

Models for Protecting the Environment for Future Generations



Science and Environmental Health Network

The International Human Rights Clinic at Harvard Law School

Models for Protecting the Environment for Future Generations

Science and Environmental Health Network

**The International Human Rights Clinic
at Harvard Law School**

October 2008

<http://www.sehn.org>

<http://www.law.harvard.edu/programs/hrp>



The Science & Environmental Health Network (“SEHN”) engages communities and governments in the effective application of science to restore and protect public and ecosystem health. SEHN is a leading proponent of the precautionary principle as a basis for public policy. Our goal is policy reform that promotes just and sustainable communities, for this and future generations.

IHRC

INTERNATIONAL HUMAN
RIGHTS CLINIC

HUMAN RIGHTS PROGRAM
AT HARVARD LAW SCHOOL

The International Human Rights Clinic (IHRC) at Harvard Law School is a center for critical thought and active engagement in human rights. The IHRC provides students the opportunity to engage directly with the vital issues, institutions and processes of the human rights movement. Each year, the IHRC partners with dozens of local and international non-governmental organizations to work on human rights projects ranging from litigation, on-site investigations, legal and policy analysis, report drafting for international oversight bodies, and the development of advocacy strategies.

**MODELS FOR PROTECTING THE ENVIRONMENT
FOR FUTURE GENERATIONS**

Table of Contents

I. Summary	1
II. Legal Bases for Present Promotion of Future Interests	3
A. The Interests of Future Generations	4
B. Duties to and Rights of Future Generations	6
C. Guardians and Trustees for Future Generations	9
III. Legal Mechanisms and Institutions for Protecting the Environment for Future Generations	11
A. Courts	12
B. Ombudsmen, or Commissioners	15
C. Guardians, or Trustees	19
IV. Conclusion	23
APPENDIX A: A Proposed Structure for an Ombudsman for Future Generations	25
APPENDIX B: A Proposed Structure for a Guardian for Future Generations	30
APPENDIX C: Examples of International Legal Frameworks to Protect Future Generations	34
APPENDIX D: Examples of Domestic Legal Frameworks to Protect Future Generations	38
APPENDIX E: Bemidji Statement on Seventh Generation Leadership	45

MODELS FOR PROTECTING THE ENVIRONMENT FOR FUTURE GENERATIONS¹

I. Summary

Due to growing concern over deteriorating environmental conditions, legal systems around the world have increasingly recognized the interests of future generations and the corresponding responsibilities of present generations. The notion of intergenerational equity is not new, but over the past several decades, more legal documents have specifically referenced future generations and their interests. Some courts, government bodies, and other entities have also begun to take the interests of future generations into account in making decisions that affect the long-term health of the environment. This paper explores the variety of ways that the legitimate environmental interests of future generations may be advanced through more frequent development and use of institutional mechanisms, such as ombudsmen and guardians. Deployment of new mechanisms would help move beyond the mere citation of the interests of future generations in legal documents. Through such innovation, the interests could be evaluated and weighed, for example, by courts determining the impacts of environmental degradation on a community, by administrative agencies drafting regulations or considering development proposals, and by executive officials negotiating with indigenous communities.²

The concept of future generations is based on precedent, both ancient and modern, international and domestic.³ Historically, for example, some Native Americans have recognized the obligation of present generations to take into consideration the long-term environmental consequences of their actions.

¹ This paper was conceived and written by Carolyn Raffensperger, executive director of the Science and Environmental Health Network (SEHN), Tyler Giannini, director of the International Human Rights Clinic at Harvard Law School's Human Rights Program, and Bonnie Docherty, lecturer and clinical instructor at the Clinic. Additional writing assistance came from Nate Ela, litigation and writing fellow at the Clinic. Research was provided by Jose Klein, J.D. 2008, Bart Lounsbury, J.D. 2007, Jason Steffen, J.D. 2007, and Mike Sullivan, J.D. 2009, all students in the Clinic. Joseph Guth, SEHN's legal director, and James Cavallaro, executive director of the Human Rights Program, reviewed the paper.

² Intragenerational equity is also an important concept with regards to the environment and is particularly tied to the environmental justice movement. Discussions about intragenerational equity are beyond the scope of this paper, however.

³ Appendices 3 to 5 provide examples of this precedent in more depth.

The constitution of the Confederation of the Six Nations of the Iroquois, the *Gayanashagowa* or “Great Law of Peace,” requires leaders to make decisions with the “Seventh Generation to come” in mind. More recently, especially since the early 1970s, international treaties have set out responsibilities to protect future generations, especially related to environmental protection. Modern constitutions and statutes have also articulated intergenerational equity in terms of duties, rights, or guardianships.

This briefing paper provides an overview of various legal models that promote protection of the environment for future generations. Part II outlines how international and domestic law highlight future generations’ interests in protecting the environment. It also explores how these interests have manifested themselves in different frameworks.⁴ Legal documents sometimes create duties for present generations to protect the rights of future generations; this approach carries great normative weight because rights are generally seen to trump other interests. In other cases, legal structures create a guardian-ward or trustee-beneficiary relationship that requires present generations to ensure ecological health for the benefit of future generations. Often, these structures mandate that the interests of present and future generations be weighed against one another when making decisions.

As outlined in Part III, the legal frameworks—duties, rights, guardianships, and trusteeships—can be implemented through a number of legal mechanisms or institutions, each of which can contribute to the advancement of protection for future generations. First, courts are a traditional mechanism, and several have addressed intergenerational equity in their decisions. Second, ombudsmen⁵ generally possess broad advisory authority to review legislation and executive acts to assess their impact on future generations and to make recommendations. Hungary and Israel have created such positions specifically for future generations. Ombudsmen exist in the environmental arena more generally, including in Canada, the United Kingdom, and the United States, playing similar advisory roles or assisting with statutory compliance. Ombudsmen in the human rights sphere often serve mediation or quasi-

⁴ The research for this paper focused on international and U.S. sources and does not represent an exhaustive comparative analysis, though some relevant constitutional provisions (e.g., Bolivia, Japan, and Norway) are provided in the appendices.

⁵ For consistency of terminology, the term “ombudsman” is used throughout this document. In the human rights context, additional terms such as human rights “commissioner” or “national human rights institution” (NHRI) are also commonly used. For general information on NHRIs, see www.nhri.net.

judicial roles by investigating issues or cases as well as hearing disputes in some instances. Third, guardians advocate in specific situations for the “best interests”⁶ of people who cannot, for example, represent themselves in litigation and negotiations. This mechanism could be developed to help ensure environmental protection for future generations. Guardianships have been successfully implemented in analogous situations; U.S. courts, for example, regularly appoint guardians to represent the interests of children and others not competent to represent themselves legally.⁷

While this paper provides ample precedent and models for protecting future generations’ interests, what is needed now is for more jurisdictions—through their legislatures, judiciaries, and executives—to develop and deploy integrated approaches that advance the interests of future generations consistent with their legal systems. Ultimately, the core mechanisms discussed here could operationalize the legal interests of future generations in innovative ways to address the important problems facing the world.⁸

II. Legal Bases for Present Promotion of Future Interests

Various legal traditions and documents recognize the interests of future generations in a clean and healthy environment, providing precedent for considering them in contemporary decision-making. Many also take the next step and articulate a legal relationship between present and future generations. Numerous instruments place specific duties on present generations to protect the environment for future generations and, in some cases, establish corresponding rights for future generations. Alternatively or additionally, legal structures establish guardian-ward or trustee-beneficiary relationships between present and future generations, respectively. Some of these approaches overlap or have yet to be precisely defined, but at their core, they all acknowledge the

⁶ The concept of “best interest” of the ward is critically important. In the context of considering the best interests of future generations, the precautionary principle and alternatives analysis approaches would be key components of the evaluation. See *infra* Part III(C) for further discussion.

⁷ Appendices A and B detail how an ombudsman and guardian of future generations would work.

⁸ For example, judges; executive officials at the national, state, or local level; indigenous councils; or private parties could appoint these ombudsmen and guardians. The positions would vary depending on the character of specific jurisdictions. For example, parliamentary systems might differ from presidential systems, and the exact interactions between courts and ombudsmen or guardians might also differ.

threats to future generations and the need for assistance from those in present generations.⁹

A. The Interests of Future Generations

A multitude of international and domestic sources acknowledge that the actions of present generations can interfere with the needs of future generations. To address this situation, legal documents commonly highlight the interests of future generations and state that they should receive attention alongside those of present generations.

The principle of sustainable development, frequently cited in international instruments, exemplifies the consideration given to the needs of future generations. The Report of the World Commission on Environment and Development (known as the Brundtland Report), which offers the most accepted definition of sustainable development, uses the term to describe “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁰ Similarly, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes provides: “Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.”¹¹ Such provisions, especially because of the phrase “without compromising,” subject present generations’ needs to those of future generations. Using a slightly different formulation, the Rio Declaration on Environment and Development, adopted by about 178 countries at the 1992 Earth Summit, declares: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”¹² The UN Framework Convention on Climate

⁹ In the 1980s and 1990s, Professor Edith Brown Weiss traced the roots of intergenerational equity in international law. She proposed three principles to inform intergenerational equity: conservation of “options,” “quality,” and “access” for future generations. E. Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198, 200-02 (1990); see also E. BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 25-26 (1989).

¹⁰ REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ch. 2(1), U.N. Doc. A/42/427 (1987), available at <http://www.worldinbalance.net/agreements/1987-brundtland.html> [hereinafter “Brundtland Report”].

¹¹ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 2(5)(c), Mar. 17, 1992, 31 I.L.M. 1312.

¹² Rio Declaration on Environment and Development, princ. 3, U.N. Doc. A/CONF.151/26 (Vol. I) (1992) [hereinafter “Rio Declaration”].

Change, the major international climate change initiative, articulates how parties must work for the “benefit” of future generations: “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”¹³ The latter two instruments emphasize a balance between present and future yet still give the latter equal weight. At least five international treaties and three declarations refer to future generations.

Domestic laws, such as those in the United States, also often recognize the interests of future generations. For example, at least eight U.S. federal statutes make specific reference to the protection of the environment for future as well as present generations.¹⁴ At least four U.S. state constitutions and five state statutes similarly reference such interests.¹⁵ The environmental policy section of the Indiana State Code, for example, describes one of its three purposes as “to preserve, protect, and enhance the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment.”¹⁶ New Mexico’s Environmental Improvement Act lists as one of its goals “to ensure an environment that in the greatest possible measure” will protect present and future generations.¹⁷ Although the statutes list multiple purposes,¹⁸ they clearly articulate a commitment to protecting the interests of future generations.

¹³ UN Framework Convention on Climate Change art. 3(1), *opened for signature* May 9, 1992, U.N. Doc. A/AC.237/18 (Part II) (Add. 1), 31 I.L.M. 848.

¹⁴ See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. § 4331(a) (2006); see also Appendix D: Examples of Domestic Legal Frameworks to Protect Future Generations.

¹⁵ See Appendix D.

¹⁶ Ind. Code tit. 13, art. 12, ch. 3(1) (2008).

¹⁷ Environmental Improvement Act, N.M. Stat. Ann. Ch. 74, art. 1(2) (2006). See also California Environmental Quality Act, Cal. Pub. Res. Code § 21001(e) (2006) (declaring the intent of the state to “[c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations”).

¹⁸ The Indiana Code says the other purposes of its environmental title are:

- (1) to provide for evolving policies for comprehensive environmental development and control on a statewide basis;
- (2) to unify, coordinate, and implement programs to provide for the most beneficial use of the resources of Indiana.

Ind. Code tit. 13, art. 12, ch. 3(1) (2008). New Mexico’s Environmental Improvement Act describes its other goals as “to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants” and to “maximize the economic and cultural benefits of a healthy people.” N.M. Stat. Ann. Ch. 74, art. 1(2) (2006).

B. Duties to and Rights of Future Generations

One legal approach to achieving the kind of intergenerational equity discussed above is to establish, explicitly or implicitly, duties for present generations to promote the interests of future generations. Some argue that every duty has a corresponding right, suggesting that a duty toward future generations would mean that future generations in turn have a right.¹⁹ Numerous legal sources establish a duty for present generations to act. Some sources specifically recognize the existence of rights of future generations.

Indigenous peoples have long articulated an obligation of present generations to promote the “welfare” of future generations. In his concurring opinion to the 1997 International Court of Justice (“ICJ”) case concerning the Gabcíkovo-Nagymaros Project of locks and dams on the Danube river (“*Gabcíkovo-Nagymaros* decision”), Judge Christopher Weeramantry chronicled the concern for future generations across several continents. He wrote:

[E]xamples may be cited from nearly every traditional system, ranging from Australasia and the Pacific Islands, through Amerindian and African cultures to those of Ancient Europe. . . . [T]hese varied cultures were reflecting the ancient wisdom of the human family which the legal systems of the time and the tribe absorbed, reflected and turned into principles whose legal validity cannot be denied.²⁰

¹⁹ Black’s Law Dictionary defines “duty” as a “legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right.” BLACK’S LAW DICTIONARY 543 (8th ed. 2004); see, e.g., Weiss, *Our Rights and Obligations*, *supra* note 9, at 203-05 (arguing for the rights framework for future generations); but see Anthony D’Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment*, 84 AM. J. INT’L L. 198 (1990) (discussing “Parfit’s Paradox” and challenges involved in conceptualizing rights for future generations); see also Lothar Gündling, *Our Responsibility to Future Generations*, 84 AM. J. INT’L L. 207, 210-11 (1990) (discussing whether there are “only” duties of present generations or also rights of future generations).

²⁰ Gabcíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 107 (Sept. 25) (Sep. Op. Weeramantry), available at www.icj-cij.org/docket/files/92/7383.pdf. Weeramantry describes a time:

[w]hen Native American wisdom, with its deep love of nature, ordained that no activity affecting the land should be undertaken without giving thought to its impact on the land for seven generations to come; when African tradition viewed the human community as three-fold—past, present and future—and refused to adopt a one-eyed vision of concentration on the present; when Pacific tradition despised the view of land as merchandise that

In North America, the *Gayanshagowa*, or “Great Binding Law,” which serves as the constitution of the Confederation of the Six Nations of the Iroquois, defines the duties, rights, and qualifications of Iroquois lords.²¹ As mentioned above, in doing so, it establishes their obligation to take future generations’ interests into account in their decision-making. The Speaker of the Council directs the New Lords of the Confederate Council to “[l]ook and listen for the welfare of the whole people and have always in view not only the present but also the coming generations.”²²

More recently, countries around the world have adapted this tradition to modern constitutions. Bolivia and Norway have enshrined the rights of future generations within their constitutions.²³ Several U.S. state constitutional provisions have also established duties to protect the implied rights of future generations to a healthy environment. The state constitutions of Hawaii,²⁴

could be bought and sold like a common article of commerce, and viewed land as a living entity which lived and grew with the people and upon whose sickness and death the people likewise sickened and died; when Chinese and Japanese culture stressed the need for harmony with nature; and when Ab-original custom, while maximizing the use of all species of plant and animal life, yet decreed that no land should be used by man to the point where it could not replenish itself.

(Footnotes omitted.) *Id.* He also noted how a relationship between present and future generations was central to resource management among the Sub-Saharan Sonjo people. Upkeep of an ancient irrigation system “was considered to be the sacred duty of each generation to ensure that the system was kept in good repair [for posterity].” *Id.* at 104.

²¹ CONST. OF THE IROQUOIS NATIONS, arts. 17-34, available at <http://www.constitution.org/cons/iroquois.htm>.

²² *Id.* at art. 28.

²³ See CONST. (1967, as amended 2002), art. 7 (Bol.), available at <http://pdba.georgetown.edu/Constitutions/Bolivia/consboliv2005.html> (according to the text as amended by Law No. 2410 of August 8, 2002, “Every person has the following fundamental rights... m) to enjoy a healthy environment, ecologically balanced and adequate for his wellbeing, safeguarding the rights of future generations.” (The original text in Spanish reads, “Toda persona tiene los siguientes derechos fundamentales: . . . m) A gozar de un medio ambiente sano, ecológicamente equilibrado y adecuado para su bienestar, resguardando los derechos de las generaciones futuras.”)); CONST. (1814, as amended 2007), art. 110(b) (Nor.), available at <http://www.stortinget.no/english/constitution.html#fulltext> (“Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.”). See also KENPO [Constitution] (1946) arts. 11, 97 (Jap.), available at <http://www.constitution.org/cons/japan.txt> (last visited July 10, 2008) (referencing the rights of future generations in general, not specifically in relation to the environment).

²⁴ HAW. CONST. art. XI, § 1 (“For the benefit of present and future generations, the State and

Illinois,²⁵ and Montana²⁶ each impose an obligation on present generations to maintain the environment for those who follow. In Hawaii, the duty applies to the state and its subdivisions; in Illinois and Montana, it extends beyond the government to obligate the states' citizenry. Both indigenous and national law thus identify the parties responsible—in this case present generations—for ensuring that the needs of future generations laid out above are met.

In many cases, parties have a duty to both present and future generations. For example, the Stockholm Declaration on the Human Environment declares that humanity “bears a solemn responsibility to protect and improve the environment for present and future generations.”²⁷ In an article on “Needs and interests of future generations,” the Declaration on the Responsibilities of the Present Generations toward Future Generations approved by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in 1997 provides: “The present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded.”²⁸ The state constitutions mentioned above—Hawaii, Illinois, and Montana—similarly establish obligations to present and future generations.²⁹ The dual duty to present and future generations creates a situation in which the rights of each are likely at some point to conflict and must be balanced.³⁰

Even when there is such balancing, using the duty-right framework has important implications. Professor Edith Brown Weiss, while recognizing the

its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State”).

²⁵ ILL. CONST. art. XI, § 1 (“The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.”).

²⁶ MONT. CONST. art. IX, § 1(1) (“The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”).

²⁷ Stockholm Declaration on the Human Environment of the United Nations Conference on the Human Environment, princ. 1, Jun. 16, 1972, 11 I.L.M. 1416.

²⁸ United Nations Educational, Scientific and Cultural Organization, Declaration on the Responsibilities of the Present Generations Toward Future Generations, art. 1, Oct. 21–Nov. 12, 1997, http://portal.unesco.org/en/ev.php-URL_ID=13178&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html.

²⁹ HAW. CONST. art. XI, § 1; ILL. CONST. art. XI, § 1; MONT. CONST. art. IX, § 1(1).

³⁰ Edith Brown Weiss recognized that issues of equity touched past, present and future generations. She wrote, “[I]ntergenerational obligations to conserve the planet flow from the present generation both to future generations as generations and to members of the present generation, who have the right to use and enjoy the planetary legacy.” Weiss, *Our Rights and Obligations*, *supra* note 9, at 202.

interests of current generations, highlights the need to give rights to future generations, stating:

[L]imitations [on the present generation] should be applied very narrowly, lest the rights of future generations develop into an all-purpose club to beat down any and all proposals for change. But surely long-term environmental damage is a good place to begin. Future generations really do have the right to be assured that we will not pollute ground water, load lake bottoms with toxic wastes, extinguish habitats and species or change the world's climate dramatically—all long-term effects that are difficult or impossible to reverse—unless there are extremely compelling reasons to do so, reasons that go beyond mere profitability.³¹

“Rights” and “duties” have a strong normative impact that elevates the interests of future generations. Rights’ force comes not from their formal applicability alone, but rather their use in balancing against other conflicting rights and interests.

C. Guardians and Trustees for Future Generations

Legal systems also advance intergenerational equity through the concepts of guardianships or trusteeships. These relationships overlap with the duty-rights framework in some ways, but legal sources frequently treat them as distinct concepts. Guardianships require present generations (the guardians) to protect the best interests of future generations (the wards). Trusteeship is a concept similar to a guardianship but is governed by a fiduciary duty.³² Both relationships help promote the interests or rights discussed above.

Precedents for guardianships date from early history to contemporary times. The ancient Sri Lankan text *The Mahavamsa*, for example, refers to a future generations guardian. A sermon to the king of Ceylon (as it was then known) says:

O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou.

³¹ *Id.* at 206.

³² This term will be discussed *infra* Part III(C).

The land belongs to the people and all living beings; thou art only the guardian of it.³³

More recently, in July 2006, representatives of several Native American tribes issued the Bemidji Statement on Seventh Generation Guardianship.³⁴ This statement affirms the framework to protect future generations that existed under the Confederation of the Six Nations of the Iroquois, assigning “responsibility to the current generations to protect and restore the intricate web of life that sustains us all, for the Seventh Generation to come.”³⁵ These examples reflect the role of guardians as serving the needs of future generations.

The idea of an intergenerational trust is also ancient, and jurists and scholars have traced it back to the laws of the Abrahamic faiths. Edith Brown Weiss points out that in the Judeo-Christian tradition, “God gave the earth to his people and their offspring as an everlasting possession, to be cared for and passed on to each generation.”³⁶ Likewise, in the *Gabcíkovo-Nagymaros* decision, Judge Weeramantry noted the use of the trusteeship concept in traditional Islamic law, under which “land belongs to God, [and] land is never the subject of human ownership, but is only held in trust, with all the connotations that follow of due care, wise management, and custody for future generations.”³⁷

In the contemporary period, the concept of a trust has surfaced in both international and domestic law. The UN Framework Convention on Climate Change holds that one of its key principles is that state parties will work for the “benefit of present and future generations.”³⁸ In U.S. law, several state constitutions have explicitly established a trusteeship. The Alabama constitution, for example, creates the “Forever Wild Land Trust” and declares that it is the policy of the state to protect “certain lands and waters of Alabama

³³ *Gabcíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. at 102 (Sept. 25) (Sep. Op. Weeramantry) (citing THE MAHAVAMSA, ch. XIV) (discussing the influence of Buddhist teaching on law and how “the notion of not causing harm to others” also touched “environmental attitudes” and “would be extended by Buddhism to future generations”).

³⁴ Bemidji Statement on Seventh Generation Guardianship (July 6-9, 2006), http://www.ienearth.org/bemidji_statement_7th%20gen_guardianship.pdf [hereinafter “Bemidji Statement”].

³⁵ *Id.*

³⁶ WEISS, IN FAIRNESS TO FUTURE GENERATIONS, *supra* note 9, at 19 (citing *Genesis* 1:1-31, 17:7-8).

³⁷ 1997 I.C.J. at 108 (Sept. 25) (Sep. Op. Weeramantry).

³⁸ UN Framework Convention on Climate Change, *supra* note 13, art. 3(1).

with full recognition that this generation is a trustee of the environment for succeeding generations.”³⁹ Other sources of law imply a trustee-beneficiary relationship without defining an actual trustee by referring generally to “benefits” that should be preserved, secured, or conserved for future generations (and usually current generations as well). The Alaska National Interest Lands Conservation Act exemplifies this approach stating one of its purposes is “to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska.”⁴⁰ The implementation of guardianship and trusteeship mechanisms will be discussed in more depth in Part III.

Whether expressed as duties, rights, guardianships, or trusteeships, the principle that future generations have legal interests is well grounded in a range of international and domestic sources. What follows is an exploration of the roles that various legal institutions and mechanisms have played or could play in implementing and protecting these legal interests effectively.

III. Legal Mechanisms and Institutions for Protecting the Environment for Future Generations

Several legal mechanisms—including courts, ombudsmen (or commissioners), and guardians (or trustees)—offer opportunities to advance environmental protection for future generations. Different jurisdictions bring different cultural and legal traditions, and thus variations have emerged and will continue to so in the implementation of such protections. The general functions of these mechanisms, however, illustrate the role each can have in

³⁹ ALA. CONST. amend. 543. *See also* COLO. CONST. art. IX, § 10 (establishing that state school lands are to be held in a “perpetual, inter-generational public trust for the support of public schools” and are to be managed with “sound stewardship” for “long-term productivity”); Conn. Gen. Stat. § 22a-1 (2006) (noting that the state’s growing population and economy have placed considerable burdens on the “life-sustaining natural environment”; defining the state as “trustee of the environment for present and future generations”; and establishing a state policy to conserve, improve, and protect natural resources and the environment through pollution control and improved environmental planning and interagency/intergovernmental coordination).

⁴⁰ Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 (2006); *see also* National Park Service Organic Act, 16 U.S.C. § 1 (2006); Wild and Scenic Rivers Act, 16 U.S.C. § 1271 (2006); Wilderness Act of 1964, 16 U.S.C. § 1131(a) (2006); Endangered Species Act, 16 U.S.C. § 1531(b) (2006); Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1609(a) (2006); National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd(a)(2) (2006).

protecting the legal interests of future generations. Courts can interpret the law to recognize the importance of intergenerational equity, grant standing to sue to those seeking to represent future generations, and provide a check on the actions of governments with regard to future generations. Ombudsmen can review and advise on environmental policies with intergenerational equity in mind; they can also serve as mediators between governments and representatives of future generations. Guardians can represent future generations as they represent other voiceless people in specific situations, such as negotiations and litigation. This Part highlights some efforts by such bodies to address the protection of future generations. The examples demonstrate how other jurisdictions might use traditional and established legal mechanisms and extend their use to deal specifically with the question of how to protect the interests of future generations.

A. Courts

International courts have interpreted the law as requiring intergenerational equity in environmental and other spheres. As noted earlier, Judge Christopher Weeramantry took the lead on this issue at the ICJ. He stated in the *Gabcíkovo-Nagymaros* decision that modern formulations of environmental law encompass “the principle of trusteeship of earth resources [and] the principle of intergenerational rights.”⁴¹ In a different opinion, he described the court as a “trustee of those rights.”⁴² In the case of *Denmark v. Norway* decided in 1993, Judge Weeramantry wrote in a concurrence: “Respect for these elemental constituents of the inheritance of succeeding generations dictated rules and attitudes based upon a concept of an equitable sharing which was both horizontal in regard to the present generation and vertical for the benefit of generations yet to come.”⁴³ Three years later, the International Court of Justice applied these precepts in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. Although it did not ultimately outlaw nuclear weapons, it considered their impact on future generations to be an important

⁴¹ 1997 I.C.J. at 110 (Sept. 25) (Sep. Op. Weeramantry).

⁴² Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in *Nuclear Tests* (N.Z. v. Fr.), 1995 I.C.J. 288, 341 (Sept. 1995) (Weeramantry, J. dissent), available at <http://www.icj-cij.org/docket/files/97/7567.pdf> (“this Court must regard itself as a trustee of those [future generations’] rights in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself.”).

⁴³ *Maritime Delimitation in the Area Between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. 38, 277 (June 14) (Sep. Op. Weeramantry), available at <http://www.icj-cij.org/docket/files/78/6761.pdf>.

factor.⁴⁴ The majority recognized that “[t]he destructive power of nuclear weapons cannot be contained in either space or time. . . . Further, the use of nuclear weapons could be a serious danger to future generations.”⁴⁵

Some domestic courts have established procedural protections for future generations in environmental cases, particularly by granting standing. In the 1994 case *Minors Oposa v. Secretary of the Department of the Environment and Natural Resources*,⁴⁶ the Supreme Court of the Philippines granted standing to 44 minors to sue on behalf of themselves and future generations because of concerns about unsustainable logging in the country.⁴⁷ Some U.S. state courts have, with intergenerational equity in mind, granted private parties the right to enforce constitutional environmental provisions. The Montana Supreme Court, for example, has found its state constitutional environmental provisions provide standing to private citizens and environmental groups to sue for environmental harms to public resources. In *Montana Environmental Information Center v. Department of Environmental Quality*, the court concluded that the state should subject a mining operation to “nondegradation” analysis because of its proposed release of arsenic into waters at concentrations greater than the concentrations present in the receiving waters.⁴⁸ The court noted that this proposed release implicated the

⁴⁴ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 243-244 (July 8), available at <http://www.icj-cij.org/docket/files/95/7495.pdf>. The ICJ embraced a broad definition of the environment. It “represents the living space, the quality of life and the very health of human beings, including generations unborn.” *Id.* at 241.

⁴⁵ *Id.* at 243-244.

⁴⁶ *Minors Oposa v. Secretary of the Department of the Environment and Natural Resources* (S.C., January 1994) (Phil.), 33 I.L.M. 173 (1994).

⁴⁷ *Id.* (“We find no difficulty in ruling that they can, for themselves, for others of their generation and for succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned. . . . Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country’s forest, mineral, land, waters, fisheries, wildlife, offshore areas and other natural resources to be aimed at their exploration, development and utilization be equitably accessible to the present as well as future generations.”).

⁴⁸ 988 P.2d 1236, 1249 (Mont. 1999) (“[T]he [constitutional convention] delegates’ intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked.”). Though not invoked by name, implicit in the Montana court’s reasoning is the precautionary principle, which is one way to protect future generations’ interests and will be discussed more below. In the face of a likelihood of substantial harm, the court opted

constitution's aspiration to preserve the environment for the benefit of future generations. Hawaii and Pennsylvania also both grant standing to private parties to sue for enforcement of constitutional environmental provisions.⁴⁹ These decisions illustrate the critical role of courts in articulating procedural rights and moving future generations' interests beyond aspirational rights.

Nonetheless, despite courts' best efforts, the need to balance the rights of present and future generations and the reality of finite resources⁵⁰ sometimes make future generations' interests more aspirational concepts than self-executing and judicially enforceable obligations. As one commentator has noted, however, the environmental right-duty relationship can "serve[] to inform and guide state actions and express[] an aspiration which, though not judicially enforceable, ought to guide the state and each person in the conduct of their [sic] affairs. Such a principle, while not self-executing in traditional terms, is certainly not without meaning or force."⁵¹

Finally, courts have the power to provide a check on other branches of government with regard to the interests of future generations. As they do with other areas of the law, they could enforce related rights created by the executive and legislature. They could review government policies in administrative cases. They could appoint an ombudsman or guardian, like those described below, and/or review decisions or recommendations of such appointees in given circumstances, such as settlements. Precedent (in common law systems) and jurisdiction limit courts, but they still contribute to the advancement of future generations' interests.

for injunctive response prior to irrefutable proof that the harm will occur. This proactive approach is consonant with protecting the legal interests of future generations.

⁴⁹ See, e.g., *Kahana Sunset Owners Ass'n v. Maui County Council*, 948 P.2d 122 (Haw. 1997); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231 (1973). See also *Oneida County Forest Preserve Council v. Wehle*, 309 N.Y. 152 (N.Y. 1955) (allowing a public-interest corporation to bring suit against the state to prevent it from granting certain logging permits).

⁵⁰ See, e.g., *Convention Concerning the Protection of the World Cultural and Natural Heritage*, Nov. 16, 1972, 1037 U.N.T.S. 151 art. 4 ("Each State Party to this Convention recognizes that the *duty* of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . 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 co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.") (emphasis added).

⁵¹ John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-execution or Self-delusion*, 57 MONT. L. REV. 323, 367 (1996).

B. Ombudsmen, or Commissioners

Ombudsmen, sometimes called commissioners, can also protect the interests of future generations. There are many variations of ombudsmen, but as outlined in the models below, they generally share the following characteristics. They are appointed by the government but maintain some level of independence. They serve an evaluative and advisory function, reviewing, for example, proposed legislation, government policies, or projects to make sure they meet the needs of particular groups. They often produce reports on their work and sometimes serve as liaisons or mediators between the government and an individual or group. On occasion they are given standing to sue. These models can be, and have been applied to meet the needs of future generations. (A proposed description of an ombudsman for future generations is included in Appendix A.)

Many countries have established human rights ombudsmen. These authorities usually serve quasi-judicial roles, either as investigators or mediators. Ombudsmen or commissioners also commonly promote human rights through education efforts—to complement the “protection” functions of investigation and mediation.⁵² Usually appointed by the legislature though sometimes by executive authorities, “[t]he primary function of [the ombudsmen] is to oversee fairness and legality in public administration.”⁵³ They attempt to protect individual rights as “impartial mediators” between alleged victims and the government.⁵⁴ They perform this function by investigating complaints received from the public and making recommendations to the government, or in some cases resolving the given matter directly. They generally have the power to access relevant information and witnesses. Sometimes, especially when an issue is a matter of “broad public concern” or the victim is a group, ombudsmen may initiate their own investigations.⁵⁵ Ombudsmen for future generations could similarly address complaints filed by individuals or future generations guardians (see below) or investigate, on their own initiative, potential violations of intergenerational equity. They could also promote the interests of future generations through education.

⁵² United Nations, Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, 4 PROFESSIONAL TRAINING SERIES 8-9 (1995).

⁵³ *Id.* at 8.

⁵⁴ *Id.*

⁵⁵ *Id.*

Ombudsmen for environmental issues provide additional models for a future generations guardian. The U.K. Sustainable Development Commission uses “advocacy, advice and appraisal . . . [to] put sustainable development at the heart of Government Policy.”⁵⁶ It reports to the prime minister and other ministers and describes itself as “the Government’s independent watchdog.”⁵⁷ The Canadian Commissioner of the Environment and Sustainable Development, appointed by the auditor general, “provides parliamentarians with objective, independent analysis and recommendations on the federal government’s efforts to protect the environment and foster sustainable development.”⁵⁸ These authorities ensure that a government considers the interest of future generations when making policy. Environmental ombudsmen also operate in a number of U.S. states. Michigan has a Clean Air Ombudsman who works with small business owners and managers as a liaison for the Air Quality Division of the Michigan Department of Environmental Quality.⁵⁹ The ombudsman helps small businesses comply with clean air laws, represents small businesses during rule development, and mediates disputes between businesses and the state Department of Environmental Quality.⁶⁰ New York has a Small Business Environmental Ombudsman program, which provides businesses with free and confidential assistance to help them comply with air quality regulations.⁶¹ While some of these ombudsmen work with businesses

⁵⁶ U.K. Sustainable Development Commission, *About Us*, <http://www.sd-commission.org.uk/pages/aboutus.html> (last visited Mar. 9, 2008). According to the Commission’s web site it:

- Produce[s] evidence-based public reports on contentious environmental, social and economic issues, such as nuclear power
- Draw[s] on expert opinion to advise key Ministers, policy-makers and stakeholders across Government
- Respond[s] openly to Government policy initiatives
- Invite[s] debates on controversial subjects
- Undertake[s] watchdog appraisals of Government’s progress.

Sustainable development, as defined in the Brundlant Report discussed earlier, typically balances environmental interests and development needs. See *supra* note 10 and accompanying text.

⁵⁷ U.K. Sustainable Development Commission, *supra* note 256.

⁵⁸ Office of the Auditor General of Canada, *Commissioner of the Environment and Sustainable Development*,

http://www.oag-bvg.gc.ca/internet/English/oag-bvg_e_921.html (last visited Mar. 9, 2008).

⁵⁹ Michigan Department of Environmental Quality, *Clean Air Ombudsman*, Clean Air Ombudsman—Mich. Dept. of Envntl. Quality: <http://www.michigan.gov/deq/0,1607,7-135-3304-11314--00.html> (last visited Mar. 9, 2008).

⁶⁰ *Id.*

⁶¹ NY Business, *Small Business Compliance*, http://www.empire.state.ny.us/Productivity_Energy_

rather than the public, they show that such authorities are frequently charged with assessing compliance with environmental standards.

Ombudsmen specifically designed for future generations have been instituted outside the United States. In November 2007, the Hungarian Parliament adopted legislation establishing a Parliamentary Commissioner for Future Generations. According to the law, the commissioner:

monitors, evaluates, and supervises the enforcement of those legal provisions, which ensure the sustenance and improvement of the condition of nature and the environment. . . . His/her task is the investigation of or ordering the investigation of all improper conduct in connection with these subjects that are brought to his/her attention, and the initiation of general or specific remedial measures to cure the effects of improper conduct.⁶²

The law grants the commissioner many powers to protect the interests of future generations, including the powers to review and propose legislation, to initiate administrative actions or judicial reviews of agency decisions, to order those illegally endangering the environment to stop their activities and restore the site they damaged, to evaluate proposed development projects, to receive all relevant information, to initiate or participate in public hearings, and to comment on and monitor international treaties.⁶³ After three failed nominations, the Hungarian Parliament elected an environmental lawyer as the first ombudsman in May 2008.⁶⁴

and_Environment/Environmental_Assistance/sb_compliance.asp (last visited Mar. 9, 2008).

⁶² Law CXLV of 2007, § 10, 164/2007 Magyar Közlöny [MK.] 12426-12429 (Hung.) (amendment to Law LIX of 1993) (translation by the International Human Rights Clinic of Harvard Law School's Human Rights Program).

⁶³ *Id.* See also Zsolt Balla, *New Ombudsman Gets Green Light*, BUDAPEST SUN, Nov. 21, 2007, <http://www.budapestsun.com/cikk.php?id=27552> (last visited Feb. 10, 2008); Axel Gosseries and Benedek Jávör, *First-ever Ombudsman for the Future*, <http://www.alternatives.ca/article3932.html> (last visited July 10, 2008).

⁶⁴ Robin Marshall, *A Different Way to Do Politics*, BUDAPEST SUN ONLINE, June 11, 2008, <http://www.budapestsun.com/cikk.php?id=28384> (last visited July 10, 2008). For information on past nominations, see *MPs Reject President's Nominees for Ombudsman*, POLITICS.HU, Dec. 21, 2007, <http://www.politics.hu/20071221/mps-reject-presidents-nominees-for-ombudsman> (last visited Mar. 9, 2008); *President Announces Ombudsman Candidates*, BUDAPEST TIMES, Jan. 16, 2008, http://www.budapesttimes.hu/index.php?option=com_content&task=view&id=4282&Itemid=159 (last visited Mar. 9, 2008).

From 2001 until 2007, the Commission for Future Generations operated pursuant to enabling legislation passed by the Knesset.⁶⁵ “The idea at the base of the law is the creation of an inner-parliamentary entity that has a comprehensive view of the legislative picture with regard to any potential effect on the needs and rights of future generations together with the means to prevent such legislation from taking place.”⁶⁶ The commission performed four basic functions: “To give opinions regarding bills brought . . . that are of concern to future generations”; “[t]o give opinions regarding secondary legislation and regulations . . . that are of concern to future generations”; “[t]o provide parliament . . . with recommendations on any matter the Commissioner [head of the commission] considers to be of importance to future generations”; and “[t]o provide the members of the parliament with advice on matters that are of special interest regarding the future generations.”⁶⁷ The commissioner had the authority to review any prospective primary or secondary legislation and participate in all top-level debate on the legislation.⁶⁸ Crucial to the effective functioning of the commissioner was his right to access relevant information:

The Knesset Commissioner for Future Generations may request from any organization or body being investigated . . . any information, document or report . . . in the possession of that body and which is required by the Commissioner for the implementation of his tasks; the aforesaid body will give the Commissioner the requested information.⁶⁹

These powers gave the commissioner broad authority to act effectively as an ombudsman for future generations. Although the Knesset later disbanded the commission,⁷⁰ it offers a useful model. In another example, France in 1993

⁶⁵ Knesset Law (Amendment No. 14), 5761-2001 [hereinafter Knesset Law], unofficial translation reprinted in The Knesset, *Commission for Future Generations 13-20* (2004), available at http://www.knesset.gov.il/sponsorship/future/eng/future_index.htm.

⁶⁶ The Knesset, *Commission for Future Generations*, *supra* note 66, at 3.

⁶⁷ *Id.* at 4-5. Secondary legislation is akin to a regulation in U.S. administrative law.

⁶⁸ Knesset Law, *supra* note 66, art. 34(a), unofficial translation reprinted in The Knesset, *Commission for Future Generations*, *supra* note 66, at 13 (“The Knesset Secretariat will pass to the Knesset Commissioner for Future Generations all bills tabled in the Knesset.”); art. 34(g) (“The Commissioner is permitted to participate in any debate of any Knesset Committee, at his discretion; if the debate is secret by law, the Commissioner will participate on the authorization of the Committee Chairman.”).

⁶⁹ Knesset Law, *supra* note 66, art. 35(a), unofficial translation reprinted in The Knesset, *Commission for Future Generations*, *supra* note 66, at 16.

⁷⁰ Knesset Legislation No. P/17/1629, published in 186 KNESSET LEGISLATION PROPOSALS 58 (Dec. 4,

established a Council for Future Generations that is “empowered to offer advice on such issues on its own initiative.”⁷¹ Future generations ombudsmen, whatever form they take, provide a layer of review to ensure that the executive and legislative branches take into account the interests of future generations in a healthy environment.

C. Guardians, or Trustees

Guardians provide a voice to the underrepresented. Guardians are advocates rather than advisors and seek, in specific situations such as litigation and negotiations, to maximize the best interests of those who cannot speak for themselves. Trustees, related to guardians, play a similar role, generally using a fiduciary duty rather than best interests standard.⁷² In the environmental context, guardians, or trustees, could help protect and promote the interests of future generations, who lack voice. (A proposed description of a guardian for future generations is included in Appendix B.)

The National Guardianship Association provides guidelines for the establishment and responsibilities of guardians in U.S. law in two documents: *A Model Code of Ethics for Guardians*⁷³ and *Standards of Practice*.⁷⁴ Explaining the principle on which guardianship is based, the former says:

In its purest form, guardianship represents an exercise of the state’s *parens patriae* authority to protect individuals who are incapable of making decisions for themselves. In theory, the concept of guardianship is rooted in the moral

2007); Gosseries and Javor, *supra* note 64.

⁷¹ In 1993, France established a Council for Future Generations that is “empowered to offer advice on such issues on its own initiative.” Alexandre Kiss, “The Rights and Interests of Future Generations and the Precautionary Principle,” in *THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION* 19, 26 (David Freestone and Ellen Hey, eds., 1995) (citing Décret No. 93-298 of 8 March 1993, *Journal Officiel de la République Française*, March 10, 1993).

⁷² Black’s Law Dictionary defines “fiduciary duty” as “[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer’s client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).” BLACK’S LAW DICTIONARY 1553 (8th ed. 2004).

⁷³ NAT’L GUARDIANSHIP ASSOC., *A MODEL CODE OF ETHICS FOR GUARDIANS* (1988), available at <http://www.guardianship.org/pdf/codeEthics.pdf>.

⁷⁴ NAT’L GUARDIANSHIP ASSOC., *STANDARDS OF PRACTICE* (2002), available at <http://www.guardianship.org/pdf/standards.pdf>.

duty of beneficence. Under this theory, individuals subject to guardianship are entitled to enhanced protection from the state.⁷⁵

Because there is no basis on which to determine the decision wards themselves would make in the case of future generations, the duty of guardians would be to fill the role of a parent and “act in the ward’s best interest.”⁷⁶ That interest is based on what a responsible person would decide in similar circumstances.⁷⁷ Guardians should seek and receive all relevant information and evaluate all alternatives.⁷⁸ Making the best decisions and avoiding a conflict of interest are imperative. To fulfill their mission, guardians may request a third-party review of actions by courts, lawyers, or others.⁷⁹ These guidelines could easily be adapted to guardians of future generations.

The government-appointed natural resource trustees established under the U.S. Superfund Amendments and Reauthorization Act of 1986 provide a relevant model for guardians on environmental issues.⁸⁰ These trustees act on behalf of the public environmental interest at specific Superfund cleanup sites and exist at the federal, state, and tribal levels. Environmental Protection Agency (EPA) officials must coordinate with the trustees “in site characterization, response actions, and settlement negotiations.”⁸¹ The act requires the EPA to share available information and to work cooperatively with trustees so that the trustees can adequately fulfill their mandate. All the trustees assist with natural resource preparedness and response actions and develop and implement restoration plans. Federal trustees also have the following authority:

⁷⁵ NAT’L GUARDIANSHIP ASSOC., A MODEL CODE OF ETHICS FOR GUARDIANS, *supra* note 74, at 9.

⁷⁶ *Id.* at 6. In other cases where it is possible to know what the ward would have done, the guardian uses substituted judgment, acting a “surrogate” who strives to make the choice the ward would have if competent. *Id.* at 8.

⁷⁷ *Id.* at 11.

⁷⁸ NAT’L GUARDIANSHIP ASSOC., STANDARDS OF PRACTICE, *supra* note 75, at 5-6. “Best Interest is the standard of decision-making the guardian should use when the ward has never had capacity or when the ward’s wishes cannot be determined. . . . The Best Interest standard requires the guardian to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the ward.” *Id.* at 6.

⁷⁹ NAT’L GUARDIANSHIP ASSOC., A MODEL CODE OF ETHICS FOR GUARDIANS, *supra* note 74, at 13.

⁸⁰ E. BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS, *supra* note 9, at 123; Comprehensive Environmental Response, Compensation and Liabilities Act (CERCLA) 42 U.S.C. § 9607(f)(2) (2006).

⁸¹ See Memorandum from Acting Assistant Administrator at the Office of Solid Waste and Emergency Response Timothy Fields, re: CERCLA Coordination with Natural Resource Trustees 1 (Jul. 31, 1997), available at <http://www.epa.gov/superfund/programs/nrd/fields.pdf>.

to ask the attorney general to seek damages and costs from a responsible party, to participate in negotiations between the United States and potentially responsible parties, to require compliance with information gathering provisions, and to initiate damage assessments.⁸²

Rooted in the tradition of *Gayanashagowa*, the Bemidji Statement lays out indigenous peoples' articulation of the need for a future generations guardian. It explains that "exploitation and industrialization of the land and water have altered the relationships [between people and the land] that have sustained our Indigenous communities."⁸³ It also notes that government agencies have failed to protect these relationships. To address these concerns, it pledges to designate Guardians for the Seventh Generation.

The health and well being of our grandchildren are worth more than all the wealth that can be taken from these lands. By returning to the collective empowerment and decision making that is part of our history, we are able to envision a future that will restore and protect the inheritance of this, and future generations.⁸⁴

The Indigenous Environmental Network (IEN) interprets the responsibilities of this position as assuming responsibility to "assess and monitor the chosen piece of the web of life, restore it when necessary, and report the status of their responsibilities to other guardians."⁸⁵ That "piece" can range in size from all water to a specific pond, but like most guardians, the Bemidji guardians deal with a particular issue. Such guardians, appointed specifically for future generations, would ensure representation of this otherwise unrepresented group and actively promote its best interests.

Despite Bemidji's vision, guardians designed specifically for future generations do not yet exist. They could, however, be extensions of court-appointed guardianships involving children or others who are not able to represent adequately their own interests. Future generations guardians would differ in that they would put themselves in the position of representing a group rather

⁸² *Id.*, app. A, § 300.615(d).

⁸³ Bemidji Statement, *supra* note 34.

⁸⁴ *Id.* An important facet of implementation of the Bemidji regime is that it can be applied across all levels of decision-making "[f]rom the smallest unit of society to the largest unit of government." *Id.* (quoting from IEN's introduction to the Bemidji Statement).

⁸⁵ *Id.* (quoting from IEN's introduction to the Bemidji Statement).

than an individual (akin to the natural resources trustee), but the mission would be essentially the same. In the context of future generations, guardians could be, though not necessarily would be, appointed by a court or limited to in-court representation.⁸⁶ Alternatively, negotiating parties might appoint a guardian to represent future generations in discussions over a new project that threatens the environment, or the government might appoint one to review an environmental impact assessment. Like the more traditional guardians, future generations guardians could also be given standing to sue to protect the best interests of their wards.

Two standards of best interest would be particularly appropriate for guardians of future generations: the precautionary principle common in international law and the best alternative approach in U.S. law.⁸⁷ Although there has been some debate about the exact meaning of the precautionary principle, a consensus is developing around the definition enunciated at the Wingspread Conference of 1998: “When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.”⁸⁸ The concept appears in a multitude of international legal instruments,⁸⁹ and courts

⁸⁶ Under the National Guardianship Association, which is based in the United States, “guardianships are established through a legal process and are subject to the supervision of the court.” NAT’L GUARDIANSHIP ASSOC., STANDARDS OF PRACTICE, *supra* note 75, at 3.

⁸⁷ In addition to the precautionary principle, Lothar Gündling lists “the obligation to reduce environmental protection to a minimum; and the obligation to develop technologies that do not harm the environment” as possible guides for present generations to follow in seeking to protect the interests of future generations. Gündling, *supra* note 19, at 212.

⁸⁸ Wingspread Statement on the Precautionary Principle (Jan. 1998), <http://www.sehn.org/state.html#w> (last visited July 19, 2008).

⁸⁹ The Rio Declaration, for example, looks to the precautionary principle as a mechanism for environmental protection. Rio Declaration, *supra* note 12, princ. 15 (“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.”). Some of the other environmental treaties, agreements, and protocols to espouse the precautionary principle are the London Dumping Convention Protocol, 1996, 36 I.L.M. 1; Maastricht Treaty on European Union, July 29, 1992, Official Journal C 191; Convention on Biological Diversity, Dec. 29, 1993, 1760 U.N.T.S. 30619; Bamako Convention on the Ban of Import to Africa and the Control of their Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 30, 1991, 2101 U.N.T.S. 36508; Cartagena Biosafety Protocol to the 1992 Convention on Biological Diversity, 2000, available at <http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf>; Agreement on Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 37924; Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, Mar. 22, 1974, 1507 U.N.T.S. 25986; Stockholm Convention on Persistent Organic Pollutants, June 19, 2001, C.N. 131.2001; European Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 36116; and

and executive agencies have validated recourse to the precautionary principle in a variety of settings.⁹⁰ In U.S. law, government agencies are required to consider all possible alternatives when evaluating a project proposal. According to the National Environmental Policy Act, federal agencies must “study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”⁹¹ A best interest standard can be interpreted as a reasonable person standard; a reasonable person, represented by a guardian, would prefer the least harmful alternative. While the precautionary principle and alternatives approach acknowledge the needs and rights of present generations, they also support the protection of an ecologically healthy environment for future generations. Both support the proposition that each generation depends on its predecessors to bequeath it an inhabitable environment.

IV. Conclusion

Future generations have legal interests in environmental protection. There is also an emerging understanding that present generations have responsibility to preserve the environment so that generations to come can enjoy it. Frameworks for articulating the connection between these premises include

ASEAN Agreement on Transboundary Haze Pollution, Jun. 10, 2002, available at: http://www.aseansec.org/agr_haze.pdf. Some scholars have argued that the precautionary principle itself “has crystallized into a principle of general customary international law.” Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J. ENV'T. L. 221, 223 (1997).

⁹⁰ Internationally, the European Court of Justice relied on the principle in a decision to ban beef imports from the United Kingdom during a mad cow disease scare. *The Queen v. Ministry of Agric. Fish and Food*, Case C-157/96 (1996); *UK v. Comm'n. of the EC*, Case C-180/96 (1996). In the United States, Hawaii's Supreme Court has explicitly adopted the precautionary principle as a guide for decisions related to natural resources. *In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000). Within the United States, the principle is flourishing in various governmental agencies, including most prominently the Food and Drug Administration, whose approach to regulation involves a precautionary shifting of the burden to drug manufacturers to demonstrate that their products are not unreasonably harmful.

⁹¹ National Environmental Policy Act, § 102, 42 U.S.C. 4332(E) (2006). The Science and Environmental Health Network's proposed state version of NEPA offers another articulation of the approach. It requires proponents of proposed projects to submit alternatives, including the no-action alternative, in their environmental impact statements (EIS) and identify “significant adverse effects.” The state agency reviewing the proposal must then “prefer” alternatives that either improve environmental quality or cause no effect over those that cause degradation. Science and Environmental Health Network, *Model State Environmental Quality Act of 2007*, § 3.2 (B), § 3.3(C)(ii), <http://www.sehn.org/lawpdf/DesigningModelEQAct.pdf>.

the duty-right, guardian-ward, and trustee-beneficiary relationships. A variety of means exist to implement these relationships. In addition to receiving help from judicial decisions, present generations can live up to their responsibility to ensure intergenerational equity by adopting and creating appropriate protection mechanisms and institutions, such as ombudsmen or guardians for future generations. These positions can take different forms to fit the needs of a given society, providing both independent evaluations and representative advocacy. Although effective alone, a combination will better protect and promote environmental health for the benefit of future generations. Given the significant and urgent threats facing the environment today, more efforts to develop and deploy such tools are needed in the immediate future.

APPENDIX A

A Proposed Structure for an Ombudsman for Future Generations

The following proposal outlines how an Ombudsman for Future Generations might be structured. This outline is intended to identify only the essential requirements for such a position.

Government Body or Private Party Consultation with Ombudsman for Future Generations

When a government body requests the assistance of an Ombudsman for Future Generations in evaluating a proposed law, policy, or reviewable action that may affect the environment or a private party calls for an investigation of a specific action, the responsibilities and obligations of the government body and the ombudsman shall be as follows:

I. Definitions

An “ombudsman for future generations” (“Ombudsman”) is a person who has the duty to ensure that an existing or proposed law, policy, or reviewable action protects and promotes the environmental legal interests of future generations.⁹²

A “reviewable action” is an action proposed by a government body or private party that can be reviewed under the government’s environmental laws.

II. Conduct of the Consultation

A. The Government Body’s Duties in Initiating Consultation

⁹² The environmental legal interests of future generations vary by jurisdiction and can be based on international law, constitutional provisions, legislative statutes, regulations, court decisions, and in some cases, private agreements.

1. The government body shall appoint a permanent ombudsman to evaluate all proposed relevant laws, policies, or reviewable actions.
2. The government body shall identify all legal authorities that specify any legal obligation toward future generations to which the government body must adhere.
3. The government body shall identify and fully describe the proposed law, policy, or reviewable action and provide at the request of the Ombudsman access to information that is necessary or helpful to the Ombudsman's evaluation.
4. The government body shall provide, at the request of the Ombudsman, access to meetings, hearings, or relevant forums that discuss the proposed law, policy, or reviewable action.

B. The Ombudsman's Duties in Evaluating a Proposed Law, Policy, or Reviewable Action

1. The Ombudsman shall prepare a Report on the Effects on Future Generations evaluating (i) the potential impacts of the proposed law, policy, or reviewable action on the ecological health of the land, water, air, and climate and (ii) any potential effects these impacts may have on future generations of the community. The Report shall:
 - (a) Describe these impacts and effects in terms of ecological health, and should not rely on discounting;
 - (b) Consider these impacts and effects in the context of all anticipated cumulative impacts on the ecological health of the land, water, air, and climate;

(c) Identify violations of any legal obligations toward future generations that the proposed law, policy, or reviewable action may cause; and

(d) Recommend alternatives to the proposed law, policy, or reviewable action, including modifications to it that could reduce or eliminate any potential adverse effects on future generations.

2. The Ombudsman may request that a public hearing be held specifically devoted to the Report. The Ombudsman may revise the Report in response.
3. The Ombudsman shall also engage in meetings, hearings, and other fora with government bodies to discuss the proposed law, policy, or reviewable action.

C. The Duties of All Parties after an Ombudsman's Evaluation

1. The government body shall consider the Ombudsman's Report on the Effects on Future Generations when it evaluates the proposed law, policy, or reviewable action.
2. The government body may not approve any law, policy, or reviewable action that violates the established legal interests of future generations.
3. If the government body decides to approve the law, policy, or reviewable action, either as proposed or as modified, it shall prepare a written Response to the Ombudsman's Report on the Effects on Future Generations. The Response:
 - (a) shall establish that any approved law, policy, or reviewable action meets all legal obligations to future generations; and

- (b) if the approved law, policy, or reviewable action may cause any adverse effects on the interests of future generations, shall establish that those effects are permitted by law and set forth the government body's reasons for allowing such adverse effects to occur.
4. The Ombudsman shall have a reasonable opportunity to prepare a reply to the government.
 5. [Optional] The Ombudsman shall have standing to sue the government body for violating any of its duties, laid out in this document, to protect the environment for future generations.
 6. [Optional] The Ombudsman shall have standing to sue private parties for violating the legal interests of future generations to protection of the environment.⁹³
 7. [Optional] The ombudsman may also seek authorization to join ongoing litigation.

D. The Duties of All Parties when the Ombudsman is a Mediator

1. The Ombudsman shall in some cases serve as a mediator among the government body; other parties, including private ones; and/or a representative of future generations, such as a guardian.
2. The representative of future generations may request that the Ombudsman review an action that will allegedly affect future generations.
3. Upon receiving a meritorious request, the Ombudsman shall investigate the action and make recommendations to the government body or other

⁹³ This may be particularly relevant in jurisdictions that do not have guardians (see Appendix B) although both an ombudsman and a guardian could be given standing to sue in some jurisdictions.

parties on means of mitigating the harm to future generations.

4. The government body or other parties shall consider the Ombudsman's recommendations and review its action. It may follow the Ombudman's recommendation. If it does not, the duties and rights of the government body and Ombudsman parallel those in section C(2-6).

APPENDIX B

A Proposed Structure for a Guardian for Future Generations

The following description outlines how a Guardian for Future Generations might be structured. This outline is intended to identify only the essential requirements for such a position. Such a position could be established to review specific actions by a government body or, as indicated in brackets below, by a tribal council or private party.

Government Body [or Tribal Council or Private Party] Consultation with and Representation Duties of Guardian for Future Generations

When a government body [or tribal council or private party] requests the assistance of a Guardian for Future Generations in evaluating a proposed action that may affect the environment or when a court appoints a Guardian to represent future generations in litigation or negotiations, the responsibilities and obligations of the government body [or tribal council or private party] and the Guardian shall be as follows.

I. Definitions

A “guardian for future generations” (“Guardian”) is a person representing the best interests of future generations who has the duty to ensure that a proposed action will provide ecologically healthy land, water, and air for the benefit of future generations.

II. Conduct of the Consultation

A. The Duties of the Government [or Tribal Council or Private Party] in Initiating Consultation

1. The government body [or tribal council or private party] shall engage the assistance of the Guardian at the outset of the process of evaluating a proposed action, which may include negotiations between or among parties.

2. The government body [or tribal council or private party] shall identify and fully describe the proposed action and provide the Guardian with access to information that is necessary or helpful to the Guardian's evaluation.
3. The government body [or tribal council or private party] shall provide the Guardian access to relevant meetings, hearings, or other forums so that the Guardian can acquire information and advocate for the best interests of future generations orally as well in writing.
4. The duties of this section are waived if litigation is involved.

B. The Guardian's Duties in Advocating for the Best Interests of Future Generations

1. The Guardian shall seek all relevant information to determine the best interests of the ward, who in this case is future generations.
2. The Guardian shall evaluate all alternatives and determine which one best provides for the interests of the ward.
3. The Guardian shall actively advocate for the best interests of the ward in whatever way the Guardian sees fit, including providing written and oral arguments or litigating.

C. The Duties of All Parties in Response to the Guardian's Advocacy

1. The government body [or tribal council or private party] shall consider the Guardian's arguments when

it evaluates the proposed action.

2. The government body [or tribal council or private party] may not take or approve any action that violates the established legal interests of future generations.
3. If the government body [or tribal council or private party] decides to approve the action, either as proposed or as modified, it shall prepare a written Response. The Response:
 - (a) shall establish that any approved action meets all legal obligations to future generations; and
 - (b) if the approved action may cause any adverse effects on the interests of future generations, shall establish that those effects are permitted by law and set forth the government body's reasons [or the reasons of the tribal council or private party] for allowing such adverse effects to occur.
4. The Guardian shall have a reasonable opportunity to prepare a reply to the government [or tribal council or private party].

D. The Guardian's Role in Litigation

1. The Guardian shall have standing to sue on behalf of future generations if:
 - (a) the government body [or tribal council or private party] did not follow the proper process for reviewing and ruling on proposed actions, or
 - (b) the government body [or tribal council or private party] violated its legal obligations to future generations.
2. In ongoing litigation relevant to future generations,

the Guardian may seek authorization to join or the court may appoint a Guardian to represent future generations.

3. Regardless of who appointed the Guardian, the Guardian shall represent the best interests of future generations in litigation.

APPENDIX C

Examples of International Legal Frameworks to Protect Future Generations

Declarations:

Rio Declaration on Environment and Development

Principle 3, U.N. Doc. A/CONF.151/26 (Vol. I) (1992),

“The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”
(Principle of sustainable development, recognition of needs of both present and future generations)

Stockholm Declaration on the Human Environment of the United Nations Conference on the Human Environment

Principle 1, Jun. 16, 1972, 11 I.L.M. 1416

“[Humanity] bears a solemn responsibility to protect and improve the environment for present and future generations.” *(General responsibility to present and future generations)*

United Nations Educational, Scientific and Cultural Organization Declaration of the Responsibilities of the Present Generations Toward Future Generations

Articles 1-5, Records of the General Conference, Paris, Oct. 21 – Nov. 12, 1997

“Article 1 - Needs and interests of future generations

The present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded.

Article 2 - Freedom of choice

It is important to make every effort to ensure, with due regard to human rights and fundamental freedoms, that future as well as present generations enjoy full

freedom of choice as to their political, economic and social systems and are able to preserve their cultural and religious diversity.

Article 3 - Maintenance and perpetuation of humankind

The present generations should strive to ensure the maintenance and perpetuation of humankind with due respect for the dignity of the human person. Consequently, the nature and form of human life must not be undermined in any way whatsoever.

Article 4 - Preservation of life on Earth

The present generations have the responsibility to bequeath to future generations an Earth which will not one day be irreversibly damaged by human activity. Each generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems and that scientific and technological progress in all fields does not harm life on Earth.

Article 5 - Protection of the environment

1. In order to ensure that future generations benefit from the richness of the Earth's ecosystems, the present generations should strive for sustainable development and preserve living conditions, particularly the quality and integrity of the environment.
2. The present generations should ensure that future generations are not exposed to pollution which may endanger their health or their existence itself.
3. The present generations should preserve for future generations natural resources necessary for sustaining human life and for its development.
4. The present generations should take into account possible consequences for future generations of major projects before these are carried out." (*General responsibility to present and future generations*)

Conventions:

Convention Concerning the Protection of the World Cultural and Natural Heritage

Article 4, Nov. 16, 1972, 1037 U.N.T.S. 151

“Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . 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 co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.” (*General responsibility to future generations*)

Convention on the Protection and Use of Transboundary Watercourses and International Lakes

Article 2(5)(c), Mar. 17, 1992, 31 I.L.M. 1312, art. 2(5)(c)

“Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.” (*Principle of sustainable development, recognition of needs of both present and future generations*)

North American Agreement on Environmental Cooperation

Preamble, Sept. 13, 1993, 32 I.L.M. 1480

“CONVINCED of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations.” (*Principle of sustainable development*)

Stockholm Convention on Persistent Organic Pollutants

Preamble, paragraph 2, May 22, 2001, 40 I.L.M. 532

“Aware of the health concerns, especially in developing countries, resulting from local exposure to persistent organic pollutants, in particular impacts

upon women and, through them, upon future generations.” (*Recognition of potential to affect present and future generations*)

UN Framework Convention on Climate Change

Preamble, Article 3, *opened for signature* May 9, 1992, U.N. Doc. A/AC.237/18 (Part II) (Add. 1), 31 I.L.M. 848.

“*Recalling* the provisions of General Assembly resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development, and resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21 December 1990 and 46/169 of 19 December 1991 on protection of global climate for present and future generations of mankind,
...

Determined to protect the climate system for present and future generations . . .

Article 3

PRINCIPLES

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” (*Recognition of needs of both present and future generations*)

APPENDIX D

Examples of Domestic Legal Frameworks to Protect Future Generations (with a focus on U.S. Law)

Non-U.S. Constitutions:

Constitución Política de la República de Bolivia

Article 7 (1967, as amended 2002), *available at* <http://pdba.georgetown.edu/Constitutions/Bolivia/consboliv2005.html>

“Every person has the following fundamental rights . . . m) to enjoy a healthy environment, ecologically balanced and adequate for his wellbeing, safeguarding the rights of future generations.”

The original text in Spanish reads, “Toda persona tiene los siguientes derechos fundamentales: . . . m) A gozar de un medio ambiente sano, ecológicamente equilibrado y adecuado para su bienestar, resguardando los derechos de las generaciones futuras.”

Constitution of Japan

Articles 11 and 97 (November 3, 1946), *available at* <http://www.constitution.org/cons/japan.txt>

“Article 11

The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

Article 97

The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.” (*Rights of future generations*)

Constitution of the Kingdom of Norway

Article 110(b) (1814, as amended 2007), *available at* <http://www.stortinget.no/english/constitution.html#fulltext>

“Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the State shall issue specific provisions for the implementation of these principles.” (*Rights of future generations, trusteeship*)

U.S. State Constitutions:

Alabama Constitution

Amendment 543

Establishing the policy of the state to protect “certain lands and waters of Alabama with full recognition that this generation is a trustee of the environment for succeeding generations” and creating the “Forever Wild Land Trust.” (*Explicit trust*)

Colorado Constitution

Article IX, § 10

“State school lands” are to be held in a “perpetual, inter-generational public trust for the support of public schools” and are to be managed with “sound stewardship” for “long-term productivity.” (*Explicit trust*)

Hawaii Constitution

Article XI, § 1

“For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” (*State and personal duties to present and future generations*)

Illinois Constitution

Article XI, § 1

“The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.” (*State and personal duties to present and future generations*)

Montana Constitution

Article IX, § 1(1)

“The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” (*State and personal duties to present and future generations*)

U.S. Federal Statutes:**Alaska National Interest Lands Conservation Act**

16 U.S.C. § 3101 (2006)

The Act’s purpose is “to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values.” (*Implicit trust*)

Clean Air Act Amendments of 1990

42 U.S.C. § 7651 (2006)

Finds that acid rain is a major concern because “current and future generations of Americans will be adversely affected by delaying measures to remedy the problem.” (*Recognition of potential to affect present and future generations*)

Forest and Rangeland Renewable Resources Planning Act of 1974

16 U.S.C. § 1609(a) (2006)

It describes the National Forest System as “a nationally significant system dedicated to the long-term benefit for present and future generations.” (*Implicit trust*)

National Environmental Policy Act of 1969

42 U.S.C. § 4331(a) (2006)

Establishes federal policy “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” (*Recognition of needs of both present and future generations*)

National Park Service Organic Act

16 U.S.C. § 1 (2006)

The Act creates the National Park Service, “which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” (*Implicit trust*)

National Wildlife Refuge System Improvement Act of 1997

16 U.S.C. § 668dd(a)(2) (2006)

The mission of the National Wildlife Refuge System is “to administer a

national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” (*Implicit trust*)

Nuclear Waste Policy Act of 1982

42 U.S.C. § 10131(a)(7) (2006)

Finds that “high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.” (*Recognition of potential to affect present and future generations*)

Wild and Scenic Rivers Act

16 U.S.C. § 1271 (2006)

The Act’s policy is to preserve “in free-flowing condition” “for the benefit and enjoyment of present and future generations” certain rivers that “possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values.” (*Implicit trust*)

Wilderness Act of 1964

16 U.S.C. § 1131(a) (2006)

It establishes “the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.” (*Implicit trust*)

U.S. State Statutes:

California Environmental Quality Act

Cal. Pub. Res. Code § 21001(e) (2006)

Declares the intent of the state to “[c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and

economic requirements of present and future generations.” (*Recognition of needs of both present and future generations*)

Connecticut General Statute

§ 22a-1 (2006)

It notes that the state’s growing population and economy have placed considerable burdens on the “life-sustaining natural environment”; defines the state as “trustee of the environment for present and future generations”; and establishes a state policy to conserve, improve, and protect natural resources and the environment through pollution control and improved environmental planning and interagency/intergovernmental coordination. (*Explicit trust for present and future generations*)

Indiana State Code

Title 13, article 12, chapter 3(1) (2008)

Adopts an environmental policy intended “to preserve, protect, and enhance the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment.” (*Recognition of interests of future generations*)

Montana Environmental Policy Act

Montana Code Annotated § 75-1-103(2) (2005)

It declares “the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may: (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” (*Explicit trust balanced against other considerations of state policy*)

New Mexico Environmental Improvement Act

N.M. Statute Annotated Chapter 74, article 1(2) (2006)

Goal of the Act is “to ensure an environment that in the greatest possible

measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people.” (*Recognition of interests of both present and future generations*)

APPENDIX E

Bemidji Statement on Seventh Generation Guardianship

Bemidji Statement on Seventh Generation Guardianship

14th Protecting Mother Earth Conference, Jul. 6-9, 2006, *available at* http://www.ienearth.org/statement_declare.html

“The first mandate . . . is to ensure that our decision-making is guided by consideration of the welfare and well being of the seventh generation to come.’

Indigenous Peoples have learned over thousands of years to live in harmony with the land and the waters. It is our intent to survive and thrive on this planet for this and many generations to come. This survival depends on a living web of relationships in our communities and lands, among humans, and others. The many Indigenous Peoples and cultures from throughout the world are threatened by the disruption of these relationships.

The exploitation and industrialization of the land and water have altered the relationships that have sustained our Indigenous communities. These changes have accelerated in recent years. We are now experiencing the consequences of these actions with increased cancer and asthma rates, suicides, and reproductive disorders in humans, as well as increased hardships of hunting and of whaling. Places that we hold to be sacred have been repeatedly disturbed and destroyed. In animals and in nature we see changing migratory patterns, diseased fish, climate change, extinction of species, and much more.

Government agencies and others in charge of protecting the relationships between our people, the land, air, and water have repeatedly broken treaties and promises. In doing so, they have failed in their duty to uphold the tribal and the public trust. The many changes in these relationships have been well documented, but science remains inadequate for fully understanding their origins and essence. This scientific uncertainty has been misused to carry out economic, cultural, and political exploitation of the land and resources. Failure to recognize the complexity of these relationships will further impair the future health of our people and function of the environment.

We value our culture, knowledge, and skills. They are valuable and irreplaceable assets to all of humanity, and help to safeguard the world. The health and well being of our grandchildren are worth more than all the wealth that can be taken from these lands.

By returning to the collective empowerment and decision making that is part of our history, we are able to envision a future that will restore and protect the inheritance of this, and future generations. Therefore, we will designate Guardians for the Seventh Generation.”