Solution Before Pollution: Mining and International Transboundary Rivers in Southeast Alaska

Britany Kee' ya aa. Lindley
Seattle University, School of Law

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SOLUTION BEFORE POLLUTION: MINING AND INTERNATIONAL TRANSBoundary RIVERS IN SOUTHEAST ALASKA

By Britany Kee’yaaa Lindley

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SOLUTION BEFORE POLLUTION: MINING AND INTERNATIONAL TRANSBOUNDARY RIVERS IN SOUTHEAST ALASKA

By Britany Kee’ ya aa. Lindley *

I. MINING AND THE INTERNATIONAL TRANSBOUNDARY STIKINE RIVER

The Stikine River is a majestic wilderness area that traverses 400 miles from where it originates in British Columbia, flows through Tongass National Forest, and ends near the island of Wrangell in southeast Alaska.1 The Indigenous Nations2 of this region, the Tlingit, Haida, Tsimshian, and Tahltan Nations, have utilized the abundance of natural resources that the Stikine has provided since time immemorial.3 Today, indigenous and non-indigenous locals live similar subsistence lifestyles and enjoy the Stikine as a recreational playground by soaking in natural hot springs, viewing striking glaciers, and camping along the banks of

* Kee’ ya aa. yoo xát duwasáakw; Yéil naax xát sïte; Kaach.ádi áyá xát; Shtax’héen Kwáan áyá xát; Kaalch’al aan kwáandáx áyá xát; Tsimshian yádi áyá xát; Tahltan dachxín áyá xát; The author’s Tlingit name is Kee’ ya aa. (the dawn rising); Member of the Tlingit Nation originating from Kaalch’al aan; Representative of the yéil (raven) moiety, the Kaach.ádi (raven frog) clan, and the Shtax’héen Kwáan (Stikine River People); Descendant of the Tahltan and Tsimshian Nations; Enrolled member of Central Council Tlingit and Haida Indian Tribes of Alaska and the Wrangell Cooperative Association. Juris Doctor Candidate, Seattle University School of Law, Class of 2018; Managing Editor, the American Indian Law Journal. The author would like to thank her family, friends, colleagues, mentors, and allies who supported and encouraged the creation of this article. The author would also like to express her sincere gratitude to the multitude of Alaska Native Tribal, First Nation, municipal, state, provincial, federal, organizational, and other leaders that have worked to defend and sustain the international transboundary rivers of southeast Alaska and British Columbia.

1 THE MCDOWELL GRP., SE. ALASKA TRANSBOUNDARY WATERSHEDS: ECON. IMPACT ANALYSIS 29 (Oct. 2016) [hereinafter MCDOWELL GRP.].
2 This article differentiates between indigenous peoples, Indigenous Nations, Tribes, and First Nations. Generally, indigenous peoples refers to indigenous peoples worldwide; Indigenous Nations refers to Native American/Alaska Native Tribes and Canadian First Nations; Tribes refers to Native American/Alaska Native Tribes; and First Nations refers to Canadian First Nations.
the river in tents or United States Forest Service cabins. Further, the Stikine provides pristine habitat for wildlife, including all five species of wild Pacific salmon, and natural beauty for two of southeast Alaska’s wealthiest industries, commercial fishing and tourism. This unparalleled ecosystem, preserved for centuries by Indigenous Nations, is now inherently threatened by a modern-day gold rush underway in British Columbia.

Southeast Alaska’s ecosystems, cultural way of life, subsistence lifestyle, and a variety of lucrative industries are inherently threatened because British Columbia’s mines are located on international transboundary watersheds. Specifically, the Red Chris Mine became an operational open pit Canadian copper mine on the headwaters of the international transboundary Stikine River in November of 2014. This mine offers no benefits to Alaska, yet it is likely to release hazardous substances into the Stikine watershed that will cause irrevocable harm. A Red Chris Mine failure would not only devastate the subsistence lifestyle that Wrangellites and others in the vicinity rely on, but would also imperil the economic future of a collection of industries that rely on the ecological integrity of the Stikine.

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5 Id.

6 See generally McDowell Grp., supra note 1, at 1.

7 See generally McDowell Grp., supra note 1, at 1.


9 See generally id.


The United States and Canada signed and ratified the Boundary Waters Treaty (the Treaty) to protect the international transboundary waters. The Treaty created the International Joint Commission (IJC), with three Commissioners appointed from each country, to regulate transboundary water use, investigate disputes, and provide solutions. However, the Treaty protections for transboundary waters are severely limited. The language of the Treaty is limiting in that it establishes the IJC with exclusively national representatives, and allows only national actors to bring a claim to the IJC, and establishes an extremely vague and outdated pollution prevention provision. These limitations indicate that specific provisions within the Treaty must be amended.

The Treaty must be amended to ensure that Tribes, First Nations, states, provinces, the United States, and Canada are able to satisfy their own respective gains, without endangering the gains of others or the environment. The Treaty should be amended to include: (1) subnational sovereigns invested in and affected by international transboundary water management, and (2) a pollution prevention plan for international transboundary waters. Such amendments would uphold the United States’ and Canada’s commitments to the principle of subsidiarity, the United Nations

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15 BWT, supra note 12, at art. IX.
16 BWT, supra note 12, at art. IV.
17 Within this article “subnational sovereigns” refers to Tribes, First Nations, states, and provinces.
18 Pollution prevention is reducing or eliminating waste at the source by modifying production processes, promoting the use of nontoxic or less toxic substances, implementing conservation techniques, and reusing materials rather than putting them into the waste stream. Pollution Prevention Law & Policies, EPA, Feb. 7, 2017, https://www.epa.gov/p2/pollution-prevention-law-and-policies [https://perma.cc/J5QH-4PP5].
Declaration on the Rights of Indigenous Peoples (UNDRIP),\textsuperscript{20} and the new ecological understandings about the irrevocable harms of pollution to the environment.\textsuperscript{21}

This article aims to provide a proactive solution to international transboundary water disputes (ITW disputes) specific to the international border between the United States and Canada, and focuses on the inherent threat of transboundary pollution central to the Stikine River. Part II of this article discusses the importance of southeast Alaskan rivers not only to the environment, but also to the subsistence and economic opportunities for Indigenous Nations and non-indigenous people alike. Part III examines the legal doctrines, principles, and policies applicable to the Stikine River ITW dispute. Part IV declares that the Treaty is the most direct and efficient avenue to address the dispute, and examines the weaknesses of the Treaty. Part V explains that the Treaty’s limitations must be amended, and suggests that it should be amended to (1) include all sovereigns with powers and significant interest in the affected region, and (2) provide a pollution prevention plan applicable to international transboundary waters. While this article does not address the amendment process for the Treaty, it does address the practical necessity for, and political viability of, the proposed amendments. Part VI concludes that amending the Treaty to embrace the principle of subsidiarity, UNDRIP, and new ecological understandings is a pragmatic, feasible, and politically realistic proactive solution for all parties invested in and affected by international transboundary water management.

II. SOUTHEAST ALASKA: THE STIKINE RIVER

The United States and Canada share a 5,525 mile border, which bisects the North American continent.\textsuperscript{22} Across thirteen states

\textsuperscript{22} JANICE C. BEAVER, CONG. RESEARCH SERV., RS21729, U.S. INT’L BORDERS: BRIEF FACTS 1 (Nov. 9, 2006).
and nine provinces,23 the border divides, crosses, or coincides with hundreds of watercourses.24 The State of Alaska alone encompasses 1,538 miles of that border25 and is home to over forty percent of the surface water resources in the United States, including over 12,000 rivers, 3 million lakes, and countless creeks and ponds.26 In Alaska’s Alexander Archipelago, also known as the southeastern panhandle, the Tongass National Forest encompasses an unparalleled ecosystem of 17 million acres.27 The Tongass is a protected wilderness area managed by the United States Forest Service, a division of the United States Department of Agriculture.28

The Tongass is home to a variety of life, including all five species of wild Pacific salmon, brown and black bears, bald eagles, moose, and approximately 70,000 people living in thirty-two communities.29 Healthy forests, like the Tongass, “purify the air we breathe; provide clean water for our cities, homes, and irrigation; reduce the effects of drought and floods; store carbon; generate fertile soils; provide wildlife habitat; maintain biodiversity; and provide aesthetic, spiritual, and cultural values.”30 Further, natural resources harvested from the Tongass include timber used for wood products; mineral resources used in manufacturing and energy production; and an abundance of vegetation, such as mushrooms.

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25 BEAVER, supra note 22.
28 The National Forest System was created by the Land Revision Act of 1891. Alaska is home to twelve percent of all National Forest lands, including Tongass National Forest. National forests are category VI protected areas by the I.U.C.N. and the United States. Lawrence S. Hamilton, Janet C. Mackay, Graeme L. Worboys, Robert A. Jones, & Gregor B. Manson, Transborder Protected Area Cooperation, I.U.C.N. (1996), https://www.iucn.org/content/transborder-protected-area-cooperation [https://perma.cc/6EW7-N7KF].
berries, and lichens used for Tribal and Alaskan specialty products. In addition, nearly 18,000 miles of shoreline, over 10,000 estuaries, and 13,750 miles of river weave through the Tongass. Fresh water sources, specifically rivers, are invaluable finite resources. The phrase *river of life* is quite literal, as fresh water is not only essential to humanity but to all life on Earth.

It is widely recognized that “the life and well-being of humanity] and the natural environment are interrelated and even interdependent.” For thousands of years, Indigenous Nations have harvested a variety of plants and wildlife from the Stikine River. Surrounded by the abundance of natural resources the ecosystem provides, southeast Alaskan locals continue to live subsistence lifestyles similar to the indigenous Tlingit, Haida, Tsimshian, and Tahltn Nations. This indigenous subsistence lifestyle is sustained by resources such as timber, wild game, and native vegetation. The Stikine’s rich and diverse ecosystem also fuels the indigenous, city, state, provincial, and national economies through its commodity resources, such as gold, timber, and salmon, and amenity resources, such as a clean environment, pristine natural beauty, and endless outdoor recreation opportunities.

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31 Id.
34 GREENING, supra note 21, at 30.
35 *Tongass Nat’l Forest Region Overview*, supra note 27.
36 *Saving Se. Alaska’s Rainforest Way of Life*, supra note 3.
A. A Lifeline for Indigenous Nations

The indigenous Tlingit, Haida, Tsimshian, and Tahltan Nations have inhabited what is now the transboundary region of southeast Alaska and British Columbia for approximately 5,000 years.\(^{41}\) The members of these Indigenous Nations, like their

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ancestors before them, remain vitally connected to the land and its resources. The traditional way of life and subsistence lifestyle practiced by the Indigenous Nations rely on rivers and the natural habitat as integral lifelines.\textsuperscript{42} The Stikine River ecosystem’s unparalleled habitats and natural resources provide substantial value to the Indigenous Nations of this region as these nations have intricate physical, spiritual, and economic relationships with their land base and its natural resources.\textsuperscript{43} Importantly, the abundance of natural resources provided by the Stikine ecosystem has supplied the Indigenous Nations with everything needed to survive, including food, shelter, clothing, canoes, weapons, and tools.\textsuperscript{44} The Indigenous Nations of this region have successfully maintained their subsistence economies and cultural traditions, despite threats to their way of life following the arrival of Europeans in the region.\textsuperscript{45} For example, the Tlingit Nation has harvested a variety of plants and wildlife from the Stikine River for countless generations.\textsuperscript{46} Some of the major mammal species of the area are brown and black bear, Sitka black-tailed deer, moose, wolf, and mountain goat. In addition, southeast Alaska supports a variety of migratory waterfowl, shorebirds, and the largest concentration of bald eagles in the world.\textsuperscript{47} To this day, the Tlingit people generally harvest berries in the spring, catch salmon in the summer, and hunt moose in the fall from the Stikine to feed their loved ones through the winter.\textsuperscript{48}


\textsuperscript{45} \textit{See, e.g.}, \textit{id.; History of Wrangell, supra} note 38.

\textsuperscript{46} \textit{Tongass Nat’l Forest Region Overview, supra} note 27.


\textsuperscript{48} \textit{Tongass Nat’l Forest Region Overview, supra} note 27.
Indigenous Nations also utilize animal hides or pelts, teeth, and bones to create ceremonial and practical pieces, such as drums, regalia, and tools.⁴⁹ Beyond conventional tribal land uses, the Stikine is also utilized for outdoor and expeditionary activities by the Alaska Crossings program, which is an intensive behavioral health program of the Southeast Alaska Regional Health Consortium⁵⁰ for troubled youth in the region.⁵¹

Indigenous nations utilize the natural resources for both their physical needs and as a source of spiritual connection. The Indigenous Nations view natural resources collectively as a single entity, with each resource impacting the others. Thus, the Indigenous Nations not only fully utilize the resources, but also respect and honor them as gifts from spiritual beings.⁵² Further, these Indigenous Nations are “place-based” people, or a people who develop intimate relationships with their specific region’s natural environment throughout their respective histories. Due to this spiritual connection, Indigenous Nations’ physical, mental, social, and spiritual health is often directly and uniquely related to the health of the ecosystems they consider home.⁵³

For example, Indigenous Nations of this region consider the Stikine River to be “sacred waters.”⁵⁴ The Tahltan Nation regards the headwaters of the Stikine as being of “tremendous cultural, spiritual, and social importance [to the Nation].”⁵⁵ Further, the Tlingit Nation’s legend of origin reveals that their people originated

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⁴⁹ See, e.g., PRITZKER, supra note 41, at 209–11.
⁵⁰ The Southeast Alaska Regional Health Consortium (SEARHC) is a non-profit medical, dental, vision, and mental health organization that was developed under the Indian Self-Determination Act to serve the health interests of the residents of Southeast Alaska. Our Story, SEARHC, http://searhc.org/about-us/our-story/ [https://perma.cc/DQ9K-HDGJ] (last viewed Dec. 9, 2017).
⁵² PRITZKER, supra note 41.
under the great ice fields of the Stikine River. It is said that the Nation emerged from under the ice at the mouth of the Stikine, near the island of Wrangell, and from there, the Tlingit people spread throughout the Alexander Archipelago. The largest Tlingit Tribe to inhabit the Alexander Archipelago settled on the island of Wrangell and is known as the Shtax’héen Kwáan, which means the “bitter unwholesome water tribe,” more commonly known as the Stikine River people.

Similar to their spiritual connection to the waters of the Stikine, the Indigenous Nations also have deep and longstanding spiritual relationships with animals. For example, the Tlingit and Haida people identify as either raven or eagle moiety, and are further represented by a family clan animal. Clan animals are specific to each clan and include a variety of prey and predator animals like frog, salmon, bear, and killer-whale. The Tlingit people traditionally believe that their moiety and clan animals carry heavenly spirits or supernatural beings. Similarly, the Tahltan people identify as either crow or wolf clans, and are further divided into family groups.

Finally, the abundance of natural resources provided by the Stikine ecosystem has supplied and continues to supply the Indigenous Nations with the opportunity for economic growth. In traditional times, the Stikine provided everything necessary for the Indigenous Nations to become highly-skilled navigators and experienced traders. Specifically, the Tlingit Nation traditionally traveled via canoe north through the channels of southeast Alaska to the interior of Alaska and south across the Pacific Coastline to northern California to trade furs and other traditionally made goods harvested from the Stikine and surrounding vicinity. Today, Indigenous Nations on both sides of the international border run lucrative businesses that rely on the natural resources and natural beauty of the region. Indigenous Nations support their families

56 History of Wrangell, supra note 38.
57 Ream, supra note 44, at 5.
58 See generally id.
59 See generally id. at 313.
60 See generally id. at 314.
61 See, e.g., PRTZKER, supra note 41, at 210.
63 Jones & Carter, supra note 37.
64 Jones & Carter, supra note 37.
through both traditional methods like artistry in prints, jewelry, and items carved from wood,\(^{65}\) as well as modern methods like commercial fishing, tourism, and mining.\(^{66}\)

### B. A Lifeline for Non-Indigenous Peoples

The Stikine River’s unparalleled habitats and natural resources also provide substantial value to the non-indigenous peoples on both sides of the international border. Similar to the Indigenous Nations, the non-indigenous peoples inhabiting this region rely on the natural resources of the Stikine not only for subsistence, but also to sustain their businesses.\(^{67}\) Further, the state and provincial governments in this region recognize the natural resources as integral to their citizens for sustenance, economic growth, and recreational enjoyment.\(^{68}\)

Non-indigenous peoples in the transboundary region of southeast Alaska and British Columbia often live subsistence lifestyles similar to the Indigenous Nations, relying on the natural habitat as an integral lifeline.\(^{69}\) For example, residents in the immediate vicinity of the Stikine River on the United States side of the border have participated in subsistence fishing on the Stikine since 2004.\(^{70}\) Between 2010 and 2014, an average of 123 personal use (subsistence) permits for salmon were issued to harvest an estimated $100,000.00 worth of fish.\(^{71}\) In addition, hunting for moose and other wild game on the Stikine, including black and

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\(^{67}\) See What’s at Risk?, supra note 11.


\(^{69}\) History of Wrangell, supra note 38.

\(^{70}\) The subsistence fishery was established by the Federal Subsistence Board and Pacific Salmon Commission. 69 Fed. Reg. 28,847 (Codified at 36 C.F.R. 242 & 50 C.F.R. 100).

\(^{71}\) McDOWELL GRP., supra note 1, at 38.
brown bear, mountain goat, deer, and wolves, is essential for many families in the vicinity.\(^\text{72}\)

Some families built businesses based on these natural resources. Thus, the prospects of a variety of lucrative businesses, and the people employed by them, are inevitably reliant on the ecological integrity of the Stikine River watershed. For example, all five species of wild Pacific salmon spawn on the Stikine River and throughout southeast Alaska.\(^\text{73}\)

Southeast Alaska, and the transboundary rivers [like the Stikine], are home to world-renowned salmon runs, supporting the commercial fishing industry, tourism, and subsistence lifestyles throughout the region. In 2013, there was a record harvest of 95 million pink salmon in Southeast Alaska, valued [at] around $220 million. In 2015, the statewide salmon harvest topped 263 million fish and was valued at around $414 million.\(^\text{74}\)

The Stikine River alone generates an estimated $4.3 million from the tourism industry’s sport fishing, and $3.5 million in wholesale value from the commercial fishing industry.\(^\text{75}\) The Stikine creates approximately 117 full and part-time jobs, including commercial fishing crews, seafood processors, tour operators, and small business owners.\(^\text{76}\) The Stikine provides an estimated $5.7 million in annual income.\(^\text{77}\)

Beyond salmon, many other natural resources provided by the Stikine fuel the economy in this transboundary region. For example, its timber is used for wood products; its mineral resources are used in manufacturing and energy production; and its abundance of native vegetation, such as mushrooms, berries, and traditional medicines, is used for specialty products.\(^\text{78}\) Specifically, the

\(^{72}\) McDowell Grp., supra note 1, at 42.

\(^{73}\) What’s at Risk?, supra note 11.


\(^{75}\) McDowell Grp., supra note 1, at 3–4.

\(^{76}\) McDowell Grp., supra note 1, at 3–4.

\(^{77}\) McDowell Grp., supra note 1, at 3.

\(^{78}\) Citizen’s Guide to Nat’l Forest Planning, supra note 30, at 8.
Canadian Red Chris Mine on the Stikine River has the potential of earning significant revenue for mined copper, gold, and silver. The Red Chris Mine is significant for various industries that utilize copper including the construction, power generation and transmission, electronic production manufacturing, and industrial machinery production industries.

In addition, the Stikine is a pristine wilderness area with winding channels, an abundance of wildlife, and an active glacier utilized by the tourism and recreation industries. The Stikine River generates an estimated $12.7 million in annual spending in southeast Alaska for both commercial and recreational activity. The beauty and grandeur of the Stikine is showcased by tour companies and the recreation industry via kayak/canoe, boat, and plane.

Finally, the state and provincial governments in this region also recognize that the natural resources are integral to their citizens through implementing programs to regulate the use of natural resources in their respective regions. For example, the Alaska’s Department of Natural Resources’ major programs include agriculture, mining, oil and gas, land and water, parks and outdoor recreation, and forestry. “Land use [in Alaska] is very diverse and includes urban and rural development, livestock grazing, . . .

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81 See, e.g., What's at Risk, supra note 11; McDowell GRP., supra note 1, at 1; Stikine River Wilderness Adventure, ALASKA WATERS, https://alaskawaters.com/activities/stikine-river-wilderness-adventure/ [http://perma.cc/TVQT-9RAG] (last visited Nov. 25, 2017) (A “Stikine River Wilderness Adventure” with Alaska Waters consists of an exploration of approximately seventy miles of this untouched, pristine wilderness area through a spectacularly stunning mountainous region covered with the lush rain forest and large waterfalls on the way to Shakes Glacier).
82 McDowell GRP., supra note 1, at 3.
subsistence hunting and fishing, recreation, and wildlife habitat.” Similarly, British Columbia’s major programs include agriculture and seafood, electricity and alternative energy, mineral exploration and mining, natural gas and oil, and forestry. The British Columbia government recognizes that “[l]and holds a unique and pivotal position in [their] society, supporting all life and standing at the centre of [their] cultures and institutions.”

C. A Geography Prime for International Disputes

The Stikine ecosystem cultivates immense cultural, environmental, recreational, and economic value to both sides of the international border for both Indigenous Nations and non-indigenous peoples alike. The diverse and often competing interests in the region from a variety of stakeholders, including subnational, national, international, and private actors, inevitably creates a region prime for international disputes. The Stikine River is underlain with rich copper deposits while simultaneously home to both a protected wilderness area and industry sustaining wildlife. Consequently, it has been the source of an international environmental dispute since 2011.

The mining of copper and other hardrock minerals in British Columbia generates thousands of jobs and billions of dollars in annual sales while providing raw materials for many products,
including light bulbs, airplanes, and building foundations.\textsuperscript{91} Coal, copper, and molybdenum are the most common raw materials excavated, but gold, silver, lead, and zinc are also mined in British Columbia.\textsuperscript{92} The Red Chris Mine, located on the headwaters of the Stikine River in northwest British Columbia, generated $428,218.00 in total revenues for 2016\textsuperscript{93} from approximately 83.6 million pounds of copper, 47,088 ounces of gold, and 190,624 ounces of silver unearthed.\textsuperscript{94} In addition, management at the Red Chris Mine “work[s] closely and cooperatively with First Nation representatives and government regulators to assure environmental management is consistent with the needs of the local First Nations and meets the highest industry standards.”\textsuperscript{95}

While Canada justifies its mineral development on international transboundary watersheds in British Columbia with its reliance on the resources it harvests, this reliance was established without international consultation. Specifically, the United States was not involved in the discussions, the environmental assessments, or the permitting processes for the Canadian mines located on international transboundary watersheds.\textsuperscript{96} Further, the current legal framework lacks any enforceable policies to protect the United States from the threat of mining pollution.\textsuperscript{97}

Proponents for the British Columbia mines downplay the environmental impact of their projects;\textsuperscript{98} however, spectators,


\textsuperscript{92} Id.

\textsuperscript{93} Red Chris Mine Overview, supra note 79.


\textsuperscript{96} Id.


\textsuperscript{98} See, e.g., Can. Envtl. Assessment Office, Red Chris Porphyry Copper-Gold Project Assessment Report, 14–22 (2005); Application for an Envtl. Assessment Certificate, RED CHRIS DEV. CO. LTD., 37 (Oct. 2004) http://projects.eao.gov.bc.ca/api/document/5886b2fda4ac041bd81fe53/fetch [https://perma.cc/PA5A-T5NF] (“Accidents and malfunctions that may occur during the construction, operations and post-closure time period at the Red Chris Project site can result in impacts to the environment. ... In most cases these incidents will be short-term, low probability and low frequency of occurrence and thus overall impacts are likely to be minor.”).
regulators, and mining proponents have known for centuries that mining activities may result in a range of harmful environmental effects. In 1550, Georgius Agricola wrote in *De Natura Fossilium* (the Textbook of Mineralogy):

> The strongest argument of the detractors of mining is that the fields are devastated by mining operations. . . Further, when the ores are washed, the water which has been used poisons the brooks and streams, and either destroys the fish or drives them away[] Thus it is said, it is clear to all that there is greater detriment from mining than the value of the metals which the mining produces.99

Over 450 years later, environmental effects of the Red Chris Mine similarly include negative impacts on climate, air quality, water quality, seismicity and terrain stability, and surface hydrology from things like acid rock drainage and metal leaching from tailing storage facilities.100 The term “tailings” is a term that refers to barren by-products produced by mining activities. Thus, tailings storage facilities are meant to prevent the mining by-products from being released into the environment.101 “Tailings storage facilities typically represent the most significant environmental liability associated with mining operations.”102 The Red Chris Mine’s tailings storage facility is in a Y-shaped valley, and is dammed at each of the valley’s three arms.103

Environmental authorities produced an Environmental Assessment for the Red Chris Mine, and concluded that the mine’s

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102 Id. at 2.
proposed mitigation measures would prevent or reduce significant environmental problems beyond the mine site to acceptable levels.\textsuperscript{104} Yet by December 2015, the mine experienced a tailings spill “caused by wear and tear” to a pipe, merely six months after the tailings storage facility became operational. This spill resulted in the Red Chris Mine temporarily shutting down.\textsuperscript{105}

The Red Chris Mine’s relatively “minor” tailings spill is foreboding as British Columbia has proven itself not only unable to address the risks of catastrophic dam failure,\textsuperscript{106} but also generally deficient in overseeing the management of its booming mining sector. In the words of the Auditor General of British Columbia, Carol Bellringer:

\textbf{\begin{quote}
[The Ministry of Energy’s and the Ministry of Mines’] compliance and enforcement activities of the mining sector are inadequate to protect the province from significant environmental risks. . . . Neither ministry coordinates with the other on their compliance and enforcement activities. . . . Both ministries lack sufficient resources and tools to manage environmental risks from mining activities. . . . Neither ministry uses a permitting approach that reduces the likelihood taxpayers will have to pay costs associated with the environmental impacts of mining activities (known as the polluter-pays principle). . . . Both ministries are aware that
\end{quote}}

\textsuperscript{104} Red Chris Porphyry Copper-Gold Project Assessment Report, supra note 100, at 27.


\textsuperscript{106} In August 2014, a tailings dam in British Columbia collapsed at the Mount Polley copper and gold mine, a project owned by Red Chris Mine proponent Imperial Metals. “Tons of toxic substances were dumped into waterways. Fish habitats were destroyed. People’s drinking water was affected. Yet, nearly three years after the disaster, and despite clear evidence of violations of Canadian laws, no charges have been brought forward by any level of government.” See, e.g., News Release: Petition Appeals to Trudeau to Ensure Imperial Metals Faces the Music for Mount Polley Disaster, MINING WATCH, Feb. 17, 2017 8:18 am E.S.T., https://miningwatch.ca/news/2017/2/17/petition-appeals-trudeau-ensure-imperial-metals-faces-music-mount-polley-disaster [http://perma.cc/58RK-GZN3].
deficiencies in their regulatory activities are resulting in risks to the environment. . . . [Finally,] the two ministries are not informing the public and legislators about the long-term risks from mining, the effectiveness of the agencies’ regulatory oversight, and the overall performance of the companies being regulated.¹⁰⁷

The risks to downstream ecosystems and inhabitants are heightened considering that a mass amount of mines in British Columbia, including the Red Chris Mine, have been established as elements of a classic mining boom under deficient regulatory policies.

A Red Chris Mine failure would cause immeasurable and irrevocable harm not only to the environment, but also to people with homes and livelihoods on both sides of the international border—including the Alaska Native Tribal members and citizens of the State of Alaska and the United States.¹⁰⁸ A mine failure would release mining by-products into the Stikine River watershed, which would drastically effect the fresh water habitat, wilderness ecosystem,¹⁰⁹ and the Indigenous Nations and non-indigenous peoples reliant on the ecological integrity of the Stikine.¹¹⁰ Mining by-products assimilate “by biota and moves through the food chain.”¹¹¹ Depending on the extent of the failure, vegetation and marine life may die, which would drastically affect the commercial fishing and tourism industries.¹¹²

¹¹⁰ See discussion supra Part II, Section A & B.
¹¹¹ Id.
¹¹² Id.; see also supra Part II, Sections A & B (Discusses the commercial fishing and tourism industries reliance on the ecological integrity of the region).
III. THE LAW OF THE LAND: THE INTERNATIONAL TRANSBOUNDARY STIKINE RIVER

The Stikine River is an international transboundary waterway that traverses 400 miles from where it originates in British Columbia, flows through Tongass National Forest’s Stikine-LeConte wilderness area, and runs into the Pacific Ocean near the island of Wrangell in southeast Alaska.\(^{113}\) The Stikine is underlain by rich copper deposits while simultaneously home to both a protected wilderness area and industry sustaining wildlife.\(^{114}\) With the development of the Red Chris Mine on the headwaters of the Stikine, the interested and affected parties in the region are engaged in an international environmental dispute for fear of the irrevocable harms of transboundary mining pollution.\(^{115}\)

International transboundary water law is a mixture of hard laws and soft laws.\(^{116}\) Generally, hard laws are legally binding obligations containing an enforcement mechanism, while soft laws consist of policies and principles that are not legally binding.\(^{117}\) However, if evidence demonstrates the intent to create a legally binding agreement through soft law, “then even a soft law agreement can provide an impetus for achieving notable accomplishments and requiring specific action.”\(^{118}\) In addition, soft laws contribute many important standards that often lead to hard laws. Scholars, Gregory C. Shaffer and Mark A. Pollack, recognize that the difference between hard laws and soft laws is not a strict line; rather, it is an evolving continuum in which hard laws are influenced by soft laws. Both hard laws and soft laws may yield results when utilized either together or separately.\(^{119}\)

\(^{113}\) McDowell Grp., supra note 1, at 29.
\(^{114}\) Letter from Dr. Jim Pojar, supra note 90.
\(^{115}\) “Today’s broad concerns about B.C. mining across the transboundary Taku, Stikine, and Unuk watersheds began with the Tulsequah Chief in the late 1900’s.” Opposition Grows in Alaska & B.C. to New Dev. of Tulsequah Chief Mine, supra note 90.
\(^{117}\) Tuholske & Foster, supra, note 116, at 666–667.
\(^{118}\) Tuholske & Foster, supra, note 116, at 668.
The international transboundary rivers between southeast Alaska and British Columbia, including the Stikine River, have a complex geo-political setting with applicable subnational, national, and international laws, principles, and policies. Although there are differing motivations behind the respective laws, each upholds the general standard to prevent the human release of hazardous substances into the environment.\(^{120}\)

**A. Subnational Law: Sovereign Powers and Pollution Prevention**

The subnational sovereigns invested in and affected by the Stikine River ITW dispute have rights and duties that fuel their concerns. Although their rights not being fully enforced in regards to this dispute, the Alaska Native Tribes, the Canadian First Nations, the State of Alaska, and the Province of British Columbia (collectively the subnational sovereigns) continue to uphold their duties in regard to the Stikine. The subnational sovereigns have worked separately and collaboratively in an attempt to procure a remedy for the Stikine River ITW dispute in the absence of any hard law obligation to do so.

The subnational laws, principles, and policies discussed in this section clearly demonstrate that protecting the ecological integrity of the Stikine, and international transboundary waters generally, is a high priority for the subnational sovereigns. Central to this dispute, the subnational sovereigns agree that pollution prevention is of extreme importance, which is clearly demonstrated through the laws, principles, and policies upheld by each subnational sovereign.\(^{121}\)

1. Indigenous Laws, Principles, and Policies

Central Council *Tlingit* and *Haida* Indian Tribes of Alaska (T&H) in southeast Alaska and the *Tahltan* Band Council (TBC) in northeast British Columbia are the aboriginal sovereigns of the conflict area.\(^{122}\) T&H represents the Tribes within the Alexander

\(^{120}\) See discussion *infra* Part III, Sections A & B.

\(^{121}\) See discussion *infra* Part III, Section A, Parts 1 & 2.

Archipelago\textsuperscript{123} including the Shtax’héen Kwàan, a Tlingit Tribe traditionally and currently located at the mouth of the Stikine River.\textsuperscript{124} TBC represents the Tahltan people, a First Nation that has occupied its territory around the headwaters of the Stikine River since time immemorial.\textsuperscript{125} Both sovereigns have (1) retained aboriginal sovereignty; (2) attained federally recognized indigenous sovereignty; and (3) exercised their respective sovereign powers in ratifying laws, principles, and policies.

As aboriginal sovereigns, both T&H and TBC have retained rights to hunt, fish, and gather on the Stikine.\textsuperscript{126} T&H has general “subsistence rights” in the natural resources of the entire state of Alaska,\textsuperscript{127} while TBC has aboriginal hunting, fishing, and resource exploration rights on both aboriginal and non-aboriginal land.\textsuperscript{128} Further, both T&H and TBC are recognized Tribal governments with inherent Tribal sovereignty.\textsuperscript{129} As such, both T&H and TBC are governing bodies that have sovereign and plenary power to legislate and to govern, conduct, and manage the affairs and property of their respective Indigenous Nations.\textsuperscript{130}
In the United States, the basic structure of Tribal sovereignty and governance is firmly established as a matter of federal law.\(^{131}\) Although the sovereign status of Alaska Native Tribes has been severely limited in the past,\(^{132}\) recent actions from state actors, federal actors, and presidential administrations indicate an expansion of Alaska Native Tribes’ sovereign powers.\(^{133}\) Most recently, Jahna Lindemuth, Attorney General for the State of Alaska, explained the inherent Tribal sovereignty of over 200 Tribes in Alaska in a letter to Governor Bill Walker.\(^{134}\) Ms. Lindemuth stated that the legal status of Alaska Native Tribes was once uncertain, but it is now more clear.\(^{135}\) Specifically, Ms. Lindemuth stated that Alaska Native Tribes have the sovereign power to establish a form of government, determine Tribal citizenship, and assert sovereign immunity among other things.\(^{136}\) Further, “[t]he Department of the Interior’s current policy and regulatory approaches are aimed at empowering tribes to more directly manage

\(^{131}\) FELIX COHEN, HANDBOOK OF FED. INDIAN LAW § 4.01 (2012 ed.).

\(^{132}\) See, e.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (Holding that the Alaska Native Tribes with original Indian title were not due just compensation under the Fifth Amendment for the taking of land by the government because Congress never intended to grant the Tribes any permanent rights in the land); Alaska v. Native Village of Venetie Tribal Gov’t., 522 U.S. 520 (1998) (Where the Supreme Court’s interpretation of ANCSA severely limited territorial sovereignty).


\(^{134}\) Letter from the Attorney General for the State of Alaska to Governor Bill Walker 1 (Oct. 19, 2017).

\(^{135}\) See generally id.

\(^{136}\) Id. at 8–12.
their own resources and lands, engage in economic development opportunities based on their own strategies and priorities, and self-govern through their own independent judgment and cultural values.” This policy is furthered by the Indian Self-Determination Act under which Tribes may take the lead in implementing federal programs under statutes like the Clean Water Act and Clean Air Act.

In addition, as a federally recognized Tribe, T&H also retains the status of a “domestic dependent nation” of the United States; thus, the United States has a trust responsibility to T&H. The Supreme Court’s “Marshall Trilogy” of the 1800s laid the foundation for the Tribes’ trust relationship with the United States. The principle at the heart of the trust relationship is that Tribes possess inherent sovereignty that pre-dates European contact and the United States Constitution. Although the Alaska Native Claims Settlement Act (ANCSA) declared that settlement would occur without “creating a . . . lengthy wardship or trusteeship,” it did not terminate the trust relationship. Rather, ANCSA further states that settlement would not diminish “any obligation of the United States . . . to protect and promote the rights or welfare of Natives as citizens of the United States or Alaska.” Further, the Ninth Circuit recognized that the United States has a federal trust responsibility towards Alaska Natives comparable to that which the

137 Letter from the U.S. Dep’t of the Interior Solicitor to the Sec’y 1 (Jan. 18, 2017).
139 The Supreme Court’s “Marshall Trilogy” of the 1800s laid the foundation for the Tribes’ trust relationship with the United States. The Marshall Trilogy consists of Johnson v. M’Intosh, 21 U.S. 543 (1823), Cherokee Nation v. Georgia, 30 U.S. 1 (1831), and Worcester v. Georgia, 31 U.S. 515 (1832). Although Alaska Native Tribes did not sign treaties to create this trust relationship, there is substantial evidence for the existence of a trust relationship between the federally recognized Alaska Native entities and the United States.
140 The Marshall Trilogy consists of Johnson v. M’Intosh, 21 U.S. 543 (1823), Cherokee Nation v. Georgia, 30 U.S. 1 (1831), and Worcester v. Georgia, 31 U.S. 515 (1832). The Court held that (1) Tribes are “domestic-dependent nations” to the United States; (2) the United States has dominion over Tribes, as trustees of tribal land. Cherokee Nation, 30 U.S. at 17. The Court later also held that (3) Tribes were “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.” Worcester, 31 U.S. at 557.
143 Id. at § 1601(c).
United States has towards other Native American Tribes, even after ANSCA.\textsuperscript{144} In addition, pursuant to direction from Congress, the Secretary of the Interior includes 229 Alaska Native entities in the list of federally recognized Tribes.\textsuperscript{145} Federally recognized Tribes have immunities and privileges of being acknowledged “Indian tribes by virtue of their government-to-government relationship with the United States[.].”\textsuperscript{146}

Unlike inherent Tribal sovereignty in the United States, First Nation sovereignty and governance in Canada is established and protected within the Canadian Constitution.\textsuperscript{147} The Canadian Constitution affirms that First Nations have inherent sovereignty, which includes a right to manage their own affairs.\textsuperscript{148} In addition, under the Indian Act, First Nations are also wards of the federal government of Canada.\textsuperscript{149} As wards, First Nations do not have ownership over the lands in which they occupy until negotiated through treaty.\textsuperscript{150} TBC’s sovereignty is further protected through such a treaty with British Columbia.\textsuperscript{151} Within the treaty, TBC negotiated for self-governance provisions to meet the unique cultural and economic needs of its members.\textsuperscript{152}

T&H and TBC have exercised their respective sovereign powers in ratifying laws, principles, and policies.\textsuperscript{153} T&H and TBC are inherently connected to the Stikine River culturally, physically, and economically because both Indigenous Nations have lived in the vicinity of the river and relied on the abundance of natural resources.

\begin{itemize}
  \item \textsuperscript{144} Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov’t, 101 F.3d 1286 (9th Cir. 1996).
  \item \textsuperscript{145} Indian Entities Recognized & Eligible to Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4,915, 4,919-20 (Jan. 17, 2017).
  \item \textsuperscript{146} 79 Fed. Reg. 4,748-02 (Jan. 29, 2014).
  \item \textsuperscript{147} Canadian Charter of Rights & Freedoms, Part II of the Constitution Act, 1982 (U.K.).
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} Indian Act, R.S.C. c I-6 s 20 (1985) (U.K.-Can.).
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} See generally Shared Decision Making Agreement Between the Tahltan Nation & the Province of B.C. (Mar. 14, 2013).
  \item \textsuperscript{152} Id.
\end{itemize}
it continues to provide since time immemorial. As such, T&H and TBC have actively worked separately, and often together, to enhance the ecological health and prosperity of the Stikine.

T&H follows traditional protocol in working together with all of “the federally recognized tribes in southeast Alaska to maximize benefit to [their] common citizenry and to protect [their] sovereign rights in perpetuity.” For example, T&H ratified a Tribal Code to ensure an ecological balance compatible with Tribal lifestyle/values and to protect subsistence resources. In addition, T&H’s Tribal Assembly adopted several resolutions to request assistance from Alaska state representatives and the federal government to protect the ecological health and productivity of Alaska’s waters and lands downstream from the threat of irrevocable environmental harm from Canadian mining on international transboundary rivers.

Further, T&H vigorously advocates for government-to-government engagement to address concerns about international transboundary water management between the southeast Alaska Native Tribes, the State of Alaska, the United States federal government, the British Columbia First Nations, the Province of British Columbia, and the Canadian federal government. In order to establish this cooperative consultation standard, T&H actively works to unite parties against the threat of the irrevocable environmental harm Canadian mines pose, including: (1) Alaska Native Tribes; (2) various influential agencies and organizations; (3) individual business owners; (4) the State of Alaska; (5) the United States federal government; (6)

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154 Saving Se. Alaska’s Rainforest Way of Life, supra note 3.
155 Our History, supra note 43.
Canadian First Nations; (7) the Province of British Columbia; and (8) the Canadian federal government.  

For example, T&H adopted a resolution to support the United Tribal Transboundary Mining Work Group in its efforts to become engaged in the resolution of mining issues and to re-establish relationships with Canada to form a collaborative strategy for mining developments on international transboundary rivers in 2014. In furtherance of its mission, the United Tribal Transboundary Mining Work Group submitted a petition pursuant to the Pelly Amendment to the Fishermen’s Protective Act of 1967 in 2016, which is currently under review, and is also working on a Human Rights petition.

TBC also proactively strives to strengthen its culture, environment, and economy through use of its sovereign powers. For example, TBC is in the process of promulgating a Tahltan Land Code, which will enable TBC to create laws that allocate and protect natural resources on reserve and throughout traditional territory. Further, TBC is invested in the ecological health of the Stikine River in several ways. First, in 2014, TBC actively protested against the Red Chris Mine proposal and initiated discussions with proponents of the Red Chris Mine, Imperial Metals. Second, in 2015, TBC


162 Telephone Interview with Kenta Tsuda, Attorney for Se. Alaska Tribes & other interested parties, Earthjustice (May 10, 2017); Telephone Interview with Frederick O. Olsen Jr., Chairman, United Tribal Transboundary Mining Work Grp. (May 10, 2017).  


signed an “Impact, Benefit and Co-Management Agreement” with the Red Chris Development Company Ltd., which ensured cooperative management procedures and Tribal employment opportunities within the Red Chris Mine project, among other things.\footnote{Our Commitments, supra note 95.} Third, in 2016, the Stikine River Salmon Studies Biological Contract was awarded to the \textit{Tahltan Fisheries Program}.\footnote{Tahltan Fisheries Newsletter, TAHLTAN BAND COUNCIL, at 1 (Feb. 2017), http://tahltan.ca/wp-content/uploads/2017/03/Final-TF-newsletter-Feb.-2017.pdf [https://perma.cc/WN54-RUEY].} Part of the study was performed collaboratively with crew members from the United States to tag 35,000 Chinook and 4,000 Coho salmon smolts.\footnote{Id.} Finally, in 2017, TBC signed a “Government-to-Government Red Chris Mine Management Agreement” with the Province of British Columbia, which established a “project specific relationship regarding the development, construction, operation and closure of the Mine, environmental management of the Mine, as well as the monitoring and enforcement of technical and environmental measures related to the Mine.”\footnote{Tahltan-Province Gov’t-to-Gov’t Red Chris Mine Mgmt. Agreement between Her Majesty the Queen in Right of the Province of B.C. & Tahltan Nation, 1 (Jan. 24, 2017), https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/tahtlan_rcma_jan_24_2017.pdf [https://perma.cc/N24E-DQSH].}

2. State and Provincial Laws, Principles, and Policies

Parliament implemented to promote managed, controlled, and protected environments.\textsuperscript{172}

Both the United States and Canada embrace the public trust doctrine and the principle of subsidiarity.\textsuperscript{173} The public trust doctrine establishes that governments must exercise a fiduciary duty to protect natural resources so that they are available to all citizens for both long-term use and enjoyment.\textsuperscript{174} In the United States, public trust resources include rivers, lakes, and shorelines.\textsuperscript{175} The principle of subsidiarity is a facet of international law that represents the simple concept that disputes should be resolved and action should be taken at the lowest level of governance appropriate to the situation.\textsuperscript{176}

The Tongass National Forest Land and Resource Management Plan is an example of how the principle of subsidiarity is embraced in the United States.\textsuperscript{177} The Stikine River weaves through Tongass National Forest, which is a protected wilderness area managed by the United States Forest Service, a division of the United States Department of Agriculture.\textsuperscript{178} The National Forest Management Act\textsuperscript{179} was the platform for the Tongass National Forest Land and Resource Management Plan.\textsuperscript{180}

\begin{flushright}
\textsuperscript{173} Canada has not officially recognized the doctrine, but its principles are within Canadian law. \textit{See, e.g.}, Tuholske & Foster, supra note 116, at 680–83; Oliver M. Brandes & Randy Christensen, \textit{The Public Trust & a Modern B.C. Water Act}, in \textit{The Future of Water Law & Governance Series}, at 1 (Polis Water Sustainability Project, 2010).
\textsuperscript{174} \textit{See, e.g.,} Tuholske & Foster, supra note 116, at 680–83; Melissa K. Scanlan, \textit{Implementing the Public Trust Doctrine: A Lakeside View into the Trustees’ World}, 39 ECOLOGY L.Q. 123 (2012).
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Subsidiarity, supra note 19.}
\textsuperscript{178} Hamilton, et al., supra note 28 and accompanying text.
\end{flushright}
The collaborative role of each State, local, and tribal government (and its agencies) in the planning process is unique. The opportunity for their involvement throughout the planning process is both required by the Planning Rule and essential to the successful development and implementation of land management plans. Such participation allows governments to more effectively coordinate the best use of limited resources, staffs, and budgets, as they work cooperatively to manage forest resources on lands across multiple jurisdictions.181

The Tongass Management Plan was produced by interested and affected state, local, and Tribal actors and presents guidance to ensure that human activities do not impact the broad range of resources the National Forest provides.182

The United States has also promulgated a number of other environmental Acts that function in a collaborative manner similar to the National Forest Management Act. For example, the Endangered Species Act prevents direct actions and habitat modification actions that jeopardize the continued existence of protected species,183 the Pollution Prevention Act provides an environmental management hierarchy based on priority: (1) prevention, (2) recycling, (3) treatment, and (4) disposal or release;184 and the Clean Water Act establishes the general structure for regulating discharges of pollutants and water quality standards of United States waters.185

In addition to federal environmental policies, the State of Alaska provides its citizens with a constitutional right to natural resources: “[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”186 In addition, Alaska has ratified its own Water, Air, Energy, and

186 Alaska Const. Art. VIII § 3.
Environmental Conservation Act, which states that “[i]t is the policy of the state to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well-being.”

Similarly, Canada has also promulgated a number of environmental Acts. For example, the Federal Sustainable Development Act provides sustainability guidelines for all federal departments; the Canadian Environmental Protection Act defines pollution prevention as “the use of processes, practices, materials, products, substances or energy that avoid or minimize the creation of pollutants and waste and reduce the overall risk to the environment or human health;” and the Fisheries Act provides for the conservation and the protection of fresh-water fish habitat.

The province of British Columbia has promulgated additional environmental policies to protect its important natural resources. British Columbia recognizes that efficient and proficient water management is essential to public health, economic development, and environmental sustainability. British Columbia has also ratified its own Environmental Management Act, which states that if “an activity or operation has been or is being performed by a person in a manner that is likely to release a substance that will cause pollution, the director may order a person . . . [to]” (1) provide information about the activity; (2) be subject to investigations related to the activity; and (3) undertake any action reasonably necessary to prevent the pollution.

Additionally, politicians of Alaska and British Columbia have consulted with T&H of southeast Alaska and TBC of British Columbia in an effort to work towards an ecologically sustainable governance over international transboundary waters. In 2015, Alaska and British Columbia established a “Memorandum of

\footnotesize{187 Water, Air, Energy, & Envtl. Conservation Act, tit. 46, ch. 46.03, art. 01, § 46.03.010(a) (2016) http://www.legis.state.ak.us/basis/statutes.asp#46 [https://perma.cc/DR4L-SMU6].
188 Fed. Sustainable Dev. Act, c. 33 (June 26, 2013) (Can.).
189 Canadian Envtl. Prot. Act, c. 33, § 3(1) (Sep. 14, 1999) (Can.).
190 Fisheries Act, c. F-14 (Apr. 5, 2016) (Can.).
192 Id.
Understanding and Cooperation.”\textsuperscript{194} The agreement recognized “the mutual commitment of Alaska and British Columbia to sustaining [the] environment for the benefit of all, including [the] valuable transboundary rivers, watersheds, and fisheries.”\textsuperscript{195} Further, on October 6, 2016, the State of Alaska and British Columbia signed a “Statement of Cooperation” to establish a working group to ensure that both governments work together to address issues related to international transboundary water management.\textsuperscript{196} Although these cooperation agreements are nonbinding, they reflect the dedication of the subnational sovereigns to collectively remedy the ITW disputes affecting their regions. Mary Polak, the Minister of Environment for British Columbia, noted that the Statement of Cooperation “will improve cooperation between British Columbia and Alaska, allowing us to better manage, protect and enhance our shared environment for generations to come.”\textsuperscript{197}

The laws, principles, and policies discussed in this section clearly demonstrate that protecting the ecological integrity of the Stikine, and international transboundary waters generally, is a high priority for the Alaska Native Tribes, the Canadian First Nations, the State of Alaska, and the Province of British Columbia as subnational sovereigns. However, such laws, principles, and policies are ultimately soft laws because they are not legally binding at an international level. Regardless, when applied to the Stikine River ITW dispute, these soft laws have the power to significantly influence applicable hard laws. As an international issue, international law is the hard law most applicable to the dispute. International law, similar to subnational law, clearly demonstrates through soft law and hard law that protecting the ecological integrity of international transboundary waters is of extreme importance to the United States and Canada.

\textsuperscript{194} Memorandum of Understanding & Cooperation Between the State of Alaska & the Province of B.C. (Nov. 25, 2015).
\textsuperscript{195} Id. at 1.
\textsuperscript{196} Transboundary Relations: Alaska Moves Forward with B.C. to Strengthen Commitment to Protect Transboundary Rivers Env’t, Alaska Lieutenant Governor Byron Mallott. \textbf{Error! Hyperlink reference not valid.} [https://perma.cc/3ESM-X9WA] (last visited Nov. 25, 2017) (Prior to the signing, the State provided the opportunity to review, comment, and offer suggestions to Alaska Native Tribes, southeast Alaska municipalities, Alaskan citizens, environmental groups, and interested parties).
\textsuperscript{197} Id.
International transboundary water law includes soft law and hard law relevant to the Stikine River ITW dispute. In addition to the national and subnational laws, principles, and policies previously discussed, two specific international soft law agreements are applicable: (1) the United Nations Conference on the Human Environment Stockholm Declaration which was affirmed by the United Nation’s Rio Declaration, and (2) the United Nations Declaration on the Rights of Indigenous Peoples. Further, two specific hard law treaties are also applicable: (1) the North American Agreement on Environmental Cooperation, which is a subpart of the North American Free Trade Agreement, and (2) the Boundary Waters Treaty.

The international laws, principles, and policies discussed in this section align with the subnational laws and clearly demonstrate that protecting the ecological integrity of the Stikine, and international transboundary waters generally, is a high priority internationally, nationally, and subnationally.

1. International Soft Law Declarations

The Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) are two examples of international soft law agreements applicable to the Stikine River ITW dispute. The Stockholm Declaration

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198 See generally supra Part III, Section A.
201 UNDRIP, supra note 20.
204 BWT, supra note 12.
205 Inclusion of these soft laws is to further the conclusion that new ecological understandings, policies, and principles indicate that the outdated Boundary Waters Treaty must be amended. These soft law international declarations have
originated as a general policy to inspire humanity to take action towards the preservation and enhancement of the environment.\textsuperscript{206} UNDRIP is specific to the rights of Indigenous Nations worldwide in correlation with their people, land, and environment.\textsuperscript{207}

The Stockholm Declaration was established not only to preserve, but also to enhance the environment for the benefit of humanity. The Stockholm Declaration originated in 1972 at the United Nations Conference on the Human Environment.\textsuperscript{208} Under Principle 21 of the Stockholm Declaration:

\begin{quote}
States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and 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.\textsuperscript{209}
\end{quote}

The purpose of Principle 21 was to fill the need for a common policy of mutual environmental respect. Ultimately, the Stockholm Declaration established the principle that sovereigns not only have the right to develop resources on transboundary waters, but also simultaneously have the responsibility to prevent international transboundary pollution.\textsuperscript{210}

The Stockholm Declaration has been affirmed and furthered through numerous enactments, including the Rio Declaration in 1992.\textsuperscript{211} In relevant part, the Rio Declaration furthered the Stockholm Declaration through its Principle 15\textsuperscript{212} and Principle 3.\textsuperscript{213}

\begin{footnotes}
\item[206] Stockholm, \textit{supra} note 199.
\item[207] UNDRIP, \textit{supra} note 20.
\item[208] Stockholm, \textit{supra} note 199.
\item[209] Stockholm, \textit{supra} note 199.
\item[210] Stockholm, \textit{supra} note 199.
\item[211] Rio, \textit{supra} note 200, at princ. 15.
\item[212] Rio, \textit{supra} note 200, at princ. 15.
\item[213] Rio, \textit{supra} note 200, at princ. 3.
\end{footnotes}
Principle 15, commonly referred to as the ‘precautionary principle,’ declares that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.214

Thus, the precautionary principle established that activity known to cause environmental harm must be actively avoided and prevented. Next, Principle 3 declares that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” Therefore, current generations have the responsibility to develop and sustain natural resources for the benefit of future generations.

UNDRIP also establishes international environmental policies, although its primary purpose is as a comprehensive international policy that “establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.”215 Specifically, UNDRIP established the policy that “[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”216 This policy is quite important to the Stikine River ITW dispute because the Stikine is not only a water-way providing lands and natural resources traditionally utilized by the Indigenous Nations in the region, but it also encompasses land in which the Tlingit Nation have a spiritual connection to. This is due to its land-based culture and its

214 Rio, supra note 200, at princ. 15.
216 UNDRIP, supra note 20, at art. 32(2).
legend of originating from under the great ice fields of the Stikine River among other things.\footnote{See generally supra Part II, Section A (Discusses the importance of the Stikine River to Indigenous Nations).}

Furthering the policy stated above, UNDRIP contains several additional provisions upholding the concept of free, prior, and informed consent (FPIC).\footnote{UNDRIP, supra note 20, at arts. 10, 11(2), 19, 28(1), 29(2), & 32(2).} Generally, FPIC upholds the policy that Indigenous Nations must provide consent to those attempting to initiate projects or take actions that may impact their people, lands, or livelihoods.\footnote{See, e.g., Adrienne McKeehan & Theresa Suppert, Free, Prior, & Informed Consent: Empowering Communities for People-Focused Conservation, 25, HARV. INT’L REV. (2014).} The United Nations Permanent Forum on Indigenous Issues defines FPIC as a principle that requires the actor(s) and the Indigenous Nation(s) potentially affected by the proposed action to engage in substantial communications, which must be (1) \textit{free} from coercion, intimidation, and/or manipulation in any form; (2) conducted \textit{prior} to any project authorization or action being taken; and (3) as transparent as possible to ensure the Indigenous Nation(s) are adequately \textit{informed} on project details.\footnote{U.N. Econ. & Social Council, Permanent Forum on Indigenous Issues, Report on the Int’l Workshop on Methodologies regarding Free, Prior, & Informed Consent & Indigenous Peoples, UN Doc E/C.19/2005/3, ¶ 46 (Feb. 17, 2005) [hereinafter Report on FPIC].}

2. International Hard Law Treaties

Both the North American Free Trade Agreement (NAFTA) and the Boundary Waters Treaty are hard laws applicable to the Stikine River ITW dispute. NAFTA and the Treaty are international treaties that are legally binding, and thus are considered hard laws. NAFTA generally bears on the present trade, development, and conservation between the United States, Canada, and Mexico.\footnote{NAFTA, supra note 203.} The Treaty is specific to management and disputes surrounding transboundary waters between the United States and Canada.\footnote{BWT, supra note 12.}

Although NAFTA deals primarily with trade, it also includes a relevant subpart specific to environmental protection and enhancement: the North American Agreement on Environmental Cooperation (NAAEC).\footnote{NAAEC, supra note 202, at art. 1(a)-(b).} NAAEC promotes (1) “the protection
and improvement of the environment in the territories of the Parties [, the United States, Canada, and Mexico,] for the well-being of present and future generations,” and (2) “sustainable development based on cooperation and mutually supportive environmental and economic policies.” Further, the Commission for Environmental Cooperation (CEC) operates as a collaboration between the three countries to implement the provisions of NAAEC and to promote transboundary ecosystem management within the context of increasing the Parties’ economic, trade, and social connections.

Although transboundary ecosystem protection and management is strongly promoted by the CEC, NAAEC lacks procedures to provide pollution prevention for transboundary resources because its current policy requires the law to be violated before enforcement. As such, the CEC lacks the authority to develop international environmental impact statements or otherwise provide any viable proactive solution to problems that threaten the environment.

The Treaty includes a stronger part specific to environmental protection and enhancement. The Treaty was the beginning of international transboundary pollution law between the United States and Canada and established the basic principles that guide the use and management of the transboundary waters along the international border. The Treaty was designed to prevent and resolve disputes over the international transboundary waters, which are defined as:

[T]he 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, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

\[\text{\textsuperscript{224}}\] NAAEC, \textit{supra} note 202, at art. 1(a)-(b).
\[\text{\textsuperscript{225}}\] NAAEC, \textit{supra} note 202, at art. 1(a)-(b).
\[\text{\textsuperscript{226}}\] NAAEC, \textit{supra} note 202, at art. 14(1).
\[\text{\textsuperscript{227}}\] NAAEC, \textit{supra} note 202.
\[\text{\textsuperscript{228}}\] BWT, \textit{supra} note 12.
\[\text{\textsuperscript{229}}\] BWT, \textit{supra} note 12, at a proclamation.
\[\text{\textsuperscript{230}}\] BWT, \textit{supra} note 12, at a proclamation.
Further, the Treaty created the International Joint Commission (IJC) to manage the use of and resolve disputes over the international transboundary waters. The IJC operates as an adjudicatory body comprised of six Commissioners, three appointed by each country.  

Article III of the Treaty requires approval by the IJC for any action taken that affects the “natural level or flow” of the transboundary waters. Article II of the Treaty declares that each country “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 legal remedies as if such injury took place in the country where such diversion or interference occurs.” This language, although not explicit, entails anti-pollution undertones. Specifically, the use of the phrase “natural channel” indicates that should interference like pollution occur, per this provision, a non-domestic polluter would be subject to the legal remedies of his or her neighbor. Finally, Article IV of the Treaty requires that the international transboundary waters “shall not be polluted on either side to the injury of health or property on the other.” These provisions enable the IJC to exercise authority over international transboundary disputes that involve environmental risks as well as environmental harms.

As demonstrated in this part, the policy of protecting the ecological integrity of international transboundary waters is woven into international treaties and the laws, principles, and policies of subnational and national sovereigns. Further, the principle of subsidiarity is generally recognized subnationally, nationally, and internationally. The Boundary Waters Treaty is the most applicable hard law available as it was ratified specifically to protect the international transboundary waters between the United States and Canada; however, it does not have the capacity to adequately

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231 BWT, supra note 12, at art. III.
232 BWT, supra note 12, at art. III.
233 BWT, supra note 12, at art. II.
234 BWT, supra note 12, at art. IV.
235 See discussion supra Part III, Section B.
236 See discussion supra Part III, Section A.
237 See discussion supra Part III.
address or provide remedy to the Stikine River ITW dispute because the Treaty is both flawed and outdated. The applicable soft laws and hard laws work to support the conclusion that the Boundary Waters treaty should be amended.

IV. THE BOUNDARY WATERS TREATY: FLAWED AND OUTDATED

The Boundary Waters Treaty presents the most direct and efficient avenue to address the Stikine River ITW dispute. The purpose of the Treaty is to manage the international transboundary waters between the United States and Canada. However, the Treaty’s ability to protect the transboundary waters along the international border between the United States and Canada is severely limited because the Treaty (1) neglects important subnational sovereigns and (2) provides outdated pollution prevention protections. Thus, the Treaty must be amended to remedy these limitations because, in its current form, the Treaty does not adequately fulfill its purpose.

A. Flawed Treaty Neglects Important Actors

Currently, the Treaty is limited because it neglects important subnational sovereigns. Although the Treaty encompasses international transboundary waters that may be subject to the laws of many sovereigns (e.g., Tribes, First Nations, states, provinces, the United States, and Canada), under the Treaty, only (1) national representatives may be appointed as Commissioners of the IJC and only (2) national governments may bring a claim to the IJC. The Treaty, and by direct correlation the IJC, is proclaimed an international cooperative established to manage and protect the transboundary waters for the benefit of current citizens and future generations. However, the Treaty limits its management and protection capacities by limiting participation in the IJC to national

239 See discussion infra Part IV.
240 See discussion supra Part III.
241 BWT, supra note 12.
242 BWT, supra note 12, at art. IX.
243 BWT, supra note 12, at art. IX.
representatives and national claimants. As evidenced by its neglect of important subnational sovereigns, the Treaty also inevitably neglects the principle of subsidiarity and UNDRIP.

The United States and Canadian governments, as central authorities, must act to remedy these limitations and should do so by embracing the principle of subsidiarity and UNDRIP. First, the governments of the United States and Canada should embrace the principle of subsidiarity, and thus “perform only tasks that cannot be performed effectively at a more immediate or local level.” The authority to make primarily local decisions regarding transboundary waters should rest with local authorities rather than solely with the dominant national governments. The principle of subsidiarity embraces the simple concept that disputes should be resolved and action should be taken at the lowest level of governance appropriate to the situation. Although the principle is a facet of international law that is not unique to environmental law, it is nevertheless important to the dispute over international transboundary water management and protection. For example, the successful conclusion of the international North Fork dispute was not due to international treaties and actors operating at the national level; rather, its resolution involved consultation between subnational sovereigns with a direct stake in the controversy.

The international North Fork dispute arose in 2004 due to the transboundary trajectory and rich ecosystem of the Flathead River, which originates in Canada and flows south through Glacier National Park in the United States. The river is home to endangered bull trout while simultaneously underlain by rich coal deposits. Although proposed Canadian mining on the headwaters of the Flathead River would undoubtedly provide jobs and profit in Canada, it would also likely cause irrevocable harm through pollution. Many actors have substantial interests in the Flathead River, including the Province of British Columbia, the State of Montana, and the Confederated Salish and Kootenai Tribes of the Flathead Reservation. In this situation, the threat of mining

245 Subsidiarity, supra note 19.
246 Subsidiarity, supra note 19.
247 Subsidiarity, supra note 19; see also, Tuholske & Foster, supra note 116, at 684.
248 Tuholske & Foster, supra note 116, at 652.
249 Specifically, seven percent of the basin is managed by British Columbia, four percent is managed by the State of Montana, and twelve percent is managed by the Confederated Salish and Kootenai Tribes. Flathead Subbasin Plan: Exec.
development stirred subnational leaders to work together towards ecologically sustainable governance despite lack of any hard law obligation to do so.

For example, the Confederated Salish and Kootenai Tribes worked with Montana Fish, Wildlife and Parks to prepare an ecological assessment and propose a plan for the management and protection of the Flathead sub-basin. Further, British Columbia and Montana established an Environmental Cooperation Arrangement. The actions taken by subnational leaders through soft law ultimately influenced action through hard laws, including the Boundary Waters Treaty and the World Heritage Site recognition, which generated impact assessments. In the end, hard law was furthered by soft law principles, and thus worked together to protect the Flathead River before pollution occurred.

In addition to embracing the principle of subsidiarity, the United States and Canada are member states in support of UNDRIP; therefore, the countries should embrace UNDRIP and recognize Indigenous Nations as important subnational sovereigns within ITW disputes. UNDRIP declares that “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” UNDRIP’s provisions, including those bolstering FPIC, drastically differ from the consultation method often utilized in decision-making discussions between Indigenous Nations and the United States or Canada. For Indigenous Nations, the consultation process was supposed to be a seat at the decision table; however, for


250 Id.
251 Tuholske & Foster, supra note 116, at 652.
252 Tuholske & Foster, supra note 116, at 684–685.
253 Tuholske & Foster, supra note 116, at art. 18.
254 FPIC refers to free, prior, and informed consent. See discussion supra Part III, Section B, Part 1.
non-indigenous actors, the consultation method, for all intents and purposes, is often treated as a box that must be checked.\textsuperscript{256} In contrast to the national consultation method, UNDRIP declares that indigenous peoples have the right “to be secure in the enjoyment of their own means of subsistence and development,” and that if such rights are deprived, then indigenous peoples “are entitled to just and fair redress.”\textsuperscript{257} This provision entails that Indigenous Nations are entitled not only to a seat at the decision table, but also to redress when and if decisions negatively impact the Nations’ means of subsistence and/or development.

Many have criticized UNDRIP, declaring it to be too vague and lacking in legally enforceable repercussion methods.\textsuperscript{258} However, UNDRIP, like all soft law, is an instrument that gains its enforceability through being upheld and embraced. Furthermore, although UNDRIP is not a legally binding instrument under international law, the United Nations declares that it does “represent the dynamic development of international legal norms and it reflects the commitment of the [United Nation]’s member states to move in certain directions.”\textsuperscript{259}

Therefore, embracing the principle of subsidiarity and UNDRIP within the Treaty is not only pragmatic, feasible, and politically realistic, but also beneficial to all parties invested in and affected by international transboundary water management. Embracing these policies would create a balance of authority in which ITW disputes could be resolved at the lowest level of governance appropriate to the situation.

B. Outdated Treaty Provides Outdated Protections

The Treaty, in its current form, is further limited because it provides outdated protections against international transboundary pollution. The 1909 Treaty was the beginning of international

\textsuperscript{256} Id.
\textsuperscript{257} UNDRIP, supra note 20, at art. 20.
transboundary pollution law between the United States and Canada. Although law and policy have substantially changed since the Treaty was enacted, the Treaty has yet to endure an amendment to reflect such changes. The Treaty simply declares that each country “agreed that the waters herein defined as 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.”

Although this provision implicates a duty on each country to work towards pollution prevention, the one sentence provision stands alone within the Treaty. The Treaty’s lack of a pollution prevention plan for international transboundary waters is contrary to modern international, national, and subnational law.

International law recommends a pollution prevention standard, but it ultimately fails to provide a hard law for transboundary pollution prevention. However, applicable soft laws generally support the idea that sovereigns have the responsibility to prevent transboundary pollution. For example, transboundary ecosystem protection and management is strongly promoted by the Stockholm Declaration, UNDRIP, and international conventions. This pollution prevention soft law is also promoted by the United States, Canada, and Mexico collectively through the NAAEC. The three countries collaborate within the CEC to implement the provisions of NAAEC and promote conservation, protection, and enhancement of the North American environment for the benefit of present and future

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260 See generally supra Part III, Sections A & B (Discusses current applicable subnational and international laws, principles, and policies).


262 BWT, supra note 12, at art. IV.

263 See discussion supra Part III.


265 Shaffer & Pollack, supra note 119, at 721.

266 Stockholm, supra note 199. See also discussion supra Part III, Section B, Part 2.

267 UNDRIP, supra note 20. See also discussion supra Part III, Section B, Part 2.


generations. Further, CEC promotes transboundary ecosystem management within the context of increasing the countries’ economic, trade, and social links. Further, CEC promotes transboundary ecosystem management within the context of increasing the countries’ economic, trade, and social links.270

Subnational, national, and international law generally endorse a common environmental standard requiring would-be-polluters to take preventative measures against the human release of hazardous substances into the environment.271 For example, T&H of southeast Alaska adopted a resolution to support the United Tribal Transboundary Mining Work Group in its efforts to become engaged in the resolution of mining issues and to re-establish relationships with Canada to form a collaborative strategy for mining developments on international transboundary rivers.272 Further, TBC of British Columbia is in the process of promulgating a Tahltan Land Code, which will enable the Nation to create laws about allocating and protecting resources on reserve.273 In addition, United States federal law contains hard laws to protect endangered species, water quality, and forests.274 The “United States works to build a clean energy economy that will sustain [the Nation’s] prosperity and the health of [the Nation’s] people and [] environment for generations to come.”275 Further, the Canadian Environmental Protection Act of 1999 defines pollution prevention as “the use of processes, practices, materials, products, substances or energy that avoid or minimize the creation of pollutants and waste and reduce the overall risk to the environment or human health.”276

Finally, the ongoing acid rock drainage at the Tulsequah Chief Mine on the international transboundary Taku River tributary

270 Id.
271 See supra Part III.
274 Tuholske & Foster, supra note 116, at 679.
about forty miles northeast of Juneau, Alaska, and the 2014 tailings dam failure at the Mount Polley mine on the Fraser River demonstrate severe weaknesses in current monitoring and enforcement efforts for mining in British Columbia. Although the Tulsequah Chief Mine was shut down nearly sixty years ago and despite promises to clean up the mine from British Columbia’s Minister of Mines in 2015, acid rock drainage continues to pollute the tributaries and watershed of the Taku River without an end in sight. Similarly, the Mount Polley mine disaster continues to concern citizens over the inadequacy of regulation and monitoring in the mining industry. After three years and a 2016 report from British Columbia’s Auditor General that concluded that the Mount Polley Mine failure stemmed from issues of “too few resources, infrequent inspections, and lack of enforcement,” justice has yet to be served upon those responsible for this disaster.

As evidenced by the Tulsequah Chief Mine and Mount Polley Mine, the Treaty’s lack of a pollution prevention plan is inadequate to protect the international transboundary region from the significant environmental risks of mining pollution. The Treaty’s outdated protections for international transboundary pollution must be amended.

281 Bellringer, supra note 107, at 4.
282 Where is the Justice for the Mount Polley Mine Disaster, Mr. Prime Minister?, supra note 280.
V. AMENDING THE BOUNDARY WATERS TREATY

To ensure that Tribes, First Nations, states, provinces, the United States, and Canada are able to satisfy their own respective gains, without endangering the gains of others or the health of the environment, the outdated Boundary Waters Treaty of 1909 must be amended. The Treaty, in its current form, is severely limited in regard to the protections it provides for international transboundary waters. The language of the Treaty is limiting in that it establishes the IJC with exclusively national representatives, and allows only national actors to bring a claim to the IJC; and establishes an extremely vague and outdated pollution prevention provision.

A. Embrace Modern International Principles and Policies

T&H of southeast Alaska, the State of Alaska, and the United States have the right to be and should be involved in managing development on international transboundary waters that directly affects the Stikine River, and all other transboundary waters along their respective borders. Further, as the IJC itself notes in its five-year strategic plan, “[l]aws, regulations, policies, programs, partnerships, and scientific understanding have substantially advanced in the last century, and new threats, not imagined at that time, now confront transboundary water resources.” The Treaty should be amended to include (1) all subnational sovereigns invested in and affected by international transboundary water management and (2) a pollution prevention plan for international transboundary waters.

First, the Treaty should establish a Subnational Joint Commission with similar rights and duties as the IJC through which Tribes, First Nations, states, and provinces may (1) elect representatives, and (2) bring claims to receive solutions for ITW disputes. A Subnational Joint Commission would operate at the root of the problem through an innovative and dedicated team of subnational Commissioners. Further, recognizing representatives from Indigenous Nations within the Subnational Joint Commission

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would not only embrace UNDRIP, but would also recognize the importance of Indigenous sovereigns and heighten the Indian law prerogative. In addition, the IJC would maintain its authority under the Treaty, and thus, maintain its ability to receive claims from national representatives. Therefore, if national representatives or the claimants themselves believed that the Subnational Joint Commission abused its discretion, either party would be able to ultimately appeal the claim to the IJC.

Second, the Treaty should establish an environmental standard that proactively promotes and enforces a balance of environmental protection and economic enhancement. The standard should (1) set environmental and all necessary regulations for international transboundary water management, including requirements for a pollution prevention plan in which actors would be held accountable to neighboring nations; (2) set specific repercussions for not complying with those regulations; and (3) set stringent accountability measures for enforcement of those regulations. The standard should align with the environmental protections that are already embraced within subnational, national,284 and international law.285

The proposed amendments to the Boundary Waters Treaty embrace the principle of subsidiarity,286 UNDRIP,287 and new ecological understandings about the irreversible harms of pollution to the environment embodied in soft law.288 The proposed amendments to the Treaty would (1) resolve the vast deficiency in legislative regulations in governing international transboundary water management; (2) provide uniform guidelines, which would end the competition among the sovereigns to satisfy personal gains, economic or otherwise; (3) enhance international transboundary water protection; and (4) address the current international transboundary water issues, namely pollution, with a practical concern for both environmental and economic impacts.

284 See infra Part III, Section A.
286 See discussion supra Part III, Section A, Part 2.
B. Political Viability of the Proposed Amendments

The United States will find that protecting Americans, their livelihoods, and the ecological integrity of their regions requires not only federal investigation of upstream Canadian projects, but also action from the United States on the international level to properly fulfill its rights and duties under the Boundary Waters Treaty. The need to address the threat of international transboundary mining pollution and deficient international transboundary water management generally is an issue in which a change in presidential administration should not shift the underlying concerns and national interests. Thus, the proposed amendments remain politically viable regardless of the contrary interests of the Trump Administration, for American interests must be vindicated in the international arena289 because subnational laws, policies, and practices are essentially soft laws that do not have any binding legal effect on ITW disputes.290 Various interested and affected parties in the United States have expressed optimism that the new Administration will handle this dispute in a manner consistent with international transboundary water law.291 Furthermore, the proposed amendments to the Treaty align with the Trump Administration’s commitment towards economic development,292 tribal sovereignty, and tribal self-determination.293

Therefore, the proposed amendments are politically viable because they align with applicable laws, principles, and policies by (1) reducing the national spending through spreading costs among


290 See supra Part III, Section A.

291 Telephone Interview with Kenta Tsuda, Attorney for Se. Alaska Tribes & other interested parties, Earthjustice (May 10, 2017); Telephone Interview with Frederick O. Olsen Jr., Chairman, United Tribal Transboundary Mining Work Grp. (May 10, 2017). See also Tsuda, supra note 289.


subnational, national, and international actors, and (2) balancing the need for an ecologically sound environment with utilizing the resources that fuel lucrative industries.  

1. Proposed Amendments Reduce National Spending

Although the Treaty intends to provide protection for international transboundary waters between the United States and Canada, the IJC is ill equipped to deal with the vast amount of ITW disputes that arise across the 5,525 mile geographic setting. Under the Treaty, the IJC is responsible for the management and dispute resolution across thirteen states and nine provinces, in which the international border divides, crosses, or coincides with hundreds of watercourses. Such an undertaking inevitably requires a substantial economic investment. Due to the Treaty’s limiting access to the IJC to national representatives and national claimants, the Treaty’s management and protection capacity has been limited. This limitation ultimately prevents the Treaty from addressing full-blown subnational transboundary disputes until something like pollution occurs, and thus it inevitably increases the national spending.

Embracing the principle of subsidiarity and UNDRIP would create a system for international transboundary water management in which disputes would begin at the lowest level of government appropriate to the situation. The proposed amendments, specifically regarding the establishment of a Subnational Joint Commission with similar rights and duties as the IJC and recognizing representatives from Indigenous Nations within the Subnational Joint Commission, not only embrace the principle of subsidiarity and UNDRIP, but also recognize the importance of Indigenous sovereigns and heighten the Indian law prerogative. Therefore, the proposed amendments to the Treaty align with the Trump Administration’s commitment towards

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294 See supra Part V (Discusses the proposed amendments).
295 BEAVER, supra note 22.
296 See Transboundary Watersheds, supra note 23.
298 Protecting Shared Res., supra note 24, at art. IX.
tribal sovereignty, tribal self-determination, and economic development.

Specifically, the Trump Administration is committed to tribal sovereignty and self-determination. On October 31, 2017, President Trump proclaimed the month of November to be National Native American Heritage Month. The proclamation states that “Native Americans [and Alaska Natives] will never be left behind under [the Trump] Administration. Together, we will strengthen the relationship between the United States Government and Native Americans.”

The proclamation acknowledges that the United States and Tribes are in a symbiotic relationship in that prosperity or detriment for one inevitably affects the other. Further, the proclamation recognizes the need for government-to-government consultation between the United States and Tribes in efforts to strengthen Tribal communities. “In addition to adopting policies to enhance economic well-being of Native American [and Alaska Native] communities, [the Trump] Administration will always come to the aid of Native American people in times of crisis.” The proposed amendments to the Treaty align with this proclamation by recognizing Tribes as integral subnational sovereigns to disputes affecting their people, lands, and livelihoods.

Further, a Subnational Joint Commission would operate at the root of the problem through an innovative and dedicated team of subnational Commissioners. Within the Stikine River ITW dispute, the Alaska Native Tribes, the Canadian First Nations, the State of Alaska, and the Province of British Columbia are closest to the problem and have the most to gain from taking action. Further, these subnational sovereigns have already displayed their willingness to allocate resources towards international transboundary water management discussions, disputes, and

302 Id.
303 Id.
304 Id.
305 See supra Part II.
resolutions. Establishing a Subnational Joint Commission would enable subnational sovereigns to settle disputes without national or international investment.

In addition, the IJC would maintain its authority under the Treaty, and thus, maintain its ability to receive claims from national representatives. Therefore, if national representatives or the claimants themselves believed that the Subnational Joint Commission abused its discretion, either party would be able to ultimately appeal the claim to the IJC. This change would not only enhance efficiency, but would also reduce national spending by spreading costs between all sovereigns invested in and affected by international transboundary water management.

2. Proposed Amendments Balance Environmental and Economic Protections

International transboundary water concerns must be addressed proactively today to prevent environmental and economic disaster tomorrow. The Stikine River watershed not only encompasses some of the largest wildlife habitat in North America, but also contains natural resources utilized by a variety of lucrative industries. The Stikine is a lifeline for Indigenous Nations and non-indigenous people alike. The people who inhabit this region utilize the Stikine for subsistence, enjoyment, and economic success. It is widely recognized that “the life and well-being of [humanity] and the natural environment are interrelated and even interdependent.” Furthermore, environmental protections inevitably provide economic protections for the various industries that rely on the ecological integrity of the Stikine, such as commercial fishing and tourism industries.

Although President Trump has made it clear that environmental protection is not high on his agenda, the American interests in the Stikine River ITW dispute play to his primary goal: protecting and enhancing economic development. The proposed

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306 See supra Part III, Section A.
307 What’s at Risk, supra note 11.
308 What’s at Risk, supra note 11; See also discussion supra Part II.
309 GREENING, supra note 21, at 30.
310 See discussion supra Part III.
311 See What’s at Risk, supra note 11.
amendments to the Treaty would acknowledge that TBC and British Columbia have the right to pursue mining as a profitable economic venture; however, the proposed amendments account for the fact that international transboundary water management must consider the interests of all transboundary sovereigns. Such interests include, for example, protecting the Stikine River’s pristine salmon habitat, which is culturally, environmentally, recreationally, and economically significant to Indigenous Nations and non-indigenous peoples on both sides of the international border.

The United States must act to fulfill its goal under the Treaty by working with the Canadian government immediately to amend the limitations within the Treaty. The Treaty should be amended to include (1) all subnational sovereigns invested in and affected by international transboundary water management and (2) a pollution prevention plan for international transboundary waters so that the Treaty may adequately protect the environment and industries on both sides of the international border. The future for the Stikine River’s international transboundary watershed depends on sustainable international, national, and subnational water management policies and stewardship practices that reflect a commitment to sound science, healthy environments, and community engagement.

VI. CONCLUSION

In the words of Elizabeth Peratrovich, a Tlingit woman and political activist on the national stage, “[n]o law will eliminate crimes but at least . . . legislators can assert to the world that [they] recognize the evil of the present situation and speak [their] intent to help us[.]” The Boundary Waters Treaty does not adequately
fulfill its purpose in its current form. The International Joint Commission is ill equipped to deal with the vast amount of transboundary disputes that arise across the 5,525 mile border between the United States and Canada. Embracing the principle of subsidiarity, UNDRIP, and new ecological understandings within the Treaty is not only pragmatic, feasible, and politically realistic, but also beneficial to all parties invested in and affected by international transboundary water management. Implementing the proposed amendments to the Treaty would (1) recognize the importance of subnational sovereigns in international disputes; (2) strengthen the ties between Indigenous Nations and their respective federal governments; (3) enhance dispute resolution efficiency and spread costs; and (4) provide adequate protections for the international transboundary waters.

To uphold the purpose of the Treaty, the United States and Canada must take action immediately to amend the limitations within the Treaty; and thus, ensure the unparalleled habitats, irreplaceable resources, and substantial value the international transboundary waters provide are adequately protected before an accident occurs that causes irrevocable environmental, economic, and cultural harm.

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316 See discussion supra Part V.