inferred from the growing body of national constitutions and regional treaties that recognize environmental rights together with more traditional rights pertaining to democratic governance, due process, freedoms of speech, assembly, religion, and so forth. However, no international treaty recognizes the right to a clean and healthy environment as a fundamental, enforceable human right. A few countries have such constitutional environmental rights,¹²⁴ but neither the United States nor Canada have anything resembling such a right. On the other hand, Montana's state constitution has declared that all citizens have a fundamental constitutional right to a clean and healthy environment and a corresponding duty to protect the environment.¹²⁵

4. Environmental Impact Assessment

Since the passage of the National Environmental Policy Act (NEPA) in 1970, impact assessment has been a mainstay of U.S. environmental law and policy. The U.S. Supreme Court, while repeatedly reversing circuit court decisions advancing a broader, more

¹²² As Lt. Governor John Bohlinger stated in a speech to Canadian government officials:

One truth is certain: the Flathead River and its tributaries are unique among all the rivers of North America. The corollary of this truth is that it is irreplaceable. . . We need . . . to insure that our shared environment is protected for not only ourselves, but for our children, and our children's children.

Montana Lieutenant Governor John Bohlinger, Speech to the Flathead Basin Commission in Kalispell, MT (Dec. 7, 2005) (on file with authors).

¹²³ See, e.g., Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENTL. L. & POL'Y 1, 17 (2001).

¹²⁴ See, e.g., EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2007: HUMAN RIGHTS AND THE ENVIRONMENT (2007), available at <http://earthjustice.org/sites/default/files/library/references/2007-environmental-rights-report.pdf>.

¹²⁵ MONT. CONST. art. IX, § 1 ("The state and each person shall maintain and improve a clean and healthful environment in [sic] Montana for present and future generations.").

substantive interpretation, has sustained NEPA's look-before-you-leap mandate and highlighted the critical importance of excellent analysis and public involvement in the procedural planning process.¹²⁶ Environmental impact assessment is thoroughly engrained in federal agencies as a necessary planning tool.¹²⁷ In addition, NEPA has spawned over thirty state environmental acts that fill an important gap in addressing activities of state governments that are not covered by NEPA. Also, impact assessment as a norm of environmental law is widely embraced in many countries.¹²⁸

While impact assessment is often a mere procedural prelude to resource development and environmental degradation, it is precautionary in nature because the assessment and disclosure of impacts occur before the impacts. Thus, the impact assessment provides an opportunity to address alternatives, adequately assess all impacts, and even rally public opposition to force curtailment or significant modification of the proposal.

5. *The Public Trust Doctrine*

The Public Trust Doctrine ("Doctrine") is another norm of environmental law that has traction in both the United States and Canada. With roots in Roman law,¹²⁹ the Public Trust Doctrine

¹²⁶ The continual pounding that environmentalists have taken at the U.S. Supreme Court, where they have lost the last dozen or so NEPA cases has been tempered by the Court's reaffirmation of NEPA's basic principles. For example, in *Robertson v. Methow Valley Citizens Council*, the Court explained that "by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The Court reaffirmed the principle that an impact assessment requires a hard look at adverse impacts, and that NEPA ensures that the public will be fully informed about those impacts. *Id.*

¹²⁷ The authors' opinion is based on thirty years of working with, and litigating against federal agencies. While federal agencies may prepare substandard documents or create exemptions from NEPA, agencies embrace the need for compliance, a far cry from NEPA's early days when agencies sought to avoid the statute entirely. *See, e.g., Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

¹²⁸ Owen McIntyre, *The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources*, 46 *Nat. Resources J.* 157, 199 (2006) ("Even those commentators who do not accept that the requirement to conduct transboundary EIA stems from the duty to prevent transboundary harm do not argue that the requirement enjoys no normative status in general international law . . .").

¹²⁹ According to the Justinian's codification of Roman law,

embraces the notion that some resources—air, water, seashores, wild animals—are not subject to privatization and are available to all citizens. Under this doctrine, the government has a corresponding duty to protect the rest of the public trust. The Doctrine is a widely accepted, though less than clearly defined, principle of U.S. law in the context of water-based navigation, recreation, tidal lands, and shorelines.¹³⁰ At the same time, the Doctrine is gaining recognition throughout the world in contexts other than navigable waters.¹³¹

Broadly speaking, the Doctrine is rooted in the above-discussed norms of intergenerational equity and sustainability: certain resources are so fundamental and common to all persons that the government owes a duty to preserve them for all persons in perpetuity. Public trust resources, which in the United States includes rivers, lakes, and shorelines up to the high water mark, cannot be privatized or despoiled to the detriment of future generations.¹³² In the United States, the Public Trust Doctrine is arguably a backstop preventing private ownership of water resources.¹³³

While Canadian courts have not formally recognized the Public Trust Doctrine as a binding legal principle, some scholars have found a basis for applying public trust principles in Canada. Canadian courts

By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects *habitationes*, monuments, and buildings which are not, like the sea, subject only to the law of nations.

J. INST. 2.1.1.1.

¹³⁰ The literature and case law on the Public Trust Doctrine is rich, beginning with the seminal article by Joseph Sax and continuing with commentary on a wide variety of applications. See, e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006); Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees' World*, 39 ECOLOGY L.Q. 123 (2012).

¹³¹ See, e.g., *M.C. Mehta v. Kamal Nath & Ors*, 2002 1 S.C.C. 388, 388 (India) (utilizing the doctrine by invoking both Justinian and U.S. judicial decisions to overrule a motel development that adversely affected the course of a river).

¹³² In 1892, the U.S. Supreme Court established the concept that public rights in waters and shorelines are paramount. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892) (stating that “[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace”). *Id.* at 454.

¹³³ John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931 (2012).

have recognized the concept in terms of navigable waters and defined a trust for the public uses that nature intended of them.¹³⁴ While the Doctrine is not as legally robust in Canada as it is in the United States, commentators opine that its principles are part of Canadian law.¹³⁵ Citizens active in promoting a Great Lakes Commons,¹³⁶ led by Canadian water activist Maude Barlow and U.S. Attorney James Olson, have formally petitioned the IJC to recognize the Public Trust Doctrine as a guiding principle under the Boundary Waters Treaty, based upon a request that is pending at the time this article is written.¹³⁷

6. *Transboundary Ecosystem Management*

Ecosystem management is becoming the norm for many government land managers, replacing traditional resource-based management regimes. While defining what constitutes ecosystem management is itself controversial, for purposes of this article, ecosystem management means sustainably managing the whole of the natural system—water, wildlife, flora, etc.—rather than managing specific commodities like timber or hydropower. The concept of ecosystem management is widely accepted but difficult to implement in a single country, let alone across international boundaries. For example, the law of ecosystem management on U.S. public lands, or lack thereof, has been the subject of scholarly literature for a long time.¹³⁸ Aspects of ecosystem management are found implicitly in many U.S. laws, but explicitly in none.¹³⁹ Competing jurisdictions on

¹³⁴ See *Corp. of Vancouver v. Canadian Pac. Ry. Co.*, [1894] 23 S.C.R. 1, 6, 17–19, (Can.); *Nickerson v. Atty General of Canada*, [1999] S.H. 150869 (N.S.S.C.).

¹³⁵ See, e.g., RALPH PENTLAND, POLIS, THE PUBLIC TRUST DOCTRINE: POTENTIAL IN CANADIAN WATER AND ENVIRONMENTAL MANAGEMENT 1–7 (2009), available at http://poliswaterproject.org/sites/default/files/public_trust_doctrine.pdf; Oliver M. Brandes & Randy Christensen, *The Public Trust and a Modern BC Water Act*, 1 POLIS WATER SUSTAINABILITY PROJECT: THE FUTURE OF WATER LAW & GOVERNANCE SERIES 1 (2010).

¹³⁶ See Maude Barlow, *How to Save Our Great Lakes*, HUFFINGTON POST: CAN. (Dec. 14, 2011, 1:45 PM ET), available at http://www.huffingtonpost.ca/maude-barlow/how-to-save-our-great-lakes_b_1148758.html.

¹³⁷ Report to the International Joint Commission on the Principles of the Public Trust Doctrine Submitted on Behalf of Council of Canadians (Le Conseil des Canadiens) and Flow for Water (Couler pour L'eau), November 30, 2011 (on file with authors).

¹³⁸ See, e.g., J.B. Ruhl, *Ecosystem Management, the ESA, and the Seven Degrees of Relevance*, 14 NAT. RESOURCES & ENV'T 156 (2000); Carol M. Rose, *Demystifying Ecosystem Management*, 24 ECOLOGY L.Q. 865, 865–70 (1997).

¹³⁹ For example, the preface to the National Environmental Policy Act states that the law “will encourage productive and enjoyable harmony between man and his

federal lands (e.g., Forest Service vs. Park Service) and between state and federal lands make cooperation complicated, even if the potential for ecosystem management exists.¹⁴⁰ However, regulations in the new 2012 National Forest Management Act expressly incorporate ecosystem management and strive to work across artificial political boundaries.¹⁴¹ These regulations perhaps herald a more enlightened approach to resource management based on ecological rather than political boundaries. But an ecosystem management mandate in U.S. statutory law is a long way off.¹⁴²

The international “law” of ecosystem management is widely embraced in scientific discourse, and its principles appear in international conventions. For example, The Convention of Biological Diversity (“Convention”) stated that “the ecosystem approach should be the primary framework of action to be taken under the Convention.”¹⁴³ However, the Convention is a framework for

environment” and will be used “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321 (2012). The language supports a holistic ecosystem based approach but does not require it. The closest that statutory law gets to ecosystem management is in the Purposes section of the ESA, which states: “The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b) (2012). However, the ESA applies only to listed species. Additionally, the substantive commands in Sections 7 and 9 of the ESA are not predicated on ecosystem management, but rather on discrete actions of federal agencies in the case of Section 7, or discrete actions of individuals, corporations and government entities for Section 9. *See, e.g.*, 16 U.S.C. §§ 1536(a)(2), 1538(a).

¹⁴⁰ Professor Robert Keiter has written extensively on this subject. *See* Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 295 (1994) (discussing how conventional resource management statutes can be used to further the concept of ecosystem management, though noting that no statute requires it); *see also* Robert B. Keiter, *Conservation Biology and the Law: Assessing the Challenges Ahead*, 69 CHI.-KENT L. REV. 911 (1994).

¹⁴¹ National Forest System Land Management Planning, 77 Fed. Reg. 21,162 (Apr. 9, 2012) (to be codified at 36 C.F.R. pt. 219); *see also* U.S. Forest Service Summary of Final Land Management Planning Rule (Mar. 23, 2012) (on file with authors) (“In the face of changing environmental conditions and stressors, such as a changing climate, the final planning rule requires plans to include plan components to . . . maintain and restore ecosystem and watershed health and resilience (ecological integrity) . . .”).

¹⁴² The enduring legacy of fractured land disposition and ownership in the western United States remains a primary culprit thwarting ecosystem management. The checkerboard pattern of alternating land ownership means that in a given ecosystem, there will be multiple federal agencies, Indian Reservations, state lands and private lands. These various land managers/owners operate under different legal mandates and controls.

¹⁴³ Second Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, dec. II/8, Nov. 6–17, 1995, *available at* <http://www.cbd.int/decision/cop/default.shtml?id=7081>; *see also* Convention on Biological Diversity, art. 8(d), Dec.

promoting ecosystem protection, not a blueprint for actual management. Nor does it contain a hard law enforcement mechanism to require any level of ecosystem management between nations. Nonetheless, the Convention promotes the concept of transboundary ecosystem management and helps establish its normative value in the discourse on transboundary pollution.

Aside from ecosystem management and other environmental law norms, is the principle of subsidiarity. Although this other facet of international law is not particular to environmental law, the principle of subsidiarity is nevertheless important to understanding the dispute over transboundary pollution. This principle embraces the concept that problems should be solved and action should be taken at the lowest level of governance appropriate to the situation.¹⁴⁴ The principle extends far beyond environmental law into many realms of governance.¹⁴⁵ Indeed, it is a principle that supports the very foundation of the E.U.,¹⁴⁶ and is stated as a principle of E.U. governance. In that context it is hard law. Subsidiarity is relevant here not because it is reflected in the treaties or conventions applicable to this dispute, or even because it is openly embraced as a norm for solving transboundary pollution problems, but rather because the successful conclusion of the North Fork dispute involved local actors with a direct stake in the controversy, not those at the national level.

While none of the foregoing precepts of international law constitute hard law, they all ultimately bear on the North Fork dispute. Soft law principles proved to be important. Canada could not disclaim its responsibility for sending pollution into U.S. waters. The Boundary Waters Treaty and the World Heritage Site petition process

29, 1993, 1760 U.N.T.S. 79 (providing that each contracting party shall “[p]romote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings”).

¹⁴⁴ See, e.g., George A. Bermann, *Taking Subsidiary Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

¹⁴⁵ *Id.*

¹⁴⁶ Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 FORDHAM INT’L L.J. 846, 847–48 (1994) (“On the one hand, integration was to be deepened, in particular, through an unprecedented extension of the powers conferred upon the European Community (or “Union”). On the other hand, the confidence of the Member States, as well as of their subnational authorities and citizens, was to be maintained through the solemn guarantee of the *proximity* of government. In other words, integration was not to lead to undue centralization.”); see also *The Principle of Subsidiarity*, EUROPA, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0017_en.htm (last updated Mar. 3, 2010).

generated important impact assessments that were respected by both sides. The designation of part of the Crown as a World Heritage Site constitutes international recognition of the area's ecological significance. Intergenerational equity is understood when discussed in the context of a priceless heritage that must be protected so our children can enjoy it. Finally, and most importantly, the principle of subsidiarity operated successfully because local interests, not national sovereigns, resolved this matter before the problem became acute.

III

FEDERAL U.S. AND CANADIAN ENVIRONMENTAL LAW

While national environmental laws cannot reach directly across borders, they can play a role in solving transboundary issues. A digression into federal environmental laws on both sides of the border illustrates how they operate in the Crown.

Drawing from the multitude of federal environmental laws passed in the 1970s,¹⁴⁷ American nongovernmental organizations (NGOs) flocked to the courts when federal agencies balked at environmental protection. In turn, federal courts played a significant role in giving meaning to federal statutes, forcing federal agencies into compliance and halting resource development in the process. The Crown was no exception.

Early in the 1980s, during the pro-development Reagan administration, then Secretary of the Interior James Watt proposed extensive oil and gas leasing on the Flathead and Lewis and Clark National Forests just south of Glacier National Park.¹⁴⁸ These proposals would have opened millions of acres of federal lands to oil and gas development.¹⁴⁹ The twin clubs of the Endangered Species Act (ESA)¹⁵⁰ and the National Environmental Policy Act (NEPA)¹⁵¹

¹⁴⁷ In keeping with a growing national awareness of the environment symbolized by the first Earth Day in April 1970, Congress passed a plethora of environmental statutes in the early 1970s, including the National Environmental Policy Act (1970), National Forest Management Act (1976), and large sections of the currently operative versions of the Federal Clean Water Act (1972), Clean Air Act (1970) and Endangered Species Act (1973).

¹⁴⁸ *See, e.g.*, *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1226–27 (9th Cir. 1988).

¹⁴⁹ *Id.* 1227–30.

¹⁵⁰ 16 U.S.C. §§ 1531–44 (2012). The ESA prevents the federal government from taking actions that jeopardize the continued existence of listed species or that adversely modify critical habitat. The statute prevents any person from “taking” a protected species, either directly or through habitat modification. The ESA is widely regarded as one of the

clobbered these proposals into oblivion.¹⁵² While courts could not prohibit oil and gas leasing under these laws, the lawsuits delayed drilling and increased public awareness about the importance of these lands through public participation and impact statement requirements.

The same legal structure could be used administratively to protect the lands. In 1997, Lewis and Clark National Forest supervisor Gloria Flora closed much of the Rocky Front to oil and gas leasing through a revision in the forest management plan under the National Forest Management Act.¹⁵³ Her controversial move, which reversed decades of policy permitting oil and gas leasing of nearly all National Forest lands unprotected by formal wilderness designation, was unsuccessfully challenged by the oil and gas industry.¹⁵⁴

Americans have used the courts to protect the Crown from other development activities. In 1994, the Ninth Circuit overturned the Flathead National Forest Plan because it failed to justify the amount of logging permitted under the Plan in its environmental review under NEPA.¹⁵⁵ Other court cases have successfully challenged forest, logging, and road development because of the adverse impacts that excessive road densities have on grizzly bears.¹⁵⁶ Even within the protected confines of Glacier Park, courts have protected the Park from attempts by inholders to increase motorized access to the

world's most stringent environmental laws; in the words of the U.S. Supreme Court, the law "admits of no exception." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). Professor Zygmunt Plater describes the ESA as a revolutionary legal document and "the first major piece of legislation in any legal system . . . to put teeth into the protection of endangered species." PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 775 (3rd ed. 2004).

¹⁵¹ 42 U.S.C. §§ 4321–70 (2012). NEPA requires environmental impact statements for all federal actions that significantly affect the environment, thus implicating most activities that occur in National Forests and National Parks. *Id.*

¹⁵² *See, e.g.*, *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Bob Marshall Alliance*, 852 F.2d at 1230. These cases demonstrate the power of NEPA's demanding impact assessment requirements. While NEPA's mandate is procedural, it was an effective means to thwart energy development in the Crown.

¹⁵³ For a discussion of the events leading to the decision to forestall leasing in the Forest lands, see Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585, 601 (2008).

¹⁵⁴ *See* *Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv.*, 157 F.2d 1142, (D. Mont. 2000), *aff'd*, 12 F. App'x 498 (9th Cir. 2001).

¹⁵⁵ *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304–05 (9th Cir. 1993).

¹⁵⁶ *See, e.g.*, *Swan View Coal., Inc. v. Turner*, 824 F. Supp. 923, 940 (D. Mont. 1992).

detriment of wildlife.¹⁵⁷ Montana state law, specifically the Montana Environmental Policy Act, can also mandate the assessment of environmental impacts on state lands not under the jurisdiction of NEPA or the ESA, and NGOs have used state law to protect areas within the Crown.¹⁵⁸

Although U.S. environmental laws cannot reach directly across the border, they can still affect transboundary pollution issues. The laws provide the United States with moral authority regarding the high value Americans place on water quality, wildlife, and wilderness. These laws also embody the look-before-you-leap principle of impact assessment.

Finally, the role of U.S. environmental law in addressing transboundary disputes has received attention in the courts in recent years. For example, the province of Manitoba successfully pursued a NEPA claim against a federal agency that was going to permit a massive water diversion in North Dakota that would affect Canadian waters.¹⁵⁹ Other recent cases involve Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Clean Air Act (CAA) claims dealing with transboundary pollution on both sides of the border.¹⁶⁰ Professor Noah Hall found these recent cases indicative of the failure of the national governments to address transboundary issues, a thesis that is consistent with this case study and discussed in great detail below.¹⁶¹

¹⁵⁷ *McFarland v. Kempthorne*, 545 F.3d 1106, 1113 (9th Cir. 2008) (preventing private property inholder from obtaining permit for snowmobile use in an area otherwise closed to such uses to protect wildlife).

¹⁵⁸ *See, e.g., N. Fork Pres. Ass'n v. Dep't of State Lands*, 778 P.2d 862 (Mont. 1989). This case concerned a challenge under the Montana Environmental Policy Act against drilling of a single test well on state lands in close proximity to Glacier National Park. *Id.* at 863. While the court held that a full environmental impact statement was not required, the court noted that impacts from a single well were not significant, and that a full statement would likely be necessary if full-field development ensued. *Id.* at 872–73.

¹⁵⁹ *See, e.g., Gov't of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41 (D.D.C. 2005).

¹⁶⁰ *See, e.g., Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982 (D. Wash. Nov. 8, 2004) (holding a Canadian company liable for toxic waste generated in Canada that polluted U.S. lands); *see also Merrill, supra* note 62, at 956 (discussing CAA section 115 as a tool used by other nations to challenge transboundary air pollution); *Her Majesty The Queen ex rel. Ont. v. U.S. Env'tl. Prot. Agency*, 912 F.2d 1525, 1529 (D.C. Cir. 1990).

¹⁶¹ Noah Hall, *Bilateral Breakdown: U.S.-Canada Pollution Disputes*, 21 NAT. RESOURCES & ENV'T 18 (2006).

North of the border, Canada's federal companion to the ESA is the Species at Risk Act (SRA),¹⁶² while the now repealed Canadian Environmental Assessment Act (CEAA) had formerly provided an analog to the American NEPA.¹⁶³ Unfortunately, Canadian environmental regulations lack strong substantive and procedural hooks and have received scant judicial attention and enforcement compared to their American counterparts.

Neither the CEAA nor the SRA would ultimately stop the mining projects in the North Fork, though compliance must be gained prior to mining operations. While the SRA could provide some means of protection, it does not have the substantive, far-reaching handles that the U.S. ESA contains. And while the CEAA appears to offer the primary means for addressing detrimental impacts associated with any project in the area,¹⁶⁴ the CEAA requires an environmental assessment for projects but allows for nearly unfettered action at the provincial level, provided the provincial process appears equivalent to national standards.¹⁶⁵

After the initial phases of the Cabin Creek and Cline mining proposals discussed below, the CEAA underwent substantial changes under the Jobs and Economic Growth Act.¹⁶⁶ These changes included

¹⁶² Species at Risk Act, S.C. 2002, c. 24–29 (Can.).

¹⁶³ See Canadian Environmental Assessment Act, S.C. 1992, c. 37 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/C-15.2/FullText.html> (for past iterations of the law, click the “Previous Versions” link, which directs you to the page: <http://laws-lois.justice.gc.ca/eng/acts/C-15.2/PITIndex.html>, where past versions of the law are available).

¹⁶⁴ Joseph L. Sax & Robert B. Keiter, *The Realities of Regional Resource Management: Glacier National Park and Its Neighbors Revisited*, 33 *ECOLOGY L.Q.* 233, 291 (2006) [hereinafter Sax & Keiter II]. As noted by Sax and Keiter, the mine proposal would trigger the CEAA if it would “cause significant adverse environmental effects both outside Canada and outside those federal lands.” *Id.* at 291 (citing Canadian Environmental Assessment Act, S.C. c. 37, § 47 (2005) (repealed 2012), available at <http://laws-lois.justice.gc.ca/eng/acts/C-15.2/20050804/P1TT3xt3.html> (last visited Dec. 5, 2013)).

¹⁶⁵ Stepan Wood, Georgia Tanner & Benjamin J. Richardson, *What Ever Happened to Canadian Environmental Law?*, 37 *ECOLOGY L.Q.* 981, 1019 (2010) (“The Canadian Environmental Protection Act of 1999 and the [CEAA] also contemplate a role for the provinces if they have equivalent standards. Such concessions can give provincial governments the final say on how strict environmental assessments will be, allowing the federal government to delegate environmental responsibilities to the provinces.”) (citations omitted). As Wood et al. explain, “[t]he results differ substantially” from province to province in terms of environmental assessment requirements. *Id.* at 1020.

¹⁶⁶ See *Parliament Passes Amendments to Environmental Assessment Act*, ENVIRONMENTAL-EXPERT (July 13, 2010), <http://www.environmental-expert.com/news/parliament-passes-amendments-to-environmental-assessment-act-181466> (“The sections of Bill C-9 relating to the environmental review process are intended to strengthen Canadian Environmental Assessment Agency (CEAA) ability to improve the timeliness of

more stringent requirements for review of mining and energy proposals,¹⁶⁷ including those relative to the Cline proposal.¹⁶⁸ Moreover, the amendments to the CEEA occurred after noted failures of the Act came to light.¹⁶⁹ The enacted amendments eliminated a track review process and streamlined the procedure for environmental assessment.¹⁷⁰ By doing so, the Canadian government accepted a larger share of responsibility for ensuring accurate and appropriate environmental assessments.¹⁷¹ While the concordant mechanisms at the provincial level would still exist, they would no longer replace, or displace, the federal assessment process. Of course, assessments merely ensure that a government body adequately reviews a proposed project to incorporate all future impacts into a decision to proceed. Any assessment does not, by itself, foreclose a project going forward. Nonetheless, increased responsibility at the national level would ensure that the Canadian government acts cautiously when overseeing any prospective development.¹⁷² Ultimately, however, the role of

federal environmental assessments; to establish clear lines of accountability; and to focus resources where they could produce the greatest benefit to the environment and the economy.”).

¹⁶⁷ See Canadian Env'tl. Assessment Agency, *Amendments to the Canadian Environmental Assessment Act*, <http://www.ceaa.gc.ca/default.asp?lang=En&xml=B6531D7A-8F4C-4A1B-AB90-4A99B713B579> (last modified Sept. 24, 2013) (“Recent amendments to the *Canadian Environmental Assessment Act* to strengthen the role of the Canadian Environmental Assessment Agency will improve timeliness of federal environmental assessment, establish clear accountability and focus resources where they would produce the greatest benefit to the environment and the economy. The changes are part of the *Jobs and Economic Growth Act* that came into effect on July 12, 2010.”). For a thorough report on the rationale behind the amendments and a comprehensive explanation of their effect, see CAN. ENVTL. ASSESSMENT AGENCY, EFFECTIVENESS OF THE ENVIRONMENTAL ASSESSMENT TRACK PROCESS UNDER THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT (2010), available at http://www.ceaa-acee.gc.ca/81D6DF0E-A184-4891-9B63-ADE35C22744C/Effectiveness_of_the_Environmental_Assessment_Track_Process.pdf.

¹⁶⁸ *Lodgepole Coal Mine Project*, CAN. ENVTL. ASSESSMENT AGENCY <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=36059> (last modified Dec. 5, 2012).

¹⁶⁹ *Id.* at 1 (noting that reports “had suggested that, in at least some cases, the environmental assessment track process was causing delay while not significantly adding value to the assessment . . . [and] it had appeared to have discouraged effective cooperation between federal and provincial government departments and agencies in those situations where an environmental assessment of the same project had been concurrently required by both federal and provincial legislation”).

¹⁷⁰ *Id.* at 21.

¹⁷¹ *Id.*

¹⁷² Though not specifically recognized as a contributing factor, the Canadian government did halt progress on the Cline Mine Proposal pending a more thorough

Canadian law in addressing transboundary pollution does not appear to be significant.

IV THE RISING THREAT OF TRANSBOUNDARY POLLUTION IN THE CROWN

A. The Cabin Creek Mine

Energy development on the Canadian side of the border was traditionally confined to coal mining in the Sparwood area.¹⁷³ As discussed above, interest in oil and gas on the American side of the border grew heavily in the 1970s and 1980s with serious attempts to lease oil and gas resources in the Rockies just south of Glacier National Park, but waned thereafter. However, interest in carbon resources in the Canadian Flathead gained renewed strength in the 1980s, setting the stage for a transboundary pollution dispute.

In the early 1980s, a Canadian mining company sought approval for two large open-pit coal mines along Cabin Creek in British Columbia, just above its confluence with the Flathead, a mere six miles from the U.S. border.¹⁷⁴ These proposals generated huge protests from Montana environmentalists, Glacier National Park managers, and American politicians. Americans feared pollution of the North Fork from the coal mines.¹⁷⁵ The fact that the North Fork River constitutes Glacier's western boundary and feeds the pristine Flathead Lake roused the passions of more than the usual environmental NGOs; Montana's congressional delegation pressured the State Department to refer the water pollution issue to the IJC, which it did.¹⁷⁶

review, offering at least an inference that the development companies would have to suffer through a longer period of review than initially anticipated.

¹⁷³ Sax & Keiter II, *supra* note 164, at 287–88.

¹⁷⁴ INT'L JOINT COMM'N, IMPACTS OF A PROPOSED COAL MINE IN THE FLATHEAD RIVER BASIN 19 (1988), available at <http://www.ijc.org/files/publications/ID590.pdf> ("In February 1984, the British Columbia Government granted Sage Creek Coal Limited approval-in-principle for a 2.2 million tonnes (2.4 million U.S. tons) per year thermal coal mine located 10 km (6 mi) upstream from the International Boundary on Howell and Cabin creeks, tributaries to the Flathead River.")

¹⁷⁵ *Canadian Mine Called Pollution Peril to U.S. Park*, N.Y. TIMES (Oct. 15, 1981), <http://www.nytimes.com/1981/10/15/us/canadian-mine-called-pollution-peril-to-us-park.html>.

¹⁷⁶ See INT'L JOINT COMM'N, *supra* note 174, at 3.

As discussed above, for the IJC to obtain jurisdiction, both national sovereigns must consent, making unilateral enforcement impossible. However, Canada consented to the State Department's referral of the Cabin Creek mine dispute, and the IJC assumed jurisdiction to address the adverse effects of pollution from coal mining in Canada on U.S. waters. The IJC, in turn, assembled a group of scientific experts from both countries to study the mine's impacts on the river system.¹⁷⁷ In 1988, the IJC adopted the experts' recommendation to refuse approval of the mine in its current configuration, partially because of potential adverse impacts to water quality and fisheries, and especially due to the adverse impacts to bull trout.¹⁷⁸ The IJC noted a possible violation of the Boundary Waters Treaty because of impacts from coal mining and associated development.¹⁷⁹ The IJC's report further recommended that mining be postponed until the impacts of transboundary pollution had been determined and both governments agreed upon an acceptable mitigation plan.¹⁸⁰ Finally, the report recommended that both governments work to develop joint sustainable, equitable, and compatible development activities and management strategies.¹⁸¹

However, the IJC recommendations were not binding, and while the British Columbian government stated it was "satisfied with the IJC's findings,"¹⁸² the Canadian government never formally accepted the IJC's findings. Nevertheless, the lack of formal approval by the Canadian government did not undercut the strength of the IJC's recommendations. The coal company allowed its provincial permit to lapse.¹⁸³ At the same time the Canadian coal project was shelved, Montana, in an act of rebuke against the IJC recommendation for more cooperation on managing the Flathead, approved an oil and gas

¹⁷⁷ See generally *id.*

¹⁷⁸ *Id.* at 24–25. Bull trout (*salvelinus confluentus*) are protected as threatened species under the U.S. Endangered Species Act. 16 U.S.C. §§ 1531–44 (2012). The species is native to Canada, and the North Fork population is considered both a stronghold of the species and vital to its recovery. See INT'L JOINT COMM'N, *supra* note 174, at 7, 24–25.

¹⁷⁹ INT'L JOINT COMM'N, *supra* note 174, at 6–8. As discussed above, Article IV of the Boundary Waters Treaty states that "waters flowing across the boundary shall not be polluted on either side." *Id.* at 8. The scientific study documented serious potential impacts from coal mining, which were then adopted by the IJC. *Id.* at 6–8.

¹⁸⁰ *Id.* at 11.

¹⁸¹ *Id.*

¹⁸² Dino Ross, *International Management of the Flathead River Basin*, 1 COLO. J. INT'L ENVTL. L. & POL'Y 223, 231 (1990).

¹⁸³ *Id.* (providing information about the early years of the North Fork dispute).

well on state lands near both Glacier Park and the North Fork of the Flathead.¹⁸⁴

Whether a result of environmental benevolence, the moral force of the IJC's recommendations, or changing energy markets, the push for Flathead coal eventually waned. The Cabin Creek mine controversy had lasting implications for future protection of the area. Professors Sax and Keiter labeled the IJC's Cabin Creek decision "a complete victory for Montana and Glacier National Park."¹⁸⁵ The threat of water pollution from Canadian mining galvanized U.S. opposition to Canadian mining in the Flathead, leading to the Montana Legislature's creation of the Flathead Basin Commission, an umbrella group that represented and surveyed Montana's interests in the amenity values of the Flathead.¹⁸⁶ This political constituency remains in place even after the Cabin Creek permit expired.

Decades later, another coal project sprung to life. Fording Coal Limited, Canada's largest coal company, held three blocks of coal licenses—Lodgepole, Harvey Creek, and Lilyburt—on Crown land, north of the Cabin Creek licenses.¹⁸⁷ Fording drilled test holes on its Lodgepole licenses and started to move forward with the project.¹⁸⁸ Again, public opposition surfaced in the United States and the project did not move forward quickly. But the company did not let its license expire.

B. The Cline Proposal

In 2004, the most recent effort to tap into North Fork coal reserves surfaced. The Cline Mining Company sought approval for a fast-track

¹⁸⁴ *Id.* at 232–35 (noting that Montana's approval of the oil and gas well was essentially a slap in the face to the Canadians, who could not invoke the Boundary Waters Treaty because the pollution did not flow across the border). Yet, despite Montana's actions, the damage from an oil spill, as well as the habitat destruction from drilling, would undoubtedly affect the transborder ecosystem.

¹⁸⁵ Sax & Keiter II, *supra* note 164, at 296.

¹⁸⁶ *About FBC*, FLATHEAD BASIN COMM'N, www.flatheadbasincommission.org (last visited Jan. 7, 2014) ("The Flathead Basin Commission (FBC) was created in 1983 by the Montana Legislature to monitor and protect water quality, natural resources and economic integrity in the Flathead Basin. The FBC is a uniquely structured non-regulatory organization that accomplishes its mandate in a consensus-building manner, stressing education, partnerships with agencies and nonprofit groups, and the voluntary participation of basin residents.").

¹⁸⁷ See James R. Connor, *Fording Coal LTD Investigating Possibility of Developing Coal Mine in Flathead's North Fork*, FLATHEAD MEMO, http://www.flatheadmemo.com/north_fork_coal/Coal/News/threat.html (last visited Jan. 7, 2014).

¹⁸⁸ *Id.*

small mining operation on the Lodgepole leases which then quickly morphed into a larger proposal to mine two to three million tons of coal per year for export.¹⁸⁹ The fast-track proposal would be based on the “small mines” review process, which under Canadian law entails limited environmental review and data collection.¹⁹⁰ While not large by comparison to many open pit mines, the Cline mine represented a serious and significant intrusion into the pristine areas of the Canadian Flathead at a time when provincial governments favored economic development. Bearing in mind that the United States had recently imposed a surcharge on Canadian softwood imports, Canada was presumably unlikely to grant environmental favors to the United States. Moreover, Montana itself was promoting development of its vast coal reserves in the southeastern part of the state.¹⁹¹

Cline pushed its proposal for the mine and quickly constructed a road into the Flathead drainage during the winter of 2004-2005, before any environmental assessment was undertaken.¹⁹² The development of a new open pit coal mine in a pristine area of the Crown seemed imminent.

The Cline proposal generated intense opposition in Montana. Concern focused on water pollution from the mine degrading the Flathead River system (which forms the western boundary of Glacier) all the way to Flathead Lake.¹⁹³ Montana has focused intense efforts

¹⁸⁹ CLINE MINING CORP., 2004 ANNUAL REPORT 5 (2004), available at <http://www.clinemining.com/financials/pdf/04ar.pdf>.

¹⁹⁰ Michael Jamison, *Concerns Voiced Over ‘Fast-Track’ Proposal*, MISSOULIAN (June 19, 2005, 12:00 AM), http://missoulian.com/news/state-and-regional/concerns-voiced-over-fast-track-proposal/article_1aaf4831-1f8f-568f-877f-2c475f6f0d60.html.

¹⁹¹ Montana has the largest coal reserves of any state in the United States, and some of the largest in the world. GOVERNOR’S OFFICE OF ECONOMIC DEVELOPMENT AT THE MONTANA DEP’T OF COMMERCE, MONTANA MEANS BUSINESS 3 (2012). Governor Schweitzer originally pushed a coal to diesel project. Samuel Western, *Spinning Coal into Gasoline*, HIGH COUNTRY NEWS (Nov. 13, 2006), <http://www.hcn.org/issues/334/16681>. When funding did not materialize, he leased over a half billion tons of Powder River Basin coal at Otter Creek to Arch Coal Company. See Press Release, Arch Coal, Arch Coal and Great Northern Properties Enter into Montana Coal Lease on Otter Creek Reserves, (Nov. 12, 2009), available at <http://news.archcoal.com/phoenix.zhtml?c=107109&p=irol-newsArticle&ID=1355044&highlight=>. The controversial leasing decision is embroiled in litigation. See, e.g., *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1073 (9th Cir. 2011).

¹⁹² Jim Robbins, *Coal Mine ‘Under the Radar’ Stirs Cross-Border Feud*, N.Y. TIMES (Mar. 15, 2006), <http://www.nytimes.com/2005/03/15/science/15mine.html?pagewanted=print&position=&r=0>.

¹⁹³ *Id.*

to recover bull trout, a native species sensitive to pollution.¹⁹⁴ The Flathead has some of the strongest bull trout populations in the lower forty-eight states.¹⁹⁵ Diverse environmental, political, and economic interests coalesced under the Flathead Basin Commission into a powerful opposition, led by Montana's charismatic former governor, Brian Schweitzer, himself a long-time Flathead Valley resident.

C. Coal Bed Methane Development in the Crown

Threats from energy development along the western flanks of the Crown were not confined to coal. In the last decade, proposals to tap into the North Fork's coal bed methane (CBM) reserves have surfaced.¹⁹⁶ CBM is natural gas trapped in coal seams. Production of CBM requires dewatering the coal seam aquifer to release the methane adsorbed onto the coal. CBM requires disposal of large quantities of groundwater that may be saline or laden with undesirable dissolved metals.¹⁹⁷ Significant CBM production has occurred in the United States since the 1990s and accounts for nearly ten percent of U.S. domestic natural gas production.¹⁹⁸ Recognizing the importance

¹⁹⁴ See, e.g., U.S. FOREST SERVICE, CONSERVATION STRATEGY FOR BULL TROUT ON USFS LANDS IN WESTERN MONTANA 7–8 (2013), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5427869.pdf; see also MONTANA BULL TROUT RESTORATION TEAM, RESTORATION PLAN FOR BULL TROUT IN THE CLARK FORK RIVER BASIN AND KOOTENAI RIVER BASIN MONTANA (2000), available at fwp.mt.gov/fwpDoc.html?id=31386. Bull Trout were listed under the Endangered Species Act as a result of litigation in the 1990s. See, e.g., *Friends of the Wild Swan, Inc. v. U.S. Fish and Wildlife Serv.*, 945 F. Supp. 1388 (D. Or. 1996). For extensive background information about this species, which is also wide-ranging in southeastern British Columbia, see Gary Carnefix, *Montana's Fish Species of Special Concern: Bull Trout*, (Jan. 2002), <http://www.fisheries.society.org/AFSmontana/SSCpages/Bull%20Trout.htm>.

¹⁹⁵ See *Montana Field Guides: Bull Trout*, MT.GOV, http://fieldguide.mt.gov/detail_AFCHA05020.aspx (last visited Jan. 22, 2014) (depicting a geographic map of the western hemisphere illustrating the range of the Bull Trout, with a substantial portion of the Bull Trout habitat overlapping Montana).

¹⁹⁶ *N. Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003) (explaining the historical and current efforts to extract coal bed methane in portions of Montana).

¹⁹⁷ See generally *id.* (holding that disposal of groundwater from CBM production contained pollutants within the meaning of the Clean Water Act, and further noting that its salinity was a threat to soils and crops, which required that the CBM company obtain a National Pollution Discharge Elimination System Permit before creating further discharges).

¹⁹⁸ Coalbed Methane Outreach Program, *Frequently Asked Questions*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/cmop/faq.html> (last updated Apr. 19, 2013) (describing CBM as a “valuable resource that accounts for about 10% of total U.S. natural gas production annually,” and discussing the differences between coal bed methane and coal mine methane).

of this energy source, British Columbia sought to increase CBM production as part of its 2007 B.C. Energy Plan.¹⁹⁹

Between 2001 and 2004, Encana²⁰⁰ drilled CBM test wells in British Columbia without any environmental review, and in 2005 the British Columbia government auctioned CBM leases in the Elk River Valley without conducting any environmental review.²⁰¹ These actions occurred at a time when CBM development was booming in the Powder River Basin despite undergoing extensive environmental review in Montana because of concerns over water quality and other adverse impacts. Montana farmers have been particularly wary of CBM development because Wyoming has sent large quantities of CBM wastewater into the state via the Powder and Tongue Rivers in southeastern Montana.²⁰² Because of these impacts, many litigants have sought redress in the courts and have been successful in reigning in CBM development.²⁰³ While Montana first sided with industry, it eventually passed stringent water quality standards aimed at limiting CBM pollution.²⁰⁴ However, such environmental controls were absent in Canada. CBM development in Canada posed another potentially serious threat to water quality in Montana.

¹⁹⁹ See *The BC Energy Plan Highlights*, BRITISH COLUMBIA, <http://www.energyplan.gov.bc.ca/bcep/default.html#3> (last visited Jan. 7, 2014) (noting that the B.C. Energy Plan was designed to promote clean, non-nuclear energy development within the Province). CBM was included in the portfolio of “clean” energy sources. *The BC Energy Plan: A Vision for Clean Energy Leadership, Oil and Gas*, BRITISH COLUMBIA, <http://www.energyplan.gov.bc.ca/bcep/default.aspx?hash=9> (last visited Jan. 20, 2014).

²⁰⁰ Encana is a major North American energy production company, with resource development projects in both the western United States and Canada. See *About Us*, ENCANA, www.encana.com (last visited Jan. 7, 2014).

²⁰¹ Cf. RESOURCE DEVELOPMENT AND GEOSCIENCE BRANCH: OIL AND GAS DIVISION, BRITISH COLUMBIA, OIL & GAS EXPLORATION: ACTIVITY REPORT 2007–2008, at 37 (2009), available at http://www.empr.gov.bc.ca/Mining/Geoscience/Publications/Catalogue/OilGas/OGReports/Documents/2008/OG_Report2008-1.pdf (detailing the coal bed methane developments in the Elk Valley region, including those held by Encana).

²⁰² See, e.g., Scott Streater, *Coalbed Methane Decision Adds Salt to Montana Farmers’ Wounds*, E&E PUBLISHING (Oct. 29, 2009), <http://www.eenews.net/stories/84044>.

²⁰³ See, e.g., *N. Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003); *N. Cheyenne Tribe v. Mont. Dep’t of Env’tl. Quality*, 234 P.3d 51 (Mont. 2010).

²⁰⁴ See *Pennaco Energy, Inc. v. Mont. Bd. of Env’tl. Review*, 199 P.3d 191 (Mont. 2008).

V

AND NOW, THE REST OF THE STORY . . .

The Cline mine proposal, along with CBM development, contained all of the ingredients of a difficult transboundary resource dispute. Canada stood to gain economically from resource development. However, water pollution from the projects threatened significant impact in the United States.²⁰⁵ The national governments had frosty relationships on other resource issues, for instance, the soft wood lumber impasse and the Devils Lake controversy.²⁰⁶ Citizens on both sides of the border, concerned with protecting the Crown as an ecosystem, had little direct recourse. Given the divergent economic and political pressure on both sides of the border and the lack of a mandatory legal framework to manage a dispute, the Cline mine controversy posed a seemingly intractable problem. The intractable nature was amplified by British Columbia's prioritization of energy development, while the national government ceded most environmental assessment oversight to the province. Yet the result, achieved only a few years later, is surprising.

To tell the story of the successful resolution of the transboundary coal-mining dispute, we first examine the failed efforts to once again invoke IJC jurisdiction. Then we explore a creative use of the UNESCO petitioning process, one that bore no legal victories but further galvanized public support for managing the Crown as an ecosystem without major resource extraction. Finally, we delve into the political machinations on both sides of the border that resulted in the subnational Memorandum of Understanding. The Memorandum, a nonbinding document, nonetheless reflected a number of soft environmental law principles.

A. Efforts to Invoke International Law

No international law or treaty could unilaterally allow Montana to halt coal mining in the Canadian Flathead. For instance, NAFTA and its corresponding environmental provisions offered no recourse, as pollution had yet to occur. The Boundary Waters Treaty offered the only prospect of using an international treaty to address the

²⁰⁵ See, e.g., Chris Peterson, *Upstream from Glacier, Worries About Coal Bed Methane*, HUNGRY HORSE NEWS (July 14, 2004), <http://www.hungryhorsenews.com/articles/2004/07/14/news/news01.txt>.

²⁰⁶ For a discussion of the Softwood Lumber Impasse, see Sarah E. Lysons, *Resolving the Softwood Lumber Dispute*, 32 SEATTLE U. L. REV. 407, 424 (2009).

transboundary pollution issue. Indeed, the very purpose of the Treaty was to resolve issues like the one presented in the North Fork of the Flathead. However, the Treaty was never invoked in the Cline mine dispute, revealing the Achilles' heel of the Treaty: its dependence on mutual state action by signatories. The U.S. State Department did not even make a formal referral to the IJC, despite a request by Montana to do so, preferring instead to “welcome discussions with Canada concerning an IJC reference.”²⁰⁷ The Canadian national government had little interest in taking the matter to the IJC. Relations between the two countries on resource issues were strained. Despite signing the Softwood Lumber Agreement in 2006—an effort to resolve the decades-old charges of Canadian subsidies to its timber industry—the parties continued to fight in the international arena.²⁰⁸

However, the IJC report concerning Cabin Creek continued to resonate in the public discourse. Conservationists and politicians referred to the report in statements to the public over the Cline proposal.²⁰⁹ The Cabin Creek report also served as a catalyst to gather baseline data about water quality in the Flathead and the importance of the area as a corridor for wildlife movement.²¹⁰ Furthermore, the British Columbia government could not now disavow the report, having accepted it fifteen years earlier.

The designation of the area as a UNESCO World Heritage site offered another avenue for invoking international law. In 2006, a group of NGOs petitioned the World Heritage Committee of

²⁰⁷ Letter from Charles S. Shapiro, Acting Assistant Sec'y of State, to Brian Schweitzer, Governor of Mont. (June 6, 2005) (on file with authors); *see also infra* note 239.

²⁰⁸ *See* Chi Carmody, *International Decisions: Softwood Lumber Dispute (2001-2006)*, 100 AM J. INT'L L. 664 (2006). Even after “resolving” the matter through an international agreement, the United States continued to press charges, which lead to continued arbitration and findings that the Canadian government breached the Softwood Lumber Agreement. *See* Press Release, U.S. Trade Rep., *Tribunal Finds Canada Failed to Cure Breach of the Softwood Lumber Agreement* (Sept. 2009), available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/september/tribunal-finds-canada-failed-cure-breach-softwoo> (“United States Trade Representative Ronald Kirk today announced that an arbitral tribunal has rejected Canadian claims that an offer to pay the U.S. Government US\$36.66 million cured Canada’s breach of the Softwood Lumber Agreement . . .”).

²⁰⁹ *See, e.g.*, Susan Gallagher, *State, Province Meet on Mining Issue*, MISSOULIAN (Mar. 22, 2006, 12:00 AM), available at http://missoulian.com/breaker/state-province-meet-on-mining-issue-tuesdayposted-on-march/article_44a44533-6f97-5c05-8886-f5f4f6455725.html.

²¹⁰ INT'L JOINT COMM'N, *supra* note 174, at App'x A: Letter of Referral.

UNESCO (Petition) to have the Crown listed as an endangered site, a procedural mechanism available to NGOs under the Convention.²¹¹ Designation of a World Heritage Site as “endangered” would not have stopped development because the Convention has no international enforcement mechanism. However, much like the IJC report on the Cabin Creek mine, the Petition put the Crown’s international recognition as a public resource in the spotlight.

The petitioners submitted their report to the U.N. World Heritage Committee on February 26, 2006, setting out the substantive issues threatening the Waterton-Glacier (and greater Flathead River Valley) region.²¹² Their primary goal was to secure conservation of the site once it was classified as threatened.²¹³ The Petition focused primarily on the threat climate change posed to the two national parks, incorporating information from the Intergovernmental Panel on Climate Change (IPCC) and the United Nations Framework Convention on Climate Change (UNFCCC).²¹⁴ It set out specific and relevant findings attributable to these sources²¹⁵ before equating the

²¹¹ INT’L ENVTL. LAW PROJECT OF LEWIS & CLARK LAW SCH., PETITION TO THE WORLD HERITAGE COMMITTEE REQUESTING INCLUSION OF WATERTON-GLACIER INTERNATIONAL PEACE PARK ON THE LIST OF WORLD HERITAGE IN DANGER AS A RESULT OF CLIMATE CHANGE AND FOR PROTECTIVE MEASURES AND ACTIONS (2006) [hereinafter WATERTON-GLACIER PETITION], available at <http://www.climatelaw.org/cases/country/intl/unescoglacier/2006Feb16/>. With direction from Lewis and Clark’s International Environmental Law Project, signatories to the Petition included, inter alia, the Center for Biological Diversity, Defenders of Wildlife, the Humane Society International, and the Montana Wilderness Association. *Id.* at ii.

²¹² *Id.* at v.

²¹³ *Id.* at 4. The Convention Concerning the Protection of the World Cultural and Natural Heritage contains a mechanism to highlight World Heritage sites that are endangered and provides a mechanism by which endangered sites are publicized, presumably to galvanize support to increase protection. *Id.* Convention Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 11. UNESCO also established the system for determining whether a property listed as a World Heritage site is endangered under its operational guidelines for implementing the Convention Concerning the Protection of the World Cultural and Natural Heritage. UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention, § IV(B) ¶¶ 178, 180–82 (Feb. 2005).

²¹⁴ See WATERTON-GLACIER PETITION, *supra* note 211, at 5–6 (showing that the IPCC Report provided the scientific ammunition while the UNFCCC provided the legal framework in the Petition to highlight the human-generated impact of climate change on the Waterton-Glacier heritage site).

²¹⁵ The cited material included the warming of global temperatures (noting temperature has increased “over the 20th century by .6°C, ± .2°C, with most warming occurring between 1910-1945 and 1976-2000”), the cause of this warming as provided by the increase in greenhouse gas concentrations, and the change in weather patterns attributable to the temperature increase. *Id.* at 5 (citing INTERGOVERNMENTAL PANEL ON CLIMATE

findings of these international documents to localized impacts in Montana and British Columbia.²¹⁶ The Petition explained the climate data accumulated at the parks (set against the broader challenge of global climate change), examined the distinct threat the data evidenced, and then asked for action from the World Heritage Committee. The Petition pointed out that the specific factors that had led to the area's designation as a World Heritage site²¹⁷ were now threatened.²¹⁸ For instance, the Petition directly stated that, “[d]ue to temperature increases and fluctuations in precipitation, climate change is already jeopardizing the complex climate of Waterton-Glacier’s ‘distinctive climate’”²¹⁹ The natural and unique climate of the area was one of the key factors the U.N. Heritage Committee relied upon in designating Waterton-Glacier a World Heritage site. The Petition posited that the single greatest threat to the parks rested with climate change, thereby directing the Committee to

CHANGE, THIRD ASSESSMENT REPORT: CLIMATE CHANGE 2001, § 2.2.2.1 (2001), available at http://www.grida.no/climate/ipcc_tar/wg1/052.htm#2221).

²¹⁶ See *id.* at 6 (“The scientific evidence and consensus confirm that climate change is occurring and that humans have the capacity to abate climate change and the adverse effects of climate change by reducing greenhouse gas emissions. The global community thus has the ability to slow or reverse the climate-change-induced damage to Waterton-Glacier’s resources of outstanding universal value.”).

²¹⁷ *Id.* at 7–8 (“1. Waterton-Glacier exists at a climatological crossroads where Pacific weather systems mingle with warm air masses from the south and east and cold weather from the north. 2. Waterton-Glacier contains adjacent mountain and prairie ecosystems. 3. Waterton-Glacier has tremendous scenic and aesthetic value. 4. The status of Waterton-Glacier as the first International Peace Park is culturally significant because the designation not only “promote[s] peace and goodwill between nations, but also underscore[s] the international nature of wilderness and the co-operation required in its protection.” 5. The waters of Waterton-Glacier flow into watersheds linked to the Pacific, Atlantic, and Arctic ocean systems. 6. Waterton-Glacier is physiographically significant because it contains examples of Precambrian rock formations.”) (citations omitted) (citing World Heritage Committee, WHC-95/CONF.203/16, § VIII(A.1) (Jan. 31, 1995), available at <http://whc.unesco.org/archive/repcom95.htm#354> (detailing the distinctive climate, physiographic setting, mountain/prairie interface and tri-ocean hydrographical divide as well as its scenic values and the cultural importance of its International Peace Park designation)).

²¹⁸ *Id.*

²¹⁹ *Id.* at 8. Furthermore, the Petition drew a sharp contrast of global temperature fluctuations with those increases in the Waterton-Glacier region, noting that “the local summer mean temperature increased 1.66°C between 1910 and 1980,” and that this in turn led to “glacial melt, changes in hydrological systems, and species migration.” *Id.* at 9 (citations omitted). And the Petition recounted the “rapid retreat of the glaciers,” *id.*, and that climate change bore responsibility for subsequent adverse effects upon the hydrological systems of the parks, disturbances to the fragile ecosystem, and a reduction in the parks’ scenic value. *Id.* at 11–14.

focus on the specific issue of climate change and the dangers it posed to the parks.²²⁰

In terms of relief, the Petition called for a broad national mandate to combat climate change. The Petition recognized the steps taken by the National Park Service to limit and decrease carbon emissions within the parks, but sought more active participation from the U.S. federal government as a whole. The call for a mandate included allowing the EPA to regulate carbon emissions under the Clean Air Act (prior to *Massachusetts v. EPA*) and a more expansive alternative energy regime.²²¹ However, because the U.N. has no legal authority to direct the EPA to do anything under the U.S. Clean Air Act, the Petition aimed to invoke broader action from an international community to foster a dialogue about further protecting this area.

In response to the Petition, UNESCO—in conjunction with the International Union for the Conservation of Nature—undertook an elaborate study of the area.²²² The scope of the investigation considered “the potential external threats to the property, including from mining and energy developments in the Canadian Flathead and Elk watersheds, and within the broader Crown of the Continent ecosystem, as well as the effects of climate change.”²²³ This evidenced a departure from the Petition and pronounced an independent assessment of the threats to the ecosystem. The language of the report suggests the importance of considering localized threats to the area—specifically, energy projects—rather than broader effects from climate change. In essence, UNESCO recognized the threats to the area, but pinpointed those threats as local as opposed to larger issues of climate change.

In its analysis, UNESCO identified three discrete threats to the area: the adverse effect of mining and energy developments, the impact of barriers to wildlife corridors, and the general impact of climate change.²²⁴ Of these issues, mining and energy development

²²⁰ *Id.* at 26.

²²¹ *Id.* at 18–19.

²²² PAUL R. DINGWALL AND KISHORE RAO, WATERTON-GLACIER INTERNATIONAL PEACE PARK (CANADA AND USA): REPORT OF THE REACTIVE MONITORING MISSION (2009), available at <http://www.gravel.org/files/WATERTON%20MISSION%20REPORT%20FINAL.pdf> [hereinafter UNESCO REPORT].

²²³ *Id.* at 3.

²²⁴ *Id.* at 5–7. The report listed specific mining operations proposed in the area, with fairly precise calculations for the tonnage estimated from those operations:

There are a number of current proposals that are under discussion and are the source of specific concern. The proposed Lodgepole coal mine producing an

posed the most serious threats to the area.²²⁵ Citing the damage caused by coal in the area, the report concluded that mining operations “would present a serious threat, incompatible with the Outstanding Universal Value of the Waterton-Glacier International Peace Park World Heritage property.”²²⁶ In fact, the report went so far as to say that any mining interest would create “an unacceptable direct impact” on the property.²²⁷

The report then stated the procedure that the parties (the United States and Canada) should undertake in the event any such mining sites were proposed.²²⁸ These steps called for a precautionary approach and demanded a full environmental assessment of potential impacts before mining could proceed. According to the report, if a proposal came forward for any coal development, the parties should petition the International Joint Commission under the Boundary Waters Treaty.²²⁹ As discussed previously, Article IX of the Boundary Waters Treaty requires the IJC to perform an assessment of any threat to the region when petitioned by signatories.²³⁰

estimated 2 million tonnes of coal per year over a 20-year period, would remove a mountain and fill a 6 km section of river valley with an estimated 325 million tonnes of rock waste. The proposed Mist Mountain coalbed methane gas production field, extending into the Flathead from the neighboring Elk River Valley, would result in wholesale landscape change over an area of about 326 km, and the dewatering process involved in gas extraction would fundamentally alter the quantity and quality of groundwater aquifers and rivers.

Id. at 5–6 (citations omitted).

²²⁵ *See id.* at 6–8 (noting the environmental assessments each respective government requires in moving forward with any energy development, the problem of geographic dislocation (in that many proposed developments occur outside the protections of the heritage site, and it is the effect that is felt inside the area), a current moratorium on petroleum and natural gas production, and that “coal exploration and production is excluded from a coal land reserve covering almost half of the watershed”).

²²⁶ *Id.* at 8. The UNESCO report focused on the likely impact upon:

water quality that ranks among the highest anywhere in the world; rich aquatic ecosystems providing breeding and feeding habitats critical for the growth and survival of endangered migratory native salmonids; corridors of natural terrain and vegetation providing key migration routes for important wide-ranging populations of carnivores, ungulates, cats and mustelids” and other similar concerns.

Id.

²²⁷ *Id.*

²²⁸ *See id.* at 8–11.

²²⁹ *Id.*

²³⁰ Boundary Waters Treaty, *supra* note 71.

Furthermore, as previously discussed,²³¹ the IJC has had the opportunity to preside over conflicts involving coal development in the area. Thus, the report reiterated the appropriate compliance process for either party in the event of coal and energy development.

Beyond the lengthy disposition of the direct threat coal development would present to the area, the report summarily addressed barriers to wildlife corridors and climate change.²³² Similarly, the report gave only a cursory explanation of the impact of climate change, nonetheless emphasizing a need to maintain “the parks and the huge area of intact nature in the Crown of the Continent ecosystem [as they] provide the best available environment to allow resilience and adaptation for plants and animals faced with climate-induced challenges to their survival.”²³³ Thus, the substance of the UNESCO panel’s recommendation for protection rested upon the detrimental impact mining would have on the larger area.

The report became an important rallying point for those seeking to stop mining activity. UNESCO’s recommendations for protection of the area from mining added an international element to the local political forces that ultimately would stop the mine and protect the area. According to one scientist who worked in the Flathead, the recommendations of an international body against further coal mining put the British Columbia government in an “untenable position” to continue supporting resource development in the Flathead—despite the lack of any binding legal mechanism.²³⁴

²³¹ Hernandez, *supra* note 77, at 551 & n.38; *see also* UNESCO REPORT, *supra* note 223, at 8 (“The mission team notes that the IJC examined a previous mining proposal in the Cabin and Howell Creeks of the Canadian Flathead, concluding that the potential risk of failure of waste dumps and settling ponds represented an unacceptable risk to the drainage basin. As a consequence of the IJC’s recommendation, this mining proposal was declined.”).

²³² UNESCO REPORT, *supra* note 222, at 6–7. When discussing corridors to wildlife, the report provided a cursory explanation of the danger of development to these corridors, but little in the way of actual solutions. Instead, it cited a need for further investigation and a corresponding conservation plan to ensure free mobility of species throughout the area. *Id.*

²³³ *Id.* at 7.

²³⁴ Jim Mann, *A Mine Fight that has Lasted 36 Years: Science, Policy, Pressure Pay off with New B.C. Mining Ban*, DAILYINTERLAKE.COM (Feb. 21, 2010, 2:00 AM), http://www.dailyinterlake.com/news/local_montana/article_c7a69c08-1ea7-11df-9cb6-001cc4c03286.html.

B. How Subnational Actors Generated the Will to Resolve the Dispute

In the aftermath of the UNESCO report, and because of incessant political pressure from within Montana, government bodies in the United States began to take action. Montana's Governor and congressional delegation weighed in strongly against the proposal.²³⁵ Their approach was a two-pronged attack: Governor Schweitzer directly approached Premier Campbell of British Columbia while U.S. Senators Max Baucus and Jon Tester applied pressure through the State Department to address the issue through the IJC, or at least on a state-to-state level.²³⁶ In the end, it was the efforts of Montana, not the federal government, that gained traction.

In a private letter between the U.S. State Department and British Columbia, the State Department "objected to a proposed open-pit coal mine in Canada near the Montana border, citing the potential for irreversible environmental damage to Glacier National Park, pristine trout streams and the largest natural lake in the West."²³⁷ This federal involvement came at the behest of Senator Baucus, a longtime opponent to development in the Flathead region.²³⁸ However, and as previously noted, the Canadian government wanted Montana and British Columbia to address any issues or conflicts between

²³⁵ See, e.g., Michael Jamison, *Baucus Vows to Fight Planned Canadian Mine*, MISSOULIAN (Sept. 11, 2007, 12:00 AM), http://missoulian.com/news/local/article_32a0cabd-744f-552d-bd96-257bc99222b6.html ("Sen. Max Baucus said BP should expect 'a massive and unpleasant fight from Montana' if the company moves ahead with a proposal to open southwest British Columbia to drilling and energy exploration. The senator also warned that fight 'will end badly' for BP.").

²³⁶ Jim Robbins, *Coal Mine 'Under the Radar' Stirs Cross-Border Feud*, N.Y. TIMES (Mar. 15, 2005), <http://www.nytimes.com/2005/03/15/science/15mine.html>. At this same time, Senators Baucus and Tester had contacted the State Department and were seeking to exert pressure at the federal level. *Id.*; see also Blaine Harden, *U.S. Objects to Proposed Canadian Coal Mine*, WASHINGTON POST (Mar. 9, 2007, 6:50 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/09/AR2007030901443.html>.

²³⁷ Harden, *supra* note 236.

²³⁸ See Press Release, Sen. Max Baucus, *Advocating Investigation Into Canada Mine Plan* (Mar. 13, 2007), available at <http://www.gravel.org/2007/03/13/baucus-wants-investigation-into-canada-mine-plan/> (stating to then Secretary of State Condoleezza Rice, "There is now another proposal on the table for a coal mine in the same area. This represents a renewed threat of degradation and destruction of social, environmental and economic assets that are important to Montana. In the face of this threat, I strongly encourage you to request a hearing by the International Joint Commission on the current mining proposal. It is of the utmost importance to Montana's outdoor heritage, and our nation's environmental legacy, to stop this mine and protect the Flathead River basin.").

themselves without resort to national bodies.²³⁹ Thus, formally invoking the Boundary Waters Treaty or other international agreements at the federal level was out of the question. Instead, protection of the Flathead depended on Montana and British Columbia addressing the issue.

In 2005, the U.S. State Department declined to pursue an IJC referral. The State Department took the position that the fifteen-year-old IJC report on the Cabin Creek mine “still stands” but did nothing to request a new IJC referral.²⁴⁰ Pressure from Montana’s senators yielded a private State Department letter to the Canadian government on February 23, 2007, roughly six years after the Montana delegation requested such action.²⁴¹ While critical of the Cline mine, the State Department did not seek to address the dispute between sovereigns.²⁴²

Efforts at the local level in Montana yielded more immediate and tangible results. Montana’s former Governor, Brian Schweitzer, was well-positioned to lead Montana’s efforts to stop mining. As a charismatic Democratic politician, he was re-elected in 2008 with a very strong mandate that included strong support from conservation groups, in a largely Republican state. He hailed from the town of Whitefish on Glacier’s western border near the Flathead River, and had a strong personal stake in the area. Schweitzer’s strong mandate also gave him credibility with the extractive industries that are important in Montana and he could thus work simultaneously to protect the Flathead from coal mining and promote Montana’s coal resource in other parts of the state.²⁴³

The Governor’s chief legal counsel, Eric Stern, who was actively involved in negotiations with the provincial government, explained that the Governor made protection of the Flathead a high priority within his administration from the time he was elected in 2004.²⁴⁴ In

²³⁹ Michael Jamison, *Canada Wants Negotiations on State Level*, MISSOULIAN (July 7, 2005, 12:00 AM), http://missoulian.com/news/state-and-regional/canada-wants-negotiations-on-state-level/article_68554d30-d818-5d11-8a8d-4a1c67a9bbd2.html (discussing a letter from Charles Shapiro to Governor Brian Schweitzer).

²⁴⁰ Harden, *supra* note 236.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Mike Dennison, *Land Board Approves Otter Creek Coal Lease*, BILLINGS GAZETTE (Mar. 18, 2012, 11:30 AM), http://billingsgazette.com/news/state-and-regional/montana/article_fdde750c-32b3-11df-83df-001cc4c03286.html.

²⁴⁴ For instance, Governor Schweitzer had contacted Premier Campbell as early as 2005 to begin discussions on protecting the Crown region. Letter from Brian Schweitzer,

2005, Canadian officials attended a Flathead Basin Committee meeting to discuss long-term protection of the Crown. Lieutenant Governor Bohlinger spoke of the long history of mutual preservation dating back to the creation of the International Peace Park and urged British Columbia officials to work cooperatively with Montanans, labeling the Flathead as “an irreplaceable loss for all North Americans.”²⁴⁵

Governor Schweitzer worked hard to cultivate a personal relationship with Premier Gordon Campbell and to impress upon him the importance of protecting the area.²⁴⁶ Though the U.S. State Department would not formally petition the IJC on this matter and questioned Montana’s unilateral efforts to negotiate an agreement, the Schweitzer administration researched the matter and found “numerous examples” of Memoranda of Agreement between provincial and state governments.²⁴⁷ Montana began pushing for a Memorandum of Agreement aimed at protecting the Flathead on both sides of the border.

The Canadian government ultimately placed the Cline mine application on hold,²⁴⁸ and Premier Campbell and Governor Schweitzer continued to hold meetings in order to discuss substantive action to protect the North Fork and limit, if not ban, mining in the area.²⁴⁹ A one-sided agreement was never an option. Montana would have to do its part to protect the Flathead south of the border. Such a

Governor of Mont., to the Hon. Gordon Campbell, Premier, Province of B.C. (Jan. 20, 2006) (on file with authors).

²⁴⁵ Speech to the Flathead Basin Commission, *supra* note 122, (on file with authors).

²⁴⁶ Telephone Interview with Eric Stern, Chief Counsel for Governor Schweitzer (Nov. 15, 2011).

²⁴⁷ *Id.*

²⁴⁸ See Patrick Reis, *Planned British Columbia Coal Mine “On Hold” Until After U.N. Appeal*, E&E PUBLISHING (July 2, 2009), <http://www.eenews.net/stories/79909> (“The British Columbia government has put Cline’s application ‘effectively on hold,’ said David Karn, spokesman for the province’s Environmental Assessment Office.”). It is noteworthy that review of the mine proposal would likely become more substantive in 2010 under amendments to the Canadian Environmental Assessment Act, though it is unclear what leverage this created on the Canadian side. See Canadian Environmental Assessment Act, S.C. 1992, c. 37 (Can.) (repealed 2012), available at <http://laws-lois.justice.gc.ca/eng/acts/C-15.2/>.

²⁴⁹ One of the major sticking points was whether any energy project would conduct a full and accurate environmental assessment “to assess potential impacts beyond the immediate vicinity of the mine site,” with draft agreements omitting such a provision. See Jim Mann, *Schweitzer Asks Canadian Feds to Intervene*, DAILY INTERLAKE (Mar. 23, 2007), http://katehunt.com/fbc/cline/news/2007_3_22Governor.html.

promise was far easier for Governor Schweitzer to make, as the state of Montana had no active coal mine leases and owned very little state land in comparison to British Columbia's Crown lands. However, there were significant federal oil and gas leasing issues on the nearby Flathead and Lewis and Clark National Forests, and Montana brought those issues to the table.

Governor Schweitzer made resolution of the Flathead mining issue a high priority in his administration, and persevered with meetings with Premier Campbell. For Schweitzer, it was the development of a personal relationship that helped bring Canada into a general agreement to protect the area.²⁵⁰ Obviously, the political cost of undoing an existing coal lease was potentially high on the Canadian side. As for Montana, there was little downside in the Flathead. However, the parties focused not just on resolving the Cline mine, but on the multitude of other potential oil, gas, and coal mining threats in the Crown on both sides of the divide. These efforts culminated in the execution of a Memorandum of Understanding with far-reaching implications for creating the prospect of sustainable governance not only for the Flathead, but for the entire Crown.

C. Canada's Position Is that Montana and British Columbia Should Address the Issue Among Themselves—a Premise Realized

On February 18, 2010, the Governor of Montana and the Premier of British Columbia (as witnessed by the Chair of the Ktunaxa Nation and a Council Member of the Confederated Salish and Kootenai Tribes) executed the Memorandum of Understanding and Cooperation on Environmental Protection, Climate Action, and Energy between the Province of British Columbia and the State of Montana ("Memorandum").²⁵¹ Aside from the usual platitudes in the prefatory language, the Memorandum is remarkable for a number of reasons.

First, the Memorandum is a subnational agreement; the United States and Canada are not signatories. Moreover, Montana and British Columbia intentionally reached beyond their own authorities to include Native American tribes on both sides of the border as

²⁵⁰ Telephone Interview with Eric Stern, Chief Counsel for Governor Schweitzer (Nov. 11, 2011).

²⁵¹ Memorandum of Understanding and Cooperation on Env'tl. Prot., Climate Action and Energy between the Province of B.C. and the State of Mont. (Feb. 18, 2010) [hereinafter Memorandum], available at <http://www.gov.bc.ca/igrs/attachments/en/MTEnvCoop.pdf>.

partners. Though the focus was initially on the Flathead, the Memorandum established a promise of mutual action towards protecting the entire ecosystem based on its “high water quality and aquatic biodiversity, and threatened and endangered species,” and based on the special wildlife corridor “that is home to the highest density of large and mid-size carnivores and the highest diversity of vascular plant species in the United States.”²⁵² The signatories also acknowledged the importance of the UNESCO World Heritage designation. The Memorandum further acknowledged the growing threats to this pristine wilderness, notably balancing climate change against employment concerns (and doing so by focusing on job creation through “renewable and low carbon energy” industries).²⁵³

The Memorandum established a framework for action by the signatories. It listed five major areas of collaboration for Montana and British Columbia: (A) remove mining, oil and gas, and coal development as permissible land uses in the Flathead River Basin; (B) cooperate on fish and wildlife management; (C) collaborate on environmental assessment of any project of cross-border significance that has potential to degrade land or water resources; (D) share information proactively; and (E) collaborate in responding to emergencies.²⁵⁴

Most notable is provision (A), which calls for the removal of any mining, oil and gas, and coal development in the area, “subject to agreement on the equitable disposition of the financial implications of this action for the Province of British Columbia *respecting existing mining and coal tenure holders*.”²⁵⁵ Thus, while British Columbia was able to include a negotiating provision safeguarding the financial interests of local companies in the Cline mine, British Columbia committed to ending the mining leases. What is equally notable is that the agreement did not attempt to limit logging, did not call for the creation of additional wilderness or larger parks, and did not impose limits on recreational development. Indeed, the British Columbia government touted the successful integration of logging, recreation, and preservation with the Crown’s ecosystem as proof that human

²⁵² *Id.* at 1. The Memorandum also recognizes the reliance of local Native American populations on the resources of the Flathead River Basin. *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 1–2.

²⁵⁵ *Id.* (emphasis added).

activities (aside from carbon resource development) are part of the sustainability equation.²⁵⁶

The Memorandum also furthers the principle of cooperative cross-border impact assessment by inviting collaborative efforts involving all of the stakeholders. It also takes a precautionary approach as well, by encouraging “proactive[]” planning and joint response to transboundary environmental emergencies.²⁵⁷ While the parties did not cede their jurisdiction within their respective borders, the Memorandum as a whole recognizes that the ecological reality of sustainable management must transcend political boundaries. These are important emerging customary norms of international environmental law.

The Memorandum is just that: a symbolic, nonbinding statement of intent. It is soft law. Politicians on both sides of the border could have claimed victory and walked away from the agreement without effectuating substantive changes on the ground. However, the Memorandum became a spur to action that resulted in substantive environmental protection far beyond what could have been achieved through hard law mechanisms.

D. Implementation of the MOU

Subsequent actions on both sides of the border demonstrate the power of this subnational, soft law agreement. The first task was to buy out the Cline mine tenures. Governor Schweitzer worked hard to secure funding for the crucial buy-out of the Canadian leases. However, the U.S. federal government failed to become an active partner, underscoring the difficulty in getting the State to act in international environmental disputes. The Governor publicly lamented that “our federal partners have let us down” when Congress was not willing to provide the buy-out funds, once again demonstrating the unwillingness of the national governments to help resolve the crisis.²⁵⁸

²⁵⁶ See, e.g., Press release, Office of the Premier, B.C., Mont. And Partners Unite to Sustain Flathead (Feb. 15, 2011), available at http://www2.news.gov.bc.ca/news_releases_2009-2013/2011PREM0011-000138.htm (touting the remaining multiple uses of the area while lauding the efforts on both sides of the border to eliminate coal, oil, and gas development).

²⁵⁷ Memorandum, *supra* note 251, § I(C)–(E).

²⁵⁸ Matt Gouras, *Schweitzer Says Federal Government ‘Let Us Down’ on Protecting North Fork Flathead*, MISSOULIAN (June 4, 2010, 6:00 AM), http://missoulian.com/news/local/article_c8070e2e-6f44-11df-8726-001cc4c002e0.html.

However, due to strong local interest in protecting the area, politicians and NGOs on both sides of the border worked to secure private funding. In February 2011, The Nature Conservancy and The Nature Conservancy Canada signed an agreement with the mining company to purchase mining rights for approximately \$9.4 million, which constituted the company's sunk costs.²⁵⁹ The purchase was the result of substantial behind-the-scenes work of politicians on both sides of the border—notably the senators of Montana who took it upon themselves to launch a public relations campaign for the protection of the area—that resulted in the protection of 400,000 acres from mining.²⁶⁰ The buy-out marked a critical step in on-the-ground implementation of the Memorandum and represented substantive protection for this jewel of the Crown after three decades of controversy.

The protection of the Flathead continues to unfold on both sides of the border. Montana's senators secured the voluntary release of over 200,000 acres of federal oil and gas leases in the Flathead drainage.²⁶¹ The North Fork Watershed Protection Act was introduced in the Senate in 2010, and hearings were held in May 2011.²⁶² The legislation, which was not presented to the full Congress for a vote, would have withdrawn federal lands from further leasing and hard rock mining. These efforts, coming on the heels of the signing of the Memorandum, show how the subnational actors provided the political will for national legislators to begin to act.

Long-term protection of the Flathead received a significant boost in November 2011 when the British Columbia Legislative Assembly approved legislation to protect 400,000 acres from further energy development. This legislation was introduced in the British Columbia

²⁵⁹ Kirk Johnson, *Montana: \$9.4 Million to Protect Flathead River*, N.Y. TIMES (Feb. 15, 2011), http://www.nytimes.com/2011/02/16/science/earth/16brfs-94MILLIONTOP_BRF.html.

²⁶⁰ Rob Chaney, *Coal Mining Again a Concern in Canadian Flathead*, MISSOULIAN (Nov. 28, 2012), http://missoulian.com/news/local/coal-mining-again-a-concern-in-canadian-flathead/article_101be164-390d-11e2-bcb6-001a4bcf887a.html.

²⁶¹ Press Release, Sen. Jon Tester, Announcement of Additional Lease Retirements Near North Fork of Flathead River (Feb. 17, 2011), available at http://www.testersenate.gov/?p=press_release&id=1923; see also Press Release, Sen. Max Baucus, Baucus, Tester Announce Formal Commitment from B.C. to Protect the North Fork Through New Legislation, (Feb. 15, 2011), available at http://www.baucus.senate.gov/?p=press_release&id=345.

²⁶² North Fork Watershed Protection Act of 2010, S. 3075, 111th Cong. (2011) (for more information, see <http://www.govtrack.us/congress/bills/111/s3075#overview>).

Legislative Assembly to “preserve the environmental values in the Flathead watershed.”²⁶³ The purpose of this legislation, known as Bill 2, was to affirm the commitments announced in the Memorandum.²⁶⁴ The Ministry of Forests, Lands, and Natural Resource Operations explained that this legislation would address specific objectives, which include: (1) establishing coal and mineral reserves; (2) prohibiting Crown land dispositions for mining purposes; (3) prohibiting issuance of Mines Act permits; (4) prohibiting issuance of Oil and Gas Activities Act permits for oil and gas exploration and development; and (5) prohibiting disposition of Crown reserves under the Petroleum and Natural Gas Act.²⁶⁵

The bill passed the legislative assembly on November 2, 2011,²⁶⁶ and received assent from the Premier of British Columbia, Christy Clark, on November 14, 2011,²⁶⁷ thus becoming provincial law. Taking the law as a whole, it eliminates all mining activity beyond the limited exception for specific quarry operations, it closes all oil and gas activity upon the land, and it protects the land as a coal land reserve. Thus, the law achieves the aim of the Memorandum and codifies what could be seen before as, at best, a limited promise between neighbors. Passage of the law is a positive step in eliminating privatization of the Crown on the Canadian side, and reflects the growing strength of the larger movement within Canada to provide permanent protection for the entire Crown.

Montana continues to fulfill its responsibilities under the Memorandum. Senators Baucus and Tester introduced the North Fork Watershed Protection Act of 2013 on February 7, 2013.²⁶⁸ The proposed act would withdraw federal land or interest both presently owned or acquired in the future from mining, mineral leasing, and geothermal leasing.²⁶⁹ The State of Montana has no direct control

²⁶³ *Legislation Introduced to Protect Flathead Watershed*, BRITISH COLUMBIA: NEWSROOM (Oct. 5, 2011), <http://www.newsroom.gov.bc.ca/2011/10/legislation-introduced-to-protect-flathead-watershed.html>.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Votes and Proceedings of the Legislative Assembly of British Columbia, Nov. 4, 2011, available at <http://www.leg.bc.ca/39th4th/votes/v111102.htm> (“Bill (No. 2) intituled *Flathead Watershed Area Conservation Act* was committed, reported complete with amendment, and by leave, read a third time and passed.”).

²⁶⁷ Votes and Proceedings of the Legislative Assembly of British Columbia, Nov. 14, 2011, available at <http://www.leg.bc.ca/39th4th/votes/v111114.htm>.

²⁶⁸ North Fork Watershed Protection Act of 2013, S. 255, 113th Cong. (2013).

²⁶⁹ *Id.* §§ 2, 3.

over these lands, requiring congressional intervention. The act would cover the geographic area of the North Fork Federal Lands, as set out in the accompanying map.²⁷⁰ The bill passed the Senate Committee on Energy and Natural Resources and continued on to the Senate on June 18, 2013, but has not come up for a vote as of the writing of this article.²⁷¹ And while Senator Baucus has announced his plans to retire from the Senate, enacting meaningful legislation that will protect the North Fork remains a priority for his remaining months in office.²⁷² As a testament to the unifying impact the region can have, Republican Representative Steve Daines of Montana has announced his support of the bill and is lobbying within the House for its passage.²⁷³ This remarkable bi-partisan preservation effort was never seriously considered prior to the Memorandum, which, again, underscores the power of this soft law subnational agreement to spur action.

VI

WHAT WE CAN LEARN FROM THE FLATHEAD: PUTTING THIS CASE STUDY IN CONTEXT

The story of the Flathead is remarkable for several reasons. It represents a success story in an era where transboundary environmental disputes are difficult to satisfactorily resolve.²⁷⁴ The pressure to develop carbon resources is difficult to thwart on both sides of the border—witness the already-renewed call for drilling in the Gulf of Mexico, even as the cleanup from the BP spill continues, and the seemingly inexorable push to develop the Alberta Tar Sands.

²⁷⁰ Bureau of Land Management, Montana State Office, *North Fork Federal Lands Withdrawal Area*, MONT.: MAX BAUCUS, U.S. SENATOR (June 9, 2010), http://www.baucus.senate.gov/01312011_North_Fork_Federal_Lands-Withdrawal_Area_June_9_2010.pdf.

²⁷¹ It should be noted that this bill is the third iteration—or attempt to enact—federal legislation protecting this area. Baucus introduced the first bill on March 4, 2010; however, it died in committee. *See* North Fork Watershed Protection Act of 2010, S. 3075, 111th Cong. (2010) (for more information, see <http://www.govtrack.us/congress/bills/111/s3075#overview>). Baucus introduced the bill again on January 31, 2011, but it was not enacted. *See* North Fork Watershed Protection Act of 2011, S. 233, 112th Cong. (2011) (for more information, see <http://www.govtrack.us/congress/bills/112/s233#overview>).

²⁷² Douglas H. Chadwick, *Old Man and the River: Senator's Fish for Montana Waterway*, NAT'L GEOGRAPHIC DAILY NEWS (Sept. 1, 2013), <http://news.nationalgeographic.com/news/2013/09/130901-north-fork-montana-flathead-baucus-river-wilder-ness-mining-glacier-park/>.

²⁷³ *See id.*

²⁷⁴ *See, e.g.,* Astrid Boos-Hersberger, *Transboundary Water Pollution and State Responsibility: The Sandoz Spill*, 4 ANN. SURV. INT'L & COMP. L. 103, 104 (1997).

Yet in the Flathead, coal, oil, and gas will remain in the ground on both sides of the border. Such a result is rare. More importantly, a potentially thorny transboundary pollution problem was avoided—it was stopped before it had the chance to start. International governance of an ecologically critical area has been furthered. What lessons can be learned from the Flathead dispute, and where does it fit in the context of international environmental law? Those questions are addressed below.

A. The Limited Role of International Law and State Actors

Substantive international treaties and accords did not resolve the North Fork dispute. The environmental dispute resolution provisions in NAFTA, the NAAEC, and the CEC offered no role in preventing pollution before it occurred. While the UNESCO Convention and the Boundary Waters Treaty did generate valuable information that was used by the public and politicians alike, the role of international law is subservient to the role that subnational actors and soft law played in actually solving the Flathead dispute. International law between national signatories standing alone proved inadequate.

The weaknesses of the UNESCO Convention are obvious in terms of substantive law, as the United Nations could never compel the United States or Canada to act. Indeed, that is not the purpose of the Convention, nor how it operates. IJC jurisdiction under the Boundary Waters Treaty required affirmative steps from both signatories. This assumed that the United States would lodge a complaint due to the downstream nature of impacts associated with the mining operations, and Canada would then acquiesce to jurisdiction.²⁷⁵ But this U.S. complaint never materialized, evidencing the reluctance of the two national governments to assert themselves in an international environmental dispute (and again, Canada's potential refusal to

²⁷⁵ Hernandez, *supra* note 77, at 563–64. Hernandez points out that “[u]nder this provision of the Treaty, the United States could unilaterally refer the matter to the IJC. However, despite recognizing the need to refer the matter to the IJC, the U.S. government is unwilling to do so without the assent of the Canadian government.” *Id.* at 563 (citing Letter from Charles S. Shapiro, Acting Assistant Sec’y of State, to Brian Schweitzer, Governor of Mont. (June 6, 2005)). The letter from Shapiro to Governor Schweitzer states that though “[t]he U.S. Government has . . . stated repeatedly that it would welcome discussions with Canada concerning an IJC reference on coalfield development in the Flathead River basin[,] . . . Canada’s position is that Montana and British Columbia should address the issue among themselves.” Letter from Charles S. Shapiro, Acting Assistant Sec’y of State, to Brian Schweitzer, Governor of Mont. (June 6, 2005) (on file with authors); *see also* Jamison, *supra* note 239.

comply with a referral request to the IJC would leave the IJC without any authority to review the matter). Therefore, the Boundary Waters Treaty, standing alone, proved an ineffective means for preserving the Flathead River basin in this instance.²⁷⁶

While the Boundary Waters Treaty was designed to resolve transboundary pollution issues like the North Fork, the signatories—the national governments—did not utilize them. Instead, the United States and Canada showcased reluctance to address the transboundary environmental issues affecting the Flathead River. Far from an outlier, this approach, or non-approach, is becoming the norm. National governments have shown an increasing avoidance towards addressing these issues, thereby shifting the responsibility to other impacted or interested parties.²⁷⁷ Examples of the diminished role of states in resolving environmental conflicts include the Devils Lake dispute in North Dakota;²⁷⁸ a trail smelter case between the State of Washington, an Indian tribe, and a Canadian mining corporation;²⁷⁹ and the “Softwood Lumber impasse.”²⁸⁰ As has been noted, while “relying on States to exercise national sovereignty to address the difficult problems [] offers attractions . . . [,] their effective authority in other areas [besides national security] is visibly diminished or seriously challenged.”²⁸¹ Successful state-to-state resolution of transboundary pollution under international law such as the *Trail Smelter* arbitration, or other heralded success stories such as the *Lake*

²⁷⁶ The Treaty has proven ineffective in another ongoing transboundary pollution dispute: Devils Lake in North Dakota. See generally Roland Paris, *The Devils Lake Dispute Between Canada and the United States: Lessons for Canadian Government Officials*, (Ctr. for Int’l Policy Studies, Feb. 2008) (on file with authors). The United States has refused to accept IJC jurisdiction in what would certainly be a loss for the nation because of the likelihood of polluted waters flowing from the United States into Canada. *Id.* The lack of resolution has been frustrating for both sides.

²⁷⁷ Shi-Ling Hsu & Austen L. Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 VA. J. INT’L L. 1, 14–24 (2007).

²⁷⁸ *Id.* at 15.

²⁷⁹ See *id.* at 15–18 (noting that “the countries did not attempt to head off private litigation through submission to the IJC, even though the IJC had successfully adjudicated a transboundary controversy involving the very same smelter seventy years earlier”) (citations omitted).

²⁸⁰ *Id.* at 18.

²⁸¹ EDITH BROWN WEISS, ASIAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL LAW IN A KALEIDOSCOPIC WORLD 4 (2009). Weiss goes on to explain that “[s]tates exercise authority over their territory and the people within their territory, and over other areas designated as being within their jurisdiction. They have a unique interest in ensuring the well-being of the people within their own State and the integrity of their territory.” *Id.*

Lanoux and *Corfu Channel* cases are less likely to provide viable models.

Of particular note in this case is the reluctance of the national bodies to send the matter to the IJC, given their history of cooperation addressing transboundary pollution. From the Trail Smelter Arbitration²⁸² to the 1988 resolution of mining issues in the Flathead region through reference to the IJC, the United States and Canada national governments have in the past taken charge of the issues in an effort to secure cross-border agreements.²⁸³ But here, this resolve to stay on the sidelines aligns with the above noted examples of State inaction.

Indeed the failure of the national governments to address the issue aligns with what Professor Thomas Merrill finds as a broader failure within the structure of international environmental law to solve transboundary pollution issues.²⁸⁴ His premise that “the world’s legal systems have generally failed in their efforts to find a solution to transboundary pollution” stems from what he finds as “structural” defects in the way state actors approach transboundary pollution under international law.²⁸⁵ Chief among these structural problems is the post-*Trail Smelter* norm of near strict liability on the country hosting the pollution. Why should the host country enter into or enforce an agreement where it stands to unilaterally lose?²⁸⁶ Enforcement of the Boundary Waters Treaty by simply imposing strict liability on Canada in the North Fork dispute would be a victory

²⁸² Trail Smelter Arbitration, *supra* note 86.

²⁸³ INT’L JOINT COMM’N, *supra* note 174. The IJC introduces the issue it must address and the mechanism by which the issue arrived in the first pages of the report:

In parallel letters from the Governments of the United States and Canada in December 1984 and February 1985 respectively, the International Joint Commission was requested to examine and report on the water quality and quantity of the Flathead River, with respect to the transboundary water quality and quantity implications of the proposed coal mine on Cabin Creek, a tributary of the Flathead River.

Id. at 3.

²⁸⁴ Merrill, *supra* note 62, at 934 (“In both international and domestic law, therefore, one sees a failure to develop an effective central regime for regulating transboundary pollution. Case-by-case approaches based on customary international law or American common law have failed to address the problem in a sustained fashion, and as a consequence no specific legal norms have been generated. Enacted law, whether bi- or multilateral international treaties or federal statutes, has also proven to be largely ineffectual.”).

²⁸⁵ *Id.* at 1017.

²⁸⁶ Indeed, Professors Sax and Keiter labeled the Cabin Creek IJC referral a “complete victory” for the United States. *See* Sax & Keiter II, *supra* note 164, at 295.

for the United States and a loss for Canada. That reality, coupled with the enormous complexity of relationships between the two countries on other issues, explains why the national governments did not intervene.

In citing the failure of the Boundary Waters Treaty to resolve this dispute, we don't suggest that the Treaty is not important. Certainly the study resulting from the Cabin Creek referral had enduring value. Both countries use the Treaty to acknowledge the importance of proactively managing the shared water resources—as evidence, witness the ongoing efforts to protect the Great Lakes.

*B. Creating New Legal Architecture: The Memorandum of
Understanding Between Subnational Actors Embracing
Transboundary Management*

Left to their own devices, British Columbia and Montana created their own solution. Neither of these subnational actors had the authority to craft a binding international agreement. At the same time nothing prevented them from memorializing a solution. The resulting Memorandum emanated from a nonbinding, soft law agreement bargained for between the subnational actors most affected by the dispute. The difficulty in the task was to draw in partners from both sides of the border and create an agreement that would be mutually respected and enacted.²⁸⁷ Furthermore, to the extent that these parties were negotiating on an international stage but were not the traditional participants in such a negotiation,²⁸⁸ the form and implementation of any agreement would have unique and novel consequences. This result is apparent from the individual steps each signatory undertook to achieve the purpose of the Memorandum. But the Memorandum cannot be viewed in isolation, and must be considered against the background of recognized norms of international environmental law. Against this background of established principles and approaches, the

²⁸⁷ WEISS, *supra* note 281, at 9 (“The challenge for all peoples is to ensure that international law reflects shared values that bind people together and that it provides processes that all regard as fair and as ensuring accountability by States, nonstate actors, and individuals.”).

²⁸⁸ See Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT’L L. 798, 798 (2002) (explaining how the Peace of Westphalia more than 350 years ago led the development of international law based upon treaties mutually agreed upon by co-equal sovereigns). See also Hall, *supra* note 89, at 135 (explaining the citizens and NGOs “are not a party to traditional formal international treaties and agreements under the Westphalian tradition”).

parties could negotiate an agreement that ensured mutual reciprocity while securing the threatened area.²⁸⁹

Moreover, freed from the confines of a particular treaty, the parties were able to negotiate a more wide-ranging and inclusive agreement. Tribal governments on both sides of the border with a large stake in the Flathead were co-equal signatories. While the Memorandum is premised on halting coal mining in the Flathead, its ultimate impact extended to areas far beyond, when U.S. oil and gas leases were retired on the other side of the Continental Divide. Thus, the Memorandum could move the parties towards transboundary ecosystem management, though no law mandated it. Moreover, the parties included climate change concerns as a significant part of the agreement, ranging far beyond what would have been the focus of a more traditional dispute under international law.

What remains to be explained is why British Columbia would agree to halt its coal mine, foregoing jobs and revenue during a recession, all to the benefit of Montanans. The answer to that question requires delving into British Columbia's motivations, and understanding what Montana promised to give up in the future. After all, the Memorandum represents a mutually bargained-for agreement, crafted by experienced politicians who would be accountable to their constituents. Moreover, the Memorandum was developed without the threat of litigation or sanctions.

To label Montana the “winner” and British Columbia the “loser” is wrong. While Montana did gain the promise to halt coal development across the border and prevent transboundary pollution of one of its prized resources, it gave up substantial development opportunities in other parts of the Crown. The State surrendered resource development opportunities on 17,000 acres of state land in the North Fork.²⁹⁰ Montana convinced Congress to put additional acres of federal lands

²⁸⁹ In essence, the parties evidenced traditional aspects of international agreement and decision-making in reaching their accord. *See, e.g.*, Jeffrey S. Dornbos, *All (Water) Politics is Local: A Proposal for Resolving Transboundary Water Disputes*, 22 *FORDHAM ENVTL. L. REV.* 1, 8 (2010) (discussing “reputation, reciprocal non-compliance, and retaliation” in the context of water disputes and how these factors play into binding agreements and decision making).

²⁹⁰ *See* Dan Testa, *In North Fork Protection, Some See a Double Standard*, *FLATHEAD BEACON* (Mar. 31, 2010), http://www.flatheadbeacon.com/articles/article/in_north_fork_protection_some_see_a_double_standard/16894. The Montana Board of Land Commissioners, which oversees development of land owned by the State of Montana, voted to not lease any of the state lands in the North Fork drainage for carbon resource development on March 18, 2010. *Id.* Perhaps ironically, at the same meeting, the Land Board voted to lease 570 million tons of coal on state land in southeastern Montana. *Id.*

off limits to coal, oil, and gas. The loss of these development opportunities cost Montana future jobs and tax revenue similar to what British Columbia experienced when it cancelled the North Fork leases.

British Columbia's motivations for giving up coal leases can also be understood in the context of the province's efforts to foster a greener image. British Columbia showcased itself to the world by hosting the 2010 Winter Olympics. The province invested hundreds of millions of dollars to insure the Games would be successful, with the stated goal of increasing tourism.²⁹¹ In the years leading up to the Olympics, British Columbia cultivated its green image in a number of ways, including enacting a remarkable carbon tax in spite of Canada's national about-face on climate change.²⁹² Underlying British Columbia's desire for a green image is the considerable economic engine sparked by the province's tourism and recreation industries. British Columbia's promotion of a green image and international destination for eco-tourism would not be served by a major international dispute over open pit coal mining in a pristine area, even if the Flathead itself is not a major tourist destination. Thus, British Columbia had ample motivation to see positive results from canceling plans for one relatively small coal mine.²⁹³

Moreover, the sacrifices that both governments made in the Memorandum did not require surrendering mining opportunities in other places. British Columbia has significant coal, CBM, and other minerals elsewhere in the province. Coal is British Columbia's top export, and the province has numerous active mines that are unaffected by the Memorandum.²⁹⁴ The British Columbia Ministry of

²⁹¹ B.C. OLYMPIC AND PARALYMPIC WINTER GAMES SECRETARIAT, BRITISH COLUMBIA'S INVESTMENT IN THE 2010 OLYMPIC AND PARALYMPIC WINTER GAMES AND RELATED ACTIVITIES (2010) (on file with authors).

²⁹² See generally David G. Duff, *Carbon Taxation in British Columbia*, 10 VT. J. ENVTL. L. 87 (2008) (discussing the approach taken by British Columbia in instituting a carbon tax).

²⁹³ See generally Soucek, *supra* note 61 (providing a wealth of information drawn from media sources and government statements that help explain British Columbia's motivation to cultivate its green image as it entered the world stage as host of the 2010 Winter Olympics).

²⁹⁴ British Columbia has two major coal export terminals, some of the largest on the West Coast. Ana Komnenic, *India Signs 'Cooperation Agreement' with British Columbia Over Coal Exports*, MINING.COM (July 29, 2013), <http://www.mining.com/india-signs-cooperation-agreement-with-british-columbia-over-coal-exports-47914/>. The province continues to develop its coal resources and seeks to become a key player in the international coal export market. *Id.*

Energy and Mines still touts CBM as a “significant” source of future jobs and revenue.²⁹⁵ British Columbia has plenty of other coal resources outside of the North Fork. Montana, too, is aggressively pursuing coal development in the Powder River Basin, far removed from the North Fork. Montana has some of the largest coal reserves in the world.²⁹⁶ Likewise, Montana’s oil and gas developments in other parts of the state have also prospered.²⁹⁷

The Memorandum can be understood as the type of Coasian bargain touted as a model for solving transboundary pollution problems. Here, two actors of relatively equal strength were unconstrained by hard international law. Professor Merrill makes a strong case for the general failure of modern international environmental law to solve transboundary pollution.²⁹⁸ He argues for application of a “Golden Rule” approach that allows the parties to negotiate a solution without the threat of absolute strict liability for the host country based on the mutual self-interests of the parties. Here the mutual benefits to both parties transcended the mere halting of one mine in one drainage. Rather, the Memorandum allowed both parties to promote and expand their image as recreation paradises and showcase the incredible environmental resources of the Crown. The Memorandum allowed the parties to showcase a “made in Montana/B.C.” agreement that embodied (but did not have to pay fealty to) important international environmental law principles. Citizens and politicians on both sides of the border could point with pride to a significant international, ecosystem-based achievement.

²⁹⁵ Ministry of Energy & Mines, *Coalbed Methane in British Columbia*, BRITISH COLUMBIA, <http://www.em.gov.bc.ca/Mining/Geoscience/Coal/CoalBC/CBM/Pages/CBMBrochure.aspx#what%20is%20the%20current%20level> (last visited Jan. 7, 2014).

²⁹⁶ Montana has leased the Otter Creek tracts to Arch Coal to develop one of the largest coal mines in North America. *See N. Plains Res. Council v. State Bd. of Land Comm’rs*, 288 P.3d 169 (Mont. 2012). Ironically, the state successfully fought a lawsuit to require environmental studies of the impacts of the leasing—an abrupt about-face from its demand that British Columbia conduct up-front environmental analyses. *See id.* Montana successfully argued that it could conduct an objective environmental review after receiving an 86 million dollar bonus bid and the company investing millions in finalizing mining studies. *Id.*

²⁹⁷ In the 2009 State of the State Address, Governor Brian Schweitzer stressed the importance of the energy sector to the state of Montana. Brian Schweitzer, Governor of Montana, State of the State Address (Jan. 28, 2009), *available at* <http://www.pewstates.org/projects/stateline/headlines/montana-state-of-the-state-address-2009-85899394574>. From 2005–2009, Montana’s oil production increased by thirty-eight percent and gas production rose thirty-four percent. *Id.*

²⁹⁸ *See generally* Merrill, *supra* note 62.

The Memorandum is a fair bargain and thus it is easy to see why both sides were willing to quickly implement it.

C. The Importance of Soft Law—Making Emerging Norms of International Environmental Law Real

In Part II, we identified several emerging norms of international environmental law: (1) the duty to minimize or eliminate transboundary pollution; (2) intergenerational equity and the precautionary principle; (3) the importance of environmental impact assessment as a means to assist with a precautionary approach; (4) the public trust doctrine; (5) the principle of subsidiarity, resolving disputes at the local rather than state level; and (6) transboundary ecosystem management.²⁹⁹ These soft law principles clearly shaped and influenced the Memorandum. Though none could have been enforced in a tribunal, they operated as important, mutually-understood background principles that were memorialized in the Memorandum, which in turn furthers their acceptance as legitimate governing principles.

Canada could hardly argue that it did not owe a duty to refrain from creating transboundary pollution by approving a mine that would pollute U.S. waters. The 1985 IJC Report on the Cabin Creek mine in the North Fork, based on both countries' joint referral, embraced the principle that the host country has an obligation to prevent or minimize transboundary pollution.³⁰⁰ That obligation is embodied in the Boundary Waters Treaty and the *Trail Smelter* decision. Canada itself has invoked the same premise when it seeks to prevent water diversions from the Missouri River watershed that flow into Canada because of fears of pollution from the Missouri reaching Canadian waters.³⁰¹ Thus, both parties could agree to halt potential transboundary pollution by eliminating the mining leases.

²⁹⁹ See *supra* Part II.

³⁰⁰ INT'L JOINT COMM'N, *supra* note 174, at 8 ("Waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."). The IJC further explained that the issue was not whether the pollution itself crossed the border, but rather whether the pollution affected a transboundary fishery resource. *Id.* The Commission's view involves a broad application of the duty.

³⁰¹ See *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37 (D.D.C. 2010) (granting an injunction against diverting water from the Missouri River Basin across the Hudson Bay Divide to Minot, North Dakota, where it would flow north into Canada). The injunction was modified in March 2013, but the environmental review is not yet complete.

The importance of a precautionary approach through impact assessment is also evident. Part I, sections C and D of the Memorandum provide mechanisms to help ensure that future development would be addressed through impact assessment. This achievement is noteworthy given Canada's willingness to eschew such an assessment for the original mining leases and the inability of the United States to compel a full environmental impact assessment across its borders under existing treaties or conventions. The parties agreed to proactively share impact assessment information between their resource agencies. Recognizing the importance of intergenerational equity, the precatory language at the beginning of the Memorandum addresses what the parties term as their "obligation" to ensure the "protection, conservation and enhancement of our shared environment for the benefit of current and future generations."³⁰² In the same vein, the governments acknowledge their trusteeship duties over the natural resources of the Crown of the Continent, recognizing that this "unique" area "deserves special protection."³⁰³

The Memorandum is also a strong reflection of the norm of ecosystem management. It promotes the holistic management of the Crown, and furthers ecosystem management as a norm of transboundary environmental management between the two nations. The Memorandum's introductory language recognizes the transboundary nature of the area's water and wildlife. The cooperative impact assessment process recognizes that transboundary resources cannot be effectively managed as isolated political units. While not stated as a principle in the Memorandum, a desire to preserve the greater ecosystem of the Crown—not just solve the immediate problem in the North Fork—explains why the United States was willing to protect tens of thousands of acres of land from further oil drilling east of the Continental Divide, far removed from the Flathead. The Memorandum recognizes the need to involve all of the land managers from a multitude of state, federal, and tribal agencies in future transboundary management issues, not just the specific agencies involved in the North Fork dispute.³⁰⁴

and the diversion is not operational. *Gov't of the Province of Manitoba v. Salazar*, 926 F. Supp. 2d 189 (D.D.C. 2013).

³⁰² Memorandum, *supra* note 251, at 1.

³⁰³ *Id.*

³⁰⁴ *Id.* § I(B)–(D).

Finally, the principle of subsidiarity should be recognized as an important catalyst for the Memorandum. The State of Montana and Province of British Columbia are closest to the problem and have the most to gain from acting. The Flathead River is not likely a conversational topic in Ottawa or Washington, D.C., but it is a big deal in Montana and southeastern British Columbia, especially as part of the Crown. The inclusion of First Nation governments with an even larger (by many centuries) interest in the Flathead further underscores the ability of local governments to solve their environmental problems by working broadly at the local level. In addition, local NGOs with a direct stake in the outcome, such as the local chapter of the National Parks and Conservation Association, the Nature Conservancy of Canada, Sierra Club and The Nature Conservancy (United States), are the true unsung heroes of the Memorandum.³⁰⁵

CONCLUSION

The Memorandum represents a huge step in transboundary environmental cooperation between the United States and Canada. The Memorandum, crafted locally to solve a single dispute, has led to significant on-the-ground protection on both sides of the international border that extend far beyond just resolving the dispute over coal mining in a single river drainage. Whether the approach taken in the Crown can bear fruit in other transboundary pollution disputes remains to be seen. Against the backdrop of international environmental law principles, subnational actors bargained for a nonbinding agreement that they had the will to implement. The Crown is more broadly protected than ever before and the protections are permanent. International ecosystem management has received a huge boost. The Memorandum furthers a number of important principles of international environmental law. Moreover, the positive

³⁰⁵ An in-depth look at the decade-long efforts of NGOs on both sides of the border is beyond the scope of this paper. NGOs played a critical role, right up to securing the nine million dollars by The Nature Conservancy and the Nature Conservancy of Canada to buy out the coal tenures. These authors are personally familiar with the tireless efforts of the Montana office of the National Parks and Conservation Association, both for its public relations promoting the importance of the Crown and for lobbying state and national politicians to protect the area. On the Canadian side, in addition to pushing for the withdrawal of the Flathead licenses, environmentalists from British Columbia successfully secured the creation of the Akamina-Kishinena in 1986 as an important link in protecting the Crown, even while the British Columbia government was leasing nearby lands for development.

results were accomplished in a relatively modest time frame: a few years instead of the decades it took to resolve the *Trail Smelter* or *Lake Lanoux* disputes. Montana and British Columbia have set the stage for a new chapter of international law and crafted a new device for the protection of natural resources and environmental regions which span the borders.