

MEMORANDUM

TO: UNEP High-Level Expert Meeting on the New Future of Human Rights and the Environment

FROM: Burns H. Weston*

DATE: 30 November 2009

RE: Climate Legacy Initiative (CLI) Policy Paper, *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* (April 2009)

Because I can attend this auspicious meeting just this one day and thus contribute to oral discussion in limited degree only, I take the liberty of respectfully calling to your attention in writing the above named Policy Paper, published last April by the Climate Legacy Initiative (CLI), a joint project of Vermont Law School's Environmental Law Center (VLS-ELC) and The University of Iowa's Center for Human Rights (UICHR) which I direct. The relevance of this project to this meeting is, I believe, manifest. Conceived in Fall 2006 and officially launched upon funding in Spring 2007 (circa the release of citizen Al Gore's *An Inconvenient Truth*), it was prepared in direct response to anthropogenic global warming and consequent climate change that, together with accelerating biodiversity loss worldwide, now pose threats to life on Earth as we know it, and to a degree unparalleled since the dinosaurs. Building on the pioneering work of Georgetown University law professor Edith Brown Weiss,¹ the project set out to answer intriguing and, indeed, generally unexplored legal questions: Is it possible for US law, the law of other countries, indigenous peoples' law, and/or international law to define the rights of future generations

* Bessie Dutton Murray Distinguished Professor of Law Emeritus and Senior Scholar, UI Center for Human Rights, The University of Iowa; also Director, Climate Legacy Initiative, Vermont Law School Environmental Law Center (South Royalton, VT 05068 USA) and The University of Iowa Center for Human Rights (Iowa City, IA 52242 USA).

¹ In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity (1989).

to a clean, healthy, and sustainable environment? Likewise, can law impose a duty on current generations to pass on a climate legacy of this sort?

In Spring 2009, the CLI gave birth to the above-referenced Policy Paper, 108 pages long itself, but complete with 624 pages of Background Papers (Appendix A) and Recommendations (Appendix B). Documenting our research and more, the Policy Paper was authored by yours truly, my Vermont Law School colleague Professor Tracy Bach, and invited contributors from numerous US-based academic institutions and civil society organizations. Additionally, before completion, it was twice reviewed by a Distinguished Advisors Panel comprise of experts well versed in environmental law and policy, human rights law and policy, and law and policy relative to the rights of future generations.²

The CLI Policy Paper makes the scholarly case that ecological protections for future generations and concomitant present-day obligations relative to them are supported by plausible and persuasive theories of social justice (particularly when the theories are grounded on the value of respect, the core value of human rights³). It finds, too, a broad consensus in law and religion around the following three propositions:

² The Distinguished Advisors Panel was comprised of the following well-known experts (in alphabetical order): Harriet Barlow (Director of the HKH Foundation), Richard Falk (Albert G. Milbank Professor of International Law and Practice Emeritus, Princeton University, New Jersey), Gary Hart (Co-Chair of the Presidential Climate Action Committee and former Senator and US presidential candidate from the State of Colorado), Roger Kennedy (dormer Director the National Park Service and Director Emeritus of the National Museum of American History, Washington, DC), Bill McKibben (environmentalist author and activist and Scholar-in-Residence, Middlebury College, Vermont), Bryan Norton (Professor of Philosophy at Georgia Tech University and charter member of the Environmental Economics Advisory Committee of the US Environmental Protection Agency's Science Advisory Board), David Orr (Paul Sears Distinguished Professor of Environmental Studies and Politics, Oberlin College, Ohio), James Gustave Speth (formerly Carl W. Knoblock, Jr. Dean of the School of Forestry and Environmental Studies, presently of the faculty of Vermont Law School), Jörg Chet Tremmel (Founder and Director of the Foundation for the Rights of Future Generations, Germany), and Edith Brown Weiss (Francis Cabell Brown Professor of International Law, Georgetown University, Washington, DC).

³ See Burns H. Weston, *Climate Change and Intergenerational Justice: Foundational Reflections*, 9 Vt. J. Env'tl. L. 375 (2008); available also as Background Paper No. 2 in Appendix A of the CLI Policy Paper.

- that the vast majority of the US population—indeed, the vast majority of the world’s population—believes, at least intuitively, that we, the living, have an obligation to leave a livable world to future generations;
- that this obligation must take the form, in Brown Weiss’ terms, of (a) preserving diversity of natural and cultural resource options comparable to those enjoyed by previous generations; (b) maintaining the quality of the planet so that it is passed on in no worse condition than when received, and repairing it where necessary to meet this duty; and (c) providing members of current generations equitable access to the legacy of past generations and conserving this access for future generations; and
- that this aspiration has found its way, too, into US federal and state and foreign constitutions, in national and subnational legislation, in regulations and judicial decisions, and, indeed, in the emerging law of human rights that extends to all people everywhere.

Additionally, it identifies and evaluates existing laws that support and codify the obligation to leave an ecologically livable world to future generations.

On final analysis, however, the CLI Policy Paper finds these expressions of intergenerational concern and commitment to be, overall, much too limited in scope and practice to meet the challenge of presently ominous and potentially catastrophic climate change. At the same time, it notes that, in the US, the Preamble of the US Constitution expresses concern for posterity and provides, therefore, a strong impetus (within the US at least) to develop legal structures and practices to protect future generations.

In this spirit, the Policy Paper calls for a paradigm shift in legal thought and action relative to the environment (globally, regionally, and locally). It argues for new legal norms, institutions, and procedures that give to the ecological rights and interests of present and future generations at least equal standing with the essentially market-driven norms and practices that rule worldwide today but which were crafted during and for a bygone 19th century Industrial Revolution and its economic priorities and interests. "Present and impending climate

change," it observes, "brings us face to face with stark, discomfiting images of a non-future. . . . Business-as-usual now appears as an irreversible experiment with the only atmosphere humans have."⁴

The CLI Policy Paper therefore concludes that, to meet the climate change challenge, the United States and world needs a heavy dose of intellectual and moral daring committed to ensuring an ecological legacy that will benefit our children, grandchildren, great-grandchildren, and other future generations. To this end, it calls for the litigation of select cases and the reinterpretation of existing laws sensitive to the preciousness of all life on Earth. Also, in a manner intended to stimulate—not foreclose—dialogue and innovation, the Policy Paper urges progress on sixteen legal initiatives "that leave a legacy of ecological justice for future generations,"⁵ defined by the ideal of a clean, healthy, and sustainable global environment. Among them are:

- the adoption of state and national constitutional amendments and statutes establishing the rights of present and future generations to clean, healthy, and sustainable environments;
- the enactment of state environmental protection acts (SEPA) to complement and strengthen, and a national environmental legacy act (NELA) to supplement, already existing but weak national environmental protection laws, the US National Environmental Protection Act (NEPA) in particular;
- the adoption of cap-and-trade regulations for allocations to energy efficiency;
- the creation of sky trusts and other environmental stakeholder trusts to sustain and safeguard common ecological assets
- the expansion of the ancient public trust doctrine beyond its current limited application to safeguard the entire environment for present and future generations;

⁴ CLI Policy Paper, p. 60.

⁵ *Id.* at 62.

- the establishment of legal guardians for future generations, with provision for their training and certification;
- the adoption of UN resolutions aimed at protecting the ecological rights and interests of present and future generations; the right to a clean, healthy, ecologically balanced, and sustainable environment; and the recognition of the atmosphere as part of the global commons or the benefit of present and future generations; and
- the fine tuning of international trade rules to the ecological needs and interests of future generations.

Longer term, but arguably most important of all, is a call for the definition, development, and deployment of a Law of the Ecological Commons for present and future generations, guided by life-sustaining, community-nourishing, and dignity-enhancing principles and procedures applicable globally as well as locally.

To this I have begun to bend my energies. Together with commons scholar and policy strategist David Bollier,⁶ I am exploring the enclosure of ecological commons large and small the world over, i.e., the privatization and commodification of large swaths of nature, culture, and other collective resources by corporations and governments using their political clout to secure free or subsidized access to public forests, minerals, and other natural resources (among other things); inventing new technologies to own and control nano-scale elements of matter; and treating the atmosphere, the oceans and other water resources, and the lands of poverty-stricken developing countries as essentially free waste dumps. It is this process, indeed, that, in modern times at least, is largely to blame for global warming, consequent climate change, and the tragic loss of precious species (including human beings). Our Commons Law Project (CLP), as we call it, will critique the reasons for the enclosures of nature (especially the neo-liberal economic commitment to private property rights and unfettered market activity); explore the ecological commons and its and venerable history in law, stretching back to the Romans and the Magna Carta and its lesser known companion Charter

⁶ Also author of *Silent Theft: The Private Plunder of Our Common Wealth* (2003); co-editor of the blog Onthecommon.org; and Croxton Lecturer on the commons at Amherst College, Massachusetts.

of the Forests, to substantiate at least in theory if not always in practice the human right to a clean, healthy, and sustainable environment; and operationalize this increasingly demanded right by revealing and reclaiming the commons (ecological and otherwise) as an abiding mode of sustainable resource management and humane community governance.

There are many reasons for doing this, but three stand out: the commons offers a penetrating critique of neoliberal capitalism; it proposes a range of practical models for managing resources; and it embodies a worldview that is more ecologically responsible and socially attractive.⁷ Although still a rudimentary schema of modern law and governance, the commons is far more holistic in perspective, empirically grounded, socially rooted, and ontologically sound than the free-market fundamentalism that has prevailed for the past generation, much to the detriment of the natural environment and human rights.

It is, thus, impossible to think that creative responses to the climate change challenge can be successful without, as the CLI Policy Paper asserts, innovative as well as effective legal and policy action. The Policy Paper offers a preliminary menu of such opportunity, including recommendations that address the international legal order. But even those that were prepared with primarily the US legal system in mind are potentially useful and adaptable to other national legal systems worldwide.

Make no mistake. The law is a slow and often ponderous process even when it produces radical outcomes. We have no illusion that the law can or will respond quickly to the environmental and human rights crisis that is painfully at hand, at least not in democratic societies. Yet, by identifying, devising, and promoting legal strategies that can help offset the deficit found to exist in the way the law prioritizes free market values over the environment and human rights, we can, I believe, do some good. And especially if, along the way, they give real impetus to a much-needed paradigm shift in the way law and nature interact. "The world is in a state of planetary emergency" warns NASA climatologist—and University of Iowa alumnus—James Hansen;⁸

⁷ For important validation, see 2009 Nobel Laureate Elinor Ostrom's *Governing the Commons: The Evolution of Institutions for Collective Action* (1990).

⁸ James Hansen, *Tipping Point, in The State of the Wild 2008* (2008), available at

referring to the amount of carbon dioxide currently in the atmosphere, he admonishes that “it is incompatible with the planet on which civilization developed.”⁹ There is no time to lose. We must get on with the transformative task, reframing the law of the environment as if the rights of living things human and otherwise really matters absolutely and as quickly as possible.

For the complete CLI Policy Paper and other details, kindly visit www.vermontlaw.edu/cli (then click on the Publications tab). I can be reached at <burns-weston@uiowa.edu>. My co-author Professor Bach can be reached at <tbach@vermontlaw.edu>.

http://pubs.giss.nasa.gov/docs/2008/2008_Hansen_1.pdf, 7–15. See also James Hansen, *The Threat to the Planet*, in NY Times Review of Books, 13 July 2006.

⁹ *Id.*