

# *New Zealand Journal of Public and International Law*



VOLUME 13 ■ NUMBER 1 ■ JUNE 2015

SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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THIS ISSUE INCLUDES CONTRIBUTIONS BY

Joshua Aird	Sir Geoffrey Palmer
Klaus Bosselmann	Nicole Rogers
Peter D Burdon	Nathan Ross
Joel Colón-Ríos	Greg Severinsen
Benjamin F Gussen	Linda Sheehan
Catherine J Iorns Magallanes	Gerald Torres
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NEW ZEALAND JOURNAL OF  
PUBLIC AND INTERNATIONAL LAW

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Faculty of Law  
Victoria University of Wellington  
PO Box 600  
Wellington  
New Zealand

June 2015

The mode of citation of this journal is: (2015) 13 NZJPL (page)

The previous issue of this journal was volume 12 number 2, December 2014

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

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The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informit and EBSCO electronic databases.

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The New Thinking on Sustainability Conference at which preliminary versions of these articles were originally presented was made possible with the generous support of the German Australian Pacific Lawyers Association, the New Zealand Law Foundation and Victoria University of Wellington.





# IMPLEMENTING RIGHTS OF NATURE THROUGH SUSTAINABILITY BILLS OF RIGHTS

*Linda Sheehan\**

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*The address explores how to create a legal paradigm that will better protect nature than current environmental laws. The address argues for a rights-based approach to environmental law and a corresponding system of ecological economics. The latter relegates economics to the role of a tool to maximise societal and ecological well-being, rather than forcing nature and people to serve the economic system. Similarly, recognition in law of the rights of nature reflects the core paradigm that humans and nature are inextricably intertwined, and creates the foundation from which other laws implementing this core paradigm may arise. As illustration, the address accordingly examines the rights of nature as already imbedded in international laws, constitutions and local laws, with a particular focus on application in communities.*

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## ***I INTRODUCTION***

This conference presents vital dialogue about re-envisioning sustainability. Much of my background has involved drafting and working to implement environmental laws and policies. It is from that background that I began to realise that, no matter how hard we work to implement our current system of environmental laws, we will inevitably come up short. I discuss why that is, and what we can do to re-envision a system of laws that sets us on a better course.

## ***II WHAT IS THE PROBLEM?***

When one sits down to draft a new statute or policy, the first step is to identify the problem that needs solving. While there is a natural evolutionary process to lawmaking, solving the wrong problem at the outset can cost years in backtracking and correcting.

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This is an edited version of a keynote address given at the "New Thinking on Sustainability" conference held at Victoria University of Wellington in February 2014.

There is no doubt that globally we face many problems due to our abuse and over-consumption of the Earth and its natural systems. Sir Geoffrey Palmer mentioned Thoreau and Walden in his opening remarks.<sup>1</sup> I grew up not far from Walden Pond and remember that area as a formative part of my childhood. One particularly important member of my Massachusetts community was the New England Cottontail rabbit. This native rabbit was so abundant that it was the focus of some of my favourite children's stories, by local author Thornton Burgess. However, we have since taken its habitat and introduced non-native species that out-compete it, and this once ubiquitous rabbit is now endangered. So this larger struggle is personal for me, as it should be for all of us.

Looking globally, extinction rates are now 1,000 times that across history; at least 40 per cent of amphibians and 25 per cent of mammals are at risk of extinction in the near future.<sup>2</sup> Even the World Bank is saying that projected climate change may cause a "transition of the Earth's ecosystems into a state unknown in human experience."<sup>3</sup> We are entering into uncharted territory.

My professional career has been in California, where I have focused on waterway and ocean issues for about 20 years. I see us increasingly doing things to ourselves here that make no sense. We pull so much water from our rivers that they are drying up, and we are pumping so much groundwater that some of our aquifers are actually collapsing. Species like the Delta smelt and Chinook salmon once flourished in the San Francisco Bay Delta Estuary, the largest on the West Coast of North America. Now they are endangered because of us. Even killer whales are now endangered, in part because they depend on the endangered Chinook salmon for food.<sup>4</sup>

Climate change is making our water problems in California worse. We naturally store much of our water in Sierra snowpacks, but scientists project that by the end of the century, 60–80 per cent of the Sierra snowpack will be gone because of climate change.<sup>5</sup> Climate change is also projected to increase sea levels by up to five feet (or more) by 2100,<sup>6</sup> and most of our population is along the coast. California is taking some steps to address greenhouse gas emissions, but this is a global problem, one we all must share.

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- 1 Geoffrey Palmer "Setting the Scene for the 'New Thinking on Sustainability' Conference" (2015) 13 NZJPIL 17.
  - 2 Millennium Ecosystem Assessment Board *Living Beyond Our Means: Natural Assets and Human Well-Being* (March 2005) at 15.
  - 3 Potsdam Institute for Climate Impact Research and Climate Analytics *Turn Down the Heat: Why a 4°C Warmer World Must Be Avoided: A Report for the World Bank* (The World Bank, Washington, 2012) at 54.
  - 4 National Oceanic and Atmospheric Administration "NOAA Biological Opinion Finds California Water Projects Jeopardize Listed Species; Recommends Alternatives" (June 4 2009) <www.noaa.gov>.
  - 5 California Natural Resources Agency *2009 California Climate Adaptation Strategy* (December 2009) at 80.
  - 6 Committee on Sea Level Rise in California, Oregon, and Washington and others *Sea Level Rise for the Coasts of California, Oregon and Washington* (The National Academies Press, Washington DC, June 2012) at 4–6.

## ***A Limits of Modern Environmental Laws***

So far I have identified symptoms of the problem, but we still need to name the cause. Looking a bit more deeply, we see how the modern environmental laws enacted in the early 1970s in the United States and elsewhere arose out of a number of acutely visible environmental insults. We saw the Cuyahoga River in Ohio spontaneously combusting in the late 1960s, but that had actually been happening already for years. It just happened to make the television news then, at a time when other cataclysmic events, like the 1969 Santa Barbara oil spill, the scourge of DDT pollution and the death of the massive Lake Erie from pollution, were also occurring.

Out of these events came Earth Day in 1970, a massive mobilisation of people speaking out for the planet. The United States Congress followed shortly thereafter with laws such as the Clean Water Act,<sup>7</sup> the Clean Air Act<sup>8</sup> and many others. These were incredible initiatives at the time and arose from an outpouring of voices for change.

All of the modern environmental laws enacted in that brief period over 40 years ago expressed wonderful intentions to stop pollution, protect endangered species and generally fix the problems that faced us. We rolled up our sleeves and got to work, and we did a relatively good job taking on some of the most acute problems. For example, rivers now do not catch on fire quite so much, we can breathe again in cities that had been choked with smog and our beaches are no longer open sewers. These are all fairly low bars, but still, we have seen successes.

But what about the chronic problems that have been slowly creeping up on us? What about climate change, species extinctions and disappearing waterways? Why have our environmental laws not tackled those?

The reason can be found in the nature of the statutes themselves. They have legalised pollution and extraction and allowed these activities to continue at a level that is not sustainable. They look at the environment in the context of what we need from it, rather than what the environment needs from us as well. This strategy might work when there is plenty of clean water and healthy, connected habitat to go around, but it does not work as we start to see those dwindle away.

## ***B The Environment is Marginalised as Shortages Mount***

What we are starting to see happen as the inevitable shortages begin is that we are pressing up against species and ecosystems and their own needs. Now is when we see the real efficacy of our environmental laws. The results so far are not promising.

A 2011 report from the Public Policy Institute of California, a non-partisan body of expert scientists and lawyers on water management, offered a number of useful ideas to help California better

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7 33 USC §§ 1251 and following.

8 42 USC §§ 7401 and following.

address its ongoing water struggles. But a recommendation in the middle of the report gave a clue as to where we might be headed with our policymaking. It wrote:<sup>9</sup>

Properly designed and prudently administered, *endangered species triage* might allow the fisheries agencies and other environmental regulators to focus on integrated ecosystem management and aggregate species recovery, without the statutorily mandated diversion of inordinate resources (and political capital) to species with low probabilities of long-term persistence.

This new concept of endangered species triage addresses the situation we face now, one in which we have established a pattern of taking more than our share of water and pushing some species to the brink of extinction as a result. Rather than substantially changing our behaviour, these experts suggest not just that we consider letting these particular species (such as the Delta smelt) go extinct. They also suggest that we should consider endangered species triage as a state water management *policy*, to be applied to other species in the future. The report even suggests we also could blame the endangered species for interfering with the survival of other species. We all can predict the destination of that road. Once we start going down this path in a conscious, deliberate way, we create what lawyers call a slippery slope that simply leads to more species extinctions. That is because we have not changed the mindset underlying our laws and policies.

This result does not apply just to species. In California right now, whole communities of economically disadvantaged people in certain areas of the state have to choose between seriously polluted drinking water sources or paying up to a third of their monthly salary on bottled water. For example, in farming communities in the San Joaquin Valley, 24 per cent of tested wells exceeded nitrate limits, and 40 per cent of the tested wells in Tulare County had nitrate levels above legal limits.<sup>10</sup> This problem has been ongoing for years.

### ***C Commonly Blamed Culprits***

As I mentioned, I have spent most of my career working with state law and policy makers in California to advance new environmental laws and implement the ones we have. Over the years, I have seen a number of culprits for the failure of our environmental laws to live up to their promise. These include the following:

- lack of funding for implementation and enforcement;
- political push-back by industry;
- bureaucratic/inefficient agency operations;
- regulatory capture: industry viewed as the client;
- lack of research and monitoring data;

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9 Ellen Hanak and others "Managing California's Water: From Conflict to Reconciliation" (Public Policy Institute of California, 2011) (emphasis added).

10 Eli Moore and Eyal Matalon *The Human Costs of Nitrate-contaminated Drinking Water in the San Joaquin Valley* (Pacific Institute, March 2011) at 11–12.

- failed public outreach; messaging that environmental laws take jobs;
- financially struggling NGO community;
- under-educated court system/complex laws; and
- gaps in laws themselves.

All of these factors are real, valid challenges we deal with on a regular basis. They tend to be the focus of advocacy in terms of problems to fix, and we have been making incremental progress on some of them. The difficulty is that even if you made significant progress on all of them, the real problem still does not sit on this list. Fixing these is the equivalent of tweaking the levers. We need to look at the deeper, more systemic cause of the challenges we face.

### ***D Fundamental Flaw of Modern Environmental Laws***

Simply put, the real problem is that we are looking at nature in the wrong way. We think of the natural world (waterways, forests, species) as something separate from us. Our laws consider nature as a repository for resources to feed our modern economic system. They do not treat nature as something we are intimately connected with, or in a relationship with. That worldview is what is getting us into trouble.

John Muir, who spent much of his life exploring the California wilderness, wrote about the deep interconnections that we have with the natural world. He famously wrote that: "When we try to pick out anything by itself, we find it hitched to everything else in the universe."<sup>11</sup> Muir valued conservation policy that reflected his mind-set that:<sup>12</sup>

The sun shines not on us but in us. The rivers flow not past, but through us. ... The trees wave and the flowers bloom in our bodies as well as our souls ...

Muir's worldview had much in common with indigenous Californians, for whom water ownership was unheard of. Water was its own entity, it had its own spirit and essence, and it was intimately connected with humans. It was understood that you had to respect and act responsibly toward water.

Muir's contemporary Gifford Pinchot, the first head of the new United States Forest Service, held a different worldview. While Pinchot's policies were far more progressive than the alternative nature domination worldview at the time, Pinchot nonetheless advocated that our new conservation ethic be to "produc[e] from the forest whatever it can yield for the service of man".<sup>13</sup> Pinchot believed that we could and should use the environment, up to the point where there is just enough available to allow us to continue our use in the future.

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11 John Muir *My First Summer in the Sierra* (Houghton Mifflin, Boston, 1917) at 157.

12 John Muir *John of the Mountains: The Unpublished Journals of John Muir* (University of Wisconsin Press, Madison, 1979) at 92.

13 Gifford Pinchot *The Training of a Forester* (JB Lippincott Co, Philadelphia, 1914) at 13.

At the turn of the last century, Muir and Pinchot came head to head in a battle over the fate of California's Hetch Hetchy Valley, which rivalled Yosemite in its beauty and natural splendour. Pinchot won, and the Hetch Hetchy Valley was dammed to provide water for the rapidly-expanding city of San Francisco, even though there were other water sources available that would have avoided a dam.

Pinchot's worldview became the nation's new conservation ethic, and it runs through essentially all of our federal environmental laws in the United States today. For example, the Magnuson-Stevens Fisheries Act allows the take of fish up to the "maximum sustainable yield"<sup>14</sup> and the Clean Water Act Regulations fail to place meaningful controls on pollution until there is a "reasonable potential" actually to violate water quality standards.<sup>15</sup> Even the Endangered Species Act is being threatened by a new, dangerous triage mentality, even though "[w]hen a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time."<sup>16</sup>

Our conservation ethic is still wrapped around the idea that nature is separate from us. We like nature, but fundamentally we treat it as something we use. It is property; we can manipulate it for our ends. This is very different from indigenous perspectives, and it is very different from modern scientific perspectives, which show us we are intimately connected with nature.

We have yet to shake our fundamental addiction to the mythology of the larger economic constructs within which we now live. Our economic system assumes, wrongly, that we can have infinite economic growth on a finite planet, that our primary economic goal should be the maximisation of individual wealth and that Gross Domestic Product (GDP) is a measure of societal well-being. None of these squares with reality. We cannot feed our economic system indefinitely with finite natural systems. As to maximising individual wealth, you cannot have a moral or stable society with the levels of wealth inequality that we are seeing today.<sup>17</sup> We have long known that GDP can flourish when fed societal ills like war.<sup>18</sup> Why do we still assume GDP measures how well-off we are? Once again, our actions defy common sense.

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14 Magnuson–Stevens Fishery Conservation and Management Act 16 USC §§ 1801 and 1802; see also 50 CFR § 600.310 (National Marine Fisheries Service's National Standards Guidelines).

15 Clean Water Act Regulations 40 CFR § 122.44(d)(1).

16 *Sierra Club v Morton* 405 US 727 (1972) at 750, fn 2/8 per Douglas J dissenting.

17 Oxfam "Working for the Few" (Oxfam Briefing Paper 178, 20 January 2014).

18 "Our Gross National Product ... if we should judge the United States of America by that - ... counts air pollution and cigarette advertising, and ambulances to clear our highways of carnage. It counts special locks for our doors and the jails for the people who break them. It counts the destruction of the redwood and the loss of our natural wonder in chaotic sprawl. It counts napalm and counts nuclear warheads and armored cars for police who fight riots in our cities. ... Yet the gross national product does not allow for the health of our children, the quality of their education or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages, the intelligence of our public debate or the integrity of our public officials. It measures neither our wit nor our courage; neither our wisdom nor our learning; neither our compassion nor our devotion to our country; it measures everything in short, except that which makes life worthwhile." Robert

We are starting to awaken to the reality that we need to change, but we are still stuck in old mindsets. Why is it that we more easily envision a world devastated by climate change and species extinctions than a fundamentally evolved economic system supporting human and Earth well-being?

### **III STAYING THE COURSE IS NOT AN OPTION**

Our modern neoclassical economic system is only about two hundred years old, and its neoliberal overlay arrived much more recently than that. It is something we invented, and we can create something new to guide us. Ecological economists have already started to do that by developing economic systems that support the vitality of humans and nature, with economics as a tool rather than the goal. Ecological economics follows the maxim that economics must serve human society and the planet, not the reverse.<sup>19</sup>

We currently have economics upside down. We treat nature and humans as resources to feed the growth of our economy, not the growth of human and environmental health and well-being. It should not be surprising, then, that we continue to consume and destroy the Earth's systems.

Adding insult to injury, we are now trying to use our economic system to fix the problem that we created with our economic system. We are privatising things like water on the theory that the market will sort out who values it most.<sup>20</sup> Water is not a fungible good. All life needs water. If we allow it to be bought and sold for profit and held by those with funds, whose tap do we turn off first? We can answer that already by looking at California's experiences.

Now is the time to re-envision a better system. The status quo cannot continue. Our societal choices are regularly violating both human rights and nature's rights. Climate change is the most visible, current example. Climate refugees forced from their homes, essential natural habitats destroyed and many other impacts are crossing the threshold from inconvenience to life-altering injury. Earth Law Center has built a map illustrating the intersection of such simultaneous violations, or co-violations, of human rights and nature's rights. They are happening on a growing basis around the world. One common example is a massive mine proposed for a relatively pristine area over the protests of the local community members, who may be jailed or worse for voicing their opposition.<sup>21</sup>

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F Kennedy "Remarks at the University of Kansas" (speech to the University of Kansas, Lawrence, 18 March 1968) John F Kennedy Presidential Library and Museum <[www.jfklibrary.org](http://www.jfklibrary.org)>.

19 See for example Linda Sheehan "Submission by Earth Law Center to the UN Conference on Sustainable Development" (November 2011) United Nations Conference on Sustainable Development <[www.unccd2012.org](http://www.unccd2012.org)>.

20 See for example Paul B Farrell "Water is the new gold, a big commodity bet" *The Wall Street Journal* (New York, 24 July 2012).

21 See Earth Law Center "Violation of Rights: Mapping Co-Violations of Human and Environmental Rights" (2015) <[www.earthlawcenter.org](http://www.earthlawcenter.org)>.

#### ***IV ALTERNATIVE: LEGAL AND ECONOMIC SYSTEMS THAT BUILD RELATIONSHIPS AMONG HUMANS AND NATURE***

Our current economic system creates exclusion rather than relationship. Individuals privatise and hoard the elements of natural systems for their own well-being at the expense of people and planet, and our economic system rewards that behaviour. We ignore the fact that we are all related. As a result, we are destroying the planetary systems on which we all rely, and all beings suffer.

Fortunately, alternatives exist. We can create legal and economic systems that build relationships to create more well-being. So again, for indigenous Californians, water ownership was unthinkable. The 1849 California gold rush changed all that. Gold was panned from creeks and water was used to blast more gold out of the side of the hills. To create some order out of the chaos at the time, the law became first in time, first in right;<sup>22</sup> whoever claimed the gold or the water flows first had first rights to use it. Remarkably, this continues to be the water law in California today. However, we can adopt new laws and worldviews that recognise waterways' inherent rights to flow and ensure that humans use water consistent with waterway needs.

Economics can evolve as well. We can look to Adam Smith, the father of neoclassical economics, for inspiration. We tend to focus today on the structure of the economic system that evolved in part from his writings. But Smith also wrote of morality and he placed a high value on relationships and community. Among other things, Smith lauded as "wise and virtuous" the person "willing that his own private interest should be sacrificed to the public interest".<sup>23</sup> He wrote that the "chief part of human happiness arises from the consciousness of being beloved",<sup>24</sup> and found that "rate of profit ... is always highest in the countries ... going fastest to ruin".<sup>25</sup> We have lost Smith's understanding of the *context* for our economic system and so have lost our way forward toward real prosperity.

It is time to regain that context of community. This is not just the human community; we must include the natural world as part of our home. Mirroring Smith's language about happiness tied to the "consciousness of being beloved",<sup>26</sup> Aldo Leopold extended the concept of community outward to the natural world. As Leopold wrote: "It is inconceivable to me that an ethical relation to land can exist without love."<sup>27</sup>

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22 See California Environmental Protection Agency "The Water Rights Process" California State Water Resources Control Board <[www.waterboards.ca.gov](http://www.waterboards.ca.gov)>.

23 Adam Smith *The Theory of Moral Sentiments* (6th ed (1790), Metalibra, São Paulo, 2006) at 213.

24 At 36.

25 Adam Smith *An Inquiry into of Nature and Causes of the Wealth of Nations* (eBook ed, Project Gutenberg, 2013) at ch 11.

26 Smith, above n 23, at 34.

27 Aldo Leopold *A Sand County Almanac* (Oxford University Press, Oxford, 1949) at 261.

How do we create governance systems that guide us toward lives in relationship and love with each other and the Earth? To answer this fundamental question, we need to resurrect the concept of responsibility. It may seem paradoxical in our individualistic economic day, but we are most free and happy when we are building and safeguarding relationships. We cannot do that without exercising our responsibilities towards our community, including the natural community. To accomplish this goal, however, our governance system must protect our and nature's inherent rights.

### ***A Rights Build Relationships***

Recognition in law of inherent rights – such as life, liberty and the pursuit of happiness – is essential to achieving a goal of healthy relationships. Rights build relationships. For example, before universal suffrage women did not enjoy a strong relationship with a society that excluded them from real consideration. Women did not have a voice that could make a difference in the way voting men's voices could. Similarly, before the fall of apartheid in South Africa, the majority of South Africans had little ability to exercise their responsibilities to their communities as they had little in the way of legally recognised inherent rights. They were excluded from the core workings of their own community; in fact, the word apartheid literally means separation.

By recognising inherent rights in law, we allow for the flourishing of strong relationships. The word recognising is important here. We do not give out inherent rights; they exist by their very nature. By passing rights-based laws, we are correcting our error of ignoring those rights in the past. The United Nations (UN) committee drafting the Universal Declaration of Human Rights knew this. Its members were asked if they were creating new human rights, and they responded that human rights do not come from the committee, or a king, or a Parliament. Rights come from existence. As the drafting committee wrote, "the supreme value of the human person ... did not originate in the decision of a worldly power, *but rather in the fact of existing*".<sup>28</sup>

Cultural historian Thomas Berry expands on this point to include the natural world, stating that: "*Rights come with existence. That which confers existence confers rights.*"<sup>29</sup> The logic of our inherent human rights extends to the natural world with which we co-evolved. Recognition of nature's inherent rights to exist, to have habitat, and to "fulfill its role in the ever-renewing processes of the Earth community" is essential for us to build the relationships with the natural world we have been ignoring.<sup>30</sup>

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28 Statement by Herman Santa Cruz, Chile, Member of the Drafting Subcommittee for the Universal Declaration of Human Rights in United Nations "The Universal Declaration of Human Rights: History of the Document" <[www.un.org](http://www.un.org)> (emphasis added).

29 Thomas Berry "Every Being Has Rights" in Hildegarde Hannum (ed) *Twenty-Third Annual EF Schumacher Lectures* (EF Schumacher Society, Stockbridge, 2003).

30 Thomas Berry *Evening Thoughts: Reflecting on Earth as a Sacred Community* (Sierra Club Books, San Francisco, 2006) at 149–150.

## ***B A Rights-Based Movement for Nature is Growing***

In making this assertion, I acknowledge the challenges we face in recognising the rights of nature in law. As legal scholar Christopher Stone wrote in his seminal essay "Should Trees Have Standing", each time someone tried to seek rights for the rightless, the initial effort seemed odd or laughable. The reason is that we initially see the rightless as objects we need and use, not as full subjects of society.<sup>31</sup> But through effective, determined movements, these wrongs were corrected, and inherent human rights have been enshrined in law.

The same is true today for the natural world. Rights-based movements have fundamentally changed our relationship with people, and they can fundamentally change our relationship with nature. Our governance systems, even our environmental laws, currently treat the natural world as an object to be used, not a subject with its own rights. We can buy, sell and manipulate nature and our balance sheets avoid accounting for its destruction. If we change our worldview to nature as subject, we will start to transform how we live with respect to nature. This benefits us not only from a utilitarian perspective by preventing the further degradation of our life support systems. It also benefits us as moral beings seeking to expand love, relationship and community.

## ***C Recognising the Inherent Rights of Nature in Law***

The concept of nature's rights in law is not new. Christopher Stone wrote about it in the early 1970s. Shortly after his essay was released, United States Supreme Court Justice William Douglas applauded the concept in his famous dissent in *Sierra Club v Morton*.<sup>32</sup> Stone listed four elements as necessary to recognise effectively the rights of an entity in law:<sup>33</sup>

- rights must be subject to redress by public body;
- the entity must have standing to institute legal actions on its own behalf (a guardian can stand in for the entity as needed);
- redress must be calculated for the entity's *own* damages; and
- relief must run to the benefit of the injured entity.

Here, Stone emphasises first and foremost that rights must be enforceable by a public body. Merely observing that nature has rights will not provide the effective force of law; enforcement must be included. As to the last point, if our actions damage an ecosystem, the restitution needs to go back to the ecosystem. We do not simply write a cheque to the person who claims to own the ecosystem and then leave it in waste. We actually must try to help restore the damage, just as we would if we had injured another person.

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31 Christopher D Stone "Should Trees Have Standing? – Toward Legal Rights for Natural Objects" (1972) 45 S Cal L Rev 450 at 453–456.

32 *Sierra Club v Morton*, above n 16, at 741.

33 Stone, above n 31, at 458–459.

## 1 *Nature's rights in the Constitution of Ecuador*

In one real world example, Ecuador amended its Constitution in 2008 by a vote of the people. Included in these amendments was the first constitutional language in the world to recognise the rights of nature. The key provisions include art 71, which states that:

Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain itself and regenerate its own vital cycles, structure, functions and its evolutionary processes.

Any person, people, community or nationality, may demand the observance of the rights of the natural environment before public bodies...

Article 72 addresses restitution, stating that "[n]ature has the right to be completely restored".

This language illustrates how the work of scholars and advocates for nature's rights builds over time. Article 71's language about rights of nature to maintain and regenerate its "evolutionary processes" reflects Berry's thoughts on nature's right to participate in the "ever-renewing processes of the Earth community". Echoes of Stone's observations can be seen in art 71's language on enforcement by "any person" before "public bodies". We can also see Stone's contributions in art 72's language regarding relief running back to the injured natural system.

There has been one completed court case so far implementing these constitutional provisions.<sup>34</sup> In this case, Ecuador's Vilcabamba River was damaged by adjacent road building. Specifically, construction pushed gravel into the river, channelising the stream flow and creating flooding downstream. Local landowners sued under the constitutional provisions. The Court agreed that the river's constitutional right to flow had been violated and it ordered those responsible to restore the river.

## 2 *The Universal Declaration of the Rights of Mother Earth*

Ecuador's leadership was quickly followed by Bolivia and the larger international community.<sup>35</sup> In 2010, after the disappointment of the failed UN climate change talks in Copenhagen the year before, Bolivia sponsored a World People's Conference on Climate Change and the Rights of Mother Earth in Cochabamba, to which all were invited. Upwards of 35,000 people from 140 nations attended. They debated and then approved a Universal Declaration of the Rights of Mother Earth.<sup>36</sup> As was done in the Universal Declaration of Human Rights, the Universal Declaration of the Rights of Mother Earth

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34 *Vilcabamba River v Provincial Government of Loja* (Provincial Justice Court of Loja, No 11121-2011-0010, 30 March 2011). See also Natalia Greene "The first successful case of the Rights of Nature implementation in Ecuador" [The Rights of Nature <therightsofnature.org>](http://therightsofnature.org).

35 See Plurinational State of Bolivia, Constitution of 2009, arts 33–34 and 108.

36 World People's Conference on Climate Change and the Rights of Mother Earth *Proposal Universal Declaration of the Rights of Mother Earth* (April 2010).

recognised the "inherent rights of Mother Earth"<sup>37</sup> to the natural world's "life, liberty and security of person".<sup>38</sup> These include the rights of the Earth and all beings to "life and to exist", to "wellbeing" and to "identity and integrity".<sup>39</sup> The Declaration added that those rights, like human rights, "arise from the same source as existence".<sup>40</sup> Like the Declaration of Human Rights, the Universal Declaration of the Rights of Mother Earth protects the rights holder – here, the natural world – from the excesses of the state and of humans generally.

### 3 *Rights of nature in international agreements*

Ecuador and Bolivia carried forward this concept of nature's rights to the ongoing UN negotiations around the 20th anniversary of the "Earth Summit," the 1992 UN Conference on Sustainable Development in Rio de Janeiro. The UN anniversary event, or 2012's "Rio+20,"<sup>41</sup> referenced nature's rights in the final UN Outcome Document. This formal agreement states that "planet Earth and its ecosystems are our home" and notes that "some countries recognize the rights of nature in the context of the promotion of sustainable development".<sup>42</sup> While limited in its direct usefulness, this provision in a unanimously adopted UN agreement starts to build rights of nature language into international debates. The Final Declaration of the parallel Rio+20 People's Summit went much further, calling on "governments and people of the world to adopt and implement the Universal Declaration of the Rights of Mother Earth".<sup>43</sup>

Another example arises from the International Union for the Conservation of Nature (IUCN). The IUCN is a worldwide NGO with thousands of partner experts offering scientific, legal and other expertise, and it holds official UN observer and consultative status. In its quadrennial meeting in 2012, the IUCN adopted Resolution WCC-2012-Res-100, recommending that the IUCN incorporate rights of nature consideration into "all levels and in all areas of [IUCN] intervention", create a "strategy for ... advocacy concerning the Rights of Nature" and begin the development of and promote a "Universal Declaration of the Rights of Nature" as a "first step towards reconciliation between human beings and

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37 Article 1(4).

38 *The Universal Declaration of Human Rights* GA Res 217, III (1948), art 3.

39 World People's Conference on Climate Change and the Rights of Mother Earth, above n 36, art 2.

40 Article 1(4).

41 See Rio+20: United Nations Conference on Sustainable Development <[www.uncsd2012.org](http://www.uncsd2012.org)>.

42 *The Future We Want* GA Res 66/288, A/Res/66/288 (2012) at [39].

43 Facilitation Committee of Civil Society in Rio+20 *Final Declaration: People's Summit 'at Rio +20' for Social and Environmental Justice in defence of the commons, against the commodification of life* (June 2012).

the Earth as the basis of our lives, as well as the foundations of a new civilizing pact".<sup>44</sup> This strong language by a global entity as respected worldwide as the IUCN heralds well for future rights of nature discussion at the international level.

#### *4 Rights of nature in local laws: Facing down threats to community well-being*

Recognition of the rights of nature in law is also occurring at the local community level. In the United States, about three dozen municipalities around the country have so far passed local laws to recognise the rights of nature.<sup>45</sup> Virtually all of these laws to date have been passed in response to specific local threats such as proposed coal mining, hydrofracking, groundwater extraction and other risks to the health and well-being of the communities. The laws passed by these communities ban the destructive activities and reject the corporate rights that support them. They also recognise the rights of nature to be protected from such harms and so acknowledge in law that nature is an important part of their community to be safeguarded and respected. The laws recognise that the community's well-being depends on a strong relationship with the natural world and with each other; they are saying we want something different.

The largest United States city so far to pass one of these local laws is Pittsburgh, Pennsylvania. The law bans proposed hydrofracking operations and states that corporations do not hold rights to frack against the will of the people. The law includes specific provision upholding the rights of natural communities and gives citizens enforcement rights. The key provision reads:<sup>46</sup>

Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within the City.... Residents ... shall possess legal standing to enforce those rights on behalf of those natural communities and ecosystems.

With these laws, Pittsburgh and similar communities are beginning to knit together a movement for nature's rights and human democratic rights.

### ***V RIGHTS OF NATURE IN LOCAL LAWS: RE-ENVISIONING SUSTAINABILITY IN SANTA MONICA, CALIFORNIA***

Santa Monica, a sizable city along a popular beach in Southern California, provides a different model. Santa Monicans proactively sought out the protection of a rights of nature ordinance in response to the United States Supreme Court's 2010 decision in *Citizens United*, which significantly

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44 World Conservation Congress "Incorporation of the Rights of Nature as the organizational focal point in IUCN's decision making" (International Union for the Conservation of Nature, WCC-2012-Res-100, September 2012) at [1]–[4].

45 For a map and summary of most of these local laws, see Earth Law Center <earthlawcenter.org>.

46 Home Rule Charter of the City of Pittsburgh, Pennsylvania, ch 618: Marcellus Shale Natural Gas Drilling at § 618.03(b) (emphasis added).

expanded corporate rights over citizens' rights.<sup>47</sup> The chief concern raised by City residents was that with their new powers, corporations might insist on the right to act contrary to the wishes of residents for a "sustainable Santa Monica".<sup>48</sup>

The City's Task Force on the Environment worked with local citizens, Earth Law Center and others to draft a proposed law to address this concern. It sent to the City Council in late 2012 a proposed ordinance that recognised the rights of Santa Monicans to a healthy environment, and the rights of natural systems themselves to health. City staff and attorneys reviewed the draft with stakeholders and presented an updated version to the City Council, which the City Council approved unanimously in April 2013.

Santa Monica's Sustainability Rights ordinance pushes back on corporate claims of superior rights, holding that "Corporate entities ... do not enjoy special privileges or powers under the law that subordinate the community's rights to their private interests".<sup>49</sup> The ordinance protects the rights of human residents, stating that Santa Monicans possess "fundamental and inalienable rights" to self-governance, as well as rights to: clean water from sustainable sources; a sustainable food system that provides healthy, locally grown food; sustainable energy future based on renewable energy sources; and other rights.<sup>50</sup> The language here is important. Santa Monicans did not want clean water, for example, at the expense of other people and ecosystems that might need it more. Their law says they have a right only to clean water from sustainable sources. The city is actually working to become 100 per cent self-reliant on water by 2020, and it is making good progress toward that goal.

Importantly, the Sustainability Rights law also recognises the integration of citizens with the natural world. It includes a nature's rights provision stating that "[n]atural communities and ecosystems possess fundamental and inalienable rights to exist and flourish in the City".<sup>51</sup> As called for by Stone, the ordinance additionally provides for enforcement, stating that: "To effectuate those rights on behalf of the environment, residents of the City may bring actions to protect these natural communities and ecosystems."<sup>52</sup> The natural or native ecosystems in the City are defined in the law as "groundwater aquifers, atmospheric systems, marine waters, and native species within the boundaries of the City".<sup>53</sup> As native systems expand, the law may be adjusted to reflect them.

47 *Citizens United v Federal Election Commission* 558 US 310 (2010).

48 City of Santa Monica *Sustainable City Plan* (adopted 20 September 1994, updated 14 January 2014) at 4.

49 "An Ordinance of the City Council of the City of Santa Monica Establishing Sustainability Rights" (9 April 2013): Santa Monica Municipal Code, ch 4.75 at § 4.75.040(c).

50 At § 4.75.040(a).

51 At § 4.75.040(b).

52 At § 4.75.040(b).

53 At § 4.75.040(b).

## ***A Implementing Nature's Rights – What do we Stand for?***

The Santa Monica ordinance provides a model to consider as we move forward from what we say no to (such as hydrofracking and coal mining) to what we say yes to (such as water self-reliance). Rights-based laws on paper are important, but a way of life that recognises the rights of nature is inspiring and necessary. We need to envision what society looks and acts like under a system of law that recognises the inherent rights of nature.

As a result, we need more pilot efforts around the world to both build these laws and implement them toward lives in harmony with the Earth. These pilot efforts will help illustrate how to take this movement up in other communities. In the meantime, we can help explain what this effort might look like to help create the tools we need to build a movement for the rights of nature.

### ***B Illustration: Waterways' Rights to Health***

As my experience has been primarily in California water issues, I will outline a potential example of rights of nature laws in the context of California waterways. I will address three things in this brief exercise – the right to flow, the right to clean water and the right to biodiversity.

#### ***1 Right to flow***

Currently, legal water rights in California are only given to humans, for human water diversions and uses. The waterway does not have a similar right to hold onto the water it needs to survive as a waterway. If there is a conflict over water use, the waterway does not have its own seat at the table. This is clearly unsustainable, as we know at least from the demise of the Delta smelt and Chinook salmon.

The alternative is to recognise in law that waterways have an inherent right to exist, which means they have an inherent right to flow. We can easily envision how to do this, even if the process is politically challenging at the current time. The state Water Code could be amended to recognise waterway rights to flow. Science could be used to determine the flow needs; indeed, in many cases we already know what those needs are. And we could apply a provision in our state Constitution banning the "waste and unreasonable use" of water to help harvest water in over-allocated basins. We can also establish state-funded, independent guardians to enforce waterway rights and make sure they are upheld.

#### ***2 Right to clean water***

The United States Clean Water Act states "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985".<sup>54</sup> We clearly have not achieved this goal. We have failed in part because our worldview does not allow us to see waterways as having a right to clean water. Instead, we see waterways as objects for our use. We accordingly legitimise continued pollution

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54 Clean Water Act 33 USC § 1251(a)(1).

as long as there is not a "reasonable potential" to violate standards,<sup>55</sup> which themselves are weakened by politics.

Unless pollution is so severe that a waterway's use is deemed "impaired",<sup>56</sup> or unless new technology is added on a case-by-case basis, there is little the Clean Water Act does to actively move waterways toward a healthy state. The law looks down toward degradation, rather than up toward a new vision of health. This impacts humans as well, as discussed earlier in the drinking water examples.

How could rights of nature create something different? We can say the waterway has a right to be clean, which is different from a right not to be degraded. We can use science to determine how clean a representative healthy waterway should be. This would necessarily not just include pollution from pipes but from all sources: running off the land, deposited from the air and from the ground up. We can then change state law to start to reflect that new goal and add enforcement provisions to ensure we reach it.

### 3 *Right to biodiversity*

Again, with biodiversity, we see the limits of our existing environmental laws. The United States Endangered Species Act is not a biodiversity statute. It is a statute that only becomes active after we have set in place ways of living that destroy the vast majority of a species' population. By that time, our lifestyles and attitudes have become so ingrained that the endangered species itself can get blamed for its own demise. The Delta smelt in particular has suffered numerous insults and jeering calls for its swift extinction in the face of profitable alternative water uses. Even putting aside the serious moral consequences of such a policy approach, the smelt is at the base of the food chain in the Delta. Its disappearance can reverberate in ways we cannot yet appreciate.

We need an approach that sets us on a sustainable path well *before* species become threatened or endangered. We need to change our laws to recognise species' rights to be healthy and thrive. We must reject as grossly inadequate species' current right to hover at the edge of extinction rather than go over.

Finally, we can bundle the right of biodiversity with the right to flow and the right to be clean, to realise a larger waterway's right to exist, thrive and evolve. Such changes in our laws will guide us toward more sustainable and harmonious actions in line with the needs and rights of the Earth.

## ***C The Grundnorm of Ecological Integrity***

In the conference, the term Grundnorm came up several times. This term from legal philosophy denotes the basic rule underlying a legal system. In our waterway example, we apply science and law to develop and practice a Grundnorm of ecological integrity. Alfred Russell Wallace, a contemporary of Charles Darwin, wrote about climate change 150 years ago. We were not ready to hear that then,

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55 Clean Water Act Regulations 40 CFR § 122.44(d).

56 Clean Water Act 33 USC § 1313(d).

and our Grundnorm became maximum sustainable yield. Now we are ready to listen to science, and our Grundnorm can evolve and bring our laws along with it.

We want well-being for ourselves and the natural world with which we exist in relationship. We need to push on the law to get us there. We also need to push on science. While science is still overwhelmingly reductionist, breaking down the natural world into pieces to study and manipulate, scientists are now starting to consider the Earth's ecosystems holistically as natural systems that also include people. This holistic understanding of our relationship with the world will help inform our ethical choices in extending our circle of community outward to include the natural world.

### ***D Next Steps in Santa Monica***

In January 2014 the City of Santa Monica integrated its Sustainability Rights ordinance into the City's newly-updated Sustainable City Plan.<sup>57</sup> The Plan sets relatively strict targets for the City in such areas as resource conservation, environmental and public health, transportation, and sustainable local economy. The new Plan makes nature's rights a guiding principle for City decisionmaking, stating that the City is "committed to Sustainable Rights for its Residents, Natural Communities and Ecosystems".<sup>58</sup> The Plan reinforces that the Sustainability Rights ordinance "codifies the commitments made in the Sustainable City Plan" and "asserts the fundamental rights of all Santa Monica residents regarding sustainability".<sup>59</sup> The Plan further emphasises the "rights of natural communities and ecosystems to exist and flourish in Santa Monica" and highlights the "rights of residents to enforce those rights on behalf of the environment".<sup>60</sup>

The Task Force on Environment and Santa Monica City officials are now examining possible implementation routes for the ordinance. These can include new commitments to greenhouse gas reductions, and heightened controls on use of the local aquifer over that provided by existing water law.

As the first city with a proactive rights of nature ordinance, Santa Monica is charting the path toward active laws that support an Earth-centred way of life. Questions need to be asked that we have not closely examined before, such as: what does health look like and how do we measure it? What kind of policies do we need to implement a rights-based law for nature? For example, should we say all new development has to be carbon-neutral or water-neutral? What kind of groundwater controls are needed to protect the aquifer, which has its own right to be healthy? Should a ban on new private wells be instituted? The discussion is beginning now among the people of Santa Monica and in their Task Force on the Environment meetings.

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57 City of Santa Monica, above n 48.

58 At 7.

59 At 7.

60 At 7.

## ***VI A NEW PATH IS POSSIBLE***

We have primarily been talking about changes in the law to recognise the inherent rights of nature. But we also need to think about how we change economics. We must move toward an ecological economics that relegates economics to the role of tool, rather than societal goal. We also need to contemplate how we harness science to implement the rights of nature to help us more clearly identify our vision of people and nature, thriving together. These efforts will take time and our collective attention.

While we take up these efforts, we can start making our task easier by changing our language. For example, I invite us all to try talking about our work without using the term 'natural resources'. We have an "adjective/noun problem" with our language that limits our thinking.<sup>61</sup> We believe we are taking action on behalf of the environment when we use terms like natural resources, sustainable development, green economy and natural capital. But if we look more closely, it is the nouns that indicate our real emphasis: resources, development, economy and capital. They reinforce the overarching power that our current destructive economic system holds over us. It is only the modifier that refers to the environment. So when we use these terms, we are by definition relegating the natural world's well-being to behind that of our neoclassical/neoliberal economy. Let's stop that now and pick different terms. Ecological integrity works. So does thriving communities, where communities include both people and nature, living and thriving together.

The law does change over time. We have seen that happen with human rights and we are starting to see that now with nature's rights. To paraphrase Donella Meadows, one of the world's leaders in how to fundamentally change systems, we have to keep acting on that goal and never give up.<sup>62</sup> We must keep articulating our vision, elevating leaders who advance that vision, becoming involved in our communities and calling for change – and ultimately, we will see change made.

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61 Personal Communication from Michael M'Gonigle, University of Victoria, Victoria (BC) (2013).

62 Donella Meadows *Leverage Points: Places to Intervene in a System* (The Sustainability Institute, Hartland, 1999).

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