



June 20, 2008

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RE: Impacts of a Proposed Coal Mine in the Flathead River Basin

Dear Commissioners:

We are writing on behalf of Wildsight, the Canadian Parks and Wilderness Society British Columbia Chapter, Yellowstone to Yukon Conservation Initiative, Sierra Club of Canada B.C. Chapter, the National Parks Conservation Association, the Wilderness Society, and the Flathead Coalition to bring to your attention some matters relevant to the Commission's mandate to assist the United States and Canada in the protection of the transboundary environment.¹ In 1988 the Commission conducted a study and issued a report and recommendations on the Impacts of a Proposed Coal Mine in the Flathead River Basin ("1988 Report"). Proposed coal mining activities once again threaten the headwaters of this pristine and ecologically important transboundary river.

In light of these renewed threats, the purpose of this letter is to respectfully request the Commission's guidance as to whether the recommendations set forth in the 1988 Report have been met. The signatories to this letter are non-governmental organizations from both Canada and the United States whose members have direct interests in the transboundary watershed of the Flathead River.

Wildsight works locally, regionally and globally to protect biodiversity and encourage sustainable communities in Canada's Columbia and Southern Rocky Mountain region. Wildsight is the lead conservation organization in southern British Columbia. Wildsight's team has been working on conservation of Canada's southern Rocky Mountains for more than twenty five

¹ *International Joint Commission 2006 Annual Report*, at 1.

years. They have worked with government, industry and communities to protect the globally significant wilderness values in the region.

The Canadian Parks and Wilderness Society – British Columbia Chapter has advocated for protection of the Canadian portion of the Flathead River Watershed since 1980. Recently, they have been advising the Province of British Columbia on the Flathead River as a transboundary river and on ways to improve the BC-Montana relationship prior to the renegotiation of the Columbia River Treaty.

The Yellowstone to Yukon Conservation Initiative (Y2Y) is an international organization spanning five US states, two Canadian provinces and two northern territories from the Wind River Range in Wyoming to the Alaska/Yukon Border. Since their inception, they have worked collaboratively with over 300 partners including government, Aboriginal communities, researchers, municipalities, and non-government organizations to maintain and restore the unique natural heritage of the Yellowstone to Yukon region. The Flathead River Basin (located in Y2Y's Crown of the Continent Priority Area) is a vital component to maintaining terrestrial and aquatic connectivity for the region, and has been identified through avian research as a priority hotspot for bird conservation. As such, they have been working to advance protection of the Canadian portion of the Flathead River Basin and maintain the ecological integrity of Montana's North Fork of the Flathead.

Sierra Club BC has been working to protect BC's threatened wilderness and wildlife since 1969. At the heart of their grassroots organization are people from all over the province who are deeply committed to safeguarding the Flathead Valley and other wild places in B.C., and promoting the responsible use of BC's natural resources. They meet regularly with government and business to ensure conservation viewpoints are heard, and to provide input on policy and budget decisions that affect the environment.

National Parks Conservation Association is America's leading voice for the protection and enhancement of the cherished landscapes, ecosystems, and cultural resources that comprise America's national parks. As the world's first peace park, Waterton-Glacier International Peace Park has been a source of global inspiration for generations. NPCA is committed to the protection of this UNESCO World Heritage Site and UN Biosphere Reserve through the work of the Glacier Field Office located in Whitefish, Montana, which seeks to educate local communities, citizens, and public officials regarding the environment risk of industrial coalfield development in the British Columbian headwaters of Waterton-Glacier International Peace Park

The Wilderness Society, which has more than 325,000 members and supporters, is a nonprofit conservation organization co-founded in 1935 by Robert Marshall (of the "Bob Marshall Wilderness Complex" south of Glacier-Waterton International Peace Park). The Society is committed to protecting America's wilderness forever, so that generations to come can enjoy the clean air and water, beauty, wildlife, and opportunity for recreation and spiritual renewal provided by wild places. The group pursues its mission through educating and engaging the public; building a solid and trustworthy scientific basis for decision-making; and advocating for sound policy now and in the future.

The Flathead Coalition has served as the local, binational voice for the protection of the Transboundary Flathead for 30 years. Comprised of Canadians and Americans who live in local communities surrounding the Flathead, the coalition is a grassroots effort to cooperate across the international border to protect the existing habitat, water quality, and fisheries values of this international watershed.

The Commission has long recognized the importance of public participation and democratic processes for the effective protection of the transboundary environment.² As representatives of critical public environmental concerns, we hope the Commission will consider the information in this letter and take the opportunity to follow up on its recommendations concerning coal mining in the Flathead River Basin. We believe such action would not only support the Commission's commitment to public participation, but would also reinforce the Commission's central role in the protection of the transboundary environment.

The 1988 Report and Recommendations

In 1985 the International Joint Commission was requested to examine and report on the transboundary water quality and quantity implications of a proposed coal mine on Cabin Creek, a tributary of the Flathead River. Sage Creek Coal Limited sought approval for the construction and operation of this mine from the Government of British Columbia. The request asked the Commission to make recommendations that would assist the governments of Canada and the United States to ensure that the provisions of Article IV of the Boundary Waters Treaty of 1909 (the "Treaty"), which states that such waters "shall not be polluted on either side to the injury of health or property on the other," are honoured.

In response to the request, the Commission established a study board, the Flathead River International Study Board (the "Board"), to undertake a technical assessment as a basis for the Commission's deliberations. The Board, composed of technical experts from both the United States and Canada, was charged with examining and reporting on:

- the present state of water quality and water quantity of the Flathead River at the border;
- current water uses (including water-dependent uses such as recreation) in the Flathead River basin together with their effects on present water quality and quantity;
- the nature, location and significance of fisheries currently dependent on the waters of the Flathead River and its tributaries, Howell and Cabin Creek;
- effects on the present state of water quality and water quantity of the Flathead River at the border which would result from the construction, operation and post-mine reclamation of the proposed Cabin Creek coal mine;

² See, e.g. *International Joint Commission of the United States and Canada Great Lakes Declaration* (Sept. 20, 2003) at 1 ("ACKNOWLEDGING ... that vigorous public participation and dialogue among all interested parties, including aboriginals and Native Americans, must remain a cornerstone of agreement implementation."); *International Joint Commission 2006 Annual Report*, at 2 ("The IJC recommends ... more public involvement in protecting and restoring the waters of the Great Lakes basin.")

- effects on current water uses (including water dependent uses such as recreation) which would result from the identified effects on the present state of water quality and water quantity at the border; and
- effects which the construction, operation and post-mine reclamation of the proposed Cabin Creek coal mine would have on the habitat for fisheries in Canada in the waters of the Flathead River and its tributaries Howell and Cabin Creeks, and consequent effects on fisheries in the United States.

The Board began its work in 1985 and after more than three years of work, forwarded a number of technical reports to the Commission. In 1988 the Commission issued its Report based on the findings of the Technical Committees and Board and on the results of three public consultation meetings and the submission of comments by various interested members of the public. Noting the pristine nature of the North Fork of the Flathead River and the high level of protection afforded the river under U.S. law, the Commission expressed concern over the potential impact of mine development on groundwater flows between the proposed mine site and the creeks in the headwaters of the Flathead River; toxic levels of nitrogen compounds; temperature changes and dissolved oxygen levels; and the potential risk of extreme or unusual events such as the failure of waste dumps and settling ponds.³ Although the Board determined that a comprehensive assessment of the impacts of the proposed mine was not possible due to the lack of adequate baseline data on essential indicators including concentrations of dissolved oxygen, abundance and diversity of aquatic invertebrates, fisheries spawning and rearing habitat and other biological characteristics of the watershed, the Commission emphasized that the acceptability of even a low probability of risk must take into account the nature of the values at risk.⁴

Of critical concern to the Commission was the mine's proximity to a significant component of the remaining available spawning and rearing habitat for prime game fish in the Flathead Basin including bull trout, western (or westslope) cutthroat trout and mountain whitefish. The Commission found that the mine would "undoubtedly" have a "deleterious effect" on eggs and fry in the spawning ground, and would "undoubtedly act as an impediment to the adult fish in reaching and/or using those altered grounds."⁵ Thus, the Commission concluded that a significant loss of fish population would occur, and that such losses would cause a reduction in the quantity and quality of the sport fishing activity in the United States and create a negative impact on the associated economic infrastructure since the affected fish populations migrate for much of their adult lives to United States waters.⁶ The Commission concluded that "a reduction of the fish population to the extent and of the duration involved here would undoubtedly be an injury of most serious consequence to the integrity of the fishery itself, and thus to that property interest in the public domain on the other side of the border."⁷ Because it

³IJC, *Impacts of a Proposed Coal Mine in the Flathead River Basin*, at 8 (Dec. 1988).

⁴*Ibid.* at 7.

⁵*Ibid.* at 8.

⁶*Ibid.*

⁷*Ibid.* at 9.

was not demonstrated that effective mitigation of that impact is feasible, the Commission found that “these consequences to the fishery would thus clearly constitute a breach of Article IV.”⁸

To ensure that the provisions of the Boundary Waters Treaty are honoured, the Commission held that “when any proposed development project has been shown to create an identified risk of a transboundary impact in contravention of Article IV, existence of that risk should be sufficient to prevent the development from proceeding.”⁹ Accordingly, the Commission issued the following recommendations:

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

We respectfully request the Commission’s guidance as to whether these recommendations have been met, and the continued applicability of these recommendations to currently proposed coal development activities in the Flathead River basin.

Coal Development Currently Proposed in the Flathead River Basin

The Commission’s opinion as to the continuing vitality of the 1988 recommendations is especially critical today because transboundary waters in the Flathead River valley, and the transboundary fish populations that depend on them, are again threatened by proposed coal developments. The Flathead River basin is one of the most pristine river drainages in the Rocky Mountain region. The river begins in Canada and flows across the international boundary into northwest Montana, where the Flathead forms the western border of Glacier National Park before emptying into Flathead Lake. Along the way, the river runs through a landscape that offers premiere wildlife habitat supporting extraordinary densities of otherwise rare species including grizzly bears, wolves, Canada lynx, and wolverines. A 2001 study by the Wildlife Conservation Society concluded that “[a] unique community of carnivore species resides in the transboundary Flathead region that appears unmatched in North America for its variety, completeness, use of

⁸ *Ibid.*

⁹ *Ibid.*

valley bottomlands, and density of species which are rare elsewhere.”¹⁰ The Flathead River itself hosts important native fish populations, including populations of bull trout, which is listed as a threatened species under the U.S. Endangered Species Act, and rare genetically pure westslope cutthroat trout, both of which migrate from Montana to spawn in the Canadian headwaters.

While the principal threat to these natural resources in 1988 arose from the proposed Sage Creek coal mine located near the confluence of the Howell and Cabin Creek tributaries to the Flathead, today’s threat arises from a similar mining proposal – dubbed the Lodgepole coal mine – located near the Foisey Creek and McLatchie Creek tributaries to the Flathead.

The coal mining threat arises from a proposal by the Cline Mining Corporation to construct and operate the Lodgepole open-pit coal mine approximately 40 kilometers (25 miles) north of the U.S.-Canadian border in the Flathead River drainage. Current plans call for Cline to remove 2 million tons of coal from this mine each year, along with 16 million tons of overburden rock that must be removed each year to access the coal, over a 20-year period. Plans call for the overburden rock to be deposited along the banks of Foisey and Crabb Creeks. According to the U.S. Department of Interior’s comments on this proposal:

Water from rain and snow will leach through these overburden materials and will enter the Flathead River system carrying heavy metals such as selenium and high levels of nitrates from blasting compounds. It has been estimated that water leaching through these overburden materials will reach the border of the United States in 24 hours and will enter Flathead Lake in approximately 48 hours. Mine development, including associated construction activities, providing transportation corridors, the operation of heavy equipment and increased settlement, and human activity in and around the project area is expected to have significant adverse impacts upon fish and wildlife of high importance to the United States and under the direct purview of the Interior.¹¹

The Cline proposal is being analyzed in parallel environmental assessment processes being conducted by the British Columbia and Canadian governments.

The threats posed by the proposed Lodgepole coal mine are similar to those addressed by this Commission in its 1988 Report concerning the proposed coal mine on Cabin Creek. Like the Sage Creek project addressed in the Commission’s 1988 Report, the proposed Lodgepole project envisions an open-pit coal mine with overburden rock deposited in waste dumps. The mine design plan includes waste dumps in the tributary drainages of the Flathead River. Moreover, like the Sage Creek project, the proposed Lodgepole project would attempt to address water run-off to surface waters in the area through ditches and settlement ponds. In addition, like the Sage Creek project, the Lodgepole project proposes extensive road construction, land clearing and earth moving activities that generate large amounts of sediment.

¹⁰John L. Weaver, *The Transboundary Flathead: A Critical Landscape for Carnivores in the Rocky Mountains* (WCS Working Paper No. 18, July 2001).

¹¹ *Letter from Willie R. Taylor, Director, Office of Environmental Policy and Compliance, to Edward Alexander Lee, Director, Office of Canadian Affairs* (Feb. 21, 2007), at 2.

Addressing such proposed development activities in the Flathead River drainage in 1988, this Commission found “overwhelming evidence ... that a significant loss of fish population will occur as the result of a combination of the adverse effects,” including an “increased level of toxic substances” as well as “sedimentation, temperature change, flow modification, degradation of habitat, dissolved oxygen reductions, increased dissolved solids and others.”¹² This Commission therefore concluded that “damage will inevitably occur to this habitat which would be located in the midst of a major mining development, and consequently to the fishery dependent on that habitat.”¹³ The Commission further concluded that “such losses would be such as to cause a reduction in the quantity and quality of the sport fishing activity in the United States and create a negative impact on the associated economic infrastructure since the affected fish populations migrate for much of their adult lives to United States waters.”¹⁴

All available evidence indicates that the developments proposed today in the Flathead basin threaten equally dire consequences. Indeed, the location of the proposed Lodgepole mine appears to be at least as sensitive for fishery impacts as the site of the Sage Creek project examined in the Commission’s 1988 recommendation. A critical fact underlying the Commission’s 1988 conclusions was its finding that the proposed Sage Creek mine “rests astride two streams that form a significant component of the remaining available spawning and rearing habitat for prime game fish in the Flathead basin – the bull trout (also known as Dolly Varden char) and to a less critical degree western cut-throat trout and mountain whitefish.”¹⁵ The Commission’s Biological Resources Committee found that the Howell Creek tributary to the Flathead River supported 55 percent of all bull trout spawning in the Canadian portion of the North Fork Flathead River system from 1980 to 1982.¹⁶ The current development threats would occur in the vicinity of Foisey and McLatchie Creeks in the upper reaches of the Flathead drainage. Although comprehensive baseline studies have yet to be conducted, a basin-wide bull trout spawning site inventory conducted in 2003 by the Montana Fish, Wildlife, and Parks agency determined that approximately 67 percent of all known bull trout redds, or spawning nests, in the Canadian portion of the North Fork Flathead River system were found in the North Fork near the mouths and immediately downstream of Foisey and McLatchie Creeks, representing 37% of the total redds detected in the entire North Fork drainage. In sum, the Sage Creek mining proposal examined by this Commission in 1988 threatened to reduce the quantity and quality of transboundary fisheries in the Flathead system; the current developments threaten an even greater impact on this critical transboundary resource.

The 1988 Report recommends withholding regulatory approval of the Sage Creek mine until “potential transboundary impacts have been adequately determined with reasonable certainty” and the potential impacts on the sport fish populations and habitats in the Flathead

¹² IJC, *Impacts of a Proposed Coal Mine in the Flathead River Basin*, at 8 (Dec. 1988).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.* at 7.

¹⁶ See IJC, *Flathead River International Study, Biological Resources Committee Technical Report*, at 264-65 (Oct. 1987).

River system “would not occur or could be fully mitigated.”¹⁷ Such determinations rely on the compilation of adequate baseline environmental and biological information. However, the baseline data that was unavailable to the Commission in 1988 has yet to be collected. According to a report commissioned by the British Columbia government in 2004 to assess the existence of baseline environmental data in the Elk and Flathead valleys, there is very little water quality data available for the low-order streams that could be affected by proposed development. According to the report, “[t]his is a potentially critical information gap and baseline water quality monitoring will very likely be needed for at least three years” before development.¹⁸ Other inventories of existing baseline data in the transboundary Flathead show a lack of botanical surveys, a lack of information on species at risk, and a failure to consider the cumulative impacts of coal development.¹⁹ These substantial gaps in baseline data are of utmost concern because if ground-disturbing activities commence prior to the compilation of baseline information, the opportunity to monitor resource changes, identify impacts and mitigation strategies, and assess compliance with the Boundary Waters Treaty will be lost.

Request for the Commission’s Guidance

We respectfully request the Commission’s guidance on the continued applicability of the 1988 recommendations and whether these recommendations have been met. As the Commission held in its 1988 Report, “to ensure the provisions of the Boundary Waters Treaty are honored, when any proposed development project has been shown to create an identified risk of a transboundary impact in contravention of Article IV, existence of that risk should be sufficient to prevent the development from proceeding.”²⁰ To an even greater extent than the project at issue in 1988, the project currently proposed in the headwaters of the North Fork of the Flathead River will have broad and ongoing transboundary environmental impacts that will harm property and resources in the United States.

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¹⁷ *1988 Report* at 11.

¹⁸ *Summit Environmental Consultants, March 31, 2004. Summary of existing baseline water quality data.* Prepared for the British Columbia Ministry of Energy and Mines.

¹⁹ Ecodomain Consulting, November 20, 2003. Species at Risk Inventory Strategy for Dominion Coal Block. Prepared for Natural Resources Canada, Canadian Forest Service.

²⁰ *1988 Report* at 9.

We hope that the Commission will take the information presented in this letter into consideration as it fulfills its role of assisting the United States and Canada in the protection of the transboundary environment, and we would be pleased to help the Commission in any way appropriate. Please let us know if we can be of any further assistance.

Sincerely,

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