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International Law and External Threats to National Parks

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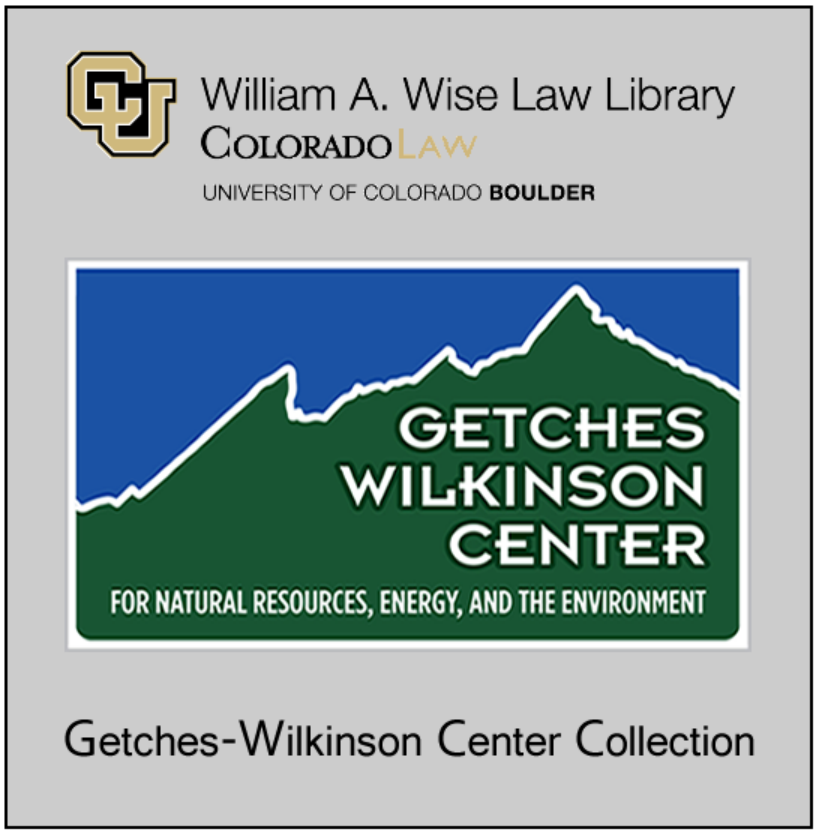

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INTERNATIONAL LAW AND EXTERNAL THREATS TO NATIONAL PARKS

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EXTERNAL DEVELOPMENT AFFECTING THE NATIONAL PARKS:
PRESERVING "THE BEST IDEA WE EVER HAD"

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I. INTRODUCTION

It is useful at the outset to identify the roles and contexts in which international law might assist in controlling external threats to national parks and other areas administered by the U.S. National Park Service (hereinafter referred to jointly as "national parks"). International law may serve two roles regarding external threats: it may provide substantive rules governing particular threats, and it may provide procedural mechanisms or frameworks for resolving disputes and making rules about external threats. See, e.g., Bilder, International Law and Natural Resource Policies, 20 Nat. Res. J. 451, 480-84 (1980).

With respect to contexts, international law might be helpful in two different types of situations. First, international law in the form of treaties may impose obligations on the United States relevant to domestic threats, by which I mean external threats to a national park originating in the United States. An example would be if a domestic threat endangered a breeding habitat located in a national park of a bird species that the United States was obligated to protect pursuant to a treaty concerning migratory birds. Cf. Coggins & Russell, Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America, 70 Geo. L.J. 1433, 1445-48 (1982).

Second, international law in the form of treaties or customary international law may provide some protection vis-a-vis international threats, by which I mean threats to a national park that originate outside the United States. Some national parks adjoin a U.S. border with another nation and are threatened by sources in that nation. Glacier National Park, which is threatened by water pollution from the proposed Cabin Creek coal mine in British Columbia, Canada, is one example. See, e.g., National Park Service, State of the Parks -- 1980: A Report to the Congress, 48-49 [hereinafter cited as State of the Parks Report]; Keiter, On Protecting the National Parks from the External Threats Dilemma, 20 Land & Water L. Rev. 355, 361-69 (1985); Wilson, Cabin Creek and International Law -- An Overview, 5 Pub. Land L. Rev. 110 (1984). Eighteen national parks (as defined above) are adjacent to U.S. borders with Canada and Mexico and thus may be so affected: the State of the Parks Report (at 52-57) identifies 317 threats to those national parks, although it is not clear how many are international threats.

A larger number of national parks are not on a U.S. border but nevertheless face threats emanating from foreign sources. Rocky Mountain National Park, which could be threatened by air pollution from a copper smelter in Mexico, and the national parks in Alaska, which are threatened by air pollution origi-

nating in northern nations such as the U.S.S.R., typify this sub-category of international threats. See, e.g., Cong. Research Serv., Library Cong., The Nacozari, Mexico, Copper Smelter: Air Pollution Impacts on the U.S. Southwest (1985); Magraw, The International Law Commission's Study of International Liability for Nonprohibited Acts as it Relates to Developing Countries, 26 Wash. L. Rev. ___ (1986).

The set of international threats is particularly ominous. International threats are likely to intensify, as the world industrializes, as the demands on the world's resources increase, and as the global ecosystem's ability to assimilate the various demands placed on it is exceeded. See, e.g., R. Falk, This Endangered Planet (1971); J. Schneider, World Public Order of the Environment (1979); I. van Lier, Acid Rain and International Law (1980). In addition, the nation in which a threatening activity occurs does not experience the transboundary damage caused by the activity and thus is unlikely of its own accord to regulate adequately that activity. (This dilemma involves what economists refer to as an "externality." See generally F. Kirgis, Jr., Prior Consultation in International Law 1-2 (1983)). Further, the activities giving rise to international threats cannot, by definition, be regulated by the United States unilaterally.

Solutions thus must be international. Some can be

bilateral, e.g., with respect to the threat confronting Glacier National Park alluded to already. But many must be regional or even global in breadth.

The need for multinational cooperation and regulation poses differing degrees of difficulty, depending, inter alia, on the number of foreign sources of a particular threat and on the United States' relations with the nations in which those sources are located. External threats that emanate from a combination of domestic and foreign threats pose particularly sensitive questions, especially when neither the domestic nor the foreign component is objectionable standing alone. Similarly, external threats sourced in, or influenced by the participation of, more than one foreign nation present difficult issues.

Part II of the presentation that follows summarizes the characteristics of the international-law system and the practical implications flowing therefrom. Part III examines specific sources of international law that may already provide some protection against international threats to national parks. In summary, a growing body of international practice exists that is evolving to -- and may already have formed, in particular instances -- customary international law with respect to transboundary harm, even where the activities giving rise to the harm are not unlawful in any way. At present, except possibly with respect to the United States' immediate neighbors, that

body of law does not offer much assistance in terms of international threats to national parks. Customary international law regarding international watercourses may require prior consultation and good-faith negotiation about international threats involving international rivers or bays, but it is doubtful that that custom provides much assistance beyond that, at least at the present time. It is also possible that regional customary law exists between Canada and the United States and between Mexico and the United States that might apply to international threats, although in the case of the United States and Mexico, such law might not be helpful. There exist a set of treaties -- and possibly some customary international law -- concerning pollution at sea that might be relevant to national parks threatened by pollution from the high seas. In addition, the United States has bilateral agreements with Canada and Mexico that may either protect a specific park or provide a framework for negotiations regarding international threats. More generally, the long experience of the international legal system in negotiating treaties and resolving disputes offers some guidance in dealing with international threats. Furthermore, a handful of national parks are World Heritage sites or international biosphere reserves, and those programs may offer some protection, either directly or indirectly.

Part IV discusses the possibility that inter-

national law may impose obligations on the United States with respect to domestic threats, i.e., threats to national parks arising within the United States.

Three final points should be mentioned to provide analytic perspective. First, it is important to recognize that just as activities in other nations can endanger U.S. national parks, so activities in the United States and U.S. undertakings outside the United States can threaten other nations' protected areas. For example, activities in Alaska reportedly threaten Canadian parks. Quite apart from the issues of whether the United States is obligated by international law (cf. Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 6.3, Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226) or U.S. law (cf. 16 U.S.C. § 470a-2) to prevent or mitigate such threats, that fact obviously affects international negotiations regarding threats to national parks (and to other U.S. resources). Second, this presentation focuses on areas administered by the National Park Service, but much of the international law discussed herein would also apply to other protected areas within the United States. Third, my research is at an early stage regarding several of the issues addressed herein; my conclusions thus are tentative and preliminary in nature.

II. THE NATURE AND SOURCES OF INTERNATIONAL LAW

A. Nature of the International Legal System

The international legal system differs significantly from the U.S. legal system, and from other national legal systems, in at least three ways. First, there is no centralized law-making authority, such as the U.S. Congress. Partly as a result of the absence of such an authority, the sources of international law differ from the sources of domestic law, and it is often difficult to determine whether an international-law norm exists regarding a given topic, such as international threats to national parks, as is described below. Second, the international legal system does not have any centralized adjudicative body authorized to determine whether international law has been violated. Third, the international legal system does not contain an effective centralized enforcement mechanism, such as a national army or police force.

In spite of the characteristics just described, international law, especially in the form of treaties, usually is followed. Behavior conforming to international law is particularly likely to occur in relations between nations with a common border -- such as the United States and Canada or the United States and Mexico -- because of the long-term implications of that geographical proximity. Nevertheless, there are numerous instances where international law has not been adhered to and where the existence of international law

has not protected the interests that the law was intended to protect. Generally speaking, the incidence of international unlawfulness increases as the core national interests -- and especially national-security interests -- of the lawbreaker are approached more closely. The primary point to keep in mind for present purposes is that, although the existence of an international norm does not guarantee compliance with that norm in the international arena, agreed-upon and clearly defined norms relating to threats to national parks would most likely be adhered to, especially among Canada, Mexico, and the United States.

In the domestic arena of the United States, it is accepted doctrine that international law is part of the law of the land and thus that the United States can be forced, via the court system, to comply with international law. See, e.g., The Paquette Habana, 175 U.S. 677 (1900). That statement, however, is subject to a number of serious limitations. Perhaps the most significant is that under U.S. law, the doctrine of later-in-time prevails, so that, for example, a properly enacted federal statute supersedes a prior treaty that otherwise would be binding, even where the statute contradicts the United States' obligations under the treaty. Similarly, courts are subject to doctrines such as the political-question doctrine, see Baker v. Carr, 369 U.S. 186 (1962), which can result in a court's refusing to exercise its jurisdiction.

Assuming, however, that no such doctrine applied and that no subsequent conflicting legislation had been enacted, the United States could be forced to comply with its treaty obligations regarding protecting national parks, even if it were otherwise inclined not to do so.

B. Sources of International Law

There are two primary sources of international law: international agreements (variously referred to by terms such as treaties, conventions, etc.) and customary international law. International agreements are typically easily identifiable. Major difficulties concern interpreting the agreements, which is often complicated by the existence of official versions in two or more different languages and imprecise drafting, and the question of whether the agreement requires implementing legislation in order to be effective. The latter question is referred to as whether the agreement is "self-executing." If the agreement is non-self-executing, it will not be effective as domestic law within the United States unless implementing legislation is passed. See, e.g., Iwasawa, The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis, 26 Va. J. Int'l L. 627 (1986); ALI, Restatement Foreign Relations Law of the United States (Revised) (Tent. Final Draft, July 15, 1985, Vol. I), § 131.

Determining whether a rule of customary inter-

national law exists is a more difficult task. The test is whether there has been a general, consistent, and representative practice of nations taken or done under the belief that such practice was required (or, in some instances, permitted) by international law. See, e.g., id. at § 102(2). That inquiry is complex, and the standards that have been applied are less than crystal-clear. The situation is complicated by the possibility that a rule of special custom or regional custom between two or more nations may exist even if a worldwide rule of customary international law on the same topic does not. Finally, a customary international law norm does not bind a nation that has persistently and notoriously objected to the norm.

At least according to Article 38 of the Statute of the International Court of Justice ("ICJ"), there is a third source of international law: "the general principles of law recognized by civilized nations." See id. at § 102(4). That source has rarely been used, but it might be significant for present purposes.

As indicated by Article 38 of the ICJ's Statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations are "subsidiary means for the determination of rules of law," although they are not, strictly speaking, sources of law themselves. Thus, for example, the 1941 Trail Smelter award holding Canada liable under international law for lawful transboundary pollution in the United

States did not create a rule of international accountability in such circumstances, but it does serve as evidence that such a rule exists. See Trail Smelter (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1938 & 1941).

The final point to be made with respect to the sources of law is that the existence of the United Nations General Assembly and the practice of the General Assembly to pass resolutions (and declarations) have raised a significant controversy with respect to the effect of such resolutions. It seems clear that a unanimous General Assembly resolution that states that it embodies international law will be given great weight, and perhaps conclusive weight, in establishing that an international-law norm does in fact exist. Resolutions that do not contain such a statement or that are not unanimous raise more difficult questions, with respect to which commentators differ widely. Actions or declarations by other parts or agencies of the United Nations or by other international organizations are less persuasive as sources of international law than are General Assembly resolutions. Thus, for example, statements by UNESCO (the United Nations Educational, Scientific and Cultural Organization) regarding the meaning of the Biosphere Reserve Program or the World Heritage Convention do not, by themselves, constitute international law.

C. Selected References

1. M. Akehurst, A Modern Introduction to International Law (4th ed. 1982);

2. I. Brownlie, Principles of International Law (3rd ed. 1979);

3. L. Oppenheim, International Law -- A Treatise (Vol. I - Peace, H. Lauterpacht, ed., 8th ed. 1955; Vol. II - Diputes, War and Neutrality, H. Lauterpacht, ed., 7th ed. 1952);

4. L. Henkin, Foreign Affairs and the Constitution (1972).

III. INTERNATIONAL THREATS TO NATIONAL PARKS

In analyzing this topic, it is critical to recognize that international threats can arise from both lawful and unlawful acts. If the international threat involves an act by a foreign nation that is unlawful under international law, that nation will be required to make reparations. Such reparations might take three forms: restitution of the status quo; satisfaction, i.e., an apology by the offending nation; and monetary payments. None of those three forms are particularly helpful regarding many forms of damage to national parks. For example, it may be impossible to quantify in monetary terms aesthetic damage. Similarly, a mere apology will not suffice. Finally, restitution may not be possible for damage to an ecological system. The emphasis thus should be on preventing harm before

it occurs, not in trying to undo or compensate for harm.

Putting aside the question of the form of reparations, it is obvious that a wide variety of international-law rules defining lawfulness are potentially relevant to the international-threats question. Many such violations are unlikely, and the interest violated would not concern parks *per se*. For example, Mexico might invade the United States via Big Bend National Park and thus violate the international-law norm against aggression. In the following discussion, I focus on those norms that are most likely to be relevant to national parks *qua* parks.

If behavior is *lawful* but nevertheless harms or threatens to harm a national park, it is still possible that the acting foreign nation may be accountable under international law. The rules are in flux, so great certainty is not possible; I describe below what appears to be evolving. The closest analogy under U.S. domestic law is strict liability. If lawful activity does give rise to transboundary harm, separate rules for liability may apply, as is discussed in Part III.C.2, below. Perhaps confusingly, if those rules are violated, an international wrong occurs, and the analysis may revert to the reparations rules already described. *See id.*

A. Multilateral Treaties (i.e., treaties to which three or more nations are parties)

1. There is no multilateral treaty pertaining to all national parks per se. Other multilateral treaties or multilateral cooperative arrangements, described below, may provide some protection, however.

2. World Heritage Convention

The Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226 [hereinafter cited as the World Heritage Convention], which entered into force on December 17, 1975, provides some protection for cultural heritage (including monuments, buildings, and sites) and natural heritage (including biological, geological and physiographical formations and natural areas of "outstanding universal value from the point of view of science, conservation or natural beauty"). Id. at art. 1 & 2. Canada and the United States are parties to the Convention; Mexico is not.

A number of national parks are designated as World Heritage sites on the World Heritage List (see id. art. 11), including Yellowstone National Park. Glacier National Park has been nominated as a World Heritage site by the U.S. government, but it has not yet been approved for such status by the international body authorized to maintain the World Heritage List. Moreover, such designation probably will not be approved on the international level unless Canada joins

in the application, which it appears reluctant to do in part because of the current controversy about the Cabin Creek coal mine.

The meaning and legal effect of the World Heritage Convention are not entirely clear. The only case to analyze the Convention is an Australian case, Australia v. Tasmania, 57 Austral. L.J. Rep. 450 (1983). The World Heritage Convention appears to be self-executing, based on my preliminary research (the Tasmania case did not address that question because under Australian law, treaties cannot be self-executing), and thus would be applicable for U.S. domestic-law purposes without the need for implementing legislation. That result is far from certain, however. See the 1981 Dep't of Interior memorandum, discussed in part IV, infra. The Secretary of the Interior has been designated to direct and coordinate U.S. participation in the Convention, 16 U.S.C. § 470a-1, and the Secretary has issued rules setting forth policies and procedures in that regard, 36 C.F.R. Part 73 (1985).

As is discussed in greater detail in Part IV, below, Articles 4 and 5 appear to place obligations for protecting cultural and natural heritage sites on the nation in which those sites are located. In addition, Article 6.2 imposes an obligation on parties to the Convention ("The . . . Parties undertake") to aid in "the identification, protection, conservation and preservation of the cultural and natural heritage" iden-

tified in the World Heritage List if the nation in which the site is located so requests. The extent of that obligation is not clear from the face of the Convention, and research has revealed no source that analyzes that question. Nevertheless, Article 6.2 appears to offer protection of some sort to national parks that are on the World Heritage List.

Article 6.3 of the Convention imposes an obligation on parties "not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other" parties to the Convention. The meaning of Article 6.3 is subject to debate. The important term "damage directly or indirectly" is capable of widely differing interpretations. Also, Article 6.3 appears to apply regardless of whether the heritage site has been placed on the World Heritage List, an interpretation that is supported by the structure of the Convention as a whole and by several opinions in the Tasmania case. If that interpretation is correct, Canada may be obligated to prevent British Columbian approval of the Cabin Creek coal mine. The constitutional powers of the Canadian provinces complicate the analysis, however. Article 34 of the Convention provides that if the federal government has the authority to prevent the prohibitive action, it must do so; but if the federal government does not have that authority, the federal government is

obligated only to inform the competent authorities at the provincial level with its recommendation for their adoption. I am not informed regarding which alternative applies to the Cabin Creek situation. See generally Lucas, Acid Rain: The Canadian Position, 32 Kan. L. Rev. 165, 171-75 (1983).

3. Man and the Biosphere Program

The Man and the Biosphere Program operates under the auspices of UNESCO. Perhaps the primary component of that program is the biosphere reserve project. That project began in the early 1970's and is not based on an international agreement per se. See UNESCO, Action plan for biosphere reserves, 20 Nature & Resources (Oct.-Dec. 1984). Each participating country, of which there are now 104, voluntarily establishes its own national autonomous committee. The activities of those committees are coordinated to some degree by UNESCO, but UNESCO does not control their operations. Two hundred fifty-two biosphere reserve sites now exist in 66 nations.

The United States, which continues to participate in the Man and the Biosphere program even though it has withdrawn from membership in UNESCO, has designated twelve national parks as Biosphere Reserves, including Glacier National Park. The State of the Parks Report, supra, at 19, identifies 386 reported threats to those twelve, although it is not clear how many are international threats. Preliminary research has not

revealed any basis for concluding that the biosphere reserve project creates binding legal obligations for the participating nations with respect to biosphere reserves in other nations. Recently proposed legislation would direct the Secretary of the Interior to give priority attention to biosphere reserves. See S. 2092, 132 Cong. Rec. S 1561 (Feb. 25, 1986).

4. Law of the Sea

The recently negotiated Law of the Sea Convention (1982), prohibits marine pollution under certain circumstances. Such pollution could eventually pollute national parks and thus would be an unlawful activity -- as defined in the Convention -- giving rise to an international threat. The United States is not party to the Convention (which is not yet in force) and has declared that it will not be a party. Thus the United States may not be able to take advantage of the treaty. However, I think it likely that the United States eventually will find it prudent to become a party. Moreover, the Reagan Administration has taken the position that the Convention embodies customary international law except with respect to the deep-seabed-mining provisions. To the extent that argument is correct, the United States would have the advantage of the relevant rules contained in the Convention even though it is not a party.

A variety of multinational conventions regarding

marine oil pollution and waste disposal also exist that might be relevant to obtaining compensation for water-borne oil pollution to national parks. See e.g., International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3; Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165; cf. International Convention on Civil Liability for Oil Pollution Damages, Nov. 29, 1969, 973 U.N.T.S. 3 (United States not a party); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1978 Gr. Brit. T.S. No. 95 (Cond. 7383), _____ U.N.T.S. _____ (United States not a party). There is also a convention possibly relevant to nuclear pollution. See Convention Relating To Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255 (United States not a party); cf. Convention on the Liability of Operators of Nuclear Ships, May 25, 1962 (not yet in force), reprinted in 57 Am. J. Int'l L. 268 (1963). For a discussion of the recent negotiations to revise the oil-pollution conventions and to develop a new compensation regime for ocean-pollution incidents involving hazardous and noxious substances, see Comment, Dead in the Water: International Law, Diplomacy, and Compensation for Chemical Pollution at Sea, 26 Va. J.

Int'l L. 485 (1986).

B. Bilateral Treaties

1. Park-specific treaties

My research thus far has not revealed any binding international agreements that specifically apply to individual national parks. Such agreements might exist, however, with respect to parks such as the Glacier National Park, which is part of an international peace park with Canada's Waterton Park. Cf. Pub. L. No. 72-116, May 2, 1932. Such an agreement might have been entered into in the 1930's when the international peace park was formed or when the two parks were designated as biosphere reserves; inquiries and research thus far have not uncovered any such agreement, however. Other national parks (as defined herein) that might be protected by such an agreement include the San Juan Island National Historical Park, the Roosevelt Campobello International Park (which is administered jointly by the Canadian and U.S. National Park Services and is located in Canada), the Rio Grande Wild and Scenic River, the Amistad National Recreation Area, and the Chamizal National Memorial. If an international agreement exists with respect to such a park, it might impose obligations regarding protecting that area that could be used with respect to an international threat.

2. United States-Canada boundary area agreements

In 1909, the United States and Great Britain (on behalf of Canada) entered into the Boundary Waters Treaty, Jan. 11, 1909, United States-Great Britain, 36 Stat. 2448, T.S. No. 548, which establishes certain obligations with respect to boundary waters and also provides a mechanism -- the International Joint Commission ("IJC") -- for helping resolve boundary-water disputes. Notably, article IV of the Treaty provides: "It is further 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." That language, which is (probably unrealistically) absolute and unyielding on its face, is nowhere in the Treaty defined more precisely, and research has not disclosed any detailed analysis of such terms as "polluted," "injury," "health," or "property." Accord Arbitblit, 8 Ecology L.Q. 339, 348-49 (1979). The force of article IV may be reduced considerably by the inclusion of a provision akin to the "Harmon Doctrine" -- i.e., that a nation has the unqualified sovereign right to utilize and dispose of the waters of an international river flowing through its territory -- in article II of the Convention.

The fact that Glacier National Park is a biosphere reserve may affect the application of article IV, on the theory that the term "property" includes that

biosphere-reserve status. According to that argument, any interference with biosphere-reserve goals or uses would constitute an injury to property within the meaning of article IV and thus would constitute a violation of the Boundary Waters Treaty.

The IJC, which is composed of three members from each nation, is a quasi-judicial body with mandatory jurisdiction and binding authority to approve or disapprove projects such as boundary-water diversions or obstructions. See J. Carroll, Environmental Diplomacy: An Examination and A Perspective of Canadian-U.S. Transboundary Environmental Relations 47 (1983). In addition, article IX of the Boundary Waters Treaty provides that either or both nations may refer matters to the IJC for its nonbinding recommendation. Such references tend to be handled in an ad hoc fashion, often involving (as in the case of the Cabin Creek controversy) a joint investigative board with the directive to conduct scientific studies. The recommendations have not always been followed strictly. Article X of the treaty permits both parties to refer a dispute to the IJC for a binding decision, but that has never been done. See Wilson, Cabin Creek and International Law -- An Overview, 5 Pub. Land L. Rev. 110, 118 (1984); Comment, Who'll Stop the Rain: Resolution Mechanisms for U.S.-Canadian Transboundary Pollution Disputes, 12 Den. J. Int'l L. & Pol'y 51, 69-70 (1982).

The United States and Canada also entered into the Agreement Between the United States of America and Canada on Great Lakes Water Quality, April 15, 1972, 23 U.S.T. 301, T.I.A.S. No. 7312, which was based on a report of the IJC. See J. Barros & D. Johnston, The International Law of Pollution 71 (1974). See generally Seminar Papers -- Great Lakes Legal Seminar: Diversion and Consumptive Use, 18 Case W. Res. J. Int'l L. 1 (1986). A more detailed supplemental agreement, specifying measures for achieving water-quality objectives, was entered into in 1978. See Agreement Between the United States and Canada on Great Lakes Water Quality, reprinted in Int'l Envt'l Rep. p. 31, 0601. Those Agreements may provide protection regarding water quality of national parks located in or adjacent to the Great Lakes system.

3. United States-Mexico boundary area agreements

Mexico and the United States entered into an executive agreement in 1983 that provides a framework for negotiations to establish air-pollution regulatory standards in the hundred kilometers on either side of the border. See Agreement Between the United States of America and the United Mexican States on Cooperation for Protection and Improvement of the Environment in the Border Area, 19 Weekly Comp. Pres. Doc. 1137 (Aug. 14, 1983) [hereinafter cited as the Environmental Agreement]. Article 2 of that Agreement provides:

> The Parties undertake, to the fullest extent practical, to adopt the appropriate measures to prevent, reduce and eliminate sources of pollution in their respective territory which affect the border area of the other.
>
> Additionally, the Parties shall cooperate in the solution of the environmental problems of mutual concern in the border area, in accordance with the provisions of this Agreement.

For a discussion of that Agreement, see Note, The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands, 19 Cornell Int'l L. J. 87 (1986). Negotiations under the Environmental Agreement resulted in another, but apparently nonbinding, agreement, dated July 19, 1985, to control emissions from the recently opened smelter in Nacozari, Mexico, and from the smelter in Douglas, Arizona, each of which pollutes the other country. The 1983 Environmental Agreement might also prove useful with respect to any international threats involving air pollution in the border area, e.g., to South Bend National Park, and possibly other types of international threats, such as the threat from Mexico's use of DDT, which is reportedly affecting animal species in the United States. See State of the Parks Report, supra, at 21.

The 1944 Treaty Relating to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, 59 Stat. 1219, T.S. No. 994, 3 U.N.T.S. 313, established the International Boundary and Water Commission ("IBWC") (replacing the old

International Boundary Commission, created in 1889 to settle boundary demarcation disputes) to plan, build and manage border water works to enter into further agreements regarding international waters, and to settle disputes regarding interpretation of the Agreement if both parties consent. The IBWC might provide a forum for investigating international threats to national parks, though it has not been so used thus far, to my knowledge.

4. Other

The United States has bilateral "environmental cooperation" treaties with the Soviet Union (1972), West Germany (1974), Japan (1975), Panama (1979), France (1984), and the Netherlands (1985). U.S. Dep't of State, Office of the Legal Advisor, Treaties in Force (1986). Those treaties might provide assistance with respect to particular international threats, although I have not had the opportunity to investigate that possibility in detail. Treaties regarding migratory wildlife and fish might also provide some protection.

C. General Customary International Law

1. Protected areas generally

There does not appear to be any general customary international law regarding protected areas per se that would provide protection to national parks.

2. Transboundary harm generally

There is a substantial body of state practice that has led some commentators to conclude that there exists general customary international law with respect to transboundary harm for lawful activities, i.e., that a nation may be held liable for lawful activities in its territory that cause injury in or to the territory of another nation. An excellent study of the relevant state practice has been conducted by the Secretariat of the United Nations General Assembly. See Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (prepared by U.N. Secretariat), UN Doc. ST/LEG/15 (1984). In summary, that state practice consists of a wide variety of treaties (including many of the treaties alluded to above) and is supported by arbitral decisions such as the Trail Smelter award, supra, and the Laq Lanoux award, Laq Lanoux (Fr. v. Spain), 12 R. Int'l Arb. Awards 281 (1957) (French), 24 I.L.R. 101 (1957) (English), court decisions such as the Corfu Channel case, Corfu Channel (UK v. Alb.), merits, 1949 ICJ Rep. 4 (judgment of Apr. 9), and United Nations declarations such as the 1972 Stockholm Declaration on the Human Environment (particularly Articles 21, 22 and 23), Reports of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, pt. 1, ch. I (UN Pub. Sales No. E73.II.A.14), reprinted in 11 I.L.M.

1416 (1972).

The International Law Commission of the United Nations is currently engaged in attempting to develop rules regarding transboundary harm. For a detailed description of that work, see Magraw, Transboundary Harm: The International Law Commission's Study of "International Liability," 80 Am. J. Int'l L. 305 (1986). In summary, the Commission's approach is based on the general principle sic utere tuo ut alienum non laedas, i.e., the duty to exercise one's rights in ways that do not harm the interests of other subjects of law. That principle imposes a duty on a nation to exercise its rights in a manner that does not unreasonably harm the interest of other nations. That duty potentially conflicts with the principle of international law that a nation has a sovereign right to be free to engage in activities within its own territory and with respect to its own nationals. The Commission has thus attempted to allow as much freedom of choice to nations as is compatible with adequately protecting the interests of other nations.

The Commission's approach thus far has been to propose rules that encourage establishing conventional (treaty) regimes to deal with specific transboundary-injury situations and that assert, in the absence of such a regime, a fourfold duty to prevent, inform, negotiate, and repair. The duty to prevent requires the acting (or source) nation to take "measures of pre-

vention that as far as possible avoid a risk of loss or injury" to other nations. The duty to inform requires an acting nation to provide the affected nation with all relevant and available information when an activity occurring within the acting nation's territory or control gives or may give rise to harm to the affected nation. The duty to negotiate requires, under certain circumstances, the acting and affected nations to enter into negotiations regarding the necessity and form of a conventional regime to deal with the situation, taking into account a variety of enumerated criteria. If a conventional regime is not arrived at and if injury occurs, the duty to repair requires the nations to negotiate in good faith to determine the rights and obligations of the nations with respect to the injury. Reparations shall be made unless such reparations are not in accordance with the "shared expectations" of the nations involved. Reparations are to be determined according to a balance-of-interest test, taking into consideration the shared expectations of the nations, the enumerated criteria referred to above, and the nations' actions with respect to the duties to prevent, inform and negotiate. The duty to make reparations thus is not the same as a rule of strict liability, but it approaches, and may be identical to, strict liability if the harm is unpredictable or if the harm is predictable and the acting nation completely ignores the first three duties.

The ultimate failure to make the required reparations in the event of harm is a wrongful act. Only at this point, therefore, has a nation committed an act prohibited by international law.

The concept of "shared expectations" in the Commission's approach seems closely related to the notion of regional customary international law. Consideration of the shared expectations of the United States and Canada and the United States and Mexico, respectively, thus would presumably be affected by the same types of factors relevant to determining whether a norm of regional customary international law exists between those two sets of countries, as is discussed in Part III.D, below.

The scope of international liability, i.e., under what circumstances does the fourfold duty apply, has been the subject of ongoing debate. One aspect that remains largely unanswered is what constitutes transboundary harm. This aspect is particularly important because international liability potentially extends to the large universe of lawful activities and because so many such activities have effects of some kind in other nations. A second aspect concerns the degree to which nations are to be accountable for the activities of private persons. Thus far, it seems that nations are to be accountable for virtually all private activities within their territory or control. A third critical

aspect concerns what type of activities are to be covered (assuming there is transboundary harm and that the actor is one for whose activities the nation is accountable). The Commission's current approach is to limit international liability to physical activities giving rise to physical transboundary harm. More specifically, the activity or situation giving rise to the harm must have a physical effect and a physical quality, and the effect must flow from that quality via a "physical linkage," i.e., natural physical media such as atmosphere, water, or earth, rather than economic, political, international-trade, or cultural media.

Because the Commission's deliberations carry little, if any, legal weight standing alone and because, in any event, those deliberations are still in process and substantial questions remain unanswered, the rules just discussed do not offer concrete assistance at present with respect to international threats to national parks. Nevertheless, they offer some promise for the future.

As indicated above, some commentators take the view that, quite apart from the Commission's deliberations, international environmental law of an enforceable nature already exists, based on the state practice alluded to earlier in this part. I am skeptical that any general customary <u>environmental</u> law exists, but I believe that a nation is not entirely free under customary law to pollute as it wishes without considering

the interests of other nations. Phrased differently, there are general international-law principles (e.g., sic utere . . . , supra) that place restrictions on behavior by nations, and those principles encompass, inter alia, behavior affecting the environment. See Brownlie, A Survey of International Customary Rules of Environmental Protection, 13 Nat. Res. J. 179, 191 (1973); Johnston & Finkle, Acid Precipitation in North America: The Case for Transboundary Cooperation, 14 Vand. J. Transnat'l L. 787, 818-19 (1981). It is useful in examining that question to consider the Trail Smelter case, supra. That case involved transboundary pollution from an iron ore smelter in British Columbia that caused damage to private property in the State of Washington. Canada and the United States agreed to submit the dispute to arbitration. The tribunal stated:

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

The arbitral tribunal, inter alia, imposed a regulatory regime on Canada with respect to the smelter and held, significantly, that even after complying with those regulatory controls, Canada would still be liable to make reparations to the United States if any harm occurred -- i.e., Canada would have to make reparations

for harm arising from wholly lawful activity.

No other tribunal, to my knowledge, has applied such a rule to a transboundary-pollution question (possibly because very few such disputes have been submitted to arbitration or to adjudication). But, in a case involving the destruction of two British warships by mines placed in Albanian waters, the ICJ held that a nation was obliged "not to allow knowingly its territory to be used for acts contrary to the rights of other States." See also Lag Lanoux award, supra. A significant embracing of the Trail Smelter rationale is found in Principle 21 of the nonbinding Stockholm Declaration, supra, which reads as follows:

> 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 insure 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.

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3. The law of the non-navigational uses of international water courses

A number of commentators have concluded that there exists a norm of general customary international law to the effect that a riparian (or basin) nation has an obligation to consult and negotiate in good faith with other riparian (or basin) nations if that nation proposes to affect an international watercourse (e.g., a river flowing between two nations) in a manner that might cause serious injury to those other nations.

See, e.g., Bourne, Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate, 1972 Can. 4.B. Int'l L. 212, 233. For an excellent discussion of that and related literature, see F. Kirgis, Jr., supra, at 17-87. Such a duty, assuming it exists, would provide some protection against international threats involving watercourses, but that duty might not prevent the threat from occurring or make that occurrence unlawful, if the duty of prior consultation and negotiation was complied with.

The Helsinki Rules on the Uses of the Waters of International Rivers, International Law Ass'n (1966) reprinted in J. Barros & D. Johnston, supra, at 77-82, drafted by the private International Law Association in 1966, are regarded by some commentators as a comprehensive statement of the international law of rivers. See G. Wetstone & A. Rosencranz, Acid Rain in Europe and North America: National Responses to an International Problem 157 (1983). Article X of the Helsinki Rules provides that no nation has the right to pollute an international drainage basin so as to cause "substantial injury" to a co-basin nation. If that proposition is law, it may be useful in protecting against international threats involving water pollution.

The International Law Commission is presently studying the non-navigational uses of international

water courses, and its deliberations may be useful in the future. The Commission has approached this topic in a manner similar to the Commission's approach to international liability, described above: both are based on the potentially conflicting rights of sovereigns to be free to engage in activities in their own territory and still be free from interference from other states; both include duties to negotiate and to notify and inform; both encourage the formation of conventional regimes to deal with specific situations; both prescribe a balancing test that is not well-defined; and both entail international accountability for failure to fulfill their respective obligations. The prospects for progress in this area, however, are dimmed by the fact that the issue is extremely political due to the conflicting, and to some degree irreconcilable, interests of upstream and downstream nations.

D. Regional Customary International Law

1. United States - Canada

As indicated above, the United States and Canada have a long tradition of cooperation with respect to boundary and environmental issues. It is possible that those activities have created a norm of regional customary international law regarding transboundary pollution or the environment more generally. If such a norm does exist -- and I emphasize that my thinking on this topic is especially embryonic -- it seems likely that the norm would provide protection against pollution to

some degree and thus might be helpful with respect to protecting national parks against international threats emanating from Canada.

The behavior of the two nations on which such a regional norm might be based include: the 1909 Boundary Waters Treaty; the IJC investigations and responses thereto; cooperation regarding the Waterton-Glacier International Peace Park in the 1930s and the biosphere-reserve activities more recently; cooperation regarding various other national parks or similar areas (e.g., Roosevelt Campobello International Park and San Juan Island Historical Park); the 1972 and 1978 Great Lakes Agreements; a 1980 Memorandum of Intent Between the Government of Canada and the Government of the United States Concerning Transboundary Air Pollution, Aug. 5, 1980, Canada--United States, U.S. Dept. State Bull., No. 2043 at 21 (Oct. 1980); the 1986 discussions between the two nations about cooperating on an acid-rain study; and a common legal tradition with respect to issues such as nuisance, see McCaffrey, Private Remedies for Transfrontier Pollution Damage in Canada and the United States: A Comparative Survey, 19 W. Ont. L. Rev. 35 (1981). In this respect, it is interesting that in the Gulf of Maine case (concerning the maritime boundary between the two nations in the Gulf of Maine area), the panel of the International Court of Justice based its reasoning in part on the long tradition of cooperation

between the two nations. For a discussion of resource issues between those nations, see U.S.-Canada Transboundary Resource Issues, 26 Nat. Res. J. 201-376 (1986).

2. United States - Mexico

One might also attempt to identify a norm of regional customary international law regarding pollution between the United States and Mexico. Relevant behavior by the nations in this respect would include: the 1944 Water Treaty; the activities of the IBWC and responses thereto; the ongoing dispute about the quality of the Colorado River; the 1983 Environmental Treaty and the 1985 Nacozari Agreement; and the fact that the Douglas Smelter in the United States has been polluting into Mexico for many years with no compensation or amelioration by the United States. The fact that Mexico is a less developed country might also affect the contents of any regional norm. See Magraw, supra, 26 Wash. L. Rev. _____ (1986). As with the possibility that there exists a regional norm between the United States and Canada, my research here is at a very early stage. At this point, I am not optimistic that, if a regional norm between the United States and Mexico exists regarding transboundary pollution, the contents of that norm would provide much protection to national parks against international threats.

IV. DOMESTIC THREATS

I have encountered no evidence of customary international law that would require the United States to protect national parks against domestic threats. With respect to international agreements, the United States-Canada boundary agreements and the United StatesMexico Environmental Agreement possibly could provide a basis for requiring the United States to protect a national park from a domestic threat if the existence of that threat also caused the United States to be in violation of either of those international agreements. The protection of the national park would thus be indirect, in a sense.

If any park-specific agreements exist, as is hypothesized above in Part III.A.2.a., they may either require the United States to protect a particular national park directly or provide protection indirectly via the possibility described in the immediately preceding paragraph. Similarly, if the United States is required by a treaty such as a migratory bird or wildlife treaty to protect the breeding grounds or other habitat of a particular species and such breeding ground or habitat is in a national park, international law could be relevant. Again, my research is in its extreme infancy in this regard.

The World Heritage Convention, supra, obligates the nation in which natural or cultural heritage is located to engage in some activities, although the

strength of that obligation is uncertain. Article 4, for example, states that each party to the Convention "recognizes that the duty of insuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation . . . ." The inclusion of the word "duty" is reassuring; the qualification implied by the terms "do all it can," "to the utmost of its own resources," and "where appropriate," reduce the strength of that obligation considerably.

Similarly, Article 5 provides that each party to the Convention "shall endeavour, insofar as possible, and as appropriate for each country" to take a number of enumerated measures, including "to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of [the cultural and natural heritage situated on its territory]." It is not obvious that the promise to "endeavour, insofar as possible, and as appropriate" entails any real obligation. The judges in the Tasmania case, supra, disagreed on that issue. A 1981 Department of Interior legal memorandum

(summarizing an earlier memorandum) states that "the Convention itself was executory; it established a general good faith responsibility for each signatory to protect heritage properties, but left latitude for implementation to each country." (The 1981 memorandum goes on to opine that 16 U.S.C. § 470a-1 "implements these provisions . . . and [restricts] that latitude" such that "the Secretary [of Interior] must be satisfied that each nominated site has adequate legal protection to ensure its preservation.") There does not appear to be a definitive answer at present.