

MOUNTAINTOP REMOVAL AT THE CROWN OF THE CONTINENT: INTERNATIONAL LAW AND ENERGY DEVELOPMENT IN THE TRANSBOUNDARY FLATHEAD RIVER BASIN

INTRODUCTION

Flowing from its headwaters in southwestern British Columbia, Canada (B.C.), into northwestern Montana in the United States, the North Fork of the Flathead River (Flathead River) is the central artery of a remarkable transboundary watershed.¹ This remote watershed is rich in biodiversity, with little human presence.² Feeding Montana's Flathead River to the south, the Canadian portion of the Flathead watershed (Canadian Flathead) is also rich in mineral resources, including coal, coalbed methane, and gold.³ An ongoing conflict between B.C. and Montana over mineral development in the Canadian Flathead⁴ has recently come to the fore after Cline Mining Corporation (Cline), a Canadian company, "opened a pre-application" process for an open-pit coal mine at Foisey Creek, a headwater tributary of the Canadian Flathead River.⁵

This Note considers whether specific international treaties or the obligations of customary international law could be effective means of protecting Montana's environmental interests from the threat of Cline's proposed coal-mining operation. Part I of this Note presents a brief sketch of the region and the relevant background of the current dispute. Part II analyzes the potential effectiveness of the North American Agreement on Environmental Cooperation⁶ and the Boundary Waters Treaty in the dispute.⁷

1. INT'L JOINT COMM'N, IMPACTS OF A PROPOSED COAL MINE IN THE FLATHEAD RIVER BASIN 5-6 (1988) [hereinafter IJC, PROPOSED MINE IMPACTS].

2. Jim Mann, *Canada's Secret Valley*, DAILY INTER LAKE (Kalispell, Mont.), July 2, 2006, available at <http://www.flathead.ca/news/59>.

3. See Joseph L. Sax & Robert B. Keiter, *The Realities of Regional Resource Management: Glacier National Park and Its Neighbors Revisited*, 33 ECOLOGY L.Q. 233, 286 (2006) (noting threats to Glacier National Park from "two new coal mines, coal bed methane exploration, and a possible gold mine" in the Canadian Flathead region).

4. B.C. interests have made concerted efforts to mine coal in the Canadian Flathead since the 1960s. Dino Ross, Comment, *International Management of the Flathead River Basin*, 1 COLO. J. INT'L ENVTL. L. & POL'Y 223, 225 (1990). Montana interests have expressed concern over mining in the region since the late 1970s. *Id.* at 226. Canada and the United States originally referred the matter to the International Joint Commission in 1984 and 1985 respectively. *Id.* at 227.

5. Jim Mann, *Governor Wants State Representation on Panel*, DAILY INTER LAKE (Kalispell, Mont.), Jan. 22, 2006, available at <http://www.dailyinterlake.com/articles/2006/01/22/news/news01.txt>.

6. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1482 [hereinafter NAAEC].

7. 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].

Part III considers what the obligations of customary international law may require of B.C. in the dispute.

I. THE NORTH FORK AND THE MINING DISPUTE

A. *The Crown of the Continent*

The Flathead watershed is part of the larger Crown of the Continent region⁸ which is “among the continent’s most ecologically rich and pristine” ecosystems.⁹ Still largely undeveloped,¹⁰ “[t]his region is where four ecosystems converge in one place,”¹¹ creating “a rich ecological zone.”¹² Researchers have indicated that the transboundary Flathead basin “has one of the most outstanding large mammal assemblages in North America, including [sixteen] carnivore and six ungulate species.”¹³

Unfortunately, “very little inventory or comprehensive habitat research has been conducted” in the transboundary Flathead basin.¹⁴ Nonetheless, there are indications that the region harbors species that are threatened elsewhere. “[T]he watershed contains eight ‘blue-listed’ aquatic and terrestrial species in British Columbia and seven species listed as endangered or threatened under the U.S. Endangered Species Act.”¹⁵ An independent study documented the presence of such “species at risk” as

8. Sax & Keiter, *supra* note 3, at 302–03.

The Crown of the Continent phrase—first coined by William Bird Grinnell in the 1890s to describe Glacier National Park—is now being used to describe an international ecosystem that extends along the Rocky Mountain spine from the Bob Marshall wilderness complex in Montana to the Elk Valley in B.C., with the two parks as its core.

Id.

9. Commission for Environmental Cooperation, Sustaining Communities and Environment, <http://cec.org> (follow “Grants for Environmental Cooperation” hyperlink; follow “Grants Awarded” hyperlink; then follow “Sustaining Communities and Environment” hyperlink under 1997).

10. See Mann, *supra* note 2 (noting that the Montana section of the valley is considered “remote and rustic,” and that there are no year-round residents in the Canadian Flathead).

11. Rich Moy, Chair, Flathead Basin Comm’n, Address at the Annual Meeting of the Flathead Lakers (July 10, 2006), http://www.flatheadcoalition.org/documents/rich_moy_12july06.html. “The wet cedar/hemlock rain forest pushes from the west against the dry plains along the Rocky Mountain Front. The region is also the northern edge of the Southern ecosystem where Bobcats are found and southern extend [sic] of the Northern eco-region where you can find lynx.” *Id.*

12. Michael Jamison, *Second Mine Approved to Drill Near Glacier*, MISSOULIAN (Missoula, Mont.), Apr. 22, 2006, at B1, available at 2006 WLNR 9311378.

13. TRANSBOUNDARY FLATHEAD RESEARCH NEEDS WORKSHOP, EXECUTIVE SUMMARY 3 (2005), available at <http://www.flatheadcoalition.org> (follow hyperlink after “February 15: Transboundary Flathead Research Needs Workshop Executive Summary”).

14. *Id.*

15. *Id.* at 2.

“bull trout, fisher, grizzly bear, wolverine and Rocky Mountain bighorn sheep” in the Canadian Flathead.¹⁶

The beauty and natural wealth of the region have brought it recognition and protections. At the center of the Crown of the Continent region are Glacier National Park in Montana and the adjacent Waterton Lakes National Park in Alberta, together “designated the world’s first international peace park in 1932.”¹⁷ The park gained further international recognition when the United Nations Educational, Scientific, and Cultural Organization (UNESCO) recognized this park as a world heritage site in 1995.¹⁸ In Montana, the “region includes four large wilderness areas, many roadless areas, and several wildlife refuges.”¹⁹ The Flathead River, upon entering the United States, forms the western border of Glacier National Park²⁰ and “has been designated as a component of the U.S. National Wild and Scenic Rivers system.”²¹ The river also enjoys Montana’s “highest water quality classification,” Class A-1.²²

The scenic splendor and unpolluted waters of this region have economic value for Montana as crucial elements in the state’s burgeoning tourism and sports fishing industries. Not only does Glacier National Park attract tourists,²³ but the region around Flathead Lake (into which the North Fork flows) is also experiencing considerable economic growth due in part to its proximity to Glacier National Park and other environmental attractions.²⁴

The Canadian Flathead, in addition to its wealth in biodiversity and largely unspoiled wilderness, is mineral rich. The Crowsnest coalfield

16. *Id.* at 3.

17. Sax & Keiter, *supra* note 3, at 292.

18. Jarrod H. Becker, Note, *The Role of International Parks in Promoting Species Retention and Biodiversity*, 29 SYRACUSE J. INT’L L. & COM. 371, 395 (2002).

19. Letter from Brian Schweitzer, Governor of Mont., to The Honorable Gordon Campbell, Premier, Province of B.C., and John van Dongen, Minister of State for Intergovernmental Relations (Jan. 20, 2006), available at <http://www.flatheadcoalition.org> (follow “January 20, 2006” hyperlink) [hereinafter Schweitzer Letter Jan. 20].

20. David K.W. Wilson, Jr., *Cabin Creek and International Law—An Overview*, 5 PUB. LAND L. REV. 110, 110 (1984).

21. IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 19.

22. *Id.*

23. See WATER USES COMM. FLATHEAD RIVER INT’L STUDY BD., WATER AND ASSOCIATED SOCIO-ECONOMIC ACTIVITIES IN THE FLATHEAD RIVER BASIN OF SOUTHEAST BRITISH COLUMBIA AND NORTHERN MONTANA 31 (1987) (“Glacier National Park draws approximately two million visitors annually, 20 percent coming from nations other than the United States.”). Montana’s Flathead Lake is also a popular destination with “regional and national recreational significance.” *Id.* at 110.

24. NAT’L PARKS CONSERVATION ASS’N, GATEWAY TO GLACIER: THE EMERGING ECONOMY OF FLATHEAD COUNTY 4 (2003), available at <http://www.npca.org/northernrockies/gateway/gatewaytoglacier.pdf> (“[T]he Flathead’s economic vitality is directly tied to Glacier Park and the region’s natural environment . . .”).

descends from the north and extends beneath the headwaters of the Flathead River.²⁵ Coalbed methane exploration and gold prospecting have also been occurring in the region, both of which raise significant environmental concerns.²⁶ Coal mining has long been a pillar of the economy of the southeastern interior of B.C., and both the provincial government of B.C. and the Canadian national government have long been interested in extending their extractive industries into the Canadian Flathead.²⁷ However, currently the Canadian Flathead has no permanent residents (“[t]here are only a handful of cabins and lodges that get part-time use”) and aside from mineral exploration, the sole economic activities in the region are outfitting and logging.²⁸

B. *The Dispute: Environment Versus Development*

The conflict between Montana and B.C. over development of the North Fork basin is not new. “British Columbia appears more committed to developing its coal, gold, and coal-bed methane than to protecting habitat in its segment of the Flathead River watershed.”²⁹ Though Montana has shown some interest in mineral extraction on its section of the basin,³⁰ “for years Montana interests have joined local Canadians in opposing” industrial resource extraction in the Canadian Flathead.³¹ The last major conflict, over a proposed mine at Cabin Creek, led Canada and the United States to refer the matter to the International Joint Commission (IJC) for a study and recommendations.³²

In the 1970s and 80s, a Canadian mining company sought approval of two open-pit coal mines along Cabin Creek just upstream of its confluence with the North Fork.³³ Concerned about the mine’s potential impact, as the mine site was only six miles north of the border,³⁴ officials from Glacier

25. Sax & Keiter, *supra* note 3, at 287.

26. *See id.* at 288–89 (describing recent coalbed exploration with little wastewater oversight or prior environmental assessment, and the likelihood that gold mining would use “cyanide heap leach technology to recover the mineral”).

27. *Id.* at 287, 297.

28. Mann, *supra* note 2.

29. Sax & Keiter, *supra* note 3, at 240.

30. *See* Ross, *supra* note 4, at 231 (explaining that Cenex received a permit to drill for oil “approximately five miles south of Polebridge, Montana, just across the North Fork Flathead River from Glacier National Park”). If Cenex had found oil, it would have made a “full-field development.” *Id.* However, “[t]he result was a dry hole.” Sax & Keiter, *supra* note 3, at 252 n.81.

31. Jamison, *supra* note 12.

32. IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 15.

33. Ross, *supra* note 4, at 226.

34. *See* Wilson, *supra* note 20, at 110 (noting that the confluence of Cabin Creek and the North Fork of the Flathead River is six miles north of the Montana border).

National Park persuaded the State Department to invoke the Boundary Waters Treaty of 1909.³⁵ Canada, surprisingly, consented to the referral,³⁶ which occurred in 1984–85.³⁷ The IJC established a bi-national body of experts to study the effects of the proposed mine and in 1988 recommended that the mine “as presently defined and understood not be approved.”³⁸ The IJC recommendations were not binding on either government.³⁹ Nevertheless, B.C. stated that it was “satisfied with the IJC’s findings,” and the company seeking approval “allowed its provincial permit to lapse.”⁴⁰ Canada, however, never formally accepted the recommendations of the IJC on the proposed Cabin Creek mine, and some commentators feel that changing energy markets may have had the greater effect on the proposed mine’s demise.⁴¹ After the IJC recommended that plans to open the mine not go forward, the question of mining in the Canadian Flathead basin fell from the public eye.⁴²

Cline’s current attempt to develop a mountaintop removal mine at Foisey Creek, a tributary of the Flathead, has renewed the concerns engendered by the Cabin Creek proposal.⁴³ At first Cline sought a permit

35. Sax & Keiter, *supra* note 3, at 294–95.

36. *Id.* at 295.

37. IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 3 (noting the reference letters to the IJC came from the United States in December of 1984 and from Canada in February of 1985).

38. *Id.* at 3, 11. The report had the following three recommendations:

- (1) the mine proposal as presently defined and understood not be approved;
- (2) the mine proposal not receive regulatory approval in the future unless and until it can be demonstrated that:
 - (a) the potential transboundary impacts identified in the report of the Flathead River International Study Board have been determined with reasonable certainty and would constitute a level of risk acceptable to both Governments; and,
 - (b) the potential impacts on the sport fish populations and habitat in the Flathead River system would not occur or could be fully mitigated in an effective and assured manner; and,
- (3) the Governments consider, with the appropriate jurisdictions, opportunities for defining and implementing compatible, equitable and sustainable development activities and management strategies in the upper Flathead River basin.

Id.

39. Boundary Waters Treaty, *supra* note 7, at 2452 (“[R]eports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.”).

40. Ross, *supra* note 4, at 231.

41. Sax & Keiter, *supra* note 3, at 296.

42. *Id.* at 296.

43. See Jim Robbins, *Coal Mine ‘Under the Radar’ Stirs Cross-Border Feud*, N.Y. TIMES, Mar. 15, 2005, at F4, available at 2005 WLNR 3971587 (comparing the Foisey Creek project to the Cabin Creek proposal); Mann, *supra* note 2 (reporting concerns regarding the threat to wildlife).

for a small mine, which, under provincial law, would not require an in-depth environmental assessment (EA).⁴⁴ Later the company amended its application to seek a permit for a large mine, which would require a more thorough environmental review.⁴⁵ Estimates indicate that Cline's proposed mine at Foisey Creek would produce between two and three million tons of coal annually.⁴⁶

Various forces in the State of Montana have joined in opposition to the mine. These interests include environmental groups, local business owners, property owners, tribal governments, the Montana state government, and officials from Glacier National Park.⁴⁷ The state government, in response to the dispute over the earlier proposed mine at Cabin Creek, created the Flathead Basin Commission, which functions as an umbrella organization to protect the State's interests in the Flathead.⁴⁸ Additionally, the U.S. government has offered Montana its support in the dispute, recognizing "the need for an IJC reference."⁴⁹

The diverse interests of these parties overlap to a degree, but they are united in their opposition and are herein referred to collectively.⁵⁰ The interests are both economic and environmental.⁵¹ The particular interests

44. Michael Jamison, *Concerns Voiced Over 'Fast-Track' Proposal*, MISSOULIAN (Missoula, Mont.), June 19, 2005, at A1, available at 2005 WLNR 11543448 ("The small-mines permit . . . requires only an internal analysis by the mining company, with no provision for public input or review.").

45. Michael Jamison, *Cline Agrees Full Environmental Review Needed*, MISSOULIAN (Missoula, Mont.), Dec. 8, 2005, at A1, available at 2005 WLNR 22489920.

46. Sax & Keiter, *supra* note 3, at 288; Jamison, *supra* note 45.

47. See Sax & Keiter, *supra* note 3, at 299 (explaining efforts by "Montana, Glacier, and their environmental allies" to have B.C. do a comprehensive environmental study before allowing mineral extraction in the Flathead basin); Mark Hume, *Montana Groups Want Testing for Mine Pollution; Potential Pollution from Open-Pit Site Close to Border Worries U.S. Residents*, GLOBE & MAIL (Canada), Sept. 22, 2006, at S3 (noting some of the "civic organizations" opposing mining in the Canadian Flathead); Letter from Flathead Coalition to The Honorable Gary Lunn, Minister of Natural Res. Can. (Feb. 17, 2006), available at <http://www.flatheadcoalition.org> (follow "February 17, 2006" hyperlink) (identifying coalition as "alliance of community, tribal, business, hunting/angling, and conservation interests").

48. See Flathead Basin Commission Act of 1983, MONT. CODE ANN. §§ 75-7-301 to -308 (establishing the Flathead Basin Commission and describing its duties); Sax & Keiter, *supra* note 3, at 301 ("The state-inspired, multi-agency Flathead Basin Commission . . . came into being in response to the Cabin Creek mine proposal . . .").

49. Letter from Charles S. Shapiro, Acting Assistant Sec'y of State, to Brian Schweitzer, Governor of Mont. (June 6, 2005), available at <http://www.flatheadcoalition.org> (follow "State Department supports Schweitzer call for IJC referral" hyperlink) [hereinafter Shapiro Letter].

50. There are also Canadian environmental groups opposing the mine. See *supra* text accompanying note 31. However, because this Note focuses on international law, it does not address the Canadian environmental interests.

51. See Letter from Brian Schweitzer, Governor of Mont., to The Honorable Gordon Campbell, Premier, Province of B.C. (Feb. 7, 2005), available at <http://www.flatheadcoalition.org> (follow "Governor Schweitzer invites Premier Campbell to endorse study of transboundary ecosystem")

addressed in this Note are sustainable development in the transboundary Flathead basin, an ecosystems approach to management of the basin,⁵² and “a comprehensive baseline assessment of the trans-boundary Flathead drainage” before permitting mineral extraction.⁵³

The Provincial and Canadian governments have long been interested in mineral extraction in the Canadian Flathead; however, the B.C. government has been less receptive to Montana’s concerns about downstream pollution.⁵⁴ Nonetheless, the B.C. government, under pressure from Montana, agreed to allow Montana to have representatives on the work group that will determine the terms of reference—“conditions that Cline must meet when it develops its own environmental assessment for the project.”⁵⁵ Gordon Campbell, the B.C. Premier, additionally agreed to meet Brian Schweitzer, the Montana Governor, and B.C. officials attended a Flathead Basin Commission meeting where they announced that Cline would be subject to an EA, rather than allowed to pursue the lightly regulated small mine permit.⁵⁶

Despite B.C.’s concession to allow Montana to play a limited role in the permitting process, there is reason for dissatisfaction on the Montana side of the dispute. First, despite involvement in drafting the terms of reference, Governor Schweitzer is not satisfied that the State’s concerns were adequately addressed.⁵⁷ Second, the B.C. permitting process itself is less than satisfactory. Under B.C.’s new Environmental Assessment Act, performing an EA is no longer mandatory, but discretionary.⁵⁸ Moreover, it is not a government agency that prepares the assessment, but rather the project proponent.⁵⁹ In preparing the assessment, the proponent need not consider

hyperlink) [hereinafter Schweitzer Letter Feb. 7] (recognizing the significance of ecological and aesthetic qualities of the transboundary Flathead, which are driving the economy of the region).

52. Letter from Brian Schweitzer, Governor of Mont., to Condoleezza Rice, U.S. Sec’y of State (May 24, 2005) [hereinafter Schweitzer Letter May 24] (voicing Montana’s interest in implementing 1988 IJC recommendation for sustainable development and management in the transboundary Flathead).

53. *Id.*

54. See Jim Mann, *B.C. Mine Plan Goes ‘Major,’* DAILY INTER LAKE (Kalispell, Mont.), Dec. 8, 2005, available at <http://www.dailyinterlake.com/articles/2005/12/08/news/news03.txt> (noting that for the past twenty years successive Montana Governors have been trying to “develop a joint management strategy for the Canadian Flathead and the North Fork area south of the border”).

55. Mann, *supra* note 2.

56. Sax & Keiter, *supra* note 3, at 298. When the B.C. Premier and Montana Governor met, it was the first time that the province and state heads had met since the Cabin Creek dispute. *Id.*

57. Jim Mann, *Mine Fight May Go to Higher Level,* DAILY INTER LAKE (Kalispell, Mont.), Jan. 16, 2007, available at <http://www.dailyinterlake.com/articles/2007/01/16/news/news01.txt>.

58. Environmental Assessment Act, s. 10(1), 2002 S.B.C., ch. 43 (B.C.); see also West Coast Environmental Law, Deregulation Backgrounder: Bill 38: The New Environmental Assessment Act (2004), <http://www.wcel.org> (follow “Environmental Assessment” hyperlink; then follow “Bill 38: the new Environmental Assessment Act” hyperlink) (“[T]he Act’s application is discretionary . . .”).

59. Sax & Keiter, *supra* note 3, at 291–92.

sustainability, cumulative effects, need, or alternatives to a project.⁶⁰ Nor does the Act require the EA to consider potential transboundary impacts.⁶¹ Even with Montana's involvement, the inadequacies of B.C.'s permitting process suggest that international law may prove a better tool for protecting Montana's interests in the North Fork basin.

II. INTERNATIONAL TREATY LAW

A. North American Agreement on Environmental Cooperation

1. "To Increase Cooperation Between the Parties to Better Conserve, Protect, and Enhance the Environment"⁶²

In passing the North American Free Trade Agreement (NAFTA),⁶³ Canada, the United States, and Mexico also agreed to the North American Agreement on Environmental Cooperation (NAAEC).⁶⁴ The U.S. government negotiated the latter agreement as a means of gaining political support for NAFTA by allaying fears that NAFTA would lead to environmental degradation.⁶⁵ The NAAEC created the Commission for Environmental Cooperation (CEC).⁶⁶ The CEC has three constituent bodies—the Council, the Secretariat, and the Joint Public Advisory Committee—each of which is composed of representatives from each member state of the NAAEC.⁶⁷ This Note considers whether the NAAEC and the CEC are able to protect environmental interests in the coal-mining dispute in the transboundary Flathead basin.

60. DAVID R. BOYD, *UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY* 157 (2003).

61. See Environmental Assessment Act, s. 10 (failing to mention transboundary impacts as a factor to consider during environmental assessments).

62. NAAEC, *supra* note 6, art. 1(c), 32 I.L.M. at 1483.

63. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057 [hereinafter NAFTA].

64. NAAEC, *supra* note 6.

65. See 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) (articulating environmental interests' concerns with NAFTA and the U.S. Government's efforts to address them).

66. NAAEC, *supra* note 6, art. 8(1), 32 I.L.M. at 1485; see also John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, in *GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 2* (David L. Markell & John H. Knox eds., 2003) (noting that "[t]he CEC is the first international organization created to address the environmental aspects of economic integration").

67. NAAEC, *supra* note 6, arts. 8(2), 9(1), 11(1), 16(1), 32 I.L.M. at 1485, 1487, 1489.

The NAAEC is ostensibly appealing because its stated objectives coincide with Montana's environmental interests in the dispute over the North Fork basin. Protecting the environment for future generations and encouraging sustainable development in North America are the NAAEC's first two stated objectives.⁶⁸ The NAAEC also aims to "increase cooperation between the Parties" in protecting the environment (wild flora and fauna in particular) and to endorse pollution prevention.⁶⁹ Additionally, among the Council's functions are the requirements to develop recommendations for assessing projects likely to have significant transboundary effects and to encourage each party to establish adequate administrative procedures for addressing environmental harm.⁷⁰ Finally, the Council has an open-ended mandate as to which matters it may consider and on which it may develop recommendations.⁷¹

To further its objectives, the NAAEC has two basic mechanisms. First, is the citizen submission mechanism that allows citizens or non-governmental organizations of any member state to make submissions to the Secretariat regarding any member state's non-enforcement of environmental laws.⁷² If the Secretariat determines that a submission merits developing a factual record, and if two-thirds of the Council votes in favor, the Secretariat will prepare a factual record documenting the non-enforcement of the environmental laws.⁷³ The citizen submission process allows international scrutiny of any member state's non-enforcement of its environmental laws, creating "a public venue where information is brought to light."⁷⁴

The second mechanism in the NAAEC for addressing environmental disputes is the consultation procedure.⁷⁵ The Agreement provides that any signatory may unilaterally seek consultation regarding another signatory's non-enforcement of its environmental laws.⁷⁶ If the initial consultation does

68. *Id.* art. 1(a)–(b), 32 I.L.M. at 1483 (stating the objectives to "foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations" and "promote sustainable development based on cooperation and mutually supportive environmental and economic policies").

69. *Id.* art. 1(c), (j) (alliterating the objective to "promote pollution prevention policies and practices").

70. *Id.* art. 10(7)(a), (8), 32 I.L.M. 1486–87.

71. *Id.* art. 10(2)(s), 32 I.L.M. at 1486 ("The Council may consider and develop recommendations regarding . . . other matters as it may decide.").

72. *Id.* art. 14(1), (1)(f), at 32 I.L.M. 1488.

73. *Id.* art. 15(1), (2).

74. Janine Ferretti, *NAFTA and the Environment: An Update*, 28 CAN-U.S. L.J. 81, 86 (2002).

75. See NAAEC, *supra* note 6, arts. 22–36, at 32 I.L.M. 1490–93 (describing the selection and operational procedures of dispute resolution under the NAAEC).

76. *Id.* art. 22(1), 32 I.L.M. at 1490 ("Any party may request in writing consultations with any other Party regarding whether there has been a persistent pattern of failure by that other Party to

not resolve the dispute, the Council may, by a two-thirds vote, “convene an arbitral panel to consider the matter.”⁷⁷ This process can ultimately lead to monetary damages or a limited suspension of trade benefits.⁷⁸ This, however, is an extreme remedy,⁷⁹ and no member state has yet sought a consultation under the NAAEC.⁷⁹

The CEC might also be of help to Montana’s environmental interests in the North Fork dispute by providing the baseline environmental study. One commentator has suggested that given the CEC’s experience preparing factual records as part of the citizen submission process and its original mandate to make recommendations regarding cross-border pollution, “implementation of TEIA [transboundary environmental impact assessment] . . . is most logically achieved by the CEC.”⁸⁰ One might also have considered the possibility of the CEC providing some funding for such a study through its grant program; however, the CEC recently discontinued the program.⁸¹

2. Analysis: “A Persistent Pattern of Failure”?⁸²

Unfortunately, despite the NAAEC’s lofty goals, the citizen submission process and the consultation process are of little help to interested Montanan parties in this dispute. The citizen submission process is not available because it is a retrospective provision; it requires that there first be an enforcement failure.⁸³ While “[f]ailure to enforce NEPA-type requirements” previously warranted a response request,⁸⁴ under the B.C. Environmental Assessment Act, the EA is now discretionary.⁸⁵ Interested parties cannot address other violations prospectively. Moreover, the CEC has determined that potential violations of the Boundary Waters Treaty by Canada or the United States are not amenable to the citizen submission process.⁸⁶

effectively enforce its environmental law.”).

77. *Id.* art. 24(1).

78. *Id.* arts. 34(4)(b), 36(1), 32 I.L.M. at 1493.

79. Knox & Markell, *supra* note 66, at 10.

80. Jameson Tweedie, Note, *Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement*, 63 WASH. & LEE L. REV. 849, 907 (2006).

81. Comm’n for Env’tl. Cooperation, Grants for Environmental Cooperation, <http://www.cec.org/grants> (last visited Jan. 23, 2008).

82. NAAEC, *supra* note 6, art. 22(1), 32 I.L.M. at 1490.

83. *Id.* art. 14(1), 32 I.L.M. at 1488 (“The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law . . .”).

84. David L. Markell, *The Commission for Environmental Cooperation’s Citizen Submission Process*, 12 GEO. INT’L ENVTL. L. REV. 545, 554 (2000).

85. Environmental Assessment Act, s. 10(1), 2002 S.B.C., ch. 43 (B.C.).

86. Press Release, Comm’n for Env’tl. Cooperation, CEC Dismisses Devils Lake Submission

However, the remaining signatories, or U.S. or Canadian NGOs could make citizen submissions if Cline's proposed mine operation is permitted, goes into operation, subsequently violates B.C. laws, and the B.C. government fails to enforce the laws.⁸⁷ While the damage would already be done, nevertheless, the citizen submission process could be a useful means (albeit not the strongest) to induce enforcement by shaming the B.C. government or providing a basis for negotiations or public action.⁸⁸

Similarly, the 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.⁸⁹ This retrospective requirement of the consultation procedure would not be applicable to potential future environmental harm associated with coal mining in the Canadian Flathead.

Again, as with the citizen submission process, if the mine is permitted and repeatedly violates environmental laws without enforcement action by provincial government, then a basis for a consultation would arise.⁹⁰ Still, since Montana is not a Party to the NAAEC,⁹¹ the U.S. government would have to request the consultation.⁹² Recently, the U.S. government has expressed concern over coal mining in the Flathead River basin, and has indicated its willingness to address this matter with the Canadian

(Aug. 23, 2006), <http://www.cec.org> (follow "Latest News" hyperlink; then follow "CEC Dismisses Devils Lake Submission" hyperlink). The Secretariat determined that the relevant provision of the Boundary Waters Treaty did not qualify as "environmental law" as defined by the NAAEC. *Id.*

87. NAAEC, *supra* note 6, art. 14(1), 32 I.L.M. at 1488.

88. See Yang, *supra* note 65, at 477–79 (noting that the citizen submission procedure is not a powerful means of forcing compliance but that it could cause "negative responses" that would induce government action). One would expect that given the provision in article 3 of the NAAEC that Parties "ensure . . . high levels of environmental protection," a submission would be able to bolster its argument by citing B.C.'s recent backsliding on its environmental standards. NAAEC, *supra* note 6, art. 3, 32 I.L.M. at 1483; see *supra* text accompanying footnotes 58–61. The CEC, however, has averred that:

[T]he enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of laws and statutes on the books. . . . The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one.

Comm'n for Env'tl. Cooperation, Logging Rider—Article 14(1) Determination, A14/SEM/ 95-002/03/14(1), available at <http://www.cec.org/files/pdf/sem/95-2-DET-OE.pdf>. This rationale seems to preclude future citizen submissions against Parties who relax their environmental standards, though this appears to negate the mandatory language of article 3 of the NAAEC.

89. NAAEC, *supra* note 6, art. 22(1), 32 I.L.M. at 1490.

90. *Id.*

91. *Id.* pmb1., 32 I.L.M. at 1482 (describing the parties as "[t]he Government of the United States of America, the Government of Canada and the Government of the United Mexican States").

92. *Id.* art. 22(1), 32 I.L.M. at 1490 (stating that "[a]ny Party may request . . . consultations").

government, albeit not through the consultation mechanism of the NAAEC.⁹³ Nonetheless, that no party has ever sought to use the NAAEC consultation mechanism indicates the unlikelihood of the U.S. government seeking a consultation, despite its support for Montana's position.⁹⁴

Nor is it likely that the CEC itself would prepare a baseline assessment of the watershed and the potential impact of the mine. The NAAEC gives the Council the authority to "consider and develop recommendations regarding . . . transboundary and border environmental issues."⁹⁵ However, there is reason to believe that this does not empower the Council to develop transboundary environmental impact assessments (TEIAs). The NAAEC initially contemplated developing a mechanism for such assessments,⁹⁶ and Canada, Mexico, and the United States have produced a draft agreement.⁹⁷ However, following the release of the draft agreement in 1997, the Parties have yet to conclude a binding agreement on the issue.⁹⁸ Despite the permissive language of article 10(2)(g), the specific reference to TEIA in article 10(7)(a) and the Parties' inability to reach a further agreement strongly indicate that CEC would not perform the baseline assessment of the transboundary Flathead basin that is sought by Montana's environmental interests.

Ultimately, despite the promise of its objectives, the NAAEC offers little assistance to Montana's interests for addressing the proposed Cline mine at Foisey Creek. Nor would it be helpful in arresting other mineral extraction proposals in the Canadian Flathead that could irreparably harm Flathead River and the Crown of the Continent region. Unlike the NAAEC, the Boundary Waters Treaty directly addresses cross-border water conflicts: the potential of this Treaty to resolve the dispute over the North Fork is the topic of the next section.

93. Shapiro Letter, *supra* note 49.

94. See Knox & Markell, *supra* note 66, at 10 (observing that no party "has ever brought a claim under" the NAAEC dispute resolution provisions).

95. NAAEC, *supra* note 6, art. 10(2)(g), 32 I.L.M. at 1486.

96. *Id.* art. 10(7)(a) ("[T]he Council shall . . . consider and develop recommendations with respect to: a) assessing the environmental impact of proposed projects . . . likely to cause significant adverse transboundary effects . . .").

97. Draft North American Agreement on Transboundary Environmental Impact Assessment (1997), available at <http://www.cec.org> (follow "Publications and Information Resources" hyperlink; then follow "Laws, Treaties, and Agreements" hyperlink; follow "Draft North American Agreement on Transboundary Environmental Impact Assessment" hyperlink).

98. John H. Knox, *The CEC and Transboundary Pollution*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 66, at 85.

*B. The Boundary Waters Treaty*1. “To Make Provision for the Adjustment and Settlement of All Such Questions as May Hereafter Arise”⁹⁹

The United States and the United Kingdom created and signed the Boundary Waters Treaty in 1909, when Canada was still a dominion of United Kingdom,¹⁰⁰ and the Treaty remains in force today between the United States and Canada.¹⁰¹ The signatories intended the Treaty to be a means of “prevent[ing] disputes regarding the use of boundary waters.”¹⁰² The Treaty defines boundary waters as the waters of “lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes.”¹⁰³ The Treaty created a bi-national body, the International Joint Commission (IJC), consisting of three commissioners from each nation, to address matters falling within the Treaty.¹⁰⁴ Appropriate for the pressing matters of the era, the Treaty largely addresses “obstructions or diversions” (e.g., dams and canals) of the boundary waters;¹⁰⁵ however, presciently, it also contains a provision 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.”¹⁰⁶

The Treaty contains a number of important principles and mechanisms for addressing transboundary water disputes. First the Treaty presents the axiom that each signatory has sovereignty over the uses of waters within its territory.¹⁰⁷ The Treaty tempers this statement of territorial sovereignty by providing that individuals injured by water use by the other Party are entitled to the same remedies that would be available in the country where

99. Boundary Waters Treaty, *supra* note 7, pmbl., 36 Stat. at 2448.

100. *Id.*; see also Richard Kyle Paisley et al., *Transboundary Water Management: An Institutional Comparison among Canada, the United States and Mexico*, 9 OCEAN & COASTAL L.J. 177, 182 (2004) (noting that at the time of the Treaty, the United Kingdom controlled Canada’s foreign policy).

101. Boundary Waters Treaty, *supra* note 7; Knox, *supra* note 98, at 81.

102. Boundary Waters Treaty, *supra* note 7, pmbl., 36 Stat. at 2448.

103. *Id.* prelim. art.

104. *Id.* arts. VII, VIII, 36 Stat. at 2451–52.

105. *Id.* art. III, 36 Stat. at 2449; see also Knox, *supra* note 98, at 81 (describing the aims of the Boundary Waters Treaty).

106. Boundary Waters Treaty, *supra* note 7, art. IV, 36 Stat. at 2450.

107. *Id.* art. II, 36 Stat. at 2449 (“Each of the high contracting Parties reserves to itself . . . the exclusive jurisdiction and control over the use and diversion . . . of all waters on its own side of the line . . .”).

the harm originated.¹⁰⁸ Article VIII of the Treaty extends mandatory jurisdiction to the IJC over “cases involving the use or obstruction or diversion of the waters.”¹⁰⁹ Giving substance to what may constitute a case, article VIII then refers back to articles III and IV, which prohibit certain activities subject to IJC approval. Without the IJC’s approval, article III prohibits “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.”¹¹⁰ Similarly, without the IJC’s endorsement, article IV prohibits any

construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary.¹¹¹

In addition to delineating the IJC’s mandatory jurisdiction, the 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.”¹¹² The nations may also refer a dispute to the 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.¹¹³ While the nations have referred many matters to the IJC for non-binding recommendations under article IX, they have referred none for a binding decision under article X.¹¹⁴

108. *Id.* Article II states:

[B]ut it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs

Id.

109. *Id.* art. VIII, 36 Stat. at 2451.

110. *Id.* art. III, 36 Stat. at 2449.

111. *Id.* art. IV, 36 Stat. at 2450.

112. *Id.* art. IX, 36 Stat. at 2452.

113. *Id.* art. X, 36 Stat. at 2453.

114. Richard Kyle Paisley & Timothy L. McDaniels, *International Water Law, Acceptable Pollution Risk and the Tatsshenshini River*, 35 NAT. RESOURCES J. 111, 121 (1995) (stating that the IJC’s power to render binding decisions “has never been invoked directly” and that “in practice the treaty has been used not so much to make binding decisions, but more to absorb and deflect attention away from contentious political issues by instructing the IJC to examine and report”).

The Boundary Waters Treaty makes no mention of modern environmental concerns such as sustainable development, ecosystems management, or transboundary environmental impact assessment. Nonetheless, because the North Fork dispute involves waters flowing across the U.S.-Canada border, the Treaty's obligations, particularly article IV, could prove very helpful.¹¹⁵

2. Analysis: Of Jurisdiction and Politics

From Montana's perspective, it would be ideal to have the IJC review the dispute and make recommendations.¹¹⁶ Initially, the *Cabin Creek* referral, in which the IJC recommended the mine not be permitted, provides precedent favorable to Montana. There is little difference between the proposed Cabin Creek coal mine and the proposed mine at Foisey Creek, save that the latter is approximately fourteen miles farther north in the drainage.¹¹⁷ Additionally, the IJC has developed considerable expertise

115. The Boundary Waters Treaty defines boundary waters as "the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes." Boundary Waters Treaty, *supra* note 7, prelim. art., 36 Stat. at 2448.

116. IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 11 (recommending that "the mine proposal as presently defined and understood not be approved"). The IJC also recommended that no future mine be permitted without positively demonstrating a "level of risk acceptable to both Governments" and assuring harm to fish habitat "would not occur or could be fully mitigated." *Id.*

117. Steve Thomas, *Cline Pushes Ahead on Lodgepole*, COAL WK. INT'L, Jan. 9, 2006, at 7, available at 2006 WLNR 1239651 (comparing the locations of the two mines). The proposed mine at Foisey Creek would be approximately the same size as the mine proposed at Cabin Creek; the former is expected to produce 3 million tons of coal annually, the latter 2.2 million tons of coal annually. *Id.*; MINE DEV. COMM. FLATHEAD RIVER INT'L STUDY BD., PROPOSED SAGE CREEK LTD. COAL PROJECT 6 (1986).

One could object that the Foisey Creek site, located 20 air miles north of the international boundary, is too removed from the border for IJC jurisdiction. Letter from Carol Rushin, Assistant Reg'l Adm'r, Office of Ecosystem Prot. and Remediation, U.S. Env'tl. Prot. Agency, to Edward Alexander Lee, Office Dir., Office of Canadian Affairs, U.S. State Dep't (Feb. 22, 2007), available at <http://www.flatheadbasincommission.org> (follow "Issues" to "Cline Mine" hyperlink; then follow "Terms of Reference and letter to British Columbia" hyperlink; then follow "U.S. Environmental Protection Agency's letter to the Office of Canadian Affairs" hyperlink). The original Cabin Creek site was only six miles north of the border. Wilson, *supra* note 20, at 110. Moreover, the definition of boundary waters in the Boundary Waters Treaty seems narrow, "not including tributary waters which . . . flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways." Boundary Waters Treaty, *supra* note 7, prelim. art., 36 Stat. at 2448-49. Despite this legitimate contention, the IJC has taken a broad approach to its jurisdiction in article IV pollution disputes. The *Garrison Diversion* case best illustrates the breadth of jurisdiction exercised by the IJC in article IV; there the IJC recommended that North Dakota not proceed with its project, which was located nearly one hundred miles south of the border, due to its potential deleterious effect hundreds of miles away on fisheries in Lake Winnipeg. INT'L JOINT COMM'N, TRANSBOUNDARY IMPLICATIONS OF THE GARRISON DIVERSION UNIT 103, 121 (1977) [hereinafter IJC, GARRISON DIVERSION UNIT]. The IJC

with regard to transboundary water issues in its century of existence, and commentators have applauded the bi-national body for its independence and impartiality.¹¹⁸ Finally, the IJC would be an ideal body to resolve the dispute because it has recognized the importance of ecosystem management¹¹⁹ and sustainable development, while taking a precautionary approach when applying the pollution provision of article IV to potentially harmful uses of boundary waters.¹²⁰

Though perhaps debatable, the dispute over mining in the North Fork basin would not likely trigger the mandatory jurisdiction of the IJC. Article VIII of the Boundary Waters Treaty stipulates that the IJC has jurisdiction over the use, obstruction, or diversion of boundary waters as mentioned in articles III and IV.¹²¹ Despite the reference to article IV, which contains the pollution provision, the article does not call for the IJC to approve or pass on matters of pollution, but only uses and diversions affecting natural water levels of boundary waters.¹²² There is an argument that the mandatory

reiterated its concern for downstream effects of pollution in the Cabin Creek report, reasoning that under article IV, pollution on one side of the border did not even have to cross the border to violate article IV; it would be sufficient if pollution in Canada damaged spawning redds that would harm downstream fisheries. IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 8–9. It is also significant that the IJC did not mention the proximity of the proposed state action to the international border in either report.

118. See Paisley, *supra* note 100, at 184 n.45 (“The IJC has been split among national lines only twice in its over ninety year history, and most decisions have been unanimous.”); Paul Marshall Parker, *High Ross Dam: The International Joint Commission Takes a Hard Look at the Environmental Consequences of Hydroelectric Power Generation—The 1982 Supplementary Order*, 58 WASH. L. REV. 445, 460 (1983) (declaring that “the IJC has a long history of involvement in environmental pollution matters, and extensive experience in land-use matters”); Sheryl A. Rosenberg, *A Canadian Perspective on the Devils Lake Outlet: Towards an Environmental Assessment Model for the Management of Transboundary Disputes*, 76 N.D. L. REV. 817, 841 (2000) (“The factual record appears to bear out the view that the IJC has been successful in acting as an impartial and independent body making principled decisions.”); Karen A. Baim, Note, *Come Hell or High Water: A Water Regime for the Jordan River Basin*, 75 WASH. U. L.Q. 919, 939 (1997) (noting that the IJC “is also well respected for its impartiality, its flexibility, its fair weighing of facts” and “has a history as an independent and successful problem-solving facilitator”) (internal quotations omitted).

119. See INT’L JOINT COMM’N, ADVICE TO GOVERNMENTS OF THEIR REVIEW OF THE GREAT LAKES WATER QUALITY AGREEMENT: A SPECIAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 2 (2006) (recommending that the governments “incorporate the concepts of ecosystem protection and watershed planning” and “use the ecosystem approach” in any new agreement); see also 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, 204 (2006) (noting that the IJC “was effectively adopting an ‘ecosystems approach’ to consider the potential adverse impacts” in the *Garrison Diversion* referral over a dispute between North Dakota and Manitoba in 1975).

120. See IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 11 (recommending that the Cabin Creek Mine not be permitted “until it can be demonstrated” that, *inter alia*, transboundary fisheries would not be harmed).

121. Boundary Waters Treaty, *supra* note 7, art. VIII, 36 Stat. at 2451.

122. *Id.*

jurisdiction of the IJC under articles VIII and III should be triggered because uses that affect levels or flows of boundary waters need only be temporary.¹²³ With mountaintop-removal mining, it is not a rare occurrence for flooding to occur due to deforestation, stream sedimentation, or coal slurry spills from impoundment ponds.¹²⁴ Thus, coal-mining activities at Foisey Creek have the potential to affect the flow of the Flathead River in Montana. Such increased flows could fall into the article III provision addressing uses that temporarily affect water levels, thus triggering IJC jurisdiction. Nonetheless, the mandatory jurisdiction provisions were originally intended to apply to dam or canal construction,¹²⁵ and it appears the parties to the dispute have failed to consider this possibility.¹²⁶

In lieu of the IJC's mandatory jurisdiction under article VIII, there is the possibility of referral under article IX. Article IX allows either one or both parties to refer a matter to the IJC for review and recommendations.¹²⁷ Under 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.¹²⁸ This position is unlikely to change: while either nation "can unilaterally refer something to the IJC, . . . they have never done so."¹²⁹

If the United States is waiting for Canada to assent to a referral of the transboundary Flathead dispute to the IJC, the forecast is not promising. The Canadian government's position is that the matter would be best resolved between the state and provincial governments.¹³⁰ There are a number of reasons that the Canadian government is less sympathetic to

123. *Id.* arts. III, VIII, 36 Stat. at 2449, 2451; *see supra* text accompanying note 110.

124. *See* ERIK REECE, *LOST MOUNTAIN: A YEAR IN THE VANISHING WILDERNESS: RADICAL STRIP MINING AND THE DEVASTATION OF APPALACHIA* 104–05, 109–10, 124 (2006) (recounting the pollution and flash floods occurring at three separate mountaintop mining operations). In the neighboring Elk River basin in B.C., both coal mine waste dumps and settling ponds have failed, resulting in pollution overflows and mud slides. MINE DEV. COMM. FLATHEAD RIVER INT'L STUDY BD., *supra* note 117, at 121–23.

125. *See supra* note 105 and accompanying text.

126. *See* Shapiro Letter, *supra* note 49 (suggesting that IJC referral can only happen upon reference from both parties); *see also* Schweitzer Letter May 24, *supra* note 52 (requesting referral to IJC without mentioning mandatory jurisdiction).

127. Boundary Waters Treaty, *supra* note 7, art. IX, 36 Stat. at 2452 (allowing IJC "examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred").

128. Shapiro Letter, *supra* note 49.

129. John Knox, *Environment: Garrison Dam, Columbia River, the IJC, NGOs*, 30 CAN.-U.S. L.J. 129, 138 (2004). For more on the historic cooperation of the IJC, *see supra* note 118 and accompanying text.

130. Shapiro Letter, *supra* note 49.

Montana's concerns. First, the U.S. government just recently refused to refer the Devils Lake boundary-water dispute to the IJC.¹³¹ Second, there is lingering Canadian dissatisfaction over the original *Cabin Creek* referral to the IJC, which resulted in a "complete victory for Montana," and the recommendations of which Canada never formally adopted.¹³² Additionally, in the larger context of disagreements between the national governments, such as U.S. embargoes on Canadian soft-wood lumber and cattle, and disputes concerning Pacific salmon harvest, there is little incentive for cooperation on the transboundary Flathead.¹³³

While the Boundary Waters Treaty does not suffer from the retrospective/prospective problem of the NAAEC, it may be even less helpful than the NAAEC.¹³⁴ It is unlikely that an individual could bring an action premised on a violation of the Boundary Waters Treaty in Canada or the United States.¹³⁵ Consequently, if the Cline Mine did not trigger the IJC's mandatory jurisdiction under article VIII, and if current political tensions prevent both parties from making a referral, the mine could begin operation and significantly pollute the North Fork. Aggrieved downstream parties would be without remedy, despite the Boundary Waters Treaty and the NAAEC. While individuals and NGOs could turn to the citizen submission process of the NAAEC in this worst-case scenario, the CEC has declared that violations of the Boundary Waters Treaty are not grounds on which to base a citizen submission.¹³⁶

Ultimately, like the NAAEC, the Boundary Waters Treaty, while

131. The Devils Lake dispute centers on North Dakota's plan to make an outlet from Devils Lake, which has no natural outlet, into the Red River, which flows into Lake Winnipeg, in Manitoba. Knox, *supra* note 129, at 130. Manitoba fears the introduction of foreign species into the Red River and harm from the poor quality of the water from Devils Lake. *Id.* at 130–31. There is particular concern that the transfer of non-native species to the Red River would violate the article IV pollution provision of the Boundary Waters Treaty. *Id.* at 132; Sax & Keiter, *supra* note 3, at 297–98.

132. Sax & Keiter, *supra* note 3, at 295–96.

133. *Id.* at 298.

134. The IJC has not required any positive harm as a prerequisite for recommending that projects not go forward. *See, e.g.*, IJC, GARRISON DIVERSION UNIT, *supra* note 117, at 121 (recommending that the project not be built due to lack of "any certainty" that potentially irreparable transboundary harm would not occur); IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 5, 11 (recommending that the proposed mine not be permitted in the absence of any positive harm).

135. *See* *Burnell v. Canada*, [1977] 1 F.C. 269, 269 (dismissing private suit against the IJC for violation of the Boundary Waters Treaty); Knox, *supra* note 129, at 136 (suggesting that bringing suit in federal court for violation of the Boundary Waters Treaty is a "long shot").

136. *See* NAAEC, *supra* note 6, art. 14(1), 32 I.L.M. at 1488 (allowing citizen submissions only after a signatory Party "fail[s] to effectively enforce its environmental law"); Press Release, Comm'n for Env'tl. Cooperation, CEC Dismisses Devils Lake Submission (Aug. 23, 2006), <http://www.cec.org/news/details/index.cfm?ID=2723> (holding that the Boundary Waters Treaty does not have the same force of law as a statute or regulation, and thus provides no basis for a citizen enforcement action).

promising in many regards, does not seem a viable means of addressing Montana's interests. Unless the United States decides to make a unilateral referral to the IJC, which seems unlikely, the IJC will not be able to address the matter. The remaining avenue for an international-law solution is customary international law.

III. CUSTOMARY INTERNATIONAL LAW

A. "General Practice Accepted As Law"¹³⁷

Customary international law is the binding law that emerges from "regularities, but not necessarily uniformities, of [state] behavior."¹³⁸ It imposes obligations on all nations, save those that "have persistently objected to a practice and its legal consequences."¹³⁹ In order for a principle to be binding customary international law, it has to be (1) general and consistent state practice and (2) followed out of a sense of legal obligation.¹⁴⁰

B. *Emerging or Existing Principles of Law?*

1. Substantive Principles: Sustainable Development and Ecosystem Management

A number of important treaties and conventions have recognized the principles of sustainable development and ecosystem management. Sustainable development, the principle of "development that meets the needs of the present without compromising the ability of future generations to meet their own needs," first became well-known with the publication of the Brundtland Report of 1987.¹⁴¹ However, a decade earlier, the Report of

137. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ Statute].

138. Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 109 (1995).

139. Philippe Sands & Jacqueline Peel, *Environmental Protection in the Twenty-first Century: Sustainable Development and International Law*, in THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY 43, 51 (Regina S. Axelrod et al. eds., 2d ed. 2005).

140. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); see also ICJ Statute, *supra* note 137, art. 38(1)(b), 59 Stat. at 1060 (stating that "international custom [is] evidence of a general practice accepted as law").

141. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE (BRUNDTLAND REPORT) 54 (1987); see also Norman J. Vig, *Introduction: Governing the International Environment*, in THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY, *supra* note 139, at 1, 6 (discussing the

the United Nations on the Human Environment, commonly known as the Stockholm Declaration, foreshadowed its emergence by recognizing the important relationship between economic development and environmental protection.¹⁴² Twenty years after the Stockholm Conference, the Rio Declaration in 1992 expressly announced that sustainable development was a guiding principle of global significance.¹⁴³ That “[t]he conference drew 116 heads of state, the largest assemblage of world leaders to that date,” enhances the significance of the Rio Declaration’s recognition of sustainable development.¹⁴⁴ Today there is “universal recognition of the application of the overarching objective of sustainable development.”¹⁴⁵

Similarly, ecosystem management has been widely recognized in international conventions and treaties. In 1966, the Helsinki Rules on the Uses of the Waters of International Rivers designated the river drainage basin as the appropriate unit for analysis regarding transboundary watercourses.¹⁴⁶ The ecosystem management principle gained recent expression in the United Nations Convention on the Law of Non-navigational Uses of International Watercourses.¹⁴⁷ Article 20 of the Convention provides that “[w]atercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.”¹⁴⁸ The near-unanimous 104 to 3 vote

Brundtland Report’s role in popularizing “sustainable development”).

142. Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Final Declaration*, U.N. Doc. A/CONF.48/14, 11 I.L.M. 1416, 1420 (1972) [hereinafter *Stockholm Declaration*]; see also DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 176 (2d ed. 2002) (“Without using the term, the *Stockholm Declaration* helped to lay the groundwork for the subsequent acceptance of the concept of sustainable development.”).

143. 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.151/5/Rev/1, 31 I.L.M. 874, 877 (1992) [hereinafter *Rio Declaration*] (stating in the first principle that “[h]uman beings are at the centre of concerns for sustainable development” and that humans “are entitled to a healthy and productive life in harmony with nature”).

144. Marvin S. Soroos, *Global Institutions and the Environment: An Evolutionary Perspective*, in *THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY*, *supra* note 139, at 21, 26.

145. McIntyre, *supra* note 119, at 196; see also J.B. Ruhl, *The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?*, 8 *DUKE ENVTL. L. & POL’Y F.* 273, 279 (1998) (arguing that opposition to sustainable development is no longer a tenable policy position).

146. Int’l Law Ass’n, *The Helsinki Rules on the Uses of the Waters of International Rivers*, at art. I, Fifty-second Conference, Helsinki, Fin. (Aug. 1966), available at <http://www.internationalwaterlaw.org> (follow “Documents” hyperlink; then follow “International Documents” hyperlink; follow “Helsinki Rules on the Uses of the Waters of International Rivers, International Law Association (1966)” hyperlink) (“The general rules of international law as set forth in these chapters are applicable to the use of the waters of an international drainage basin . . .”).

147. Convention on the Law of the Non-navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700 [hereinafter *International Watercourses Convention 1997*] (not yet in force).

148. *Id.* art. 20, 36 I.L.M. at 710.

approving the Convention indicated the broad international support of its principles.¹⁴⁹

The body of decisions of the IJC regarding water use between Canada and the United States most validates the application of sustainable development and ecosystem management principles to transboundary water issues between the two countries. The IJC first employed the language of ecosystem management in the *Garrison Diversion* referral of a dispute between North Dakota and Manitoba.¹⁵⁰ The dispute centered on North Dakota's desire to divert water from the Missouri River to irrigate lands that drained into the Hudson Bay watershed via the Red River.¹⁵¹ Manitoba was concerned that the water from the Missouri River would introduce exotic species into the Hudson Bay watershed.¹⁵² Canada and the United States referred the dispute to the IJC for recommendations.¹⁵³ The IJC studied the case and unanimously concluded that the diversion should not be built due to the threat of "severe and irreversible damage to the ecosystem."¹⁵⁴

The IJC again employed an ecosystem analysis when it decided the *Poplar River* referral.¹⁵⁵ In that case the IJC specifically considered the proposed coal-fired power plant's effects on "the existing biological community in the East Fork of the Poplar River."¹⁵⁶ Also, in the original

149. Joseph W. Dellapenna, *Custom-built Solutions for International Disputes*, UNESCO COURIER (France), Feb. 1, 1999, at 33, available at 1999 WLNR 5242462. The convention will enter into force after thirty-five nations have ratified it. International Watercourses Convention 1997, *supra* note 147, art. 36, 36 I.L.M. at 715. This could take more than a decade. Dellapenna, *supra*.

150. IJC, GARRISON DIVERSION UNIT, *supra* note 117, at 58–60 (analyzing the impact of the diversion on "water quality," "rural domestic, industrial, and agricultural water use," and "fish and wildlife"); see also McIntyre, *supra* note 119, at 204 (proffering that "the IJC was effectively adopting an 'ecosystems approach' to consider the potential adverse impacts of the project").

151. Knox, *supra* note 129, at 131.

152. IJC, GARRISON DIVERSION UNIT, *supra* note 117, at 5 (expressing Canadian and Manitoban concerns of the transboundary effects of the Garrison Diversion Unit, as well as the potential "transferring [of] foreign biota from the Missouri River into the Hudson Bay Drainage Basin"); Knox, *supra* note 129, at 131 (observing that "the Missouri River has a lot more exotic species from the Hudson Bay watershed point of view").

153. McIntyre, *supra* note 119, at 204 ("[I]n 1975 the State parties requested that the IJC examine and report on the transboundary implications of the . . . scheme in the state of North Dakota and make recommendations in relation to modifications, alterations, or adjustments that might assist in meeting the obligations of Article IV of the 1909 Treaty.")

154. IJC, GARRISON DIVERSION UNIT, *supra* note 117, at 121.

155. INT'L JOINT COMM'N, WATER QUALITY IN THE POPLAR RIVER BASIN 194–95, 197 (1981) [hereinafter IJC, POPLAR WATER QUALITY] (recognizing the U.S.-Canadian commitment to protect "recreational, scenic, natural preserve, and ecosystem research uses"); see also McIntyre, *supra* note 119, at 205 (suggesting that the IJC took "an expansive view of the environmental impacts of the project based on an 'ecosystems approach'").

156. IJC, POPLAR WATER QUALITY, *supra* note 155, at 197. Ultimately, the IJC did not oppose operation of the two power plants. *Id.* at 198.

Cabin Creek referral, the IJC extended consideration to the natural ecology of the transboundary Flathead basin, relying in part on Montana's "particularly stringent environmental requirements in [the] boundary region."¹⁵⁷ Additionally, it also addressed sustainable development, expressly recommending that in order to avoid future disputes in the Canadian Flathead the two nations should create a joint body to manage the watershed in a sustainable manner.¹⁵⁸

The incipient principles of sustainable development and ecosystem management evident in the IJC's *Garrison*, *Poplar River*, and *Cabin Creek* referrals have found full expression at the IJC in the last thirty years. Initially, the Great Lakes Water Quality Agreement of 1978 incorporated the "ecosystem concept."¹⁵⁹ The first article of the Great Lakes Agreement expressly states that the signatory nations must take into account the larger ecosystem, not just the human interests.¹⁶⁰ The IJC recently presented a proposal to amend the Great Lakes Agreement in which it specifically recommended not only ecosystem management, but also sustainable development in the Great Lakes basin.¹⁶¹

2. "Rarely, If Ever, . . . Absolute Obligations"¹⁶²

In looking at this small sample of treaties, conventions, IJC recommendations, and IJC development, it becomes clear that principles of ecosystem management and sustainable development have more than a de minimis basis, particularly in the U.S.-Canada context. Considering that customary law need coalesce around "regularities, but not necessarily uniformities, of [state] behavior," one could conclude that these principles merit the status of customary international law.¹⁶³ If so, B.C. would be legally obligated to consider sustainability and the larger ecosystem before

157. IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 7, 9.

158. *Id.* at 11 (recommending that "the Governments consider . . . equitable and sustainable development activities and management strategies in the upper Flathead River basin").

159. Agreement Between the United States of America and Canada on Great Lakes Water Quality, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383 [hereinafter Great Lakes Agreement 1978]; R.L. Thomas et al., *The Ecosystems Approach: A Strategy for the Management of Renewable Resources in the Great Lakes Basin*, in PERSPECTIVES ON ECOSYSTEM MANAGEMENT FOR THE GREAT LAKES 31, 31 (Lynton K. Caldwell ed., 1988).

160. See Great Lakes Agreement 1978, *supra* note 159, art. I, 30 U.S.T. at 1385 ("Great Lakes Basin Ecosystem' means the interacting components of air, land, water and living organisms, including man, within the drainage basin of the St. Lawrence River . . ."), art. II, 30 U.S.T. at 1387 ("The purpose of the Parties is to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem.").

161. See *supra* note 119 and accompanying text.

162. McIntyre, *supra* note 119, at 209.

163. Bodansky, *supra* note 138, at 109.

permitting mountaintop removal in the cross-border Flathead.

However, one commentator has argued that these substantive principles exist only in international dialogue, not practice; consequently, they do not meet the state practice requirement for customary international law.¹⁶⁴ Although there is widespread acceptance of environmental principles such as sustainable development and ecosystem management, this only means that nations discuss them, not that such principles guide nations' actions.¹⁶⁵ This normative/descriptive distinction, the argument continues, is sufficient to move the principles out of the realm of customary international law, for they do not satisfy the state practice requirement.¹⁶⁶ Quite simply, if something is not a current practice, but only aspirational,¹⁶⁷ it cannot be a custom.

While this is a potent argument, it is not necessarily fatal to Montana's environmental concerns in the transboundary Flathead basin. Determining the usefulness of the substantive principles of international environmental law is held in abeyance for the moment. To more fully evaluate the status of these principles in the realm of customary international law, one must first look to established customary international law regarding actions that parties should follow in situations of transboundary pollution.

C. Established Principles of Customary International Law

1. The Prevention Principle

The prevention principle—that no nation may undertake activities within its borders that will cause significant injury to another nation—is widely considered a basic tenet of customary international law. A brief elaboration of the history of this principle reveals ample support for this conclusion. It is further significant because the development of this principle is closely linked to the development of U.S.-Canada relations regarding transboundary environmental issues.

The international arbitral panel convened to settle the *Trail Smelter Arbitration*, a transboundary dispute between Canada and the United States, first reasoned that:

164. *See, e.g., id.* at 115. “In the environmental realm . . . verbal claims and physical behavior often diverge. States acknowledge a duty to prevent significant transboundary harm, but continue to cause such harm; they accept resolutions recommending assessments and notification, but seldom act accordingly.” *Id.*

165. *Id.*

166. *Id.* at 115–16.

167. McIntyre, *supra* note 119, at 179.

[U]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.¹⁶⁸

The dispute centered on a lead and zinc smelter in Trail, B.C. located seven miles north “as the crow flies” of the U.S.-Canada border, whose sulfur dioxide fumes allegedly damaged crops in eastern Washington.¹⁶⁹ After failing to successfully refer their dispute to the IJC for a recommendation under article IX of the Boundary Waters Treaty, the nations agreed to convene an arbitral panel to resolve, *inter alia*, the issue of “whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?”¹⁷⁰ In its 1941 Final Decision, the panel answered the question in the affirmative, holding that the smelter “shall be required to refrain” from causing further damage.¹⁷¹ Eventually, the panel adopted a two-pronged test created by the U.S. Supreme Court that provided for injunctive relief against another sovereign state when (1) the case “is of serious magnitude” and (2) the injury is established by “clear and convincing evidence.”¹⁷² Analogizing to one Swiss case between disputing cantons and a series of U.S. Supreme Court decisions,¹⁷³ the panel repeatedly evoked notions of equity, while stressing that respect for the sovereignty of the disputing parties would require a stronger showing of harm than would a normal nuisance case “between two subjects of a single political power.”¹⁷⁴ This decision has been hailed as “one of the foundations of international law.”¹⁷⁵

A review of twentieth-century international law reveals that (1)

168. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1938 (1941); 35 AM. J. INT'L L. 684, 716 (1941) [hereinafter Trail Smelter 1941]. Subsequent citations are to the latter source.

169. *Id.* at 688, 693.

170. *Id.* at 686.

171. *Id.* at 717.

172. *Id.* at 715. The panel noted that “[w]hat the Supreme Court says [in *New Jersey v. New Jersey*, 256 U.S. 296, 309 (1921)] of its power under the Constitution equally applies to the extraordinary power granted this Tribunal.” *Id.*

173. *Id.* at 714–17 (citing *New Jersey v. City of New York*, 283 U.S. 473 (1931); *New York v. New Jersey*, 256 U.S. 296, 309–10 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906); *Soleure v. Argovia*, R.O. 26 I, 137, 450–51).

174. *Id.* at 716 (quoting *Tenn. Copper Co.*, 206 U.S. at 238).

175. Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL. L.J. 233, 236 (2006).

international courts and arbitral panels have reaffirmed the principle that no nation may act in its territory in a way that significantly harms another country, and (2) nations and international bodies have included this principle in treaties and conventions. Following the *Trail Smelter Arbitration*, international adjudicatory bodies reaffirmed the prevention principle. In 1957, the International Court of Justice (ICJ) decided the *Corfu Channel Case*, stating the “general and well-recognized principle[]” that it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹⁷⁶ The *Lac Lanoux Arbitration* affirmed this, reasoning that a nation must notify another nation before undertaking activities within its border that may harm the other state.¹⁷⁷ Most recently the International Court of Justice (ICJ) in the *Case Concerning the Gabčíkovo-Nagymaros Project* spoke eloquently of the duty not to cause transboundary environmental harm:

[Recalling] the great significance that [the ICJ] attaches to respect for the environment, not only for States but also for the whole of mankind: the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.¹⁷⁸

In addition to the aforementioned arbitral panels and the ICJ, numerous international declarations and conventions regarding transboundary waterways uphold the principle that one waterway state may not use the waters in its jurisdiction in a way that will harm other states in the river basin. This is significant because such accords may be a source of customary international law “when [they] are intended for adherence by states generally and are in fact widely accepted.”¹⁷⁹

Three important international instruments affirm the obligation of

176. *Corfu Channel Case (Merits)* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

177. *Lac Lanoux Arbitration* (Spain v. Fr.), 12 R.I.A.A. 281 (1957); see also Brian R. Popiel, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. ENVTL. AFF. L. REV. 447, 452–53 (1995) (offering an analysis of the *Lac Lanoux Arbitration*).

178. *Case Concerning the Gabčíkovo-Nagymaros Project* (Hung. v. Slovak.) 1997 I.C.J. 7, 41 (Sept. 25) (quoting *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 241–42, para. 29 (July 8)).

179. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987).

states not to use their resources in a way that causes significant harm to other states. First, Principle 21 of the Stockholm Declaration stated that while states have the “sovereign right to exploit their own resources pursuant to their own environmental policies,” states also have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁸⁰ Twenty years later, the United Nations Conference on the Environment and Development in Rio de Janeiro repeated the same language in Principle 2 of the Rio Declaration, echoing this limitation on exploitation of resources within national borders.¹⁸¹ Finally, in 1997, the International Water Courses Convention reaffirmed that “[w]atercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.”¹⁸²

In addition to the above-mentioned decisions, international bodies addressing U.S.-Canada transboundary water disputes have continued to reaffirm this principle since the seminal *Trail Smelter Arbitration*. In the *Gut Dam* dispute, Canada and the United States established an arbitral tribunal to address claims arising from flooding to which Canada had contributed by its prior damming of a portion of the St. Lawrence River.¹⁸³ When the panel accepted the nations’ settlement in which Canada agreed to compensate the United States with \$350,000 for the harm,¹⁸⁴ it implicitly affirmed, in the context of transboundary waterways, the principle that one nation cannot use its territory in a way that significantly harms another.

The body of recommendations from the IJC on U.S.-Canada transboundary water disputes also strongly supports the prevention principle. Recommendations upholding this obligation include the *Garrison Diversion*, *Poplar River*, and *Cabin Creek* referrals.¹⁸⁵ In the *Garrison Diversion*, the IJC panel recommended indefinite delay of sections of the project that could potentially result in long-lasting or irreversible transboundary damage from the inadvertent transfer of exotic biota to another ecosystem.¹⁸⁶ In the reports from the latter two disputes, the IJC interpreted, to varying degrees, the pollution provision of article IV

180. *Stockholm Declaration*, *supra* note 142, at 1420.

181. *Rio Declaration*, *supra* note 143, at 876.

182. International Water Courses Convention 1997, *supra* note 147, art. 7(1), at 36 I.L.M. at 706.

183. Establishment of International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam, U.S.-Can., Mar. 25, 1965, 17 U.S.T. 1566–67.

184. Settlement of Claims Relating to Gut Dam, U.S.-Can., Nov. 18, 1968, 19.6 U.S.T. 7863.

185. IJC, GARRISON DIVERSION UNIT, *supra* note 117, at 121–23; IJC, POPLAR WATER QUALITY, *supra* note 155, at 198; IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 11.

186. IJC, GARRISON DIVERSION UNIT, *supra* note 117, at 121.

of the Boundary Waters Treaty, not to prohibit pollution per se, but instead “injury” from pollution to boundary waters.¹⁸⁷

The abovementioned sources—international arbitral decisions, decisions from the ICJ, widely supported international agreements—as well as historical U.S.-Canada relations, strongly support the conclusion that the prevention principle, specifically in the context of transboundary watercourses, is a binding principle of customary international law. The international conventions and historical U.S.-Canada interactions indicate and satisfy the state-action requirement, and the adjudicatory decisions upholding the prevention principle indicate and satisfy the requirement that the state action be done from a sense of legal obligation.

2. Scope of the Prevention Principle: B.C.’s Obligations in the North Fork

The immediate and obvious application of the prevention principle to the North Fork dispute is to prohibit Canada using its resources in a way that would cause significant harm to the United States. As in the *Trail Smelter* and the *Gut Dam* disputes, it would seem clear that if the Cline Mine went into operation and subsequently caused significant harm to fisheries or water quality in Montana, then Canada would be liable for damages. This, however, offers little comfort to anyone concerned with the potential significant harm to the Flathead River and the overall ecosystem in the Crown of the Continent region.

Fortunately, unlike the NAAEC citizen submission process, the prevention principle can operate prospectively.¹⁸⁸ The Third Restatement of Foreign Relations Law acknowledges that nations have the obligation to assure that their actions do not cause significant harm to other nations and, correlatively, nations may seek redress against other nations that threaten to violate this obligation.¹⁸⁹ The IJC relied on prospective application of the prevention principle when it recommended that the Garrison Diversion and Cabin Creek mine not proceed.¹⁹⁰ That this obligation entails proactive, preventative efforts is widely recognized.¹⁹¹

187. IJC, POPLAR WATER QUALITY, *supra* note 155, at 190–91; IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 8.

188. *See supra* Part II.A.1.

189. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601(1), 602(1) (1987).

190. *See* IJC, GARRISON DIVERSION UNIT, *supra* note 117, at 108–09 (concluding that safeguards could not eliminate the potential for irreparable harm); IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 8 (asserting that the “overwhelming evidence” indicates that strip mine would have “deleterious” effects).

191. *See, e.g.*, International Watercourses Convention 1997, *supra* note 147, art. 7, 36 I.L.M. at 706 (obliging watercourse states to “take all appropriate measures to prevent the causing of significant

To determine if Canada must take affirmative actions to avoid causing cross-border harm, the questions presented by the *Trail Smelter Arbitration* must be considered: whether the dispute involves potential for significant harm, and whether this can be shown by clear and convincing evidence.¹⁹² Although the potential for significant harm cannot be determined without a baseline study of the area, the potential harm can be indirectly addressed by considering the effects on rivers and ecosystems from current mountaintop removal coal-mining operations in Appalachia in the United States. Looking at the IJC studies of the Flathead from the *Cabin Creek* IJC referral provides further insight into the values at stake.

The effects of mountaintop removal mining in the Appalachian Mountains on the river systems of the region strongly suggest that a similar mine at Foisey Creek at the headwaters of the Flathead would cause significant cross-border harm. Mountaintop mining involves removal of the summit of a mountain, the “overburden,” to recover buried layers of coal.¹⁹³ The detritus is placed in valleys adjacent to the mining operation while the coal is removed.¹⁹⁴ Once all the coal is removed, some of the overburden is returned to the site, but because the material increases in volume when broken up, not all of it can be returned and large amounts of detritus remain in the valleys.¹⁹⁵ This process creates “valley fills.”¹⁹⁶

The adverse effects of these operations are considerable.¹⁹⁷ The Federal District Court for the Southern District of West Virginia recently observed:

When valley fills are permitted in intermittent and perennial

harm”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 601(1) (declaring that states must “take such measures . . . to the extent practicable under the circumstances” to prevent significant harm); *Draft Articles on the Law of Non-navigable Uses of International Watercourses and Commentaries Thereto and Resolution on Transboundary Confined Groundwater*, Report of the International Law Commission on the Work of its Forty-sixth Session, 49 U.N. GAOR Supp. (No. 10) at 89, 103 ¶ 5, U.N. Doc. A/49/10 (1994), reprinted in [1994] 2 Y.B. Int’l L. Comm’n pt. 2, 88, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (pt. 2), available at <http://www.un.org/law/ilc> (follow “ILC Yearbook” under the “Related web sites” pull down menu; then follow the “46th Session (1994)” under the “Sessions list” pull down menu; then follow “Yearbook of the International Law Commission, 1994, vol. II (Part Two), Download” hyperlink) (noting that the obligation to act affirmatively to prevent harm can be deduced from international watercourse treaties, multilateral conventions, and decisions from international arbitrations).

192. *Trail Smelter* 1941, *supra* note 168, at 715.

193. *Ohio Valley Envtl. Coal. v. Bulen*, 410 F. Supp. 2d 450, 456 (S.D. W. Va. 2004), *aff’d in part, vacated in part*, 429 F.3d 493 (4th Cir. 2005).

194. *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng’rs*, 479 F. Supp. 2d 607, 615 (S.D. W. Va. 2007).

195. *Id.*

196. *Id.*

197. *Id.*

streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality.¹⁹⁸

The effects of a valley fill at Foisey Creek, if localized to the immediate stream segment, would not violate the prevention principle. There would be no cross-border harm. Unfortunately, it is not possible to isolate the headwaters of the North Fork from its downstream waters. This is the case, for example, for migratory fish species that travel to the upper reaches of the Flathead to spawn.¹⁹⁹ Coal-mining activities in Foisey Creek would likely destroy spawning grounds for protected and valuable migratory fish species, such as the bull trout.²⁰⁰ In the *Cabin Creek* referral, the IJC recognized that the combined effects of the proposed coal mine to the headwaters of the Flathead would “cause a loss to the fishery, a loss which is felt on the other side of the boundary.”²⁰¹ Considering the analogues from *Cabin Creek* and Appalachia, it follows that a mountaintop removal coal mine at Foisey Creek would cause harm to the Montana portion of the watercourse.

In addition to destroying the species dependent on the upper reaches of the waters, valley fills from mountaintop removal coal mines affect downstream water quality. Headwaters, because of their unique characteristics, are “disproportionately important in functions related to biodiversity, water quality, and nutrient processing.”²⁰² By destroying headwaters, valley fills pose a “serious danger to the aquatic ecology.”²⁰³ Mountaintop removal coal mines also carry the danger of catastrophic spills from waste dumps; such events have occurred both in Appalachia and at

198. *Bragg v. Robertson*, 72 F. Supp. 2d 642, 661–62 (S.D. W. Va. 1999).

199. BIOLOGICAL RESOURCES COMM. OF THE FLATHEAD RIVER INT’L STUDY BD., PREDICTED IMPACTS OF THE PROPOSED SAGE CREEK COAL LIMITED MINE ON THE AQUATIC AND RIPARIAN RESOURCES OF THE FLATHEAD RIVER BASIN, BRITISH COLUMBIA AND MONTANA 72 (1987).

200. *See id.* at 89 (citing studies indicating that approximately one-third of bull trout in the Flathead basin spawn in the Canadian portion of the watershed and concluding that even under optimal conditions a mine at Cabin Creek would destroy ten percent of the bull trout population in the total Flathead river system); *see also supra* notes 14–16 and accompanying text.

201. IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 8.

202. *Ohio Valley Envtl. Coal.*, 479 F. Supp. 2d at 637.

203. *Id.* at 638.

nearby coal-mining operations in B.C.²⁰⁴ The cross-border effects on water quality from valley fills and from potential spills at Foisey Creek could be significant. This is particularly worrisome considering the many protections afforded the Flathead basin in Montana.²⁰⁵

On top of the harm to the aquatic ecosystem, mountaintop mining has adverse effects on the larger surrounding environment. In granting a preliminary injunction, one court aptly described the effects of a proposed mountaintop mine:

If the forest wildlife are driven away by the blasting, the noise, and the lack of safe nesting and eating areas, they cannot be coaxed back. If the mountaintop is removed, even [the mining company's] engineers will affirm that it cannot be reclaimed to its exact original contour. Destruction of the unique topography of southern West Virginia . . . cannot be regarded as anything but permanent and irreversible.²⁰⁶

While permanent and irreversible damage localized entirely to B.C. cannot affect this analysis, it is a concern to the degree that it affects Montana. A study of the proposed Cabin Creek mine indicated that the only case in which the mine would not affect wildlife on the Montana side of the border was if the mine operated at optimal conditions.²⁰⁷ Similarly, in all but the most favorable conditions, a mine at Foisey Creek could adversely affect the surrounding ecosystem in the Crown of the Continent region.²⁰⁸ Once begun, operations would continue unceasingly 24 hours per day, 365 days per year, for 20 years.²⁰⁹ Considering the reality of the mountaintop mining in Appalachia and the studies of the Cabin Creek mine in the Flathead basin, it seems likely that there would be effects on the larger Crown of the Continent region. Moreover, because of the particularly high

204. See MINE DEV. COMM. FLATHEAD RIVER INT'L STUDY BD., *supra* note 117, at 121–23 (cataloguing historical failures of waste dumps and settlement ponds in the nearby Elk Valley in B.C.); Ken Ward Jr., *Mine Spill on Tug Underscores Dam Concerns*, CHARLESTON GAZETTE & DAILY MAIL (Charleston, W. Va.), Oct. 13, 2000, at 1A (reporting 200 million gallon spill of coal slurry from failed waste impoundment pond).

205. See *supra* notes 17–22 and accompanying text.

206. *Bragg v. Robertson*, 54 F. Supp. 2d 635, 646 (S.D. W. Va. 1999).

207. See BIOLOGICAL RESOURCES COMM. OF THE FLATHEAD RIVER INT'L STUDY BD., *supra* note 199, at 264–68 (noting that under adverse operating conditions or in the case of an extreme event, populations of terrestrial vertebrates across the international border would decline).

208. See Jamison, *supra* note 45 (noting the need for thorough environmental review of the proposed Cline Mine).

209. Flathead Basin Comm'n, Cline Mine in a Nutshell, http://www.flatheadbasincommission.org/mining/cline/news/cline_news.html (follow “Cline Mine in a nutshell” hyperlink) (last visited Jan. 23, 2008).

environmental standards in this pristine region of the United States, the threshold of what should be considered significant harm is quite low.²¹⁰

The likelihood of significant harm to the North Fork and the surrounding ecosystem implicates the prevention principle. However, consideration of the harmful effects of radical strip mining in Appalachia does not suffice to prevent a coal mine in B.C. Here one must consider the second element articulated by the *Trail Smelter Arbitration*, the requirement that the harm be shown by “clear and convincing evidence.”²¹¹

Surely it would not be acceptable for Cline not to consider the potential effects of its mine, and thus be able to escape the prevention principle on account of lack of evidence. From the Montana perspective, the ideal means of compiling evidence in order to assess potential cross-border harm would be for Cline to complete a comprehensive environmental assessment (EA).

3. A Procedural Principle: The Transboundary EA

Like the substantive principles of sustainable development and ecosystem management, the procedural requirement of an EA for transboundary harm is not foreign to international environmental law. The Watercourses Convention of 1997 requires an EA before a nation may proceed with a project “which may have a significant adverse affect upon other watercourse States.”²¹² While there is academic debate about the source of the obligation to conduct an international EA, few question that it has normative status in international law.²¹³

That the obligation to perform an EA follows from the obligation to prevent significant cross-border harm is commonsensical. In order to determine if a given activity may cause such harm as to violate the prevention principle, it is necessary to evaluate the potential harm.²¹⁴ An

210. See *supra* notes 8–22 and accompanying text. Compare the *Poplar River* referral, IJC, POPLAR WATER QUALITY, *supra* note 155, at 195–98 (finding that coal-burning power plant might cause some degradation to river but, since water quality was already poor, anticipated degradation would not be sufficient to show injury), with the *Cabin Creek* referral, IJC, PROPOSED MINE IMPACTS, *supra* note 1, at 9 (finding that in situation where one nation has stringent environmental standards in a region, both nations should seek creative ways of ensuring that that uses on both sides of border respect high standards).

211. *Trail Smelter 1941*, *supra* note 168, at 715.

212. International Watercourses Convention of 1997, *supra* note 147, art. 12, 36 I.L.M. at 707. The EA is part of the requirement that a state preparing to undertaking activities notify other transboundary states prior to beginning if the activities could have a significant adverse effect on the other states. *Id.*

213. McIntyre, *supra* note 119, at 199–200.

214. Popiel, *supra* note 177, at 475.

EA is the tool with which a party may evaluate the potential harm of a given project.²¹⁵ In the context of potential international harm and the prevention principle, the international EA is entirely appropriate.

One could use the prevention principle and the international EA as vessels for importing the principles of sustainable development and ecosystem management into the dialogue. While these principles have not been recognized as binding customary international law, they have developed “normative specificity and sophistication”²¹⁶ internationally and have long had a role in guiding U.S.-Canada water debates.²¹⁷ Because they are recognized principles with a degree of normative weight,²¹⁸ one should incorporate them into the international EA for the proposed Cline Mine. This would be particularly appropriate given the significant environmental values in Montana that the mine could drastically impact.²¹⁹

D. Customary International Law and the Transboundary Flathead

It follows from this analysis that, pursuant to the prevention principle, the likelihood that significant cross-border harm will result from the proposed Cline Mine requires Canada to take affirmative actions to assure that such harm does not occur. It is most appropriate that Canada should conduct a comprehensive EA addressing the impact the mine would have on the Montana environment. Because the threatened environmental values in Montana are highly protected and of international significance and because of the normative force of emerging principles of international environmental law, the EA should address the issues of ecosystem management and sustainable development.

B.C. law does not require consideration of the transboundary impact of the mine, nor is the B.C. government required to consider sustainable development issues.²²⁰ Furthermore, by not considering the downstream effects of the mine, the B.C. government is not, a fortiori, considering the larger ecosystem effect of the proposed mine. Nevertheless, the limits of B.C. environmental law are not the limits of protection available to the Flathead River and the greater Crown of the Continent region. The

215. *Id.* at 462.

216. *See* McIntyre, *supra* note 119, at 207–09 (pointing out examples of specific reference to the principles in international law).

217. *See supra* notes 150–61 and accompanying text.

218. *See* McIntyre, *supra* note 119, at 160 (arguing that emerging principles of customary international law should receive greater consideration in international decisions affecting the environment, even if they have not yet become obligations of customary international law).

219. *See supra* notes 8–24 and accompanying text.

220. *See supra* notes 58–61 and accompanying text.

prevention principle and its concomitant, the international EA, require Canada to take affirmative steps before undertaking activities that threaten significant cross-border harm. If Montana's concerns are not fully addressed by B.C., Montana should further implore the U.S. government to seek both a remedy for violation of customary international law and creation of an arbitral panel if Canada does not consent to such measures.

CONCLUSION

Both treaty law and customary international law have potential for resolving the dispute over the proposed Cline mine at Foisey Creek by addressing Montana's concerns of cross-border harm, ecosystem management, and sustainable development. The treaties prove marginally helpful. First, the NAAEC would not be an effective means of addressing the issue in a preventative manner, though both of the treaty's mechanisms could be effective if the mine went into operation and Canada did not adequately enforce applicable environmental laws. Second, the Boundary Waters Treaty and the IJC might effectively address Montana's concerns in resolving the dispute, but the mine is not likely to trigger the IJC's mandatory jurisdiction. Political issues between Canada and the United States make it unlikely that the nations will refer the dispute to the IJC for a decision or recommendation.

The last possibility considered, customary international law, offers the best means by which Montana and the United States could resolve the dispute in a way that addresses their concerns with cross-border harm. The prevention principle mandates that coal mining in the Canadian Flathead not cause significant cross-border harm. As there is a threat of significant harm, Canada must take affirmative measures. In particular, it must consider the mine's transboundary impact.

The TEIA is the appropriate tool for assessing such potential damage. Furthermore, considering the environmental values at stake and the normative force of emerging principles of international environmental law, such an assessment should consider ecosystem management and sustainable development. While the latter considerations may not be enforceable internationally, the prevention principle is obligatory. If B.C. and Canada are unwilling to take steps to analyze the potential cross-border harm that could result from coal mining at Foisey Creek, the United States should require that an international arbitral panel address the question under customary international law.

EPILOGUE

On December 21, 2007, in response to continuing U.S. diplomatic pressure, the Canadian government announced that it would subject the Lodgepole mine to a comprehensive review under the Canadian Environmental Assessment Act (CEAA).²²¹ The Canadian Fisheries Department is to assure completion of the review, which is premised on potential harm to the fisheries in the Canadian Flathead.²²² Cline Mining Corporation will conduct the assessment.²²³

This is a positive development for a number of reasons. First, the scope of a comprehensive review under the CEAA is broader than that of its counterpart under B.C. law: assessment is mandatory, as are considerations of alternatives and cumulative impacts.²²⁴ Second the stated purpose of the act includes promoting sustainable development.²²⁵ Third, the Act provides for assessment of transboundary impacts.²²⁶

Nevertheless, comprehensive review under CEAA has a number of shortcomings. While this is not the place to address them exhaustively, the following should be noted: First, in the sustainable-development balance, the Act is weighted toward development, rather than sustainability.²²⁷ Second, opportunity for public comment on a proposal is limited to thirty days.²²⁸ Third, the proposed comprehensive review is not the most demanding review available under the act.²²⁹

Ultimately, the use of international law as a means of protecting the watershed should not be diminished. The CEAA, while more comprehensive than the B.C. statutory scheme, is no panacea.²³⁰ Moreover,

221. Notice of Commencement of an Environmental Assessment, Lodgepole Mine, British Columbia, Canadian Environmental Assessment Registry, 07-03-36059 (Dec. 21, 2007), available at http://www.ceaa.gc.ca/050/Viewer_e.cfm?CEAR_ID=36059; Jim Mann, *Canada OKs Limited Review of Mine Plans*, DAILY INTER LAKE (Kalispell, Mont.) Dec. 19, 2007, available at <http://www.dailyinterlake.com/articles/2007/12/18/news/news02.txt>.

222. Notice of Commencement of an Environmental Assessment, *supra* note 221.

223. *Id.*

224. R. Jamie Herring, *The Canadian Federal EIA System*, in ENVIRONMENTAL IMPACT ASSESSMENT: PRACTICE AND PARTICIPATION 231, 236–37 (Kevin S. Hanna ed., 2005); *cf.* Environmental Assessment Act, s. 10(1), 2002 S.B.C., ch. 43 (B.C.) (EA discretionary); DAVID R. BOYD, UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY 157 (2003) (alternatives and cumulative impacts need not be considered).

225. Canadian Environmental Assessment Act, R.S.C., ch. 37, s. 4(1)(b) (1992).

226. Canadian Environmental Assessment Act, s. 47(1); Herring, *supra* note 224, at 234.

227. Herring, *supra* note 224, at 242.

228. Canadian Environmental Assessment Act, s. 23(3); Herring, *supra* note 224, at 243.

229. Herring, *supra* note 224, at 235, 237–38. (noting, *inter alia*, that the comprehensive assessment is a “self-assessment” by the project proponent, rather than the more rigorous “independent assessment” of mediation of panel review).

230. *See id.*, at 241–46 (enumerating various shortcomings of CEAA).

with skyrocketing prices for coal—particularly coking coal—natural gas, and gold,²³¹ one can only expect the pressure for bringing industrial resource extraction to the Canadian Flathead to continue to build.

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231. Edmund L. Andrews, *Fed Chief Shifts Path, Inventing Policy in Crisis*, N.Y. TIMES, Mar. 16, 2008, at A1, available at 2008 WLNR 5162377; *Coal: Prices Forecasted to Rise Three-Fold*, GREENWIRE, Mar. 7, 2008; Jad Mouawad, *Oil Tops Inflation-Adjusted Record Set in 1980*, N.Y. TIMES, Mar. 4, 2008, at C1, available at 2008 WLNR 4264573.

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