

# KOSMOS

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**CUTTING EDGE LAW, JUSTICE, POWER AND PEACE**

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TOWARD A COMMON THEORY OF VALUE  
21st CENTURY COLLECTIVE SPIRITUALITY  
NEW PARADIGM FOR DEVELOPMENT AND GOVERNANCE

## Guardians of Future Generations

by Carolyn Raffensperger

*"The affinities of all the beings of the same class have sometimes been represented by a great tree... As buds give rise by growth to fresh buds, and these if vigorous, branch out and overtop on all sides many a feebler branch, so by generation I believe it has been with the great Tree of Life, which fills with its dead and broken branches the crust of the earth, and covers the surface with its ever branching and beautiful ramifications."*

— Charles Darwin, 1859

*I dreamed that I was standing next to a young tree. It was the Tree of Life. One branch was dead. The tree was dying from the changing climate. I was charged with keeping it alive for future generations.*

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Years ago, a colleague of mine, Bob Shimek from the Indigenous Environmental Network, called to ask how we could put the precautionary principle<sup>1</sup> together with the seventh generation rule to change the terms of the debate around a large gold mine proposed for Bristol Bay in southwest Alaska. At 20 square miles, the Pebble Mine would be one of the largest open-pit gold mines in the world. The secret of the Bay is that its waters support half of the world's salmon. The mine would require dams to forever hold back the cyanide-laced mine tailings from the waters of the rivers and Bay.

Whenever I hear the word 'forever,' I sit up and take notice. Most of the treasures we are able to protect we can save in the present moment. There are always new threats. We are not guaranteed protection forever. But damage can be forever. Mountain top removal, species extinction, mine tailings—these things are forever. Bob was asking how we could stop the forever damage of the Pebble Mine and leave Bristol Bay, the salmon and rivers and local tribes intact, healthy and undamaged.

I had been working on the precautionary principle since 1998. At the time, it was a novel way to make decisions because it coupled epistemology with ethics. Most environmental issues were decided solely on economics and risk sciences. Decisions like whether to permit the Pebble Mine were generally made using cost-benefit analysis. How could we say 'no' to the mine when it would generate jobs and a lot of raw materials used in the industrial economy? There aren't a lot of people in the Bristol Bay area and it was possible that the dams would hold the mining tailings for long enough that we could figure out another solution. There was little or no discussion of ethics or rights in the halls of governmental agencies. The challenge of the precautionary principle is that it involves a different calculus than risk and economics in

its mandate to take action to prevent harm to present and future generations (the ethic) in the face of scientific uncertainty (the epistemology).

All along my indigenous friends had said that the precautionary principle was the seventh generation rule, a rule long practiced by the Iroquois Confederacy of the northeast United States. Decisions ought to be made with the seventh generation in mind. Would we think about the Pebble Mine differently if we considered its impact on our great grandchildren's great grandchildren?

When I went to participate in a workshop in Yellowknife, Alaska on the Giant Mine, a mine that is at the other end of the mining life cycle from the not-yet mined Pebble Mine, I realized how many places we have ravaged with our worn-out economic arguments and our monstrously huge machinery. The Giant Mine is abandoned by the mining company but remains an oozing, toxic 2,300-acre scar on the Earth, leaking tons of arsenic trioxide into the local waters. It will be hazardous for millennia. I had been asked to draft the principles of perpetual care for the Giant Mine to guide the long-term management plan of the Canadian government.

The Giant Mine was the first place I understood the nature of forever. Governments caring for other sites, such as the US Waste Isolation Pilot Plant site holding transuranic waste, were aiming at site integrity and waste containment for 250,000 years. In generational shorthand, that is 10,000 generations. What struck me was how long seven generations seemed when I was seeking to implement it as a way of making decisions. We are so far outside the bounds of seven generations that 'forever' takes on new meaning. We are literally destroying the tree of life—hacking it down, branch by branch.

Bob's question about how we could put the seventh generation rule into play around the Pebble Mine provoked an instant answer: we could designate a legal guardian for future generations to protect their interests and their rights.

That question and answer initiated a legal project that was premised on the concept that present and future generations share an unalienable right to a clean and healthy environment. This stands in contrast to how environmental law is practiced in the West, which is essentially free-market, private-property law based on a utilitarian ethic. We buy and sell clean air and clean water and the privilege of polluting. Private property is privileged over the right to breathe clean air or drink clean water.

## Rights-Based Law vs. Utilitarianism

The law of rights is an entirely different body of law than free-market, private-property law. It is built on a different ethic than utilitarianism with its greatest good for the greatest number. You cannot buy and sell an inalienable right. The argument for mining a place like Bristol Bay is that there aren't many people who live there. The benefit of mining to the economy accrues to a lot of people, whereas the probable damage only affects the ecosystems and the few Alaska natives who live in the lands of Bristol Bay. Under a utilitarian ethic, it is assumed that the people and the Bay should be willing to sacrifice for the good of everyone else.

Over the past 20 years, the possibilities of the future have narrowed. We are at a terrifying precipice of environmental change that our ancestors could not have imagined. Climate change, more than any other problem, threatens the very existence of Future Generations. But climate change is not the only tragedy we are leaving to Future Generations. The entire globe is pock-marked with abandoned mines, Fukushimas, the silence of sick and lost amphibians, an acidified ocean. Capitalism and the underlying utilitarian premise made the Earth a sacrifice zone because every place was fungible and marketable.

Rights are not fungible and marketable. They exist and function outside the market. Rights are recognized and codified in different ways within the law. United Nations Declarations, such as the UN Declaration of Human Rights, do not rise to the level of common or judicial law, but they become universal standards by which we judge violations of norms. Most countries, states and tribal governments adopt constitutions that spell out rights. Similarly, statutes that either give voice to constitutions or stand on their own serve to define the parameters of rights.

Currently, Future Generations are mentioned in various treaties, constitutions and statutes but their right to a clean and healthy environment has not yet moved forward in a comprehensive legal fashion. That could change with the growing reality of climate change, which raises the twin questions of what rights do Future Generations have and what are our responsibilities to them? The Rights of Nature have been recognized in some nations' constitutions and US municipalities. The Rights of Nature overlap the rights of Future Generations of all beings because what is being protected—the web of life—is the same for Nature or Future Generations.

Model constitutional provisions specify the right of Future Generations as follows: Article i: inalienable right § 1: Right to an Ecologically Healthy Environment:

(1) Present and future generations of citizens of the State have the right to an ecologically healthy environment. This right includes but is not limited to: the enjoyment of clean air, pure water, and scenic lands; freedom from unwanted exposure to toxic chemicals and other contaminants; and a secure climate.

(2) This right is self-executing although it shall be maintained and strengthened under the guidance of the State Legislature.

## New Institutions: Guardians of Future Generations

If Future Generations have a right to inherit an ecologically healthy environment, present generations have a responsibility to tend and nurture it. Fulfilling our responsibility will require new institutions and new decision-making strategies since the old institutions and decision-making strategies were built on entirely different assumptions. The idea of a guardian or an ombudsman for Future Generations is precisely the kind of new institution that could embody the new assumptions of inalienable rights to a clean and healthy environment. A guardian or ombudsman can be located at every level of government from the United Nations to municipalities.

Guardians would have three primary responsibilities: The first would be to review regulations for their impact on Future Generations.

The second responsibility would be to do an audit of the commons under their jurisdiction and report the status and health of the shared commonwealth. They would draft plans for restoring the well-being of the commons for Future Generations.

The final responsibility of the guardians of Future Generations would be to participate in all decisions that could have an impact on the seventh generation or beyond and, as the representatives of generations to come, give or withhold consent to projects that would affect the rights of Future Generations.

Most proposals for guardians of Future Generations will be asked to evaluate activities that would provide an economic benefit to present generations but environmental losses to both present and Future Generations (e.g., mining, fracking, drilling, logging, fishing, agricultural practices, transportation systems).

## Decision-Making Principles for Future Generations

Fulfilling our responsibility to Future Generations calls for not only new institutions but also new decision-making tools, especially economic ones. Yes, the guardian of Future Generations would use the precautionary principle. The principle calls for heeding early warnings, setting goals, identifying and choosing the best alternative to harmful activities, reversing the burden of proof, and the democratic processes of consultation and consent.

The economic tenets of Future Generations' rights are three-fold. The first is that present generations may leave Future Generations a debt, but the debt must be for an asset that Future Generations also inherit. We can leave a bond to Future Generations by bequeathing them a gorgeous park. But disasters are on a pay-as-you-go basis. The radioactive waste sites, the abandoned mines, the polluted streams cannot be left for Future Generations to

clean up. They did not reap the benefits of the nuclear energy, the mines or the pollution. They cannot be required to pay.

The second basic economic tenet is that the polluter must pay, not the public and certainly not Future Generations. The polluter cannot outsource the costs of pollution and environmental degradation onto the commons.

The third economic tenet is that financial discounting may not be used to justify inaction. An economic expression of the precautionary principle parallels the notion that scientific uncertainty shall not be used as an excuse to delay precautionary action. The economic version is that discounting shall not be used as an excuse to delay precautionary action. We have used the economic argument that the future is uncertain and a dollar today is best spent on known benefits rather than preventing uncertain harm in the distant future. We have also argued that Future Generations will be smarter, richer and have more technological inventions at their disposal so we should leave these problems to them. These arguments fail in the face of the strong probability that unless we make major changes in behavior and technology, the future will be full of climate chaos, major environmental degradation and species loss. Investing today in those changes makes a healthy future more likely.

### The Right to Consent: A Centerpiece of Community Law

A right emerging in international fora is that of Free, Prior and Informed Consent. The UN Declaration of the Rights of Indigenous Peoples asserts that indigenous people have a right to be consulted and give or withhold their consent to activities that affect their lands and their future. Familiar to many as the right of individuals to not have experiments done on them without their consent, this right of consent is becoming a center-piece of the law of community. Communities have rights. Rights are not just enjoyed by individuals but by the communities of indigenous people with their places, communities of Future Generations and by all of us who share the commons of air, water, the moon, the ocean, wildlife. These are rights we hold *with* each other. As such, the right of Free, Prior and Informed Consent is a right of community self-determination. The legal guardian of Future Generations must have the authority to be consulted and to give or not give consent to activities that may destroy the ability of Future Generations to thrive.

### Taking Away the Axe: A Dream

The advantage to acting now and caring for present generations is that it will set us on a course that increases the chance that Future Generations will have a habitable and healthy world. When setting out on a long journey, a tiny shift in the compass direction we choose can make all the difference in where we end up. I think of that compass direction in light of a dream a beloved had a few years ago. He is also an indigenous man and had gone to support an Indian tribe in a mining struggle on the border of Canada and



The UN Declaration of Rights of Indigenous Peoples upholds the right to consent.

the United States. The mining company was badgering the elders to sell their mineral rights for pennies on the dollars. My friend took his dream to the women of the community and they agreed to follow its direction. This is what happened. The women invited the mining officials to breakfast with the children. They prepared a menu of eggs, bacon and polenta. They did not serve toast because they did not wish to use their best jam. The children were dressed in their best clothes, scrubbed and combed. They had had practice conversations with adults and told there was nothing they could do wrong. On the morning of the breakfast, the children were paired at the table with a mining official. The children and officials carried on conversations about their names, whether they had brothers and sisters, what they liked in school, and the date of their birthdays. When it was time to go to school, the children were ushered out and the officials returned to their seats. The mothers took the chairs of their children and the grandmothers stood behind them. The mothers offered the mining officials pictures of their children and then asked a litany of questions: “Do you choose my child to die of leukemia? Do you choose my child to die of a brain tumor? Do you choose my child to have reproductive disorders and be unable to have children? Tell me now so I can mourn properly.” The mining officials wept. One quit her job on the spot. The mining trucks were gone by that afternoon.

That is not the end of that story. There will never be an end. But somehow mothers and grandmothers found a way that morning to protect the children and grandchildren. They prevented a mining disaster in their community. I think perhaps they also healed the souls of the mining officials. Will that mining company be back with new personnel or will another mining company take their place? Probably. But this is what I know for sure. There will be dreamers. There will be lawyers. There will be artists and engineers and mothers and grandfathers. There will be another breakfast. We will stand together as guardians of the future. We will tend and nurture the tree of life for generations to come.

<sup>1</sup> <http://sehn.org/precautionary-principle>

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