

# Laboratories of the Future: Tribes and Rights of Nature

Elizabeth Kronk Warner\* and Jensen Lillquist\*\*

The arc of the moral universe is long but it bends toward justice.

—Dr. Martin Luther King, Jr.<sup>1</sup>

Tribes are not vestiges of the past, but laboratories of the future.

—Vine Deloria, Jr.<sup>2</sup>

---

DOI: <https://doi.org/10.15779/Z38599Z292>

Copyright © 2023 Elizabeth Kronk Warner and Jensen Lillquist.

\* Elizabeth Kronk Warner is the Jefferson and Rita Presidential Dean and Professor of Law at the S.J. Quinney College of Law at the University of Utah. She is also a citizen of the Sault Ste. Marie Tribe of Chippewa Indians. Prior to beginning the deanship at Utah Law, she served as a tribal district judge for the Prairie Band Potawatomi Nation and as an appellate judge for her own Tribe, the Sault Ste. Marie Tribe of Chippewa Indians. She is incredibly thankful to Esther Johnson for her help in translation and also to the amazing library staff, and especially Melissa Bernstein and Kerry Lohmeier, at the S.J. Quinney College of Law for their assistance in responding to research questions and with citations. Special thanks to Angela Turnbow for her assistance in formatting this article.

\*\* J.D. Candidate 2023, S.J. Quinney College of Law; Editor-in-Chief of the *Utah Law Review*.

1. Rev. Dr. Martin Luther King, Jr., Remaining Awake Through a Great Revolution, Address at the National Cathedral (Mar. 31, 1968).

2. *To Protect the Constitutional Rights of American Indians, 1965: Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968 and S.J. Res. 40 Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary*, 89th Cong. 195 (1965) (statement of Vine Deloria, Jr., Executive Director of the National Congress of American Indians).

*From global challenges such as climate change and mass extinction, to local challenges such as toxic spills and undrinkable water, environmental degradation and the impairment of Earth systems are well documented. Yet, despite this reality, the U.S. federal government has done little in the last thirty years to provide a comprehensive solution to these profound environmental challenges; likewise, significant state action is lacking. In this vacuum, environmental legal advocates are looking for innovative environmental solutions to these challenges. Against this backdrop, rights of nature have increasingly gained traction as a possible legal tool to help protect the natural environment from the harms perpetrated by humans. Rights of nature laws generally have two elements: (1) legal personhood for natural entities, such that nature has standing in court, and (2) substantive rights for natural entities. This Article explores the scope and origins of rights of nature and examines how they are being implemented both within the United States and abroad. It highlights the work being done by Tribes and Indigenous Peoples in this space and argues that, particularly in the United States, state and local governments should learn from this work. Specifically, the work of Tribes in this space can serve as alternative ethical paradigms and laws for non-Native communities looking for an alternative to the status quo. In the United States, Tribes can serve as “laboratories” for environmental change given their tribal sovereignty and environmental ethics. In addition, Tribes exist within a different legal framework from U.S. states and municipalities. By comparing rights of nature-related litigation in Florida and in the White Earth Nation of Ojibwe, it becomes clear that rights of nature provisions adopted by Tribes stand a greater chance of withstanding legal challenge than provisions adopted by municipalities. Accordingly, environmental reform can benefit from the collaboration and experimentation of Tribes.*

Introduction .....	327
I. Rights of Nature in Contemporary Law .....	330
A. What Are “Rights of Nature”? .....	330
1. Legal Personhood .....	334
2. Substantive Rights .....	339
B. Implementation of Rights of Nature .....	341
1. Global Developments .....	342
a. Constitutional Rights of Nature .....	343
b. Statutory Rights of Nature .....	347
c. Judicially Recognized Rights of Nature.....	351
2. Subnational U.S. Developments .....	353
II. Tribes and the Rights of Nature .....	362
A. Laboratories for the Future .....	363

1. Tribal Sovereignty .....	363
2. Tribal Environmental Ethics .....	369
3. Tribes as Laboratories.....	375
B. Development of Rights of Nature within Tribal Governments	
379	
1. The Ponca Tribe of Indians of Oklahoma.....	381
2. The Yurok Tribal Council of the Yurok Tribe.....	382
3. The Menominee Indian Tribe of Wisconsin .....	382
4. The Nez Perce Tribal General Council.....	383
5. Considering the Resolutions .....	384
III. Pending Rights of Nature Cases: <i>Wilde Cypress Branch</i> and	
<i>Manoomin</i> .....	385
A. <i>Wilde Cypress Branch v. Beachline South Residential</i> .....	386
B. <i>Manoomin v. Minnesota Department of Natural Resources</i>	388
Conclusion .....	392

## INTRODUCTION

Rights of nature are increasingly moving into the legal mainstream, both in the United States and abroad.<sup>3</sup> Rights of nature laws, which seek to make injuries to natural entities legally cognizable and justiciable in court, generally consist of at least one of two elements: (1) legal personhood for nature or specific natural entities and (2) substantive rights for nature or specific natural entities.<sup>4</sup> To date, six countries have implemented the rights of nature on a national level,<sup>5</sup> and several states and cities outside the United States have passed rights of nature.<sup>6</sup> Within the United States, various Tribes and municipalities have passed rights of nature laws; no state has done so.<sup>7</sup> Considering that before the early 2000s, no rights of nature law had been passed,<sup>8</sup> these laws represent a fairly significant legal and cultural shift, at least within their respective jurisdictions. Environmental law scholars are clamoring to examine the impacts of these

---

3. See Erin O'Donnell, Anne Poelina, Alessandro Pelizzon & Cristy Clark, *Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature*, 9 *TRANSNAT'L ENV'T L.* 403, 404–05 (2020).

4. See *infra* Part I.A.

5. See *infra* Part I.B.1.

6. See *infra* note 205.

7. See *infra* Part I.B.2.

8. See *Rights of Nature: Timeline*, CELDF, <https://celdf.org/rights-of-nature/timeline/> [<https://perma.cc/34ZY-V3NM>] (last visited Jan. 26, 2023) (tracing the first rights of nature law to 2006); *What Are Rights of Nature? Rights of Nature Legislative Examples, History, Timeline, Documents & References*, INVISIBLE HAND, <https://www.invisiblehandfilm.com/what-are-rights-of-nature/> [<https://perma.cc/2WAC-475U>] (last visited Jan. 26, 2023) (same); Katie Surma, *Does Nature Have Rights? A Burgeoning Legal Movement Says Rivers, Forests and Wildlife Have Standing, Too*, *INSIDE CLIMATE NEWS* (Sept. 19, 2021), <https://insideclimatenews.org/news/19092021/rights-of-nature-legal-movement/> [<https://perma.cc/B8DF-XHW6>] (same).

developments and how advocates might successfully utilize such arguments in state and federal court.<sup>9</sup> While existing environmental laws and related environmental ethics and values within the United States tend toward anthropocentrism in prioritizing the protection of humans alone, rights of nature laws and ideals center on the natural world.<sup>10</sup> For many who view rights of nature as valuable to the effective protection of the environment and as a necessary switch toward an environmental ethic that will better protect the Earth from the negative impacts of exploitation, it may seem as if the arc of the moral universe is finally bending toward justice.

Ultimately, non-Native communities considering or looking for ethical paradigms alternative to anthropocentrism should consider the work being done by Tribes in this space. Tribal environmental ethics may depart from anthropocentrism, and Tribes are already implementing laws based on such alternative ethical paradigms. Yet, scholars and advocates often fail to look to Indigenous Peoples and Tribes for guidance in this area;<sup>11</sup> Indigenous Peoples and Tribes have been incorporating the rights of nature principles into tribal and customary law for a long time.<sup>12</sup> This Article helps to fill the void by demonstrating not only that the theoretical conception of rights of nature may benefit from Indigenous Peoples, but also that Tribes can offer legal protections where other actors cannot. To date, at least five Tribes within the United States have passed rights of nature resolutions.<sup>13</sup> These Tribes, as much as any state or municipality, represent laboratories in which the concept of rights of nature can be tested for strengths and weaknesses. This testing may in fact produce the United States' first enforceable rights of nature provisions.

Tribes have the potential to possess significant regulatory power and are unique within the U.S. legal system. “[T]hey are both sovereigns and wards subject to the protection of the federal government.”<sup>14</sup> In *Montana v. United States*, the Supreme Court stated that “the inherent sovereign powers of an Indian [T]ribe do not extend to the activities of nonmembers of the [T]ribe.”<sup>15</sup> Yet, it

---

9. See, e.g., Erin Ryan, Holly Curry & Hayes Rule, *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2447 (2021) (detailing rights of nature laws and examining their impacts through comparisons to the public trust doctrine); Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature As Law*, 31 TUL. ENV'T L. J. 1 (2017).

10. See Ryan et al., *supra* note 9, at 2541–55 (comparing the public trust doctrine, which is emblematic of anthropocentric environmental law within the United States, to the rights of nature, which are biocentric).

11. See O'Donnell et al., *supra* note 3, at 411 (“The underlying assumption that this intensive management represents a radically *new* way of engaging with the environment obscures the contributions made through the specific laws of Indigenous people, who have managed ‘Country’ in this way for millennia.”).

12. See *id.* at 405.

13. See *infra* Part II.B.

14. M. Julia Hook, Dorsey & Whitney LLP, *Federal Regulatory Delegations to States and Indian Tribes*, WESTLAW 104A ROCKY MOUNTAIN MINERAL L. FOUND. 13-1, 13-4 (1999).

15. *Montana v. United States*, 450 U.S. 544, 565 (1981).

created two exceptions to this general rule: first, a “[T]ribe may regulate . . . the activities of nonmembers who enter consensual relationships with the [T]ribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>16</sup> Second, a “[T]ribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe.”<sup>17</sup> The second *Montana* exception is especially relevant to the enforcement of rights of nature laws.

Thus, while U.S. municipalities have faced substantial obstacles to enacting enforceable rights of nature provisions, Tribes may be more successful. This is because of the inherent sovereignty of Tribes and because tribal environmental ethics differ from those of many non-Native communities in notable ways.<sup>18</sup> Many (although certainly not all) Tribes possess a relationship with their environment and land that recognizes not only how humans are benefitted by nature but also values nature for its own self-worth. This special connection with the environment and land therefore informs the environmental ethics of many Tribes. That ethic, which differs from mainstream environmental ethics, improves the likelihood of effective and enforceable rights of nature provisions within tribal communities.

This Article highlights a legal path for Tribes in the United States to enact enforceable rights of nature provisions where U.S. municipalities cannot. As such, Part I more fully details the concept of “rights of nature” and how this legal concept relates to the more traditional anthropocentric model of environmental laws used within the United States. In addition, Part I examines both international and subnational developments in the United States and discusses the relative strengths and weaknesses of the several existing models, as well as challenges to enforceability. Part II turns to Tribes in the United States and more fully details tribal exceptionalism and sovereignty, tribal environmental ethics, and the concept of Tribes as laboratories. Part II then examines several tribal rights of nature provisions. Part III compares two ongoing cases to highlight the potential strength of Tribes in this area: *Wilde Cypress Branch v. Beachline South Residential*,<sup>19</sup> which stems from Orange County, Florida’s rights of nature provision, and *Manoomin v. Minnesota Department of Natural Resources*,<sup>20</sup> which stems from the White Earth Band of Ojibwe’s rights of nature provision.

---

16. *Id.*

17. *Id.* at 566.

18. *See infra* Part II.A.2.

19. Complaint, *Wilde Cypress Branch v. Beachline S. Residential, LLC*, No. 2021-CA-004420-O (Fla. Cir. Ct. Apr. 26, 2021).

20. Complaint, *Manoomin v. Minn. Dep’t of Nat. Res.*, Civil Case No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021), <https://turtletalk.files.wordpress.com/2021/08/manoomin-et-al-v-dnr-complaint-w-exhibits-8-4-21.pdf> [<https://perma.cc/6JL8-EGJT>].

Ultimately, this Article advances the emerging rights of nature literature in two important ways. First, it demonstrates how Tribes<sup>21</sup> have made and continue to make important contributions to the rights of nature discourse both inside of the United States and beyond. Second, this Article examines how legal arguments in support of rights of nature have a greater likelihood of success in tribal court systems than in other legal systems within the United States. This is because, to date, courts have not questioned a Tribe's sovereign authority to enact such legislation; the same cannot be said for municipalities within the United States. This is the first Article to substantively examine how Tribes within the United States fit within the larger rights of nature movement and how the unique role of Tribes within the U.S. legal system may produce different results.<sup>22</sup>

## I.

### RIGHTS OF NATURE IN CONTEMPORARY LAW

Rights of nature have become an emerging area of scholarly and practical debate.<sup>23</sup> This Part proceeds first by examining what is meant by “rights of nature” and second by looking to how rights of nature have been implemented globally and within the United States. It provides a foundation from which to compare and contrast the rights of nature laws developed by several nations, U.S. municipalities, and Tribes located in the geographic United States.

#### A. What Are “Rights of Nature”?

As an initial starting point, it is helpful to begin with an understanding of what “rights of nature” are. By centering the natural world, rights of nature diverge from the majority of existing U.S. environmental laws, which center protection of humans and their environment. While proponents do not always

---

21. Tribes as separate governments possessing inherent sovereignty is a concept unique to the United States. Accordingly, this article uses the terms “Tribe” and “Indigenous Peoples” when referring to the contributions of tribal governments within the United States and the incredibly valuable contributions of Indigenous Peoples around the world. Both terms are used to be truly inclusive of these impressive contributions.

22. Cf. Ryan et al., *supra* note 9, at 2536–39 (briefly noting several North American Tribes that have recognized rights of nature, but not discussing the legal framework in which they reside); Alexandra Huneeus, *The Legal Struggle for Rights of Nature in the United States*, 2022 WIS. L. REV. 133 *passim* (2022) (outlining rights of nature in the United States and detailing developments in United States-based Tribes).

23. For a discussion of and response to some of the most common arguments against adoption of a rights of nature framework, see Houck, *supra* note 9, at 27–30. See also Surma, *supra* note 8 (noting the arguments by both proponents and opponents on rights of nature laws); Martuwarra RiverOfLife, Alessandro Pelizzon, Anne Poelina, Afshin Akhtar-Khavari, Cristy Clark, Sarah Laborde, Elizabeth Macpherson, Katie O'Bryan, Erin O'Donnell & John Page, *Yoongoorrookoo: The Emergence of Ancestral Personhood*, 30 GRIFFITH L. REV., 505, 508–09 (2021) (observing how some authors criticize rights of nature and personhood for being merely symbolic and inconsistent).

agree on exactly which rights should be held by nature or natural objects,<sup>24</sup> there are generally two components to rights of nature, both in proposals and implementations:<sup>25</sup> (1) legal personhood and (2) substantive rights.<sup>26</sup> These components will be discussed in detail below. Before exploring these in any great depth, however, it is also useful to sketch the origins of rights of nature legal frameworks and the problems such laws seek to address, and to distinguish rights of nature laws from other environmental laws.

Most commentators who discuss rights of nature point to Professor Christopher Stone's seminal article *Should Trees Have Standing?*<sup>27</sup> While the idea of "rights of nature" certainly did not originate with Stone, even within Anglo-American thought,<sup>28</sup> he was the first to analyze the issue within a modern U.S. legal framework.<sup>29</sup>

Professor Stone frames his argument in favor of the development of the rights of nature by explaining that some groups, such as children, women, and

24. Compare, e.g., Markie Miller & Crystal Jankowski, Letter to the Editor, *Personhood Will Not Protect the Environment*, THE GUARDIAN (Nov. 22, 2019), <https://www.theguardian.com/global/2019/nov/19/weekly-letters-failure-of-democracy> [<https://perma.cc/XE7J-UTBM>] (arguing, as proponents of the Lake Erie Bill of Rights, that legal personhood is inappropriate and that ecosystem rights in combination with a human right to a healthy environment are needed), with OLIVER HOUCK, MARI MARGIL, SHRAWAN SHARMA, RYAN TALBOTT, TAMMY BELINSKY, LINDSEY SCHROMEN-WAWRIN, HUGO ECHEVERRIA, STACY LONG, MICHELLE MALONEY, FRANCISCO BUSTAMANTE, PELLA THIEL, BILL GREENDEER, DEON BEN, JULIEE DE LA TERRE, CHRIS NYE, MARION GILLIAM, BEN PRICE, KARA SCOTT, THOMAS LINZEY, SHANNON BIGGS, RICHARD MOTT, NATALIA GREENE, JOHN RICHARDSON & KARENNA GORE, THE RIGHTS OF NATURE PRINCIPLES (2017), <https://celdf.org/wp-content/uploads/2015/08/RIGHTS-OF-NATURE-PRINCIPLES-FOR-CELDF-WEBSITE.pdf> [<https://perma.cc/7TK4-4Y6F>] (calling for "the right of nature to appear as the real party in interest" in legal and administrative proceedings).

25. By "proposals," we mean academic and non-academic commentary calling for rights of nature provisions or arguing for the theoretical viability of rights of nature. By "implementations," we mean legislation, constitutional amendments, court decisions, and so on, that put the theory behind rights of nature provisions into practice.

26. See O'Donnell et al., *supra* note 3, at 408–09 (noting "existence rights" and "legal personhood"); Dana Zartner, *Watching Whanganui & the Lessons of Lake Erie: Effective Realization of Rights of Nature Laws*, 22 VT. J. ENV'T L. 1, 5–7 (2021) (noting legal personhood and substantive rights).

27. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). See, e.g., *Rights of Nature: Timeline*, CELDF, <https://celdf.org/rights-of-nature/timeline/> [<https://perma.cc/34ZY-V3NM>]; *What Are Rights of Nature? Rights of Nature Legislative Examples, History, Timeline, Documents & References*, INVISIBLE HAND, <https://www.invisiblehandfilm.com/what-are-rights-of-nature/> [<https://perma.cc/3FRU-5X9F>]; Surma, *supra* note 8.

28. See generally RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 33–54 (1989) (tracing the history of the concept of "rights of nature" within Anglo-American thought to nineteenth-century thinkers).

29. Stone discusses the development of rights of nature from both a legal perspective and a socio-psychic perspective and explores what it means for nature to have rights. This Article focuses on Stone's legal arguments. For greater discussion on the socio-psychic perspective, see Stone, *supra* note 27, at 489–501. This idea of society's environmental ethics is more fully explored in the Section below discussing rights of nature development within Indian country. Many tribal communities have a different relationship with the environment, which helps to explain in part the prevalence of rights of nature legal arguments in Indian country.

enslaved peoples, were historically denied legal rights in the West, and that these rights were eventually recognized by the mainstream legal system.<sup>30</sup> Additionally, Stone points out that non-living things, such as trusts and corporations, have legal rights,<sup>31</sup> and that lawyers are able to speak for these entities that cannot speak for themselves.<sup>32</sup> He notes: “Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable.”<sup>33</sup> In other words, because Western legal systems have generally expanded right-bearing entities to previously unrecognized groups, and because Western legal systems recognize the rights of non-living entities, there is no theoretical reason why nature or natural entities should not have rights. Many contemporary non-tribal legal arguments in favor of extending legal rights to nature or natural entities echo Stone.<sup>34</sup> The specifics of Stone’s proposal will be discussed more fully below.

Stone’s proposal essentially answers the question of “why not extend these rights?” Perhaps a more fundamental question is “why extend them?” It is no great secret that despite the proliferation of environmental laws in the United States and globally in the late twentieth century (which has certainly improved environmental outcomes), environmental challenges remain: namely, climate change, over-extraction of resources, and mass extinction. To many, rights of nature laws are viewed as a catch-all remedy (whether that is true remains to be seen). Professor Oliver Houck summarizes several reasons rights of nature laws are set forth as a solution to environmental issues:

For one, they reinforce and expand the interpretation of [existing environmental laws], adding restoration requirements to some, enforcement to others. They also provide a safety net where existing programs have been overwhelmed by other interests, or because they fail to address the injury at all. More proactively, they provide a seat at the table, in advance of development decisions, for nature rights to appear through the lens of its own needs and not simply the cacophony of competing human interests. As proactively, they provide a vantage point to demand restoration for past injury and to insist on compensation going forward. Lastly, and perhaps most enduringly, they catalyze a new awareness of our relationship with the natural world, which, in turn, could play a larger role in human survival than many now admit.<sup>35</sup>

---

30. Stone, *supra* note 27, at 451.

31. *Id.* at 452.

32. *Id.* at 464.

33. *Id.* at 453.

34. See, e.g., Houck, *supra* note 9, at 26–27; Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 *ECOLOGY L.Q.* 1, 35–39, 50–51 (2016) (detailing personhood for corporations, and concluding that corporate personhood may provide theoretical support for legal personhood for nature).

35. Houck, *supra* note 9, at 35. See also Erin L. O’Donnell & Julia Talbot-Jones, *Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India*, 23 *ECOLOGY & SOC’Y* 7, 8 (2018)



Importantly, rights of nature laws differ in significant ways from traditional environmental laws. Traditional environmental laws—in the United States, examples include the Clean Water Act,<sup>36</sup> the Clean Air Act,<sup>37</sup> the Endangered Species Act,<sup>38</sup> and the Solid Waste Disposal Act<sup>39</sup>—are typically focused on preventing pollution or conserving resources (and are thus anthropocentric). By contrast, rights of nature laws are focused on rights of natural elements, such as rivers or ecosystems (and as such are more biocentric).<sup>40</sup> Thus, perhaps traditional environmental laws could be rhetorically framed as recognizing a right for water to be relatively free of pollution, or as recognizing the right of a species to continue to exist; indeed, Professor Houck notes as much: “Without mentioning the name, [the United States] already recognizes and enforces the entitlement of all living things to exist and has pioneered significant instruments toward this end including impact assessment, citizen suits, and judicial review.”<sup>41</sup> Yet, traditional environmental laws typically establish a permitting program rather than an absolute prohibition on an activity.<sup>42</sup> Finally, traditional environmental laws are limited by their jurisdictional reach: federal environmental laws often apply only to federal activity<sup>43</sup> or, where they do reach private activity, are limited to an exercise consistent with Congress’ Commerce Clause power.<sup>44</sup> Thus, despite significant overlap between the two, traditional environmental laws are generally narrower in scope than can be rights of nature

---

(arguing that legal personhood for nature is important because “continuing to prosecute environmental cases on the basis of ever-more attenuated ‘harm’ to humans relies on an . . . anthropocentric argument, which obscures the needs of nature . . . [and because] [i]f the injuries to the environment . . . are ignored, then a significant proportion of the total injuries are not accounted for.”).

36. 33 U.S.C. §§ 1251–1388.

37. 42 U.S.C. §§ 7401–7671q.

38. 16 U.S.C. §§ 1531–1544.

39. 42 U.S.C. §§ 6901–6992k.

40. Compare 33 U.S.C. § 1251(a) (“The objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”), with *Ley de Derechos de la Madre Tierra* [Law of the Rights of Mother Earth], Law 071, ch. I, art. 1 (Dec. 2010) (Bol.) (“This Act is intended to recognize the rights of Mother Earth, and the obligations and duties of the Multinational State and society to ensure respect for these rights.”).

41. Houck, *supra* note 9, at 22.

42. See e.g., 33 U.S.C. § 1311(a) (“Except as in compliance with [section 1342, establishing a permitting program,] the discharge of any pollutant by any person shall be unlawful.”); 16 U.S.C. § 1539(a) (allowing for an incidental take permit where an actor may kill or harm endangered species, if such killing is not the purpose of an otherwise legal activity).

43. See 42 U.S.C. § 4332 (“[A]ll agencies of the Federal Government shall— . . . (C) include in . . . other major Federal actions significantly affecting the quality of the human environment [an Environmental Impact Statement].”).

44. See Richard J. Lazarus, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 VA. ENV’T L.J. 231, 259 (2005) (“The precise problem is that congressional authority to enact [environmental laws] depends on the exercise of congressional Commerce Clause authority.”). See, e.g., 33 U.S.C. §§ 1251(a), 1362(12), 1362(7) (limiting the prohibitions of the Clean Water Act to “waters of the United States”); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 170–73 (2001) (limiting “waters of the United States” to non-isolated waters and implying that isolated waters were outside Congress’ Commerce Clause authority).

laws, in that they focus on particular resources, permit environmental degradation, and are generally focused on human health and well-being.<sup>45</sup>

Another relevant distinction is between rights of nature laws and laws recognizing a human right to a healthy environment—though in some cases, one statute may recognize both.<sup>46</sup> As above, the distinction between the two comes in their aim; a right to a healthy environment is focused on human living conditions,<sup>47</sup> while a right of nature is focused on the rights of a natural entity itself.<sup>48</sup> Likewise, rights of nature are not exclusively animal rights, though the two again overlap.<sup>49</sup> Rights of nature laws can focus on landscapes, rivers, entire ecosystems, or nature itself.<sup>50</sup> This Article therefore focuses on the rights of nature outside of humans and animals.

Thus, with that background in mind, we now turn to the two general components of rights of nature laws: (1) legal personhood, and (2) substantive rights.

### 1. *Legal Personhood*

Professor Stone’s original article advocating rights of nature is focused primarily on legal personhood,<sup>51</sup> as its title suggests. As other scholars have

45. Cf. JONATHAN Z. CANNON, *Environmental Law, the Court, and Interpretation*, in ENVIRONMENT IN THE BALANCE: THE GREEN MOVEMENT AND THE SUPREME COURT 28, 31–34 (2015) (describing “a fundamental re-ordering of societal values” and priorities embodied in the main U.S. environmental statutes).

46. See, e.g., The National Environment Act §§ 3, 4 (2019) (Uganda) (“3. Right to a decent environment. (1) Every person in Uganda has a right to a clean and healthy environment . . . 4. Rights of nature. (1) Nature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.”).

47. See James R. May, *The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes*, 42 CARDOZO L. REV. 983, 985 (2021) (“The field of human rights engages rights that are thought to inhere to humanness, commonly categorized as either civil and political, or social, economic, and cultural. . . . A right to a healthy environment straddles the liminality between and among other rights.”).

48. See, e.g., CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR Oct. 20, 2008, tit. II, ch. 7, art. 71 (“Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”); ORANGE CNTY., FLA. CODE OF ORDINANCES part I, art. VII, § 704.1A(1),

[https://library.municode.com/fl/orange\\_county/codes/code\\_of\\_ordinances?nodeId=PTICH](https://library.municode.com/fl/orange_county/codes/code_of_ordinances?nodeId=PTICH) [<https://perma.cc/7VY6-V4LB>] (“The Wekiva River and the Econlockhatchee River, portions of which are within the boundaries of Orange County, and all other Waters within the boundaries of Orange County, have a right to exist, Flow, to be protected against Pollution and to maintain a healthy ecosystem.”).

49. See Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 HARV. L. REV. 276, 279–80 (2021) (relying upon the theoretical distinction between rights of nature and animal rights).

50. See *id.*

51. See generally Stone, *supra* note 27 (“The first sense in which the stream is not a rights-holder has to do with standing. The stream itself has none. So far as the common law is concerned, there is in general no way to challenge the polluter’s actions [unless a human shows] . . . an invasion of *his* rights.”).

noted, “[I]legal personality is articulated as the capacity to bear rights and duties in law. Legal personhood typically confers three specific rights . . . [including] the right to sue and be sued in court (known as legal standing).”<sup>52</sup> When it comes to rights of nature laws, proponents typically focus on legal standing.<sup>53</sup>

Standing under the U.S. Constitution<sup>54</sup> has three elements: (1) injury in fact, (2) causation, and (3) redressability.<sup>55</sup> Establishing legal personhood for natural entities would remove a barrier to establishing the “injury in fact” prong, in essence, by allowing injuries to natural entities to be legally recognized and by allowing groups to rely on those injuries when bringing suit.

Prior to Stone’s article, the law of standing was in flux;<sup>56</sup> some lower courts had held that injuries to recreational and aesthetic interests were sufficient to establish standing for groups with a “special interest” in areas affected by federal

52. O’Donnell et al., *supra* note 3, at 408–09.

53. See, e.g., Stone, *supra* note 27, at 458; Houck, *supra* note 9, at 25–30; *Drewes Farms P’ship v. City of Toledo*, 441 F. Supp. 3d 551, 559 (N.D. Ohio 2020) (describing the Lake Erie Bill of Rights and noting that it establishes standing for Lake Erie). *But see* Te Urewera Act 2014, part 1, subpart 3, §§ 11–12 (N.Z.) (vesting ownership of the land in Te Urewera, a legal person consisting of a previous national park in New Zealand). Importantly, the notion of recognizing legal personhood to non-human entities is not embraced by all rights of nature advocates. For instance, advocates of the Lake Erie Bill of Rights (LEBOR) “distinguish between human rights (‘personhood’) and ecosystem rights.” Markie Miller & Crystal Jankowski, Letter to the Editor, *Personhood Will Not Protect the Environment*, THE GUARDIAN (Nov. 22, 2019), <https://www.theguardian.com/global/2019/nov/19/weekly-letters-failure-of-democracy> [<https://perma.cc/42KD-UD8Q>] (“[LEBOR] does not establish ‘personhood,’” because “[p]ersonhood protections for ecosystems can quickly be co-opted. We must not advance a movement where ecosystem rights come in conflict with the human rights of poor people”). See also *Guest Blog: A Conversation with the Guardian*, CELDF (Dec. 10, 2019), <https://celdf.org/2019/12/guest-blog-a-conversation-with-the-guardian/> [<https://perma.cc/TW5D-ARS9>]. While the distinction between ecosystem rights and human rights is important, the LEBOR unequivocally establishes an element of legal personhood by recognizing Lake Erie as having standing. See *Drewes Farms P’ship v. City of Toledo*, 441 F. Supp. 3d 551, 559–60 (N.D. Ohio 2020) (quoting the LEBOR: “The Lake Erie Ecosystem may enforce its rights [via an action] . . . brought in the name of the Lake Erie Ecosystem as the real party in interest”). Likewise, other proponents argue for variations on legal personhood for non-humans by blending Western systems of law with Indigenous law. See *RiverOfLife et al.*, *supra* note 23, at 517–21 (proposing the “ancestral person” as “a novel and intersectional category of legal personhood located at the encounter between colonial legal systems” and Indigenous beliefs).

54. Importantly, because the standing doctrine derives from Article III of the U.S. Constitution, it applies only when a litigant seeks to “invoke the authority of an Article III court.” *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 661 (D.C. Cir. 1996). See also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992). Thus, state courts are not bound by federal standing requirements and instead apply various approaches to standing. See Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RES. L. 349, 353 (2015) (describing how some states provide exceptions to standing requirements and about half of the states have not explicitly adopted *Lujan*).

55. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

56. See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 169, 179–93 (1992) (arguing that standing was a post-New Deal phenomenon and detailing shifts in the law of standing, including the shift from “legal wrong” to “injury in fact” as a prerequisite for suit).

projects.<sup>57</sup> These cases allowed for proponents of environmental causes to establish standing through injury to them but did not permit standing for non-humans; thus, non-humans are without rights in the eyes of the law. This is the crux of Stone's point: "[A]n entity cannot be said to hold a legal right unless and until *some public authoritative body* is prepared to give *some amount of review* to actions that are colorably inconsistent with that 'right.'"<sup>58</sup> In other words, even if a jurisdiction were to recognize substantive rights to a natural entity, without a process by which to vindicate those rights, that entity would be de facto rights-less.

Thus, Stone argues that to be a "holder of legal rights," an entity must satisfy three criteria: "[F]irst, . . . the thing can institute legal actions *at its behest*; second, . . . in determining the granting of legal relief, the court must take *injury to it* into account; and, third, . . . relief must run to the *benefit of it*."<sup>59</sup> On the first point, Stone argues for a guardianship model as a substitute for traditional standing.<sup>60</sup> Here, "when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship."<sup>61</sup> This, he argues, opens the floodgates to litigation less than recognizing standing simply for recreational interests.<sup>62</sup> As is discussed below, several Tribes and municipalities have adopted this recommendation and created guardianships for the natural elements impacted by their rights of nature provisions.<sup>63</sup>

Regarding his second point, Stone argues that injuries to natural objects should be assessed under the "welfare economics position": "Every well-working legal-economic system should be so structured as to confront each of us with the full costs that our activities are imposing on society."<sup>64</sup> Though not articulated explicitly, Stone argues both for the economic costs of pollution<sup>65</sup> and for the injuries to animals' right to exist to be legally cognizable.<sup>66</sup> Finally, on his third point, Stone argues that remedies for damages to natural objects should be placed in a trust fund, which would then be used to repair the damage to the object.<sup>67</sup>

---

57. See, e.g., *Scenic Hudson Pres. Conf. v. Fed. Power Comm'n*, 354 F.2d 608, 615–16 (2d Cir. 1965) (holding that parties with a special interest in the affected area are considered aggrieved and meet Article III's case or controversy requirement, even if they do not have an economic interest). See also David Sive, *Environmental Standing*, 10 NAT. RES. & ENV'T 49, 49–54 (1995) (tracing the pre- and post-*Scenic Hudson* caselaw).

58. Stone, *supra* note 27, at 458.

59. *Id.*

60. *Id.* at 464–67.

61. *Id.* at 464.

62. *Id.* at 470–71.

63. See *infra* notes 178, 201, 238, 409.

64. Stone, *supra* note 27, at 474.

65. *Id.* at 474–75.

66. *Id.* at 475–76.

67. *Id.* at 480–81.

After Stone's article, the Supreme Court in *Sierra Club v. Morton*<sup>68</sup> held that non-economic, recreational, and aesthetic injuries constituted an "injury in fact" for purposes of standing,<sup>69</sup> thus cementing lower courts' holdings. The Court held, however, that that injury must be to the human plaintiff;<sup>70</sup> since the Sierra Club had not alleged injuries to any of its members,<sup>71</sup> it lacked standing. Justice Douglas dissented and argued for the natural entity injured to have standing for itself, essentially adopting Stone's proposal.<sup>72</sup> Yet, even following the recognition of non-economic injuries in *Sierra Club v. Morton*, environmental plaintiffs faced procedural hurdles.<sup>73</sup> For instance, the Court requires a "particularized" injury,<sup>74</sup> which the plaintiffs in *Massachusetts v. EPA* only barely overcame;<sup>75</sup> there, the Supreme Court considered whether the impacts of climate change could trigger standing to sue under the Clean Air Act.<sup>76</sup> It narrowly held that because a state was a plaintiff, standing was satisfied.<sup>77</sup> In part, rights of nature laws would eliminate this barrier by allowing a more straightforward recognition of the injuries to the climate system itself.

In 2017, proponents promulgated several model provisions for rights of nature laws, including "the right of nature to appear as the real party in interest in administrative proceedings and legal actions affecting these rights," the right of "those committed to protecting [rights of nature] to represent [nature] in these proceedings," and the right for "damages derived from these proceedings [to] be used solely to protect nature and restore nature to its prior natural state."<sup>78</sup> These

---

68. 405 U.S. 727 (1972).

69. *Id.* at 734 ("We do not question that [harm to the aesthetics and ecology of the Mineral King valley] may amount to an 'injury in fact' sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.").

70. *Id.* at 734–35 ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

71. *Id.* at 735 ("Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose."). The result, however, was a procedural bump in the road, as Sierra Club was permitted to amend its complaint and assert that its members were affected. *See Sierra Club v. Morton*, 348 F. Supp. 219, 220 (N.D. Cal. 1972).

72. *Sierra Club v. Morton*, 405 U.S. at 741–42 (Douglas, J., dissenting).

73. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–66 (1992) (holding the Defenders of Wildlife lacked injury to satisfy standing since its members had no concrete plans to return to areas affected by the challenged regulation); *Summers v. Earth Island Inst.*, 555 U.S. 488, 494–95 (2009) (holding Earth Island lacked standing since it settled the dispute with regard to the only affected member).

74. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

75. 549 U.S. 497 (2007).

76. *Id.* at 517–21 (noting the "particularized" requirement and holding states deserve "special solicitude" in a standing analysis); *id.* at 541 (Roberts, J., dissenting) ("The very concept of global warming seems inconsistent with this particularization requirement.").

77. *Id.* at 520–26.

78. Houck et al., *supra* note 24.

essentially distill Stone's original proposal for nature's standing via a guardianship model and for damages to be used to redress injuries to nature.<sup>79</sup>

Proponents argue that the system of granting standing to recreational users of an area, rather than the entity itself, is insufficient. Stone, for instance, argues that litigation costs, the inability of the current model to account for externalities, and the potential for plaintiffs to “sell[] out” natural entities are problematic.<sup>80</sup> Houck adds that it not only can be difficult to find an individual person adversely affected by an action that also harms the environment, but additionally that the current model of environmental standing “lead[s] to inherently subjective judgements; the judges who reject environmentalist standing are almost invariably the ones who reject their cases on the merits as well.”<sup>81</sup> Ultimately, Houck concludes that legal personhood “adds . . . honesty. Yes, weekend hikers may be offended . . . [but m]uch litigation of this type is driven at bottom by the desire to protect a resource for its own sake, its own right to be.”<sup>82</sup>

Yet, it is not altogether clear whether recognizing rights for either nature in general or a specific natural entity would remedy some of the issues environmental advocates face in establishing standing. For instance, in *Juliana v. United States*,<sup>83</sup> the U.S. Court of Appeals for the Ninth Circuit, after acknowledging the urgency of climate change and the U.S. government's role in failing to address it,<sup>84</sup> held that the “redressability” prong of standing was not met given that it was outside the power of an Article III court to grant relief.<sup>85</sup> While rights of nature laws allow for a legal recognition of natural entities' injuries, a court may lack the power to redress these injuries. This is an issue with which rights of nature proponents must contend.

In sum, rights of nature proponents often advocate extending legal personhood to non-human natural entities in an effort to make these entities' injuries legally cognizable. While under the current standing doctrine aesthetic and recreational injuries to humans are cognizable, proponents argue that simply recognizing injuries to natural entities themselves would be more straightforward, be less subjective, and would remove one barrier—but not all barriers—to bringing suit on behalf of an injured natural entity.

---

79. Compare *supra* notes 58–67 and accompanying text, with *supra* note 78 and accompanying text.

80. Stone, *supra* note 27, at 460–62.

81. Houck, *supra* note 9, at 27–28.

82. *Id.* at 28.

83. 947 F.3d 1159 (9th Cir. 2020).

84. *Id.* at 1166–67.

85. *Id.* at 1169–73 (reasoning that an order preventing the United States from promoting fossil fuels and requiring that the United States prepare a plan to decrease greenhouse gas emissions was uncertain to redress plaintiff's injuries, and that the court did not have the power to supervise the complex policy decisions that must be made within the plan).

## 2. Substantive Rights

Even if standing were recognized in a natural entity, the question remains: How would a court resolve a dispute implicating the rights of that entity? What substantive rights would an entity possess? For humans (in the United States), substantive rights include the right to free speech,<sup>86</sup> due process,<sup>87</sup> and freedom from unreasonable search and seizure,<sup>88</sup> among others. Proponents of rights of nature point to several possibilities for substantive, procedural, and electoral rights.

Stone, for instance, points to the National Environmental Policy Act (NEPA) as an analogue to procedural due process for the environment and argues for its expansion to private entities.<sup>89</sup> Further, Stone argues for the right of certain “objects” to be free from irreparable injury,<sup>90</sup> and even for potential electoral apportionment for non-humans.<sup>91</sup> Nonetheless, Stone concedes that non-human entities should not have “every right we can imagine, or even the same body of rights as human beings have.”<sup>92</sup>

Professor Houck focuses on injuries to natural systems and entities, rather than wading into the murky waters of procedural rights or electoral rights. According to Houck, within (Western) environmental ethics, substantive rights of nature include “the right to *exist*, the right to *continue* to exist, and the right, if degraded, to be *restored*.”<sup>93</sup> Houck later specifies that “legal principles of nature rights [include]: (1) to avoid disruption of basic ecosystem functions; (2) to avoid harm to all natural areas where alternatives are available; (3) to avoid critical areas altogether; (4) to mitigate prospective damage fully and in kind; and (5) to restore damage already incurred.”<sup>94</sup> Likewise the Rights of Nature Principles, noted above, call for a recognition of “inherent rights of nature to exist, flourish, evolve, and regenerate, and to restoration, recovery, and preservation.”<sup>95</sup> Similar language appears in several of the laws discussed below.<sup>96</sup>

Professor Houck traces several objections to substantive rights of nature; we do not repeat each of the points he makes, but rather focus on those related

---

86. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”).

87. See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

88. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”).

89. Stone, *supra* note 27, at 483–85.

90. *Id.* at 485–86.

91. *Id.* at 487.

92. Stone, *supra* note 27, at 457.

93. Houck, *supra* note 9, at 31.

94. *Id.* at 40–41.

95. See Houck, *supra* note 24.

96. See *infra* notes 210, 216, 232, 235, and 392 and accompanying text.

to the themes of this Article. First, he notes that some argue that the inherent anthropocentricity of laws suggests laws should not deal with non-human interests.<sup>97</sup> He responds that humans have consistently recognized rights in non-humans and have historically relied upon natural law as a guide for doing so, and further, that it would be false to claim that rights of nature are anthropocentric simply because they are enshrined in law.<sup>98</sup> Second, Houck notes that rights of nature imply reciprocal rights, which would be absurd for natural entities to shoulder.<sup>99</sup> He refutes this by pointing out that “[r]ights are not contracts,” and that some humans are incapable of such duties but are afforded rights nonetheless.<sup>100</sup> Finally, and perhaps most importantly, “[v]ocal opposition comes . . . from those who see a threat to private property and freedom itself.”<sup>101</sup> Houck responds that “[g]ranting the utility of property rights—and overlooking the fact that the same was said of rights for [B]lack[] [people] and women—nothing in the rights of nature demands that private ownership be abridged any more than it is by zoning regulations, pollution controls, and other measures that we accept routinely for the common weal.”<sup>102</sup> We would add that successful rights of nature laws have been made subject to valid existing rights and expressly disclaim an effect on property rights.<sup>103</sup>

As a final, though perhaps obvious observation, it is important to note that the substantive rights of nature recognized depend upon the entity at issue. If the entity granted rights is nature writ large, the law might recognize rights focused on the non-impairment of ecological systems.<sup>104</sup> In contrast, if the law recognizes rights of a body of water, the law might recognize rights focused on the non-impairment of water quality and aquatic and riparian life.<sup>105</sup>

---

97. See Houck, *supra* note 9, at 31, 33.

98. *Id.* at 31–32, 33.

99. *Id.* at 32.

100. *Id.* at 32–33 (referring to infants and the mentally impaired).

101. *Id.* at 34. For instance, in Florida, agribusinesses opposed local rights of nature laws on these grounds, apparently due to concern that such laws would hurt their bottom line by limiting activities that could take place on their property. See Surma, *supra* note 8. Likewise, agribusiness challenged the LEBOR over concern that the LEBOR would prevent local farms from using fertilizer on their fields. See *Drewes Farms P’ship v. City of Toledo*, 441 F. Supp. 3d 551, 554–55 (N.D. Ohio 2020).

102. Houck, *supra* note 9, at 34.

103. See, e.g., Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, § 16 (N.Z.) (“Unless expressly provided for by or under this Act, nothing in this Act—(a) limits any existing private property rights in the Whanganui River; or (b) creates, limits, transfers, extinguishes, or otherwise affects any rights to, or interests in, water; or (c) creates, limits, transfers, extinguishes, or otherwise affects any rights to, or interests in, wildlife, fish, aquatic life, seaweeds, or plants; or (d) affects the application of any enactment.”).

104. Cf., e.g., Ley de Derechos de la Madre Tierra [Law of the Rights of Mother Earth], Law 071 (Dec. 2010) (Bol.) (focusing on Earth systems).

105. Cf., e.g., Complaint for Declaratory Relief at \*22 ¶ 85(b), *Colo. River Ecosystem v. Colorado*, No 1:17-cv-02316, 2017 WL 4284548 (D. Colo. Sept. 25, 2017) (seeking a declaration that “[t]he Colorado River Ecosystem possesses the rights to exist, flourish, regenerate, be restored, and naturally evolve” and describing the ecosystem as the interplay of physical, chemical, and biological forces).



In sum, rights of nature proponents generally call for legal personhood or substantive rights, or both. The idea is partly to shift Western legal systems towards a recognition of beings not traditionally recognized by such systems, but also to fill the gaps left in piecemeal environmental laws. Jurisdictions adopting rights of nature laws often adopt only legal personhood or substantive rights, though some adopt both.<sup>106</sup>

### B. Implementation of Rights of Nature

Since the mid-2000s, jurisdictions across the globe have sought to implement and have implemented rights of nature.<sup>107</sup> Not all developments are the same, however: different rights are recognized in different kinds of non-human entities by differing mechanisms. According to Professor Erin Ryan, rights of nature laws protecting entities generally “fall into three distinct categories: those that protect all of nature, those that protect specific features or ecosystems, and those that protect individual plant or animal species.”<sup>108</sup> Likewise, Ryan notes that while most implementations of rights of nature provisions are legislative, some are constitutional, and some have been addressed via the judicial system.<sup>109</sup> While all three mechanisms are at work internationally,<sup>110</sup> within the United States, only legislative means have been used, though there have been efforts to amend state constitutions or force judicial recognition of rights of nature.<sup>111</sup>

This Section reviews the current state of rights of nature laws. First, as background, it looks to developments globally and outlines the differing approaches taken by various nations and their relative effectiveness and reception. Second, it looks to developments within the United States, excluding those undertaken by Tribes,<sup>112</sup> and highlights the difficulties in enforcing such laws. In part, this Section seeks to provide a concise history of rights of nature laws and to evaluate their relative strengths and weaknesses as enacted. Furthermore, this Section seeks to provide sufficient background to illustrate how rights of nature laws enacted by Tribes differ both in their ethical framework and their legal enforceability (especially when compared to other laws operating within the U.S. legal system).

---

106. For instance, Bolivia has adopted substantive rights of nature without providing for legal personhood, while New Zealand has recognized legal personhood for specific entities without specifying substantive rights. *See infra* Part I.B.1.b. Conversely, many rights of nature laws passed by U.S. municipalities recognize both substantive and procedural rights. *See infra* notes 213–215 and accompanying text.

107. *See infra* text accompanying notes 117–123, 206–211; *Rights of Nature: Timeline*, CELDF, <https://celdf.org/rights-of-nature/timeline/> [<https://perma.cc/34ZY-V3NM>] (noting the rights of nature laws that have been passed, starting with Tamaqua Borough’s in 2006).

108. Ryan et al., *supra* note 9, at 2507.

109. *See id.* at 2510.

110. *See infra* Part I.B.1.

111. *See infra* Part I.B.2.

112. Tribal developments are excluded from this Section as they are discussed in Part II below.

### 1. *Global Developments*

Before narrowing our focus to U.S. developments, it is helpful to consider what is happening with the development of rights of nature globally. Notably, for several of the examples discussed below, Indigenous Peoples led the way in demanding and making change in terms of incorporating rights of nature into the law.<sup>113</sup>

That being said, some scholars argue that certain rights of nature laws run the risk of co-opting and mischaracterizing Indigenous philosophies and lifeways. For instance, Mihnea Tănăsescu argues that the recognition of rights of nature in New Zealand more closely tracked Indigenous views than did the recognition in Ecuador (both discussed below).<sup>114</sup> According to Tănăsescu, Ecuador’s grant of rights of nature twists the Indigenous concept of Pacha Mama into the Western concept of “nature”—a universal, totalizing figure—and then problematically allows any individual to assert rights on its behalf.<sup>115</sup> Conversely, Tănăsescu argues that New Zealand’s grant is place-based and provides for particular representational relationships, and thereby lessens the risk of co-opting.<sup>116</sup> In sum, while rights of nature laws may be a step in the right direction, from an Indigenous perspective, not all adequately reflect local Indigenous philosophies.

There are several examples of implementation of rights of nature outside the United States. Ecuador (2008),<sup>117</sup> Bolivia (2010),<sup>118</sup> New Zealand (2014),<sup>119</sup> Colombia (2016),<sup>120</sup> Uganda (2019),<sup>121</sup> and Bangladesh (2019)<sup>122</sup> have implemented rights of nature on a national level. In addition, there have been several subnational developments of rights of nature across the globe.<sup>123</sup> For brevity, only the national implementations will be discussed. These implementations stem from three mechanisms: constitutional provisions,

---

113. See Houck, *supra* note 9, at 37. See O’Donnell et al., *supra* note 3, at 405 (arguing that “the most transformative cases of rights of Nature have been consistently influenced, and often actually led, by Indigenous peoples”); Mihnea Tănăsescu, *Rights of Nature, Legal Personality, and Indigenous Philosophies*, 9 *TRANSNAT’L ENV’T L.* 429, 430–31 (2020) (“More often than not, Indigenous nations have been involved, in one way or another, in establishing rights for nature.”).

114. Tănăsescu, *supra* note 113, at 446–52.

115. *Id.* at 446, 450–51, 437–39.

116. *Id.* at 446–47.

117. See *infra* Part I.B.1.a.

118. See *infra* Part I.B.1.b.

119. See *infra* Part I.B.1.b.

120. See *infra* Part I.B.1.c.

121. See *infra* Part I.B.1.b.

122. See *infra* Part I.B.1.c.

123. See *Rights of Nature Law and Policy*, HARMONY WITH NATURE, <http://harmonywithnatureun.org/rightsOfNature> [https://perma.cc/C68U-JALL] (last visited Jan. 26, 2023) (detailing subnational developments through legislation, subnational constitutions, or subnational court decisions in Argentina, Australia, Brazil, Canada, France, India, Mexico, Netherlands, Peru, and Spain).

statutory provisions, and judicial decisions.<sup>124</sup> Each mechanism has strengths and weaknesses, as will be discussed below.

*a. Constitutional Rights of Nature*

In 2008, Ecuador enacted a new constitution that includes a chapter on rights of nature.<sup>125</sup> In relevant part, the provision reads:

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.<sup>126</sup>

In addition, the Ecuadorian Constitution provides that “Nature has the right to be restored.”<sup>127</sup> It also compels the State to “eliminate or mitigate harmful environmental consequences” in “cases of severe or permanent environmental impact”<sup>128</sup> and to restrict activities “that might lead to the extinction of species” and “the permanent alteration of natural cycles.”<sup>129</sup>

As Professor Erin O’Donnell points out, “Indigenous presence [is] very much at the centre” of the rights of nature articles, as “the influence of Indigenous voices not only was palpable throughout the drafting process and its momentous outcome, but also can be evinced in the equation of Nature with the more complex Andean concept of Pacha Mama.”<sup>130</sup> Indeed, Professor Marc Becker details how Indigenous movements gained political power,<sup>131</sup> and ultimately, how Indigenous movements led to Ecuador’s 2007 constitutional assembly and ultimate 2008 referendum adopting the constitution.<sup>132</sup> In essence, Indigenous popular support contributed to the success of the 2008 Constitution, and several key items from Indigenous activists’ agendas were included in the new constitution, including greater protection for natural resources and the

124. See Ryan et al., *supra* note 9, at 2510.

125. See CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR Oct. 20, 2008, tit. II, ch. 7, arts. 71–74. For an English translation, see Georgetown University, *Constitution of the Republic of Ecuador*, POLITICAL DATABASE OF THE AMERICAS (Oct. 20, 2008) <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> [https://perma.cc/HW9L-69W9], or CONSTITUTE PROJECT, ECUADOR’S CONSTITUTION OF 2008, [https://www.constituteproject.org/constitution/Ecuador\\_2008.pdf](https://www.constituteproject.org/constitution/Ecuador_2008.pdf) [https://perma.cc/L2W9-LN6Z].

126. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR Oct. 20, 2008, tit. II, ch. 7, art. 71.

127. *Id.* at art. 72.

128. *Id.*

129. *Id.* at art. 73.

130. O’Donnell et al., *supra* note 3, at 413–14.

131. MARC BECKER, *The Politicization of Indigenous Identities*, in PACHAKUTIK: INDIGENOUS MOVEMENTS AND ELECTORAL POLITICS IN ECUADOR 1–24 (2011).

132. See MARC BECKER, *Rewriting the Constitution . . . Again*, in PACHAKUTIK: INDIGENOUS MOVEMENTS AND ELECTORAL POLITICS IN ECUADOR 127, 130, 157–60 (2011).

environment codified in the rights of nature provisions.<sup>133</sup> As noted above, however, Ecuador’s rights of nature provision is not unproblematic, as the equation of Pacha Mama with nature writ large is not wholly accurate,<sup>134</sup> and the constitution as a whole contains contradictory provisions.<sup>135</sup>

Following the 2008 constitutional recognition of rights of nature, Ecuador has continued to develop the doctrine. In 2014, Ecuador adopted provisions in its penal code that allow for criminal actions to enforce rights of nature.<sup>136</sup> Further, in 2017, Ecuador passed the Organic Code of the Environment,<sup>137</sup> and in 2021, it began investigating further legislative reform of its rights of nature provisions.<sup>138</sup> Likewise, there has been litigation to enforce the rights granted in the constitution.<sup>139</sup> As noted by Professors Craig M. Kauffman and Pamela L. Martin in a 2017 study, ten of thirteen cases (lawsuits and administrative actions) brought to enforce rights of nature were successful.<sup>140</sup> Recently, the Constitutional Court of Ecuador enforced rights of nature in two key decisions.

133. *See id.* at 151–52, 137–42.

134. Tănăsescu, *supra* note 113, at 450 (“Pachamama is an Indigenous other-than-human figure that erupts in the political space of the state. However, the equivalence in the constitutional text between this figure and nature . . . is deeply problematic, as it forces the radical potential of an Indigenous cosmopolitics into the moulds of modernist ontology.”).

135. *See id.* at 435 (noting that the Ecuadorian Constitution contains both environmental provisions and development-oriented provisions and thus “contains both ecocentric and anthropocentric provisions”).

136. *See* Craig M. Kauffman & Pamela L. Martin, *Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail*, 92 *WORLD DEV.* 130, 133 (2017).

137. *See* Código Orgánico Del Ambiente [Organic Code of the Environment], (Ecuador). *See also* *Organic Code on the Environment*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE AND THE ENV’T, <https://www.climate-laws.org/geographies/ecuador/laws/organic-code-on-the-environment> [<https://perma.cc/ESE8-39GZ>] (“[The Organic Code of the Environment] aims to guarantee the right of people to live in a healthy and ecologically balanced environment, as well as to protect the ‘rights of nature’ recognized in the Constitution of Ecuador. Its objectives include setting out environmental principles and guidelines that guide the public policies of the State, and establishing effective, efficient and cross-cutting measures to address the effects of climate change through mitigation and adaptation actions. The environmental principles set out in the code include the Polluter Pays principle, sustainable development and *in dubio pro natura* (when in doubt, favor Nature).”).

138. *See generally* *Ecuador Begins Legislative Reform to Strengthen Rights of Nature*, CTR. FOR DEMOCRATIC AND ENV’T RTS. (Mar. 15, 2021), <https://www.centerforenvironmentalrights.org/news/ecuador-begins-legislative-reform-to-strengthen-rights-of-nature> [<https://perma.cc/9XXU-VJ5C>] (summarizing the Center for Democratic and Environmental Rights legislative reforms).

139. *See generally* Mari Margil, *Recent Developments in Ecuador: Rights of Nature*, COMMON DREAMS (July 17, 2020), <https://www.commondreams.org/views/2020/07/17/recent-developments-ecuador-rights-nature> [<https://perma.cc/8SAL-N57S>] (summarizing the initial litigation). *See also* Oliver A. Houck, *Noah’s Second Voyage: The Rights of Nature As Law*, 31 *TUL. ENV’T L.J.* 1, 39 (2017); *Rights of Nature Law and Policy*, HARMONY WITH NATURE, <http://harmonywithnatureun.org/rightsOfNature> [<https://perma.cc/59M2-GUYR>] (summarizing and providing links to decisions through 2022).

140. Kauffman & Martin, *supra* note 136, at 134.

In September of 2021, it decided the Mangroves case,<sup>141</sup> and in December of 2021 it decided the Los Cedros case.<sup>142</sup>

The Mangroves case involved a challenge to an environmental regulation that included a catch-all term that would have allowed for significant industrial development so long as reforestation took place.<sup>143</sup> The Court held that environmental regulations should be interpreted to have the best environmental outcome.<sup>144</sup> Specifically, the Court determined that reforestation projects were insufficient to protect the rights of nature.<sup>145</sup>

The Los Cedros case dealt with government-permitted mining in Los Cedros, a protected forest.<sup>146</sup> After a nearby municipality challenged the permits, the Court held that compliance with existing environmental permits does not equate to compliance with the rights of nature.<sup>147</sup> Importantly, the Court noted that “[t]he rights of nature, as all rights established in the Ecuadorian Constitution, have the full force of law. They do not merely constitute ideals or rhetorical declarations, but legal mandates.”<sup>148</sup> The Court relied on the

141. Corte Constitucional del Ecuador [CCE] [Constitutional Court of Ecuador] Sept. 8, 2021, Sentencia 22-18-IN/21 (Ecuador).

142. Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Nov. 10, 2021, Sentencia 1149-19-JP/20 (Ecuador).

143. Corte Constitucional del Ecuador [CCE] [Constitutional Court of Ecuador] Sept. 8, 2021, Sentencia 22-18-IN/21, 11, 12 (Ecuador).

144. *Id.* at 45 (“Conforme al artículo 395 numeral 4 de la Constitución, ‘en caso de duda sobre el alcance de las disposiciones legales en materia ambiental, éstas se aplicarán en el sentido más favorable a la protección de la naturaleza.’” [“Pursuant to article 395 numeral 4 of the Constitution, ‘in the case of doubt regarding the scope of legal provisions in environmental subject matter, these will be applied in the sense most favorable to the protection of nature.’”] [translated by Esther Johnson, University of Utah S.J. Quinney College of Law, Class of 2023]).

145. *Id.* at 16–17. Further, the Court struck a regulation allowing for monoculture reforestation (reforestation using only one species of tree) as unconstitutional under Article 409, which deals with soil conservation. *Id.* at 25.

146. See Katie Surma, *Ecuador’s High Court Affirms Constitutional Protections for the Rights of Nature in a Landmark Decision*, INSIDE CLIMATE NEWS (Dec. 3, 2021), <https://insideclimatenews.org/news/03122021/ecuador-rights-of-nature/> [https://perma.cc/PM5J-HBN6]. For the parent company’s press release, see *Ecuador Constitutional Court Rules on Exploration Activities in the “Los Cedros” Protected Forest in the Rio Magdalena Project Within the ENAMI EP Strategic Exploration Alliance in NW Ecuador*, CORNERSTONE (Dec. 2, 2021), <https://cornerstoneresources.com/news-releases/21-23-ecuador-constitutional-court-rules-on-exploration-activities-in-the-los-cedros-protected-forest-in-the-rio-magdalena/> [https://perma.cc/37RY-ZN62].

147. See Surma, *supra* note 146 (“Neither the government nor the mining companies had performed or provided the court with technical studies on the effects that mining would have on Los Cedros, the court said. Instead, the companies had argued that by complying with existing government regulations, their activities would respect the rights of nature. The court disagreed, citing scientific studies that show Los Cedros is a delicate and endangered forest . . . The government’s failure to conduct studies looking at the fragility of Los Cedros coupled with the uncertainty of the effects from the permitted mining activity violates the rights of nature to exist and regenerate, the court ruled.”).

148. Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Nov. 10, 2021, Sentencia 1149-19-JP/20, 10 (Ecuador) (“Los derechos de la naturaleza, como todos los derechos establecidos en la Constitución ecuatoriana, tienen plena fuerza normativa. No constituyen solamente

precautionary principle<sup>149</sup> to hold that the risk of irreversible damage by the mining violated the rights of nature.<sup>150</sup>

Ecuador's implementation of rights of nature has both strengths and weaknesses. A strength of Ecuador's constitutional implementation lies in its scope: it protects nature, or "Pacha Mama," in general, and sets forth limits on Ecuador's power in certain areas that could harm nature. Further, it is self-executing and enforceable through the judiciary; implementation is not contingent on further administrative action. Yet, the fact that anyone can sue to enforce these provisions can be viewed as a strength or weakness; on the one hand, it allows potentially broader enforcement, but on the other hand, anyone could sue for any reason (risking the co-opting of Pacha Mama). In other words, while there is certainly broader access and broader enforcement, there is also the possibility of "partisan political mobilization of the rights of nature."<sup>151</sup> Another weakness of the constitutional implementation in terms of replication by other countries lies in its relative difficulty to enact.<sup>152</sup> It is no mistake that Ecuador is the only country to have enacted such a provision. Further, as Becker details, the process of drafting a new constitution was politically complicated and fraught with potential pitfalls.<sup>153</sup> While the process of amending or rewriting a constitution differs from country to country, it is generally a more procedurally and politically complicated avenue due to the relative strength of the protections a constitutional amendment can offer.

---

ideales o declaraciones retóricas, sino mandatos jurídicos." [translated by Esther Johnson, University of Utah S.J. Quinney College of Law, Class of 2023].)

149. *Id.* at 14–15 ("Según el artículo 396 de la Carta Fundamental el principio de precaución determina que 'en caso de duda sobre el impacto ambiental de alguna acción u omisión aunque no exista evidencia científica del daño, el Estado adoptará medidas protectoras eficaces y oportunas'" (emphasis in original). ["According to article 396 of the Fundamental Charter, the precautionary principle determines that 'in the case of doubt regarding the environmental impact of any action or omission, even if scientific evidence of the damage does not exist, the State shall adopt timely and effective protective measures.'"]]).

150. *Id.* at 53 ("La plausibilidad de las hipótesis expuestas da cuenta de que existe el riesgo de que la realización de la actividad minera en el Bosque Protector Los Cedros, provoque un *daño grave e irreversible en el agua*, el cual llevaría a la afectación al ecosistema y a las actividades humanas" (emphasis in original). ["The plausibility of the aforementioned hypotheses indicates that there exists a risk that performing mining activities in the Los Cedros Protective Forest will provoke a serious and irreversible damage to the water, which would lead to the affectation of the ecosystem and human activities."]) [translated by Esther Johnson, University of Utah S.J. Quinney College of Law, Class of 2023].

151. Tănăsescu, *supra* note 113, at 438.

152. For instance, Chile proposed a new constitution that would have included a rights of nature provision, but voters rejected it. See Katie Surma, *Chilean Voters Reject a New Constitution That Would Have Provided Groundbreaking Protections for the Rights of Nature*, INSIDE CLIMATE NEWS (Sept. 4, 2022), <https://insideclimatenews.org/news/04092022/chile-constitution-rights-of-nature/> [https://perma.cc/8RP8-75T3].

153. See BECKER, *supra* note 132, at 127–28.

*b. Statutory Rights of Nature*

Three countries have implemented rights of nature via statute: Bolivia, New Zealand, and Uganda. First, in 2010, Bolivia enacted a rights of nature statute.<sup>154</sup> Its Law of the Rights of Mother Earth specifies that “Mother Earth takes on the character of collective public interest” and recognizes a non-exclusive set of rights.<sup>155</sup>

I. Mother Earth has the following rights:

- 1. To life:** The right to maintain the integrity of living systems and natural processes that sustain them, and capacities and conditions for regeneration.
- 2. To the diversity of life:** It is the right to preservation of differentiation and variety of beings that make up Mother Earth, without being genetically altered or structurally modified in an artificial way, so that their existence, functioning or future potential would be threatened.
- 3. To water:** The right to preserve the functionality of the water cycle, its existence in the quantity and quality needed to sustain living systems, and its protection from pollution for the reproduction of the life of Mother Earth and all its components.
- 4. To clean air:** The right to preserve the quality and composition of air for sustaining living systems and its protection from pollution, for the reproduction of the life of Mother Earth and all its components.
- 5. To equilibrium:** The right to maintenance or restoration of the interrelationship, interdependence, complementarity and functionality of the components of Mother Earth in a balanced way for the continuation of their cycles and reproduction of their vital processes.
- 6. To restoration:** The right to timely and effective restoration of living systems affected by human activities directly or indirectly.
- 7. To pollution-free living:** The right to the preservation of any of Mother Earth’s components from contamination, as well as toxic and radioactive waste generated by human activities.<sup>156</sup>

In addition, the statute requires that Bolivia develop policies to prevent harm to systems inherent to Mother Earth<sup>157</sup> and creates duties for private individuals.<sup>158</sup> In 2012, Bolivia enacted a statute that began to implement the Law of the Rights

---

154. See Ley de Derechos de la Madre Tierra [Law of the Rights of Mother Earth], Law 071 (Dec. 2010) (Bol.).

155. *Id.* at ch. II, art. 5.

156. *Id.* at ch. III, art. 7.

157. *Id.* at ch. IV, art. 8.

158. *Id.* at ch. IV, art 9.

of Mother Earth.<sup>159</sup> This statute, the Framework Law of the Mother Earth and Integral Development for Living Well, specifies that “violation of the rights of Mother Earth . . . constitutes a violation of public law and collective and individual rights.”<sup>160</sup> The statute, however, leaves penalties for violation to another law.<sup>161</sup>

Bolivia’s Law of the Rights of Mother Earth is notable for three reasons: first, it was the first national statutory implementation of rights of nature.<sup>162</sup> Second, it is aimed at Earth systems rather than specific species or specific natural bodies.<sup>163</sup> Third, the statute does not specify who may enforce the rights of nature provision, or by what means. This last concern has led some to criticize Bolivia for failing to follow through with substantive implementation of the law.<sup>164</sup>

Second, New Zealand has legislatively implemented rights of nature for several specific natural entities. In 2014, New Zealand passed the Te Urewera Act,<sup>165</sup> which states that “Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person.”<sup>166</sup> Te Urewera was a national park from 1954 until the act,<sup>167</sup> which removed national park designation from the area and, instead, vested fee simple ownership of the area in Te Urewera itself.<sup>168</sup> The Te Urewera Act was driven by a settlement between the Tūhoe and

159. See *Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien* [Framework Law of the Mother Earth and Integral Development for Living Well], Law 300 (Oct. 2012) (Bol.).

160. *Id.* at Title IV, ch. I, art. 38 (“La vulneración de los derechos de la Madre Tierra . . . constituye una vulneración del derecho público y los derechos colectivos e individuales.” [translated by Esther Johnson, University of Utah S.J. Quinney College of Law, Class of 2023]).

161. *Id.* at Title IV, ch. II, art. 42 (“Los tipos de responsabilidad por el daño causado a los derechos de la Madre Tierra, serán regulados por Ley específica.” [“The types of responsibility for the damage caused to the rights of Mother Earth[] will be regulated by specific law.”] [translated by Esther Johnson, University of Utah S.J. Quinney College of Law, Class of 2023]).

162. See Ryan et al., *supra* note 9, at 2515.

163. The word “system” appears eighteen times within the statute. See *Ley de Derechos de la Madre Tierra* [Law of the Rights of Mother Earth], Law 071 (Dec. 2010) (Bol.). Furthermore, “Mother Earth” is defined as “a dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated, interdependent and complementary, which share a common destiny.” *Id.* at ch. II, art. 3. “Living systems” is defined as “complex and dynamic communities of plants, animals, microorganisms and other beings and their environment, where human communities and the rest of nature interact as a functional unit under the influence of climatic, physiographic, and geological factors, as well as production practices, Bolivian cultural diversity, and the worldviews of nations, original indigenous peoples, and intercultural and Afro-Bolivian communities.” *Id.* at ch. II, art 4.

164. See Anna Hernandez, *Defending Mother Earth in Bolivia*, CULTURAL SURVIVAL (June 1, 2016), <https://www.culturalsurvival.org/news/defending-mother-earth-bolivia> [<https://perma.cc/6FAK-5CDU>] (summarizing critiques).

165. See Te Urewera Act 2014 (N.Z.).

166. *Id.* § 11.

167. See Jacinta Ruru, *Tūhoe-Crown Settlement – Te Urewera Act 2014*, MĀORI L. REV. (Oct. 2014), <https://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/> [<https://perma.cc/2W8U-NN8T>].

168. See Te Urewera Act 2014, part 1, subpart 3, § 12(3) (N.Z.).



New Zealand.<sup>169</sup> The area is governed by a board<sup>170</sup> that consists primarily of members appointed by the Tūhoe Te Uru Taumatua.<sup>171</sup> Notably, Te Urewera is inalienable<sup>172</sup> except by an act of Parliament.<sup>173</sup>

In 2017, New Zealand passed the Te Awa Tupua Act.<sup>174</sup> The Act declares that “Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.”<sup>175</sup> “Te Awa Tupua” refers to the legal person created by the Act and “compris[es] the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.”<sup>176</sup> This includes all other bodies of water connected to the Whanganui River.<sup>177</sup> The Act provides that guardians will be appointed to serve as the representatives of Te Awa Tupua.<sup>178</sup> However, the Act expressly disclaims any effect on property rights, water rights, or subsistence rights.<sup>179</sup> As above, the Te Awa Tupua Act was driven by a settlement with the Māori.<sup>180</sup> In 2017, New Zealand also recognized the legal personhood of Mount Taranaki in a redress deed to the Māori.<sup>181</sup> However, this recognition has not yet been implemented into legislation.<sup>182</sup>

New Zealand’s rights of nature provisions are notable in a few ways. Namely, all three instances resulted from settlements with or redress to Indigenous Peoples.<sup>183</sup> The Te Urewera Act followed a deed of settlement between New Zealand and the Tūhoe;<sup>184</sup> officially, New Zealand apologized for

169. See *Te Urewera*, TŪHOE, <https://www.ngaituhoe.iwi.nz/te-urewera> [<https://perma.cc/Y9DL-MHSQ>].

170. Te Urewera Act 2014 § 16.

171. *Id.* § 21. The Tūhoe are an Indigenous population in New Zealand; the Te Uru Taumatua is a governing board within the Tūhoe. See *Te Uru Taumatua*, TŪHOE, <https://www.ngaituhoe.iwi.nz/tut> [<https://perma.cc/XGK5-9JJP>].

172. Te Urewera Act 2014, part 1, subpart 3, § 13 (N.Z.).

173. *Id.* § 111.

174. See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.).

175. *Id.* § 14(1).

176. *Id.* § 12.

177. *Id.* § 7.

178. *Id.* § 20.

179. *Id.* § 16 (“Unless expressly provided for by or under this Act, nothing in this Act—(a) limits any existing private property rights in the Whanganui River; or (b) creates, limits, transfers, extinguishes, or otherwise affects any rights to, or interests in, water; or (c) creates, limits, transfers, extinguishes, or otherwise affects any rights to, or interests in, wildlife, fish, aquatic life, seaweeds, or plants; or (d) affects the application of any enactment.”).

180. See Zartner, *supra* note 26, at 12–15 (detailing the history leading up to the Act).

181. See RECORD OF UNDERSTANDING FOR MOUNT TARANAKI, POUĀKAI AND THE KAITAKE RANGES, NGĀ IWI O TARANAKI, subpts. 5.2, 5.5 (2017), <https://www.govt.nz/assets/Documents/OTS/Taranaki-Maunga/Taranaki-Maunga-Te-Anga-Putakerongo-Record-of-Understanding-20-December-2017.pdf> [<https://perma.cc/MN72-3LDH>].

182. *Cf. id.* at 5.5 (noting future legislation to establish legal personality).

183. See *supra* notes 169, 180, 181.

184. See DEED OF SETTLEMENT OF HISTORICAL CLAIMS, TŪHOE-N.Z. (2013), <https://www.govt.nz/assets/Documents/OTS/Ngai-Tuhoe/Ngai-Tuhoe-Deed-of-Settlement-4-Jun-2013.pdf> [<https://perma.cc/9AHG-824P>].

warfare and deprivation of Tūhoe property.<sup>185</sup> Likewise, the Te Awa Tupua Act followed from a deed of settlement between New Zealand and the Māori,<sup>186</sup> this settlement was driven by treaty breaches on the part of New Zealand.<sup>187</sup> The Mount Taranaki record of understanding, while not a settlement,<sup>188</sup> similarly follows from treaty breaches on the part of New Zealand.<sup>189</sup> Further, all three instances focus on legal personhood for specific areas or entities; unlike Bolivia's legislative rights of nature provision, New Zealand did not recognize rights of nature for nature writ large, nor did it enumerate any substantive rights.

Third, in 2019, Uganda passed the National Environment Act,<sup>190</sup> which included a provision on rights of nature.<sup>191</sup> The provision reads, in full:

- (1) Nature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.
- (2) A person has a right to bring an action before a competent court for any infringement on rights of nature under this Act.
- (3) Government shall apply precaution and restriction measures in all activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles.
- (4) The Minister [responsible for the environment] shall, by regulations, prescribe the conservation areas for which the rights in subsection (1) apply.<sup>192</sup>

---

185. See *Ngāi Tūhoe Deed of Settlement Summary*, N.Z. GOV'T, <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/find-a-treaty-settlement/ngai-tuhoe/ngai-tuhoe-deed-of-settlement-summary/> [https://perma.cc/9E65-LTCY] (“The Crown apologises to Tūhoe for past dealings that breached the Crown’s obligations under the Treaty of Waitangi. These include: indiscriminate raupatu, wrongful killings, and years of scorched earth warfare; denying Tūhoe the right of a self governing Urewera Reserve by subverting the Urewera District Native Reserve Act of 1896; excluding Tūhoe from the establishment of Te Urewera National Park over their homelands; wrongfully treating Lake Waikaremoana as Crown property for many years.”).

186. See RURUKU WHAKATUPUA: TE MANA O TE AWA TUPUA (2014), <https://www.govt.nz/assets/Documents/OTS/Whanganui-Iwi/Whanganui-River-Deed-of-Settlement-Ruruku-Whakatupua-Te-Mana-o-Te-Awa-Tupua-5-Aug-2014.pdf> [https://perma.cc/422J-SR54].

187. See WHANGANUI IWI (WHANGANUI RIVER) DEED OF SETTLEMENT SUMMARY, N.Z. GOV'T, <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/find-a-treaty-settlement/whanganui-iwi/whanganui-iwi-whanganui-river-deed-of-settlement-summary/> [https://perma.cc/4G7S-DEVJ] (“The Crown apology is the Crown’s formal apology for Treaty breaches as the Crown seeks to atone for past wrongs and build a renewed relationship with Whanganui Iwi.”).

188. RECORD OF UNDERSTANDING FOR MOUNT TARANAKI, POUĀKAI AND THE KAITAKE RANGES, NGĀ IWI O TARANAKI-N.Z., subpt. 3.2.2 (2017), <https://www.govt.nz/assets/Documents/OTS/Taranaki-Maunga/Taranaki-Maunga-Te-Anga-Putakerongo-Record-of-Understanding-20-December-2017.pdf> [https://perma.cc/2QXX-G4WE].

189. *Id.* at 4.1.

190. The National Environment Act §§ 3, 4 (2019) (Uganda).

191. *Id.* § 4.

192. *Id.*

As of November 2022, the regulations noted required by subsection (4) have not yet been issued, thus leaving rights of nature in Uganda undeveloped.<sup>193</sup> Uganda's law has both strengths and weaknesses. Its strengths include its implementation of rights for nature writ large, rather than specific bodies, and its allowance for enforcement by citizens.<sup>194</sup> Likewise, Uganda's national recognition of rights of nature has galvanized local Indigenous communities to push for protection of sacred sites.<sup>195</sup> Conversely, its requirement of the government to designate areas to trigger the rights provision is a weakness. However, once an area is designated, it appears the government will recognize the rights of all natural entities within that area.

These three examples show the relative strengths and weaknesses of statutory implementation of rights of nature. Statutory provisions are relatively easier to pass than constitutional amendments; however, they generally offer fewer protections. As illustrated above, these laws either protect specific areas or have yet to be substantively implemented in ways that lead to improved environmental outcomes. Further, compared to constitutional provisions, statutes can more easily be changed, struck down, or rescinded (though to our knowledge no nationally implemented rights of nature statute has been rescinded or struck down).

### c. *Judicially Recognized Rights of Nature*

Colombia and Bangladesh have implemented rights of nature through the judiciary. Colombian courts, in several decisions, have recognized rights of nature.<sup>196</sup> Two cases are particularly relevant. In 2016, the Constitutional Court

---

193. See Jack Losh, *Uganda Joins the Rights-of-Nature Movement But Won't Stop Oil Drilling*, NAT'L GEOGRAPHIC (June 2, 2021), <https://www.nationalgeographic.com/environment/article/uganda-joins-the-rights-of-nature-movement-but-wont-stop-oil-drilling> [https://perma.cc/SSM4-M8EG].

194. Like in Ecuador, the breadth of these rights is a strength in terms of enforcement but could be a philosophical weakness in terms of essentializing nature; unlike in Ecuador, however, there do not appear to be issues surrounding a co-opting of Indigenous concepts.

195. See *Uganda Recognizes Rights of Nature, Customary Laws, Sacred Natural Sites*, AFRICE (Mar. 29, 2021), <https://africeug.org/uganda-recognises-rights-of-nature-customary-laws-sacred-natural-sites/> [https://perma.cc/9P22-7QT4].

196. See Héctor Herrera-Santoyo, *The Rights of Nature (Rivers) and Constitutional Actions in Colombia*, GNHRE (July 8, 2019), <https://gnhre.org/community/the-rights-of-nature-rivers-and-constitutional-actions-in-colombia/> [https://perma.cc/TM5K-KMU6] (detailing the history of decisions through 2019). See also *Rights of Nature Timeline*, CELDF, <https://celdf.org/rights-of-nature/timeline/> [https://perma.cc/34ZY-V3NM] (last visited Jan. 26, 2023) (surveying rights of nature court decisions globally); *Rights of Nature Law and Policy*, HARMONY WITH NATURE, <http://harmonywithnatureun.org/rightsOfNature> [https://perma.cc/59M2-GUYR] (last visited Jan. 26, 2023) (compiling a timeline of rights of nature legal measures around the world). The judicial system in Colombia operates differently from that of the United States; in Colombia, there are four national courts of last resort: the Supreme Court of Justice, the Constitutional Court, the Superior Court of the Judiciary, and the State Council. See Angie Vega, *A Brief Explanation of Colombia's Legal System*, ANIMAL LEGAL & HIST. CTR. (2018), <https://www.animallaw.info/article/brief-explanation-colombia%E2%80%99s-legal-system#google-search> [https://perma.cc/CTB2-K8N8]. In 1991,

of Colombia ruled “[t]he Atrato River, its basin and tributaries are recognized as an entity subject to rights of protection, conservation, maintenance and restoration by the State and ethnic communities.”<sup>197</sup> Further, in 2018, the Supreme Court of Justice of Colombia, in response to an action to combat deforestation in the Colombian Amazon,<sup>198</sup> built upon the Atrato River decision to hold that the Amazon was a subject of rights and ordered plans to end deforestation.<sup>199</sup>

In 2019, the Bangladesh Supreme Court held that *all* rivers within the country are living entities with legal personhood.<sup>200</sup> Notably, the ruling appointed the Bangladesh National River Conservation Commission as the legal guardian of rivers within the country.<sup>201</sup>

Judicially implemented rights of nature avoid political pressures and processes. This, however, is just as much a weakness as a strength. A subsequent court could later modify these rights without democratic input. In sum, judicial implementation is less predictable than constitutional or legislative implementation, but it is perhaps more expedient and flexible.

To date, six countries have implemented rights of nature on a national level. Of these, Ecuador’s constitutional recognition appears to have the most “teeth,” given that the Ecuadorian judiciary has relied upon it to stop environmentally destructive development.<sup>202</sup> Of the methods of implementation discussed above,

Colombia adopted a constitution that contains several articles relating to the environment, though none expressly recognize rights of nature. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 78–82.

197. Corte Constitucional [C.C.] [Constitutional Court] Nov. 10, 2016, Sentencia T-622/2016 (p. 5) (Colom.) (translated by the Dignity Rights Project, Delaware Law School, USA) <http://files.harmonywithnatureun.org/uploads/upload838.pdf> [<https://perma.cc/E7SM-74BR>].

198. Corte Suprema de Justicia [C.S.J.] [Supreme Court] Apr. 5, 2018, M.P.: Villabona, STC4360-2018 (p. 47–50) (Colom.).

199. *Id.* at 49, 50. *See also* Nicholas Bryner, *Colombian Supreme Court Recognizes Rights of Amazon River Ecosystem*, IUCN (Apr. 20, 2018), <https://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem> [<https://perma.cc/G5AT-MTQ3>] (discussing the significance of Colombia’s recognition of rights of the Amazon); Anastasia Moloney, *Colombia’s Top Court Orders Government to Protect Amazon Forest in Landmark Case*, REUTERS (Apr. 6, 2018), <https://www.reuters.com/article/us-colombia-deforestation-amazon/colombias-top-court-orders-government-to-protect-amazon-forest-in-landmark-case-idUSKCN1HD21Y> [<https://perma.cc/R2ME-UB52>] (same).

200. *See* Mari Margil, *Bangladesh Supreme Court Upholds Rights of Rivers*, MEDIUM (Aug. 24, 2020), <https://mari-margil.medium.com/bangladesh-supreme-court-upholds-rights-of-rivers-ed78568d8aa> [<https://perma.cc/2KXY-TYVE>]; Rina Chandran, *Fears of Evictions as Bangladesh Gives Rivers Legal Rights*, THOMSON REUTERS FOUND. NEWS (July 4, 2019), <https://news.trust.org/item/20190704113918-rzada> [<https://perma.cc/UX9K-XWJW>]; Ashley Westerman, *Should Rivers Have Same Legal Rights as Humans? A Growing Number of Voices Say Yes*, NPR (Aug. 3, 2019), <https://www.npr.org/2019/08/03/740604142/should-rivers-have-same-legal-rights-as-humans-a-growing-number-of-voices-say-ye> [<https://perma.cc/3CJ7-U9RR>]; Sigal Samuel, *This Country Gave All Its Rivers Their Own Legal Rights*, VOX (Aug. 18, 2019), <https://www.vox.com/future-perfect/2019/8/18/20803956/bangladesh-rivers-legal-personhood-rights-nature> [<https://perma.cc/LNE2-N9DW>].

201. Chandran, *supra* note 200.

202. *See, e.g.*, Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Nov. 10, 2021, Sentencia 1149-19-JP/20 (Ecuador).

it seems that Ecuador's has done the most to improve environmental outcomes.<sup>203</sup> Ecuador's constitutional provision has broad scope, as it applies to nature writ large, rather than specific natural entities. Other, more recently enacted, statutory provisions may turn out to have similar strengths. Constitutional and legislative implementation are responsive to democratic pressures, particularly from Indigenous Peoples as illustrated in both Ecuador and New Zealand. More comparative study is needed to evaluate whether and by how much rights of nature laws improve environmental outcomes within these different countries.

The following background illustrates the primary drawback of attempts at U.S. implementation of rights of nature: namely, that such implementation has only succeeded within U.S. municipalities and lacks the scope and enforceability of efforts in other countries.

## 2. Subnational U.S. Developments

Neither the U.S. federal government nor any state government has implemented rights of nature *per se*.<sup>204</sup> Developments in rights of nature have taken place primarily in Tribes, cities, and counties. This Subsection will examine the implementation of such laws in municipalities, focusing on both the language of the law and the legal consequences for its enactment. This information is helpful for understanding how rights of nature arguments are developing within the United States outside of Indian country.

---

203. Several lawsuits have resulted in successful rights of nature enforcement. *See supra* notes 140–150. However, scholars have critiqued the Ecuadorian government for proceeding with environmentally harmful activities justified by the related “Good Living” standard contained in the Ecuadorian constitution. *See, e.g.*, CARLOS E. GALLEGOS-ANDA, ECUADOR’S GOOD LIVING: CRISES, DISCOURSE AND LAW 199–208 (2020); MIHNEA TĂNĂSESCU, UNDERSTANDING THE RIGHTS OF NATURE: A CRITICAL INTRODUCTION 123–24 (2022) (noting a 2013 lawsuit seeking to enforce rights of nature in which a judge “interpreted the *buen vivir* doctrine enshrined in the Ecuadorian constitution as requiring a level of resource extraction and argued that there [was] no inherent reason why extraction cannot be done in an environmentally responsible manner”).

204. *See supra* Part I.A (noting that the United States has adopted some laws that could be framed as rights of nature laws).

Roughly fifty municipalities within the United States have enacted rights of nature,<sup>205</sup> including: Tamaqua Borough, Pennsylvania (2006);<sup>206</sup> Pittsburgh, Pennsylvania (2010);<sup>207</sup> Santa Monica, California (2013);<sup>208</sup> Grant Township, Pennsylvania (2014);<sup>209</sup> Toledo, Ohio (2019);<sup>210</sup> and Orange County, Florida (2020).<sup>211</sup> In addition, a 2017 lawsuit brought on behalf of the Colorado River sought from the courts a declaration of legal personhood.<sup>212</sup>

---

205. See *Ecocentric Communities: Rights of Nature Toolkit*, EARTH L. CTR., <https://www.earthlawcenter.org/towns-cities> [<https://perma.cc/4BTB-QJC8>] (providing an interactive map which lists the following as having enacted rights of nature ordinances: Benton County, Oregon; City of Mt. Shasta, California; Mendocino County, California; Santa Monica, California; Mora County, New Mexico; Las Vegas, New Mexico; Lafayette, Colorado; Yellow Springs, Ohio; Columbus, Ohio; Campbell County, Virginia; Montgomery County, Virginia; Town of Halifax, Virginia; Town of Mountain Lake Park, Maryland; Peach Bottom Township, Pennsylvania; East Berlin Borough, Pennsylvania; Blaine Township, Pennsylvania; Baldwin, Pennsylvania; Pittsburgh, Pennsylvania; West Homestead, Pennsylvania; Borough of Forest Hills, Pennsylvania; Wilkinsburg, Pennsylvania; Licking Township, Pennsylvania; State College, Pennsylvania; East Berlin Borough, Pennsylvania; Nockamixon Township, Pennsylvania; East Brunswick Township, Pennsylvania; Mahanoy Township, Pennsylvania; Packer Township, Pennsylvania; Lehman Township, Pennsylvania; Newton Township, Pennsylvania; Harvey's Lake, Pennsylvania; Town of Whales, New York; Van Etten, New York; Town of Danby, New York; Borough of North Plainfield, New Jersey; Nottingham, New Hampshire; Barnstead, New Hampshire; Shapleigh, Maine; Newfield, Maine; and Bethel, Arkansas). Other scholars list this figure as high as two hundred, see Marsha Jones Moutrie, *The Rights of Nature Movement in the United States: Community Organizing, Local Legislation, Court Challenges, Possible Lessons and Pathways*, 10 ENV'T EARTH L.J. 5, 9 (2020) ("Community Rights US reports that 200 local governments in twelve states eventually adopted laws recognizing Nature's legal rights using its community rights model."), though this estimate appears to be too high. Community Rights US in fact lists only twelve such laws (eleven when excluding the tribal law noted by the map), and the estimate of two hundred appears to be based on all community rights laws, see *Community Rights Ordinances US Map*, CMTY. RTS. US, <https://communityrights.us/community-rights-ordinance-campaigns-across-the-us/ordinance-map/> [<https://perma.cc/NC8L-6RXX>].

206. See BOROUGH OF TAMAQUA, PA., CODE § 260–61(F), <https://ecode360.com/30168546> [<https://perma.cc/Y3GB-NGFC>] (establishing rights of nature). See also *id.* § 260–61(G) (establishing a human right to a healthy environment).

207. See PITTSBURGH, PA., CODE OF ORDINANCES § 618.03, [https://library.municode.com/pa/pittsburgh/codes/code\\_of\\_ordinances?nodeId=COOR\\_TITSIXCO\\_ARTIRERAC\\_CH618MASHNAGADR\\_S618.03STLIGPIRENAEN](https://library.municode.com/pa/pittsburgh/codes/code_of_ordinances?nodeId=COOR_TITSIXCO_ARTIRERAC_CH618MASHNAGADR_S618.03STLIGPIRENAEN) [<https://perma.cc/CAY7-96JR>] (establishing rights of nature).

208. See SANTA MONICA, CAL., MUNICIPAL CODE 12.02.030(b), [https://library.qcode.us/lib/santa\\_monica\\_ca/pub/municipal\\_code/item/article\\_12-chapter\\_12\\_02-12\\_02\\_030](https://library.qcode.us/lib/santa_monica_ca/pub/municipal_code/item/article_12-chapter_12_02-12_02_030) [<https://perma.cc/L8LA-KVF9>] (establishing rights of nature). See also *id.* at 12.02.030 (asserting a human right to a healthy environment and a right to self-governance).

209. See Grant Township, Indiana County, Pa., Cmty. Bill of Rts. Ordinance, Section 2, <http://s3.documentcloud.org/documents/1370022/grant-township-community-bill-of-rights-ordinance.pdf> [<https://perma.cc/RA9N-FGRT>].

210. See *Drewes Farms P'ship v. City of Toledo*, 441 F. Supp. 3d 551, 558–60 (N.D. Ohio 2020) (reprinting Toledo's rights of nature ordinance).

211. See ORANGE COUNTY, FLA., CODE OF ORDINANCES part I, art. VII, § 704.1.A(1), [https://library.municode.com/fl/orange\\_county/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTVIIIG\\_EPR\\_S704.1RICALWASTEN](https://library.municode.com/fl/orange_county/codes/code_of_ordinances?nodeId=PTICH_ARTVIIIG_EPR_S704.1RICALWASTEN) [<https://perma.cc/76EG-2U5G>].

212. Complaint for Declaratory Relief, *Colo. River Ecosystem v. Colorado*, No 1:17-cv-02316, 2017 WL 4284548 (D. Colo. Sept. 25, 2017).

Many municipal rights of nature laws are focused on nature and ecosystems in general and provide the right to “exist [and] flourish.”<sup>213</sup> Most such laws provide legal personhood to provide the natural entity standing or permit citizens to sue on the natural entity’s behalf.<sup>214</sup> The laws are similar to Pittsburgh’s, which reads: “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 of Pittsburgh.”<sup>215</sup>

As of early 2022, only one rights of nature provision of a U.S. municipality, the Lake Erie Bill of Rights (LEBOR), has been fully litigated.<sup>216</sup> Similarly, only one such provision, in Orange County, Florida, has been asserted as the basis for a complaint in court.<sup>217</sup> Thus, rights of nature laws remain a novel tool that courts have not yet had the opportunity to widely consider, both because they have rarely been challenged and because they have rarely been used as the basis for enforcement.<sup>218</sup>

Before delving into the problems faced by municipal rights of nature laws and some examples of these challenges, it is worth briefly exploring why communities enact such laws. Generally, municipalities enact a rights of nature provision as a response to a specific environmental threat, such as fracking,<sup>219</sup> or

213. *Id.* at \*22.

214. *See, e.g.,* ORANGE COUNTY, FLA., CODE OF ORDINANCES part I, art. VII, § 704.1.B, [https://library.municode.com/fl/orange\\_county/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTVIIIG\\_EPR\\_S704.1R1CLWASTEN](https://library.municode.com/fl/orange_county/codes/code_of_ordinances?nodeId=PTICH_ARTVIIIG_EPR_S704.1R1CLWASTEN) (“Orange County, municipalities within Orange County, any other public agency within Orange County, and all Citizens of Orange County shall have standing to bring an action in their own name or in the name of the Waters to enforce the provisions of this Section of the Charter.”); *Drewes Farms P’ship v. City of Toledo*, 441 F. Supp. 3d 551, 558–60 (N.D. Ohio 2020) (quoting the LEBOR: “The Lake Erie Ecosystem may enforce its rights, and this law’s prohibitions, through an action prosecuted either by the City of Toledo or a resident or residents of the City . . .”).

215. *See* PITTSBURGH, PA., CODE OF ORDINANCES § 618.03, [https://library.municode.com/pa/pittsburgh/codes/code\\_of\\_ordinances?nodeId=COOR\\_TITSIXCO\\_ARTIRERIAC\\_CH618MASHNAGADR\\_S618.03STLIGPIRENAEN](https://library.municode.com/pa/pittsburgh/codes/code_of_ordinances?nodeId=COOR_TITSIXCO_ARTIRERIAC_CH618MASHNAGADR_S618.03STLIGPIRENAEN) [<https://perma.cc/CAY7-96JR>].

216. *See* *Drewes Farms P’ship v. City of Toledo*, 441 F. Supp. 3d 551 (N.D. Ohio 2020) (invalidating the LEBOR).

217. *See First U.S. “Rights of Nature” Enforcement Case Filed*, CTR. FOR DEMOCRATIC & ENV’T RTS., (Apr. 27, 2021), <https://www.centerforenvironmentalrights.org/news/first-us-rights-of-nature-enforcement-case-filed> [<https://perma.cc/Y28Y-BK2T>]. *See also* *Complaint* at 3–4, *Wilde Cypress Branch v. Beachline South Residential, LLC*, No. 2021-CA-004420-O (Fla. Cir. Ct. Apr. 26, 2021); Isabella Kaminski, *Streams and Lakes Have Rights, a US County Decided. Now They’re Suing Florida*, THE GUARDIAN (May 1, 2021), <https://www.theguardian.com/environment/2021/may/01/florida-rights-of-nature-lawsuit-waterways-housing-development> [<https://perma.cc/88AP-FVNL>].

218. *See infra* Part III (detailing the only two known enforcement actions).

219. *See, e.g.,* Moutrie, *supra* note 205, at 10–24 (discussing how rights of nature laws in five communities emerged as a response to fracking, oil and gas extraction, and industrial runoff). Madeleine Sheehan Perkins, *How Pittsburgh Embraced a Radical Environmental Movement Popping Up in Conservative Towns Across America*, INSIDER (July 9, 2017), <https://www.businessinsider.com/rights-for-nature-preventing-fracking-pittsburgh-pennsylvania-2017-7> [<https://perma.cc/9VTT-ZE25>] (“Pittsburgh [embraced rights of nature] in an effort to keep hydraulic fracturing, commonly known as

to increased local pollution or environmental degradation.<sup>220</sup> Some local communities appear to have become exasperated with the inadequacy of state and federal environmental laws to protect them from the economic and health-related consequences of environmental degradation.<sup>221</sup> Such laws have been enacted in small towns long considered to be politically conservative.<sup>222</sup> As discussed by Marsha Jones Moutrie, these laws often seek to establish local power while diminishing corporate power.<sup>223</sup> Because of this, a handful of these “community rights” laws have been invalidated on grounds other than a legal defect in their rights of nature provision.<sup>224</sup>

Aside from the difficulties inherent in passing a rights of nature law, U.S. municipalities have faced several further legal issues. First, such laws may be invalid as a structural-constitutional matter. For instance, municipal rights of nature laws may be preempted by state or federal statutes. In the U.S. legal system, a law is preempted when a higher level of government has a law that expressly or impliedly prevents a lower level of government from enacting such a law.<sup>225</sup> Second, such laws may be unconstitutionally vague. A law is void for vagueness if “it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” or “if it authorizes or even

---

fracking, out of the city in 2010.”); Justin Nobel, *Nature Scores a Big Win Against Fracking in a Small Pennsylvania Town*, ROLLING STONE (Apr. 1, 2020), <https://www.rollingstone.com/politics/politics-news/rights-of-nature-beats-fracking-in-small-pennsylvania-town-976159/> [https://perma.cc/ZFQ4-G4QA] (describing the rejection of a permit to frack in Grant Township, Pennsylvania).

220. See Surma, *supra* note 8 (noting the reasons behind the Orange County, Tamaqua, and Toledo laws); *id.* (“Galvanized by oil spills, toxic waste dumps, lead-tainted water, air pollution and fracking, Americans increasingly battered by climate change have been drawn towards the rights of nature movement.”).

221. See Justin Nobel, *How a Small Town Is Standing Up to Fracking*, ROLLING STONE (May 22, 2017), <https://www.rollingstone.com/politics/politics-news/how-a-small-town-is-standing-up-to-fracking-117307/> [https://perma.cc/9NHN-KR99] (noting how citizens realized “no one was going to save us but ourselves” following EPA’s approval of a fracking wastewater injection well despite local opposition); Sigal Samuel, *Lake Erie Now Has Legal Rights, Just Like You*, VOX (Feb. 26, 2019), <https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio> [https://perma.cc/TJ3S-LX5K] (“The pollution of Lake Erie had gotten so bad that it had taken a serious toll on [citizen’s] lives. The government, they felt, wasn’t doing enough to protect the lake. And so they wondered: What if the lake could protect itself?”).

222. See Perkins, *supra* note 219 (noting that most rights of nature laws appear in “conservative small towns”); Surma, *supra* note 8 (describing Tamaqua as a “solidly Republican town”).

223. See Moutrie, *supra* note 205, at 8–9, 41, 53–56.

224. See *id.* at 24–41 (tracing the history of litigation surrounding Grant Township, Pennsylvania; Highland Township, Pennsylvania; Mora County, New Mexico; Lafayette, Colorado; and the Lake Erie Bill of Rights). Only the LEBOR’s rights of nature provision was expressly challenged and invalidated; the other laws were challenged for violating corporate rights or reasons other than an infirmity with the rights of nature provision. *Id.*

225. See generally Lauren E. Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2229–33 (2017) (detailing the history of municipalities’ limited power and the history of home rule charters, which vest slightly more power in municipalities but remain subject to preemption challenges); 62 C.J.S. Municipal Corporations § 182 (2022).



encourages arbitrary and discriminatory enforcement.”<sup>226</sup> Third, such laws may expose municipalities to damages liability or liability for attorney fees, and attorneys advocating for such laws may face sanctions.<sup>227</sup> While the foregoing survey of rights of nature implementation in the United States illustrates these issues, most provisions have not faced legal challenges and remain on the books. This is the case with the world’s first rights of nature law.

Most commentators trace implementation of rights of nature (both in the United States and globally) to Tamaqua Borough, Pennsylvania.<sup>228</sup> In 2006, the Borough enacted an ordinance meant to prevent the land application of sewage sludge without testing.<sup>229</sup> Yet, the ordinance also contains the following provision: “It shall be unlawful for any corporation or its directors, officers, owners, or managers to interfere with the existence and flourishing of natural communities or ecosystems, or to cause damage to those natural communities and ecosystems.”<sup>230</sup> Further, “Borough residents, natural communities, and ecosystems shall be considered to be ‘persons’ for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems.”<sup>231</sup> Thus, the Borough ordinance contains both substantive rights (the right of natural communities and ecosystems to flourish) and legal personhood (recognition of standing of non-human entities). This ordinance remains on the books and opponents have not challenged it in court, as opponents of some similar ordinances have.<sup>232</sup>

---

226. Hill v. Colorado, 530 U.S. 703, 732 (2000) (citing City of Chicago v. Morales, 527 U.S. 41, 56–57 (1999)).

227. See *infra* notes 248–274 and accompanying text. Though beyond the scope of this article, and as Moutrie discusses, a law containing a rights of nature provision may be struck for other reasons, such as violating corporations’ fundamental rights. See Moutrie, *supra* note 205, at 24–25 (detailing the typical challenges brought by corporations against community rights laws containing rights of nature provisions).

228. See, e.g., Surma, *supra* note 8; *Rights of Nature: Timeline*, CELDF, <https://celdf.org/rights-of-nature/timeline/> [<https://perma.cc/34ZY-V3NM>] (last visited Jan. 26, 2023) (chronicling the ordinance’s history in context). In fact, the Navajo Nation enacted a provision that requires the Nation to use Diné Natural Law to resolve ambiguities; Diné Natural Law “declares and teaches that: . . . All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws and have rights and freedoms to exist.” NAVAJO NATION CODE ANNOTATED, tit. 1, § 205 (2010). This provision, unlike Tamaqua’s, did not purport to be substantive law, however.

229. See BOROUGH OF TAMAQUA, PA., CODE § 260–57, <https://ecode360.com/30168546> [<https://perma.cc/XC6A-86GW>]; *id.* § 260–62.

230. *Id.* § 260–61(F).

231. *Id.*

232. See Surma, *supra* note 8 (“[T]he 2006 Tamaqua ordinance has never been tested in court.”); Moutrie, *supra* note 205, at 24–41 (describing the litigation surrounding similar ordinances). See also CELDF, *Tamaqua Borough, Pennsylvania* (Aug. 31, 2015), <https://celdf.org/2015/08/tamaqua-borough/> [<https://perma.cc/HY32-DNGP>] (outlining the history of the ordinance).

As other jurisdictions within the United States began to consider rights of nature provisions, legal challenges to these provisions started to arise.<sup>233</sup> Toledo, Ohio's Lake Erie Bill of Rights (LEBOR) illustrates two issues opponents may raise in a legal challenge to a local rights of nature law: unconstitutional vagueness and state preemption. In a 2019 special election, Toledo added the LEBOR to its city charter.<sup>234</sup> The LEBOR states that the Lake Erie Ecosystem has the right "to exist, flourish, and naturally evolve," and is self-executing.<sup>235</sup> Notably, the LEBOR deems invalid (within city limits) any state or federal permit or authorization that would violate the LEBOR,<sup>236</sup> imposes criminal liability on any corporation or government that violates the LEBOR,<sup>237</sup> and permits both the City and any resident to enforce it.<sup>238</sup> The LEBOR makes clear that "[t]he Lake Erie Ecosystem may enforce its rights [via an action] . . . brought in the name of the Lake Erie Ecosystem as the real party in interest."<sup>239</sup> In addition, the LEBOR, echoing Professor Stone's argument that rights of nature laws should use damages to restore damaged objects,<sup>240</sup> states that damages "shall be paid to the City of Toledo to be used exclusively for the full and complete restoration of the Lake Erie Ecosystem."<sup>241</sup> Further, the LEBOR imposes strict liability on governments and corporations.<sup>242</sup>

Immediately following its enactment, Drewes Farms Partnership sued, and the State of Ohio later joined the litigation.<sup>243</sup> The Northern District of Ohio invalidated the LEBOR as unconstitutionally vague: "What conduct infringes the right of Lake Erie and its watershed to 'exist, flourish, and naturally evolve'? . . . How would a prosecutor, judge, or jury decide? LEBOR offers no guidance."<sup>244</sup> The court implied that the law partly failed because it imposed criminal liability and strict liability.<sup>245</sup> In addition, the court suggested that the LEBOR failed for reasons other than vagueness: "[T]he Lake's health falls well outside the City's constitutional right to local self-government . . . Consequently, municipal laws

---

233. As noted above, and as detailed by Marsha Jones Moutrie, several laws containing rights of nature provisions have been struck on other grounds. *See* Moutrie, *supra* note 205, at 24–25 (detailing the typical challenges brought by corporations against community rights laws containing rights of nature provisions).

234. *See* *Drewes Farms P'ship v. City of Toledo*, 441 F. Supp. 3d 551, 554 (N.D. Ohio 2020).

235. *Id.* at 554 (reprinting the LEBOR). Notably, the LEBOR also contains a provision establishing the right to a clean and healthy environment for residents of Toledo. *See id.* at 558–60.

236. *Id.* at 559.

237. *Id.*

238. *Id.*

239. *Id.* at 559–60.

240. *See* Stone, *supra* note 27, at 480–81.

241. *Drewes Farms P'ship v. City of Toledo*, 441 F. Supp. 3d 551, 560 (N.D. Ohio 2020).

242. *Id.*

243. *Id.* at 554.

244. *Id.* at 556 (citation omitted).

245. *Id.* at 555 ("Heightened scrutiny applies to laws that impose criminal penalties, burden the exercise of constitutional rights, or apply a strict-liability standard.").

enacted to protect Lake Erie are generally void if they conflict with Ohio law.”<sup>246</sup> In sum, the LEBOR failed on both vagueness and preemption grounds. Toledo voluntarily dismissed its appeal to the U.S. Court of Appeals for the Sixth Circuit.<sup>247</sup>

Likewise, municipalities that enact rights of nature ordinances may face serious financial costs for doing so, and attorneys who seek to pursue such arguments in court may face sanctions. Two examples illustrate these issues: Grant Township, Pennsylvania, and a lawsuit seeking to establish personhood for the Colorado River. Grant Township enacted a “Community Bill of Rights” (CBR), which contained a provision on self-government; a right to “clean air, water and soil” for humans and non-humans; a right to scenic preservation; a rights of nature provision; and a right to a sustainable energy future.<sup>248</sup> The CBR authorized citizens or the Township itself to enforce these rights and noted that enforcement of the rights of nature provision “shall [be brought] in the name of the ecosystem or natural community . . . [and d]amages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury.”<sup>249</sup> Further, the CBR purported to strip corporations of their personhood and their ability to challenge the CBR if they violated the ordinance.<sup>250</sup>

The Pennsylvania General Energy Company (PGE) challenged the CBR primarily on state and federal preemption grounds and federal constitutional grounds.<sup>251</sup> While PGE sought to invalidate the entire ordinance, the court considered only the specific provisions PGE attacked in its arguments.<sup>252</sup> The court did not consider the section recognizing substantive rights of nature, though it did consider the section focused on enforcement and damages,<sup>253</sup> quoted above. The court enjoined enforcement of this provision, along with the

---

246. *Id.* at 557.

247. *Drewes Farms P’ship v. City of Toledo*, 2020 WL 3620205 (6th Cir. 2020).

248. *See* Grant Township, Indiana County, Pennsylvania Community Bill of Rights Ordinance, Section 2, <http://s3.documentcloud.org/documents/1370022/grant-township-community-bill-of-rights-ordinance.pdf> [<https://perma.cc/RA9N-FGRT>].

249. *Id.* at Sections 2(f), 4(b)(c).

250. *Id.* at Section 5(a) (“Corporations that violate this Ordinance, or that seek to violate this Ordinance, shall not be deemed to be ‘persons,’ nor possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. ‘Rights, privileges, powers, or protections’ shall include the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of this municipality lack the authority to adopt this Ordinance.”).

251. *See* Pa. Gen. Energy Co., LLC v. Grant Twp., 139 F. Supp. 3d 706, 715 (W.D. Pa. 2015) (“Plaintiff raises thirteen separate causes of action. Plaintiff claims the Ordinance, as a whole, violates the Supremacy Clause, the Equal Protection Clause, the Petition Clause of the First Amendment, the Contract Clause, and both the substantive and procedural components of the Due Process Clause of the United States Constitution. Plaintiff also claims the entire Ordinance is preempted by Pennsylvania’s Second Class Township Code, the Oil and Gas Act, the Limited Liability Companies Law, and the Sunshine Act and violates state law as an impermissible exercise of police power and because it is exclusionary.”).

252. *Id.*

253. *See id.* at 719.

provision stripping corporations of their personhood and rights.<sup>254</sup> The Township, represented by Community Environmental Legal Defense Fund (CELDF) attorneys, counterclaimed that “PGE is violating the inalienable rights of the people . . . to ‘local community self government.’”<sup>255</sup> The court refused relief on this claim.<sup>256</sup> Additionally, advocates of the CBR along with the Little Mahoning Watershed sought to intervene.<sup>257</sup> The court denied intervention,<sup>258</sup> and the U.S. Court of Appeals for the Third Circuit affirmed.<sup>259</sup> The Third Circuit expressed doubt, but did not rule on, whether the Watershed could be a proper party under Federal Rule of Civil Procedure 17.<sup>260</sup>

In response to the district court’s judgment on the pleadings,<sup>261</sup> the Township repealed the CBR and adopted a Home Rule Charter.<sup>262</sup> The Charter contained substantively the same provisions as the CBR,<sup>263</sup> thus avoiding certain state preemption issues.<sup>264</sup> Eventually, after the parties settled the case,<sup>265</sup> the court granted attorney fees to PGE<sup>266</sup> and imposed sanctions against the attorneys who filed counterclaims against PGE.<sup>267</sup> Somewhat begrudgingly, the court did

254. *See id.* at 722.

255. *Id.* at 710.

256. *Id.* at 714.

257. *Pa. Gen. Energy Co., LLC v. Grant Twp.*, C.A. No. 14-209ERIE, 2015 WL 6002163, at \*1 (W.D. Pa. Oct. 14, 2015).

258. *Id.* at \*5.

259. *Pa. Gen. Energy Co., LLC v. Grant Twp.*, 658 F. App’x 37, 42 (3d Cir. 2016).

260. *Id.* at 38 n.2 (“PGE argued to the District Court that a watershed . . . is not a proper party to this lawsuit according to Fed. R. Civ. P. 17(b). The District Court did not directly decide this question, concluding instead that the Township adequately represented any interests the watershed may have, and we have no disagreement with that approach. . . . We do not see, however, how a watershed could be considered a proper party under Rule 17. Under that Rule, in order to be a party to a lawsuit, the purported litigant must have the capacity to sue or be sued. On this point, the rule speaks only in terms of individuals, corporations and others permitted by state law to sue or be sued. . . . The plain language of Rule 17 does not permit an ecosystem such as the Little Mahoning Watershed to sue anyone or be sued by anyone, and for that reason alone we have misgivings with the Watershed being listed as a party in this litigation. But, because this particular issue was not pursued on appeal, and given the nonprecedential nature of this opinion, we make no specific holding on the question.”).

261. *Pa. Gen. Energy Co., LLC v. Grant Twp.*, 139 F. Supp. 3d 706 (W.D. Pa. 2015).

262. *Pa. Gen. Energy Co. v. Grant Twp.*, C.A. No. 14-209ERIE, 2017 WL 1215444, at \*1 (W.D. Pa. Mar. 31, 2017).

263. *See* Home Rule Charter of the Township of Grant, Indiana County, Pennsylvania, <http://celdf.org/wp-content/uploads/2016/02/Grant-Township-Community-Rights-Home-Rule-Charter.pdf> [<https://perma.cc/KT4B-UDFX>]. *See also* the CBR, *supra* note 248.

264. *See* Moutrie, *supra* note 205, at 26.

265. *Pa. Gen. Energy Co., LLC v. Grant Twp.*, C.A. No. 1:14-cv-209, 2019 WL 1436937, at \*2 (W.D. Pa. Mar. 31, 2019) (noting that the parties settled for \$1.00).

266. *Id.* at \*5 (assessing attorney fees at \$100,000 and costs at \$2,979.18).

267. *See* *Pa. Gen. Energy Co., LLC v. Grant Twp.*, C.A. No. 14-209ERI, 2018 WL 306679, at \*12 (W.D. Pa. Jan. 05, 2018) (“This Court has determined that Attorneys Linzey and Dunne have pursued certain claims and defenses in bad faith. Based upon prior CELDF litigation, each was on notice of the legal implausibility of arguments previously advanced as to: (1) the purported invalidity of corporate rights; (2) the identification of a regulated corporation as a ‘state actor’; (3) community self-governance as a justification for striking or limiting long-standing constitutional rights, federal and state

not impose sanctions on another attorney who filed the motion to intervene on behalf of the Watershed.<sup>268</sup>

*Colorado River v. Colorado* further illustrates the ways in which those seeking to recognize the rights of nature may face serious financial penalties.<sup>269</sup> In 2017, Jason Flores-Williams sued Colorado seeking a declaration that the Colorado River had legal personhood and that it possessed the substantive “rights to exist, flourish, regenerate, be restored, and naturally evolve.”<sup>270</sup> In response to the amended complaint, the State presented four arguments on its motion to dismiss: (1) the State’s sovereign immunity barred the complaint; (2) plaintiffs lacked standing under a federal statute or Article III; (3) the complaint “fail[ed] to demonstrate jurisdiction under any other federal statute in the absence of an actual case or controversy under Article III”; and (4) the complaint “present[ed] a non-justiciable issue of public policy.”<sup>271</sup> In addition, the Colorado attorney general’s office sent a letter to Flores-Williams, per Rule 11 of the Federal Rules of Civil Procedure, threatening sanctions.<sup>272</sup> The crux of the letter was that federal suit was frivolous given the State’s sovereign immunity.<sup>273</sup> Flores-Williams chose to voluntarily dismiss the case with prejudice rather than proceed with “a lengthy sanctions battle.”<sup>274</sup>

---

laws, and regulations; and (4) the purported invalidity of ‘Dillon’s Rule’ to the extent it applies to limit a municipality’s ability to enact ordinances in conflict with state and federal law.”); Pa. Gen. Energy Co., C.A. No. 1:14-cv-209, 2019 WL 1436937, at \*13 (granting sanctions totaling \$52,000).

268. See Pa. Gen. Energy Co., C.A. No. 14-209ERI, 2018 WL 306679, at \*8 (W.D. Pa. Jan. 6, 2018) (“Having found that the motion for sanctions as to Attorney Schromen-Wawrin is untimely, the Court shall enter an Order granting the motion to strike filed on behalf of Little Mahoning Watershed and East End Hellbenders (citation omitted) on that basis only. The Court stresses, however, that the denial of relief should not be interpreted as condoning the commencement of proceedings to intervene where, as under the facts presented here, no reasonable interpretation of existing case law rendered such motion appropriate. . . . Accordingly, the disposition of the motion for sanctions with regard to Attorney Schromen-Wawrin reflects only the untimeliness of the motion, and not the merits.”).

269. *Colo. River Ecosystem v. Colorado*, No 1:17-cv-02316 (D. Colo. Sept. 25, 2017).

270. Complaint for Declaratory Relief, *Colo. River Ecosystem v. Colorado*, No 1:17-cv-02316, 2017 WL 4284548, at \* 22 (D. Colo. Sept. 25, 2017).

271. Defendants’ Motion to Dismiss Amended Complaint, *Colo. River Ecosystem v. Colorado*, Civil Action No. 17-CV-02316-NYW, at 2 (D. Colo. Dec. 1, 2017), <https://www.documentcloud.org/documents/4320638-Coloradio-River-Eco-v-CO-12-1-17-Amended-Motion.html#document/p1/a390933> [<https://perma.cc/9W6A-AC98>].

272. See Letter from Scott Steinbrecher, Senior Assistant Att’y Gen., State of Colo., to Jason Flores-Williams, Law Off. of Jason Flores-Williams (Nov. 16, 2017), <https://s3.documentcloud.org/documents/4320639/AG-s-Letter-to-Flores-Williams-on-Rule-11.pdf> [<https://perma.cc/NJP3-2NCC>]. See also Fed. R. Civ. P. 11.

273. See Letter from Scott Steinbrecher, *supra* note 272.

274. Lindsay Fendt, *Colorado River ‘Personhood’ Case Pulled by Proponents*, ASPEN JOURNALISM (Dec. 5, 2017), <https://aspensjournalism.org/colorado-river-personhood-case-pulled-by-proponents/> [<https://perma.cc/2QCV-2VD5>] (quoting Flores-Williams). See also Unopposed Motion to Dismiss Amended Complaint with Prejudice, *Colo. River Ecosystem v. Colorado*, Case No. 17cv02316–NYW, at 2 (D. Colo. Dec. 03, 2017) (“COMES NOW Plaintiff Colorado River Ecosystem, by and through undersigned counsel, and respectfully moves this Honorable Court to dismiss the Amendment Complaint with prejudice”).

In sum, as *Grant Township* demonstrates, municipalities may face serious costs for enacting rights of nature laws. Further, as seen in the Colorado River case, attorneys who assist in such efforts may face penalties. It is important to note that the sanctions imposed and threatened in the cases highlighted above were not, strictly speaking, due to attorneys' arguments advocating for rights of nature.<sup>275</sup> Regardless, there are potentially high monetary barriers to these ideas.

Thus, while local governments within the United States appear to be increasingly looking to the possibility of rights of nature laws, substantial obstacles still remain—namely, vagueness, preemption, and potential sanctions. Stone foresaw this, as he explained that

[t]here is something of a seamless web involved: there will be resistance to giving the thing 'rights' until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it 'rights'—which is almost inevitably going to sound inconceivable to a large group of people.<sup>276</sup>

Tribes, as will be explored in Part II, are in a unique position to avoid several of the obstacles faced by U.S. local governments.

## II.

### TRIBES AND THE RIGHTS OF NATURE

Despite significant development within U.S. jurisdictions and internationally, there is no perfect formula for how governments should articulate rights of nature and what they should entail. As described above, different jurisdictions implement different rights for different natural entities through different mechanisms. In this regard, tribal developments related to rights of nature can prove instructive and helpful to other jurisdictions. As discussed below, tribal governments can and do serve as helpful "laboratories" from which other governments can learn.

Yet, importantly, not all Indigenous Peoples support the development of the rights of nature, as Indigenous Peoples are not monolithic. This is because wide-ranging implementation of a rights of nature framework could infringe on the ability of Indigenous Peoples to develop their territories.<sup>277</sup> This is why the development of rights of nature should happen organically from within tribal communities and in a way that recognizes and respects tribal sovereignty. Additionally, Tribes may either develop their own, Indigenous concepts of rights of nature or may use settler-colonial legal constructs to help such

---

275. In the *Grant Township* litigation, the court imposed sanctions for frivolous arguments about the power of community rights, see Pa. Gen. Energy Co., C.A. No. 14-209ERI, 2018 WL 306679, at \*12, while in the Colorado River case, sanctions revolved around sovereign immunity, see *supra* note 272 and accompanying text.

276. See Stone, *supra* note 27, at 456. See also Houck, *supra* note 8, at 34.

277. See Houck, *supra* note 9, at 34.

advancement.<sup>278</sup> “[S]ome Indigenous peoples have demonstrated a nuanced strategic approach to using ‘rights of Nature’ as a way to support a collective approach to environmentally sustainable and culturally appropriate development by raising the profile of both natural entities *and* Indigenous peoples.”<sup>279</sup> In this regard, Tribes have the capacity to be both truly unique and adaptive in their development of rights of nature.

This Part first explores how the legal framework for tribal sovereignty and tribal environmental ethics enable the development of rights of nature by Tribes. It then more fully theorizes the concept of “Tribes as laboratories.” This Section asserts that tribal governments serve as valuable legal “laboratories” from which other sovereigns may learn from the successes and occasional failures of tribal governments. U.S. municipalities and states currently considering adoption of rights of nature provisions may have much to learn from tribal efforts. Differences may exist, however, as to tribal and non-tribal concepts of standing and legal personhood. Second, this Part reviews the resolutions adopted by several Tribes within the United States and compares them with the ordinances of U.S. municipalities, specifically demonstrating how the “laboratories” have aligned and differed.

#### A. *Laboratories for the Future*

Tribes within the United States are governed by a different legal framework than that governing states or municipalities.<sup>280</sup> In addition, many Tribes have environmental ethics that differ markedly from those embraced by Western entities.<sup>281</sup> This Section begins with a brief introduction to tribal sovereignty to explain why Tribes possess the authority to enact rights of nature laws, and to illustrate how they might better withstand judicial review. Next, this Section discusses tribal environmental ethics as a potential explanation for why the development of rights of nature laws has been largely successful within tribal and Indigenous communities but faced substantial challenges elsewhere. Finally, this Section examines the concept of “Tribes as laboratories,” and examines how Tribes can play a role in experimenting with novel legal frameworks.

##### 1. *Tribal Sovereignty*

“Tribal sovereignty” has multiple meanings for many Indian people, as exemplified by the story below:

[A] young Indian activist who had grown weary of his own strained explanations to non-Indians of what Indians meant when they said “our sovereignty.” So he asked a respected elderly Indian couple of the Tribe: “Just what do we mean when we say ‘sovereignty’?” In response, the

---

278. See O'Donnell et al., *supra* note 3, at 413.

279. *Id.* at 416.

280. See *infra* Part II.A.1

281. See *infra* Part II.A.2

old man reached for his walking stick, drew a deep line in the dirt, pointed to one side and then the other, and said: “That’s North Dakota. This is Turtle Mountain. And that’s sovereignty.” As the young man turned to the elderly woman she reposed her look in agreement, but subtly added, “this is sovereignty,” as she pointed directly inside herself.<sup>282</sup>

Thus, tribal sovereignty can be a reference to both a physical place and the people who occupy the place; for many Indians, their Tribe’s sovereignty contributes to their very personhood. In addition, “tribal sovereignty” refers to the resulting legal relationship between Tribes and other U.S. jurisdictions.<sup>283</sup>

Tribes possess power unique within the United States. Tribes pre-existed the formation of the United States,<sup>284</sup> and early in U.S. history, the Supreme Court described Tribes “as distinct political communities, having territorial boundaries, within which their authority is exclusive.”<sup>285</sup> Chief Justice Marshall, the author of the “Marshall Trilogy” of cases that serves as the foundation of modern federal Indian law,<sup>286</sup> “recognized that [T]ribes possess territorial sovereignty.”<sup>287</sup> Today, as the Supreme Court has summarized, “Indian [T]ribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”<sup>288</sup> As a result, Tribes (1) have separate court systems, (2) are not subject to the restrictions imposed by the U.S. Constitution, and (3) retain regulatory and adjudicatory power within their territories, including limited power over non-Indians. These three features can allow Tribes to enact and enforce rights of nature provisions; Tribes do not face the same barriers as municipalities. For example, because the U.S. Constitution does not apply to Tribes,<sup>289</sup> claims based in the U.S. Constitution, such as vagueness, that have plagued municipalities trying to adopt rights of nature provisions do not hinder Tribes.

First, as separate sovereigns, many (although not all) Tribes have tribal courts. Tribal court systems exist in the United States as systems of justice outside of the U.S. state and federal justice systems. Some tribal courts resemble typical settler colonial-styled justice systems, while other tribal courts are quite

---

282. Richard A. Monette, *Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide*, 21 VT. L. REV. 111, 124–25 (1996).

283. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (Nell Jessup Newton, et al. eds. 2017) [hereinafter COHEN’S HANDBOOK].

284. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

285. Worcester v. Georgia, 31 U.S. 515, 557 (1832).

286. The cases composing the Marshall Trilogy include Johnson v. M’Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); and Worcester v. Georgia, 31 U.S. 515 (1832). M’Intosh, Cherokee Nation, and Worcester were first referred to as the “Marshall Trilogy” by Charles F. Wilkinson. See David H. Getches, Daniel M. Rosenfelt & Charles F. Wilkinson, CASES AND MATERIALS ON FEDERAL INDIAN LAW 42–45 (1st ed. 1979).

287. Monette, *supra* note 282, at 128.

288. United States v. Wheeler, 435 U.S. 313, 323 (1978).

289. See COHEN’S HANDBOOK, *supra* note 283, § 5.01[1].



traditional.<sup>290</sup> As with courts, many Tribes also have legislative bodies, often called “tribal councils.”<sup>291</sup> Because Tribes are separate sovereigns from the United States, there is no uniform government structure.<sup>292</sup>

Several legal developments led to the separateness of Tribes. The first development, as mentioned above, is that Tribes are extra-constitutional, meaning that Tribes exist outside of the U.S. Constitution and are not subject to its constraints.<sup>293</sup> For example, in *Cherokee Nation v. Georgia*,<sup>294</sup> the U.S. Supreme Court held that Tribes were “domestic dependent nations,” highlighting their separateness from both state and federal governments. Similarly, in *Worcester v. Georgia*, the U.S. Supreme Court further clarified the separateness of Tribes, finding that the laws of the states shall have “no force” and “no effect” within the exterior boundaries of tribal nations.<sup>295</sup> In the late nineteenth century, however, the U.S. Supreme Court articulated the absolute authority of the federal government over tribal nations in *United States v. Kagama*<sup>296</sup> when the Court held that Congress has plenary authority over Tribes. As an expression of its plenary authority over Indian country, Congress passed the Indian Reorganization Act (IRA)<sup>297</sup> on June 18, 1934, with the partial purpose of

---

290. A variety of tribal courts currently exist within the United States. *See id.* § 4.04[3][c][iv]. *See also* B.J. Jones, *Role of Indian Tribal Courts in the Justice System*, 1, 2 (2000), <http://www.icctc.org/Tribal%20Courts-final.pdf> [<https://perma.cc/2DXN-LK9J>] (“Many tribal justice systems evolved from courts set up by the Bureau of Indian Affairs on reservations in an attempt to assimilate Native people into the predominant Anglo legal system. As a result of this, many Indian tribal courts mirror the justice systems that exist in states and the federal system and use very similar procedures and rules. Other Indian tribal courts have attempted to bring back traditional dispute resolution techniques by adding these methods into their court systems. As a result, these courts and their procedures may differ dramatically from the procedures of a state or federal court.”).

291. *See* COHEN’S HANDBOOK, *supra* note 283, § 4.04[3][c][ii].

292. *Id.* § 4.04[3][c] (discussing the different forms of tribal governments).

293. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that “the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution” and thus, the Nation was not subject to the requirements of the Fifth Amendment); *United States v. Wheeler*, 435 U.S. 313, 329–30 (1978) (affirming *Talton* and holding the Double Jeopardy Clause did not bar double prosecution by the United States and the Navajo Nation as the two were separate sovereigns). *See also United States v. Lara*, 541 U.S. 193 (2004) (holding that a Tribe’s ability to prosecute a defendant for a crime against a police officer is inherent in tribal sovereignty and does not stem from federal authority. Thus, scholars have noted that “tribal sovereignty is both pre-constitutional and extra-constitutional.” Ann E. Tweedy, *Connecting the Dots Between the Constitution, The Marshall Trilogy, and the United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 656 (2009).

294. 30 U.S. 1, 17 (1831).

295. 31 U.S. 515, 520, 539 (1832).

296. 118 U.S. 375 (1886).

297. 25 U.S.C. § 461 et seq. (1934).

increasing local tribal self-government.<sup>298</sup> Following passage of the IRA, U.S. Indian tribal courts began to proliferate throughout Indian country.<sup>299</sup>

The second development that led to the separateness of Tribes took place in the 1960s and 70s when Congress and the Supreme Court took steps to limit the authority of tribal courts.<sup>300</sup> This was perhaps in reaction to fears in mainstream society regarding the application and enforcement of tribal law.<sup>301</sup> As a result of these developments, tribal courts have limited authority over non-

---

298. See also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (“The intent and purpose of the Reorganization Act was ‘to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.’” (quoting H.R. Rep. No. 73-1804, 73d Cong., 2d Sess., at 6 (1934))); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 810 n.40 (2008) (“Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (2000), which had as its purpose the need to craft measures ‘whereby Indian [T]ribes would be able to assume a greater degree of self-government.’”); Honorable Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. REV. 1, 1 (1997) (“Passage of the Indian Reorganization Act allowed the [T]ribes to organize their governments, by drafting their own constitutions, adopting their own laws through tribal councils, and setting up their own court systems.”)

299. See generally 18 U.S.C. § 1151 (stating that “[e]xcept as otherwise provided in sections 1154 and 1156 of this title, the term ‘Indian country’, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”). See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 835 (2007) (“There are a growing number of tribal courts in place to hear disputes—between both members and non-members—that arise on the reservation. Tribal courts vary widely in their structure: trial courts, appellate courts, Peacemaker courts, talking circles, drug courts, and specialized courts for domestic violence or child custody matters can all be found in Indian country.”).

300. For example, see the Indian Civil Rights Act of 1968, which applied many of the protections of the U.S. Constitution to Indian country as well as generally limiting American Indian tribal court punishment authority to \$5,000 and/or one year in prison. 25 U.S.C. §§ 1301–03. See also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (holding that American Indian tribal courts did not have authority over non-Indians in criminal matters).

301. For example, in testimony related to what became known as the Indian Civil Rights Act, U.S. Senator Burdick stated, “in many cases the tribal courts are ‘kangaroo courts.’ One of the basic reasons for my statement is that the method of selecting tribal judges insures [*sic*] that an Indian appearing before tribal court, in too many cases, will not get fair treatment.” *C.R. of the American Indian: Hearings Before the Subcomm. on C.R. of the S. Comm. on the Judiciary*, 87th Cong. 88 (1961) (statement of Hon. Quentin N. Burdick, U.S. Senator from N.D.). More recently, in her comments on the pending Tribal Law and Order Act of 2009, the Honorable Theresa Pouley indicated that some still remain concerned regarding the effectiveness of American Indian tribal courts. “At the hearing last month on the draft Tribal Law and Order Act, representatives from the Departments of Justice and Interior expressed concerns to this Committee regarding the extension of tribal court sentencing authority. DOJ and BIA expressed concerns as to whether tribal courts would adequately protect the rights of criminal defendants. DOI expressed similar concerns, and also raised issues regarding increased costs of longer detentions and possibly an increase in habeas petitions.” *Tribal Cts. and the Admin. of Just. in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 100th Cong. (2008) (statement of Hon. Theresa M. Pouley, Judge, Tulalip Tribal Court; President, Northwest Tribal Court Judges Association) [<https://perma.cc/Q3P7-TQ6Z>].

Indians: they have no authority over non-Indian criminal defendants<sup>302</sup> and restricted authority over non-Indians involved in civil matters, as discussed more fully below in relation to the *Montana* decision.<sup>303</sup>

As further evidence of Tribes' separateness from the federal government, the federal government's general policy is to leave issues related to tribal members solely within the inherent tribal sovereignty of tribal governments.<sup>304</sup> For example, "adjudication in tribal court is normally final and unreviewable in any other forum,"<sup>305</sup> as state courts do not have appellate authority and the federal courts have very limited review. Because federal Indian law (the law governing the relationship between Tribes and the federal government) is federal law, federal courts sometimes have subject matter jurisdiction to review tribal court decisions. However, parties must generally exhaust tribal court remedies before seeking federal court review.<sup>306</sup>

Tribes remain separate, sovereign nations existing within the boundaries of the United States. Tribes maintain those aspects of sovereignty that have not been removed by virtue of treaty, by statute, or "by implication as a necessary result of their dependent status."<sup>307</sup> Accordingly, any examination of tribal authority should start with the presumption that the Tribe in question possesses sovereignty, unless the federal government divested the Tribe of its sovereignty.<sup>308</sup> By virtue of their inherent sovereignty, Tribes possess authority over their members and territories.<sup>309</sup> This authority includes the ability to regulate through tribal environmental laws.<sup>310</sup>

As alluded to above, despite inherent tribal sovereignty, Tribes sometimes face jurisdictional uncertainty in relation to their authority over the actions of non-members and non-Indians acting within the Tribe's territory. In the civil context,<sup>311</sup> in *Montana v. United States*, the U.S. Supreme Court considered the

---

302. *Oliphant*, 435 U.S. at 195.

303. *See* *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 320 (2008) (holding that although American Indian tribal courts have jurisdiction to regulate conduct on tribal lands, that power is lost once the land is transferred to non-Indians). *See also* *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (holding that American Indian tribal courts possess civil jurisdiction over non-Indians when the non-Indians either enter into a consensual relationship with the plaintiff allowing for tribal court jurisdiction or when the non-Indians' activities threaten the health, welfare, economic security, or political integrity of the Tribe).

304. *See generally* *Worcester v. Georgia*, 31 U.S. 515 (1932) (holding that the laws of Georgia did not have any effect within the Cherokee Nation's territory); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that Tribes have the power to determine tribal membership).

305. *See* COHEN'S HANDBOOK, *supra* note 283, § 4.04[3][c][iv][C].

306. *See, e.g.,* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

307. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

308. *See* COHEN'S HANDBOOK, *supra* note 283, § 4.01[1][a].

309. *See* *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

310. *See generally* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY (2005) (describing how tribal environmental law has been enacted where it does not conflict with federal environmental laws of general application).

311. Tribes' criminal jurisdiction is generally limited to only Indians. *See* *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195 (1978).

extent of a Tribe's inherent sovereignty over non-Indians and concluded that Tribes may regulate non-Indians in only limited circumstances.<sup>312</sup> Ultimately, because of implicit divestiture of the Crow Nation's inherent sovereignty,<sup>313</sup> the Court determined that the Nation did not have authority to regulate the hunting and fishing of non-Indians owning fee land within the Crow Nation's reservation boundaries.<sup>314</sup> The Court, however, acknowledged that, despite the implicit divestiture of tribal inherent sovereignty over non-Indians on fee land within reservation boundaries, Tribes may regulate the activities of such individuals under two circumstances. First, Tribes may regulate the activities of individuals who have entered into "consensual relationships with the [T]ribe or its members."<sup>315</sup> Second, a Tribe retains the "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe."<sup>316</sup> Although *Montana* arose within the boundaries of the Crow Nation's reservation, no precedent exists that expressly limits application of the second *Montana* exception to activities expanding beyond the Tribe's exterior boundaries, and federal courts have taken a very functional view of these activities.<sup>317</sup> Most importantly, as relevant to the scope of this article, courts have found the second *Montana* exception to apply to cases involving environmental pollution.<sup>318</sup>

---

312. 450 U.S. 544 (1981).

313. *Id.* See also N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN. L. REV. 353 (1994) (explaining the history of the Supreme Court's use of the implicit divestiture theory and the flaws of the Court's approach). "According to this theory, courts can rule that, in addition to having lost certain aspects of their original sovereignty through the express language of treaties and acts of Congress, [T]ribes also may have been divested of aspects of sovereignty by implication of their dependent status." Kevin Gover & James B. Cooney, *Cooperation Between Tribes and States in Protecting the Environment*, 10 NAT. RES. & ENV'T 35 (1996).

314. *Montana*, 450 U.S. at 564–65 (holding that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the [T]ribes, and so cannot survive without express congressional delegation"). Since *Montana*, the Supreme Court has also considered the ability of Tribes to regulate the conduct of non-members and non-Indians on other types of lands. For example, in *Strate v. A-1 Contractors*, the Court held that the Indian Tribe did not possess the inherent sovereignty to adjudicate a civil complaint arising from an accident between two non-Indians on a state highway within the Tribe's reservation boundaries. 520 U.S. 438 (1997). The *Strate* Court explained that "[a]s to nonmembers, we hold, a [T]ribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. at 453.

315. *Id.* at 446.

316. *Id.* at 566.

317. See COHEN'S HANDBOOK, *supra* note 283, § 7.02[1]. *But c.f.* Minnesota Dep't of Nat. Res. v. Manoomin, File No. AP21-0516 (White Earth Band of Ojibwe Court of Appeals Mar. 10, 2022) (holding that the tribal court's subject matter jurisdiction did not extend to activities that occurred solely outside of the Tribe's reservation).

318. See, e.g., *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 148, 151 (D.C. Cir. 1996) (holding EPA could not delegate permitting to the Tribe under the Resource Conservation and Recovery Act, but noting the decision "does not . . . strip the [T]ribe of its sovereign authority to govern its own affairs. With its comprehensive environmental codes and an agency and court devoted solely to

In sum, Tribes are sovereign entities with their own court systems. In addition, Tribes have authority to regulate activities of non-Indians affecting the economic security or health and welfare of the Tribe. This means that Tribes may enact rights of nature laws, and that such laws may be enforceable in tribal court. Further, the relative position of tribal governments as separate sovereigns not subject to the U.S. Constitution suggests that the preemption and vagueness issues that constrain municipal rights of nature laws do not similarly constrain Tribes.<sup>319</sup>

## 2. *Tribal Environmental Ethics*

Next, we consider how law does or does not align with a community's environmental ethics and how this alignment (or misalignment) may impact legal claims. There is a strong interplay between environmental policy and the environmental ethics underlying its creation. Environmental policy is “the product of the combined influences of environmental ethics, science, and economics.”<sup>320</sup> Environmental ethics, as Professor Rebecca Tsosie explains,

helps us analyze the moral relations between human beings and the natural environment and forms a context in which to understand our system of environmental laws. Systems of environmental ethics are comprised of values, which underlie judgments about what is “good” – either morally or materially – and norms, which are designed to place values into operation at the social level by making judgments about certain conduct.<sup>321</sup>

In other words, environmental ethics represent a community's values. Therefore, if a law is misaligned with these values, then conflict, such as litigation, will result. If a community attempts to adopt a legal provision inconsistent with its ethical principles, effective enforcement of that provision will be highly suspect because individuals will constantly resist its application. This conflict can be seen not only in challenges to rights of nature provisions, but in challenges to traditional environmental statutes. For example, in non-tribal situations examined above, rights of nature provisions enacted by municipalities are challenged because the municipality does not have authority to enact such provisions. And these provisions are antagonistic to the ethic structure of the sovereign (the state), which centers individual humans.

---

enforcing tribal and federal environmental regulations, the [T]ribe has as much authority to create and enforce its own solid waste management plan as it ever had”); *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) (upholding EPA's interpretation of the Clean Water Act that allowed Tribes to set discharge limits more stringent than EPA's since the interpretation “is in accord with powers inherent in Indian tribal sovereignty”). See also COHEN'S HANDBOOK, *supra* note 283, § 10.01[1] (detailing tribal authority to regulate for environmental protection).

319. See COHEN'S HANDBOOK, *supra* note 283, § 5.01[1] (explaining how the text of the U.S. Constitution expresses an understanding that Tribes are separate sovereign nations).

320. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 226 (1996).

321. *Id.* at 243 (citations omitted).

As detailed above, legal challenges to rights of nature statutes adopted by U.S. municipalities have been successful. However, such a provision has never been enforced in either state or federal court.<sup>322</sup> This suggests that the communities' values or environmental ethics are possibly misaligned with the provisions being enacted. Therefore, rights of nature advocates may face difficulties outside of Indian country that are a product of environmental ethics applicable to those jurisdictions.<sup>323</sup> Conversely, because successful claims challenging rights of nature laws outside of Indian country (e.g., vagueness, etc.) have not been raised in Indian country, the environmental ethics underlying rights to nature may be more aligned with tribal environmental ethics than with non-tribal environmental ethics. This is because tribal communities and those working within tribal communities may be more prone to accept biocentric rather than anthropocentric environmental laws.

For example, Tănăsescu compares the work being done around rights of nature in Ecuador to the work in New Zealand.<sup>324</sup> The former incorporated rights of nature in a way that is likely inconsistent with the Indigenous ontologies that are supposedly the foundation of the rights of nature framework. In doing this, Ecuador threatens the success of the provision and the efforts of Indigenous Peoples who worked to promote it.<sup>325</sup> Although Indigenous Peoples proved crucial to this work, the rights of nature, which were heavily influenced by Amerindian philosophies, were inserted into a legal framework that did not account for these ethical and philosophical differences.<sup>326</sup> In other words, because the underlying legal structure was based on an anthropocentric view of the world and legal rights, it was difficult to square a rights of nature law with a legal and ethical system that centers people rather than nature. Conversely, the work being done in New Zealand attempts to devise a legal framework that is consistent (or makes significant efforts to be consistent) with the Māori philosophy underlying the rights of nature provision.<sup>327</sup>

This comparison demonstrates how important it is that the environmental ethics surrounding the rights of nature are reflected in the adopted legal

---

322. See *supra* Part I.B.2.

323. At least one other scholar has examined these developments and reached related but slightly different conclusions. Huneus, *supra* note 22, at 133. Professor Huneus does acknowledge the differences between tribal and non-tribal rights of nature ordinances. *Id.* at 144. She then explains that the rights of nature movement in the United States is redefining success in order to “change the way we understand the relationship of humans to nature.” *Id.* at 149. By changing how we interact with nature, the movement seeks to redefine American environmental ethics as it tries to realign with U.S. values.

324. See Tănăsescu, *supra* note 113, *passim*.

325. See *id.* at 434–39.

326. *Id.* The term “Amerindian” is shorthand for “American Indian.” Eduardo Viveiros De Castro explains what is known as “‘perspectival quality’ . . . the conception, common to many peoples of the continent, according to which the world is inhabited by different sorts of subjects or persons, human and non-human, which apprehend reality from distinct points of view.” Eduardo Viveiros De Castro, *Cosmological Deixis and Amerindian Perspectivism*, 4 J. ROYAL ANTHROPOLOGICAL INST. 469, 469 (1998).

327. *Id.* at 439–42.

framework. A square peg will not fit into a round hole. If the legal ethics underlying the existing system do not align with the rights being adopted, such as rights of nature, then challenges will arise. This is a challenge that non-Native communities in the United States are likely to encounter. As the majority of existing environmental laws are anthropocentric (center individual humans), non-Native communities will be working to adopt and enforce rights of nature that are based in a different environmental ethic from their community's. Work needs to be done on an equal footing to be successful; the environmental ethics of the community must match the legal provision recognizing the rights of nature for the community to have effective adoption and enforcement.<sup>328</sup> This is consistent with Stone's recognition that a fundamental ethical shift is necessary as part of the rights of nature framework. Without a change to the underlying environmental ethics of a community, enactment of rights of nature provisions will continue to be challenged. Because many tribal communities possess environmental ethics that center the natural world and not just humans,<sup>329</sup> Tribes may be in a position to avoid this conflict between ethics and policy. This is because, as discussed below, many Tribes possess an environmental ethic that aligns with a rights of nature framework.

What environmental ethic should be used in developing said policy? According to Professor Tsosie, "[a] comprehensive environmental ethics deals broadly with concepts of moral rights and interests, and with our connection to other aspects of our natural world. In terms of environmental policy, an environmental ethic 'justifies' our actions towards the earth and our natural environment."<sup>330</sup> In selecting an environmental ethic, we are choosing our justification for the selected policy and the device that will measure its success or failure.

Many Tribes, although not all, have moved away from (or never adopted) the anthropocentric environmental ethic driving most U.S. environmental policy. As Tănăsescu explains, on an ontological level, Amerindian philosophies consider subjectivity (subjective experience)—not matter or material properties—to be what connects all beings.

In other words, "the manifest bodily form of each species is an envelope (a "clothing") that conceals an internal humanoid form." This deep form of anthropomorphism—literally, everything has interiority—sustains a relational ontology steeped in what [Marisol de la] Cadena calls "earth-practices," defined as "relations for which the dominant ontological distinction between humans and nature does not work." The reason is two-fold: firstly, it is relations that are primary and, secondly, it is subjectivity that connects all beings. In many Amerindian philosophies, Andean ones included, there is one humanity and there are many

---

328. *Id.*

329. *See, e.g.,* Tsosie, *supra* note 320, at 246–47; Tănăsescu, *supra* note 113, at 450.

330. Tsosie, *supra* note 320, at 246–47 (citations omitted).

natures, a view that de Castro calls multinaturalism.<sup>331</sup>

While humanity plays a role in both Amerindian philosophies and other environmental philosophies within the United States, the worldviews are fundamentally different. The former focuses on relationships between humans and the natural world, while the latter focuses on individual rights.

There are two aspects to tribal environmental ethics particularly worth exploring within the context of this Article. First, in general, development and incorporation of environmental ethics into environmental policy-making constitute expressions of tribal self-determination.<sup>332</sup> Such expression of self-determination, therefore, perpetuates tribal sovereignty.<sup>333</sup> Second, environmental laws and ethics may be particularly important for Tribes with cultural and spiritual connections to their environment and land.<sup>334</sup>

As Professor Christine Zuni Cruz notes, “not every sovereign act undertaken by an [I]ndigenous nation necessarily promotes [its] sovereignty . . . . Adoption of Western law can create a gap between the adopted law and the people . . . . In this respect, an Indian nation’s government can . . . [alienate] its

331. Tănăsescu, *supra* note 113, at 450 (internal citations omitted).

332. Tsosie, *supra* note 320, at 299–300. Admittedly, however, departure of traditional environmental ethics may also be an expression of tribal self-determination. Tribes should not be constrained to one static conception of environmental ethics, but rather should be allowed to evolve and adapt as any other governments are allowed to do. *Id.* at 300. Professor Tsosie goes on to explain that “tribal sovereignty will not always result in adherence to traditional norms of economic or environmental conduct.” *Id.* at 311.

333. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (“Although no longer possessed of the full attributes of sovereignty, [Indian Tribes] remain a separate people, with the power of regulating their internal and social relations.” (internal quotation marks omitted)); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (prohibiting “the exercise of state jurisdiction” over the controversy at issue because it “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves”). Tribal laws incorporate several different types of law, including treaties, constitutions, customary and traditional laws, legislative enactments, and administrative rulemaking. For a general discussion of the various categories of tribal laws, see MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW*, 1–5 (2011); JUSTIN B. RICHLAND & SARAH DEER, *INTRODUCTION TO TRIBAL LEGAL STUDIES* (2d ed. 2010). Different types of law may express tribal sovereignty in different ways. For example, tribal constitutions establish basic tribal powers and governmental structures. COHEN’S HANDBOOK, *supra* note 283, § 4.05[3]. Some tribal constitutions also explicitly reference the inherent sovereignty of the Tribe. See, e.g., ROSEBUD SIOUX TRIBE CONST. art. IV, § 3, <https://narf.org/nill/constitutions/rosebudconst/constitution.pdf> [<https://perma.cc/RC4Z-4JPL>]. Tribal customary law may also be developed to recognize the Tribe’s important cultural ties to the past and the significance of tribal culture in the future. See generally Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMPAR. L. 287, 287 (1998) (comparing “distinctively Indian social norms” across multiple Tribes’ courts). Overall, “[i]n recent decades, the scope of tribal law has been widening to meet the needs of tribal self-government and contemporary self-determination. This explosion in both tribal common law decision making and positive law reflects the growing demand on Indian nations to address a wide array of matters.” COHEN’S HANDBOOK, *supra* note 283, § 4.05[2].

334. See generally SARAH KRAKOFF, EZRA ROSSER, ALEX TALLCHEIF SKIBINE, JAMES M. GRIJALVA, DEAN B. SUAGEE, ELIZABETH ANN KRONK, SARA C. BRONIN, ALLISON M. DUSSIAS, JACQUELINE PHELAN HAND, JESSICA OWLEY, KIRSTEN MATOY CARLSON, ROBERT T. COULTER & GHISLAIN OTIS, *TRIBES, LAND, AND THE ENVIRONMENT* (Sarah Krakoff & Ezra Rosser eds., 2012) (detailing the close spiritual and cultural connection of Tribes to their environments).



own people.”<sup>335</sup> Accordingly, just like any other nation state, a Tribe should develop its environmental law consistent with its existing environmental ethics. “[U]ltimately, an [I]ndigenous nation’s sovereignty is strengthened if its law is based upon its own internalized values and norms.”<sup>336</sup> Although there are instances where applying federal law and cultural influences have incapacitated Indigenous environmental systems and ethics,<sup>337</sup> the capacity for innovation in identifying tribal or Indigenous environmental ethics persists but departs from U.S. legal norms.<sup>338</sup> Accordingly, non-Native communities considering alternative ethical paradigms to anthropocentrism benefit from considering tribal environmental ethics. This is because such ethics may depart from anthropocentrism and Tribes are already implementing laws based on such alternative ethical paradigms. Tribes therefore can provide templates to non-Native communities as to both what an effective alternative environmental ethic might look like and how to implement such an alternative.

Consideration of tribal environmental ethics does not only benefit non-Native communities and governments. Rather, discussion and development of tribal environmental ethics also benefits Tribes through promotion of self-determination and sovereignty. Development and articulation of tribal environmental ethics constitute an expression of tribal self-determination. Moreover, by determining for themselves what constitutes their community environmental ethics, Tribes can avoid buying ethical paradigms “sold” to them by non-Natives: paradigms designed to benefit those outside of tribal communities, rather than Tribes or individual Indians.<sup>339</sup>

Further, reconsideration of the environmental ethics driving U.S. environmental policy also potentially benefits Indians and Tribes, because the existing “American environmental policy has often failed to recognize the equity interests of so-called ‘minority’ populations such as American Indians and Hispanics.”<sup>340</sup>

---

335. Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1, 3–4 (2000).

336. *Id.* See also Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL’Y 357, 358–59 (2006) (discussing common conflicts between tribal “incorpor[ation of] non-Indian law” and “[T]ribes’ efforts to represent their histories and existence using their own terms”).

337. Tsosie, *supra* note 320, at 293. Also, because application of tribal environmental norms to non-members of a specific Tribe may be controversial, tribal environmental ethics may not be given their fullest expression. *Id.* at 294.

338. For example, climate change adaptation is a space where the federal government has yet to enact a comprehensive federal environmental statute that occupies the field. In this space, Tribes have been doing innovative work. See, e.g., Elizabeth Ann Kronk Warner, *Indigenous Adaptation in the Face of Climate Change*, 21 J. ENV’T & SUSTAINABILITY L. 129 (2015).

339. See generally James L. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901, 902–03 (1992).

340. Tsosie, *supra* note 320, at 264. Professor Tsosie goes on to point out that such environmental injustice spurred a movement in reaction to environmental racism, or the present-day environmental justice movement. *Id.* at 264–65.

Beyond the generalized motivation of self-determination and sovereignty shared by all governments, many, but not all, tribal governments' close connection to their land and environment may motivate them more to adopt environmental laws and regulations that generally center life rather than only human life. Although other communities may have a special relationship with their environments, such special relationships are not unusual for many Tribes and individual Indians. Such special relationships in turn can lead to the development of robust ethical paradigms for many tribal communities. As Professor Rebecca Tsosie explains:

American Indian tribal religions . . . are located "spatially," often around the natural features of a sacred universe. Thus, while [I]ndigenous people often do not care *when* the particular event of significance in their religious tradition occurred, they care very much about *where* it occurred.<sup>341</sup>

Professor Frank Pommersheim agrees that land plays an important spiritual role for many Tribes and individual Indians, as he explains that land "is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape."<sup>342</sup> For many Tribes and individual Indians, this strong connection to a specific place translates into an equally strong desire to promote sustainability.<sup>343</sup> Because many Tribes and Indians view their relationship with nature and future generations as "holistic, cyclical, and permanent," a strong sense and promotion of sustainability is the natural result.<sup>344</sup>

Specific to the connection between place and development of ethics, Professor Sarah Krakoff adds that, "[f]or American Indians, the place itself is sacred, and therefore the starting point for the system of beliefs and ethics that

---

341. See Tsosie, *supra* note 320, at 282–83. Professor Tsosie goes on to explain that "[u]nder the Native American perception of reality, which is 'bound up in spatial references,' specific natural areas are imbued with complex significance. Thus, a [T]ribe may speak of its 'origin place' – such as a river, mountain, plateau, or valley – as a central and defining feature of the tribal religion. The [T]ribe may also depend on a number of 'sacred' places for practice of religious activities. These spatial references orient the people and place them within the land; they give a sense of history, rootedness, and belonging." *Id.* at 283. She ultimately concludes that "[t]he connections of the Indian people to their reservation lands are deeply-rooted and complex. Tribal governments clearly perceive that the future of the people is linked to the land; land is not fungible for Indian people, nor is it merely of instrumental value." *Id.* at 331–32. Professor Tsosie also gives the example of the Tewa of New Mexico who view their world as being bounded by four sacred mountains, which are related to their origin myth. *Id.* at 283 (citing ALFONSO ORTIZ, *THE TEW WORLD: SPACE, TIME, BEING AND BECOMING IN A PUEBLO SOCIETY* 19 (1969)).

342. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989).

343. Tsosie, *supra* note 320, at 286.

344. *Id.* at 286–87.

generate from it . . .”<sup>345</sup> Accordingly, although a close connection to the land and environment may not be completely unique to Tribes, this connection certainly has motivated the development of environmental ethics for many tribal communities. This connection, combined with the relational aspect of Amerindian philosophies examined above, demonstrates how rights of nature provisions built upon these principles can differ significantly from the ethical foundations of non-tribal communities.

Recognizing this, scholars external to Indian country have called for a recalibration of the environmental ethics used to develop environmental laws outside of Indian country.<sup>346</sup> For example, Professor Oliver Houck discusses the need for an “awakening ethic.”<sup>347</sup> Interestingly, Houck recognizes that Indigenous Peoples have been regulating resources in a sustainable way since “ancient” times.<sup>348</sup> Ultimately, a radical shift in relation to nature is necessary—“whether we will be able to bring about the requisite institutional and population growth changes depends in part upon effecting a radical shift in our feelings about ‘our’ place in the rest of Nature.”<sup>349</sup> Tribal environmental ethics may provide the needed paradigm shift. It is our theory that the ethical differences between Tribes and mainstream society likely explain why we have seen fewer efforts to derail rights of nature movements within tribal communities compared to other communities within the United States. This is because rights of nature provisions better align with many Tribes’ environmental ethics compared to the ethics of non-tribal communities. Within tribal communities, rights of nature provisions are more likely to be consistent with tribal environmental ethics and therefore deemed normatively “good.” Whereas in non-tribal communities, rights of nature provisions are more likely to be inconsistent with existing environmental ethics prioritizing the individual; thus, they may be seen as normatively “bad.” We can see an example of this when considering the Florida and White Earth cases explored below. In the former, rights of nature are challenged on their legal validity by members internal to the community, whereas in the latter rights of nature are challenged, not by members of the tribal community, but by non-tribal citizens seeking to avoid application outside of the reservation.

### 3. Tribes as Laboratories

As illustrated above, Tribes differ from other jurisdictions within the United States because their unique sovereignty contributes to a unique legal

---

345. Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENV. U. L. REV. 865, 869 (2008).

346. Stone, *supra* note 27, at 489–501.

347. Houck, *supra* note 9, at 9–15 (arguing that Western society’s ethics have grown and expanded over time to recognize the importance of protecting non-people).

348. *Id.* at 16.

349. Stone, *supra* note 27, at 495.

system, and in that they often possess different environmental ethics, which can help develop novel solutions to environmental problems. This Subsection synthesizes how these differences may contribute to Tribes being an effective laboratory for the development of rights of nature laws.

There are several reasons why we should look to Tribes and Indigenous Peoples for guidance for the best articulation of rights of nature. Failing to adequately credit and recognize Indigenous Peoples and Tribes runs the risk of “environmental colonialism,” which is the “imposition of a culturally specific construction of ‘nature,’ as well as a set of related normative and ethical assumptions, by those in a position of dominance upon those who are in a subordinate power relationship.”<sup>350</sup> Relatedly, failure to give credit to the important work of Indigenous Peoples and Tribes erases those contributions.<sup>351</sup> Conversely, incorporating tribal and Indigenous legal principles into mainstream environmental law helps to both promote tribal sovereignty and decolonize environmental law.<sup>352</sup>

Perhaps more tangibly, tribal governments serve as helpful laboratories of legal experimentation that other governments and legal actors can learn from. Tribal successes, laws, and regulations can serve as the basis for other governments’ own environmental laws and regulations.<sup>353</sup> Although the concept of laboratories of innovation was originally developed within the context of states,<sup>354</sup> the theory applies equally to Tribes. While states and Tribes are different in some regards, such as in the origins of their governing authority and their relationships with the federal government, similarities do exist. Some similarities include defined territories, general regulatory authority over citizens, and governing power that exists outside of the federal government.<sup>355</sup> Given the similarity in governmental function between states and Tribes, the possibility exists that Tribes may serve functions similar to states, within the U.S. governmental regime, in terms of the benefits associated with federalism—acting as laboratories of legal experimentation.

A notable distinction between most Tribes and most states is size. Yet, laws enacted on a smaller, regional scale are valuable because similarly situated communities can learn from the Tribe’s successes and failures. Additionally, since the late 1960s, the federal government has been somewhat successful at

---

350. O’Donnell et al., *supra* note 3, at 411–12.

351. *Id.* at 426.

352. *Id.* at 425.

353. While not promoting Tribes as innovative laboratories of legal innovation, other scholars have explored how those of the “Global South” are “an underutilized source of innovative intellectual production.” Huneeus, *supra* note 22, at 137 (citations omitted).

354. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

355. For a general discussion of tribal authority, see COHEN’S HANDBOOK, *supra* note 283, § 4.

addressing large-scale environmental challenges, and many modern environmental challenges are local in nature (e.g., negative impacts of climate change). As discussed below, Tribes are certainly developing or have the capacity to develop new laws related to the rights of nature, making such developments significant because other sovereigns can learn from these legal successes (and failures). And, finally, norms originally developed on a local scale have the capacity to become binding nationwide. Even though Tribes operate on a much more localized scale than the federal government and states (although notably the Navajo Nation is larger than some states), legal developments happening at a smaller scale may still be “scaled up” to benefit larger sovereigns. For example, take smoking bans. Banning public smoking initially started as a result of local efforts but has become a consistent nationwide phenomenon.<sup>356</sup> States or the federal government may be able to take the localized legal actions of Tribes and apply successful innovations at a much larger scale.

In addition to promoting the traditional benefits of federalism, such as increased experimentation, there are several benefits to overlapping jurisdiction.<sup>357</sup> For states, these include (1) finding the optimal jurisdiction for regulation, (2) creating a regulatory safety net, and (3) allowing regulatory testing, among others.<sup>358</sup>

These benefits are equally applicable to the relationship between the federal government and tribal governments in terms of environmental regulation. First, regarding the optimal jurisdiction, “overlapping jurisdiction may be pivotal to encouraging the more appropriate level of government to respond to a given problem,”<sup>359</sup> such as tribal governments. An example of this may be the need to protect cultural resources. Tribes have largely acted to protect cultural resources from environmental contamination, but the federal government has yet to incorporate similar widespread provisions into federal law,<sup>360</sup> even though there exists a federal desire to protect cultural resources.<sup>361</sup> With increasing tribal

---

356. COMMITTEE ON SECONDHAND SMOKE EXPOSURE AND ACUTE CORONARY EVENTS, *The Background of Smoking Bans*, in SECONDHAND SMOKE EXPOSURE AND CARDIOVASCULAR EFFECTS: MAKING SENSE OF THE EVIDENCE 109–24 (2010).

357. Tribes are units of government separate from the federal government, yet maintain overlapping regulation with the federal government in the area of tribal environmental law. See Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental “Laboratories”*, 86 U. COLO. L. REV. 789 (2015).

358. Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 177–84 (2006).

359. *Id.* at 177.

360. See Warner, *supra* note 357, at 840–43.

361. For example, Section 1 of the National Historic Preservation Act specifies a federal desire to protect cultural resources: “[T]he historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.” Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515. Yet, the National Historic Preservation Act does not require that all historical and cultural “foundations” be protected.

environmental regulations designed to protect cultural resources, the federal government may ultimately feel pressured to adopt similar regulations. The same may prove true in the context of rights of nature.

Second, regarding a regulatory safety net, Professor Erwin Chemerinsky explains that “[t]he genius in having multiple levels of government is that if one fails to act, another can step in to solve the problem.”<sup>362</sup> He went on to give an environmental example: that “[i]f one level of government fails to clean up nuclear waste, another is there to make sure that it is done.”<sup>363</sup> Historically, the federal government served as a “safety net” for states that declined to regulate the environment, primarily in the 1970s through the 1990s when many states failed to effectively protect the environment.<sup>364</sup> Today, however, the federal government arguably has a “deregulatory and passive approach toward environmental regulation,” prompting the need for increased state, tribal, and local government leadership in the field of environmental regulation.<sup>365</sup> “The potential for pendulum swings in environmental protectiveness between the federal and the state government highlights the importance of having a compound system of government and calls into question the wisdom of more static allocations of power between the states and the federal government.”<sup>366</sup> Thus, in the absence of U.S. recognition of rights of nature, Tribes may fill the gap that is left.

Finally, such governing systems potentially promote regulatory testing, innovation, and refinement. “Regulatory innovation is especially important with respect to environmental law where the actual object of regulation – the environment – is continually changing, in response to myriad factors, including the effects of regulation itself.”<sup>367</sup> When regulating the environment, adaptation and flexibility are crucial to effective regulation. Accordingly, this benefit of dynamic federalism is significantly in line with the historical concept of states as laboratories of experimentation.<sup>368</sup>

Thus, it is likely that tribal experimentation with rights of nature can prove just as valuable to state and international experimentation.<sup>369</sup> Partnerships between Tribes, the federal government, and states may ultimately prove fruitful

---

362. Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74 (2005).

363. *Id.*

364. Engel, *supra* note 358, at 179–80.

365. *Id.* at 180.

366. *Id.* at 181.

367. *Id.* at 182.

368. *Id.*

369. *Cf.* Moutrie, *supra* note 205, 9–24, 41–53 (noting the basic community rights model for rights of nature laws and noting rights of nature laws that follow a different model, including those of Tribes).

in developing solutions to these modern-day environmental challenges.<sup>370</sup> Specific to Tribes as innovative laboratories, “it now appears that the unique structure of tribal sovereignty within the US empowers tribal authorities to be simultaneously the custodians and current torchbearers of an ecological jurisprudence, and the promoters of a more pluralistic and ontologically diverse interpretation of ecological jurisprudence.”<sup>371</sup> This is illustrated in the examples of implementation of rights of nature within Tribes, discussed below.

### B. *Development of Rights of Nature within Tribal Governments*

As described in Part I.B.1, Indigenous Peoples around the world have often influenced and led the development of the rights of nature.<sup>372</sup> This is true of Tribes within the United States as well,<sup>373</sup> as several Tribes have implemented rights of nature. As a comparison piece to the work being done by municipalities, as discussed above, this Section will delve into the work on rights of nature being accomplished by Tribes. Tribes that have specifically adopted rights of nature provisions include<sup>374</sup> the Ponca Nation (2018),<sup>375</sup> the White Earth Band of

---

370. See, e.g., *Federalism: Hearings Before the S. Comm. on Governmental Affairs*, 106th Cong. 5 (1999) (testimony of Hon. Tommy G. Thompson, Gov. of Wis., and President, Council of State Gov’ts) (“[A]s we enter a new millennium, we must reinvigorate the partnerships among the federal, state and local governments to ensure the American people are the benefactors of a strong, united effort to address and solve the problems that face our great country.”).

371. O’Donnell et al., *supra* note 3, at 416.

372. *Id.* at 403–27.

373. See generally *id.* at 415–16 (describing “the recent emergence of rights of Nature initiatives” among U.S. Tribes); Geneva E.B. Thompson, *Codifying the Rights of Nature: The Growing Indigenous Movement*, ABA (May 13, 2020), [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2020/spring/codifying-rights-nature-growing-indigenous-movement/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2020/spring/codifying-rights-nature-growing-indigenous-movement/) [<https://perma.cc/V7BK-KMYT>] (“Many Native nations are finding that one remedy to regaining cultural and ecological health, safety, and security is to develop laws, policies, and legal systems that will strengthen their ability to prosecute bad actors that continue to commit ecological colonization and genocide in ancestral territories.”).

374. See generally *Rights of Nature Law Library*, CTR. FOR DEMOCRATIC AND ENV’T RTS., <https://www.centerforenvironmentalrights.org/rights-of-nature-law-library> [<https://perma.cc/M94R-JG6P>] (summarizing and providing links to tribal rights of nature provisions) (last visited Jan. 26, 2023).

375. Ponca Tribe of Indians of Oklahoma, *A Resolution Recognizing the Preexisting Ponca Tribal Law of Nature* (2018), <https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/5fbd1628f6f5f91feb704f8e/1606227497137/Revised+2019+Ponca+Tribe+Law+of+Rights+of+Nature.pdf> [<https://perma.cc/A436-2JSM>]. See also Phil McKenna, *‘We’re Being Wrapped in Poison’: A Century of Oil and Gas Development has Devastated the Ponca City Region of Northern Oklahoma*, INSIDE CLIMATE NEWS (Dec. 26, 2021), <https://insideclimatenews.org/news/26122021/ponca-city-oklahoma-fossil-fuels/> [<https://perma.cc/JL3V-86GC>] (“In 2018, the Ponca Nation became the first [T]ribe in the United States to sign into law a rights of nature resolution, and the [T]ribe is now working on an additional rule that would give added protection to the rivers that run through their community.”).

Ojibwe (2018), discussed fully in Part III;<sup>376</sup> the Yurok Tribe (2019);<sup>377</sup> the Menominee Indian Tribe of Wisconsin (2020);<sup>378</sup> and the Nez Perce Tribe (2020).<sup>379</sup> In addition, in 2003 the Navajo Nation adopted rights of nature principles as a guideline for the interpretation of other statutes.<sup>380</sup> Other developments include a proposed amendment to the Ho Chunk Constitution that would recognize rights of nature,<sup>381</sup> which is still working through the legal process for adoption,<sup>382</sup> and a complaint filed in the Sauk-Suiattle Tribal Court on behalf of the Sauk-Suiattle Indian Tribe and Tsuladx<sup>w</sup> (Lushootseed for “salmon”) arguing, in relevant part, that Tsuladx<sup>w</sup> possess inherent rights under the natural laws of the Lushootseed people.<sup>383</sup> In discussing each various tribal developments of the rights of nature, this Section illustrates the similarities and differences between rights of nature laws implemented by U.S. municipalities and those implemented by Tribes.

---

376. White Earth Band of Ojibwe, Resolution No. 001-19-009 (Dec. 31, 2018), <https://static1.squarespace.com/static/58a3c10abebafb5c4b3293ac/t/5c3cdbfe352f53368c1449bf/1547492352265/White+Earth+Rights+of+Manoomin+Resolution+and+Ordinance+combined.pdf> [<https://perma.cc/M7YD-MNTH>].

377. Yurok Tribe, Resolution No. 19-40, *Resolution Establishing the Rights of the Klamath River* (May 9, 2019), <https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/5fbd0f6029c5e26690281697/1606225766698/YUROK+RESOLUTION+RIGHTS+OF+KLAMATH+RESOLUTION+2019.pdf> [<https://perma.cc/AS3A-7JVY>].

378. Menominee Indian Tribe of Wisconsin, Resolution No. 19-52, *Recognition of the Rights of the Menominee River* (Jan. 16, 2020), <https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/5fbd0f9829c5e26690282329/1606225816984/MENOMINEE+RESOLUTION+ADOPTED+JAN+16+2020+Resolution+19-52+Recognition+of+the+rights+of+the+Menominee+River+%281%29.pdf> [<https://perma.cc/M9YH-CTCL>].

379. Nez Perce Tribe, Resolution SPGC20-02, (June 20, 2020), <https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/5fbd0f7ec7afe470b558f29f/160625790657/NEZ+PERCE+SNAKE+RIVER+RESOLUTION+2020+%281%29.pdf> [<https://perma.cc/Y9MY-GB5J>].

380. See NAVAJO NATION CODE ANN., tit. 1, § 205 (2010), <https://www.navajonationcouncil.org/wp-content/uploads/2021/04/V0010.pdf> [<https://perma.cc/NN8Q-V6P9>].

381. *Press Release: Ho-Chunk Nation General Council Approves Rights of Nature Constitutional Amendment*, CELDF (Sept. 17, 2018), <https://celdf.org/2018/09/press-release-ho-chunk-nation-general-council-approves-rights-of-nature-constitutional-amendment/> [<https://perma.cc/CCW6-7EUQ>].

382. See Mary Sussman, *A Bill for Rights for Nature? Ho-Chunk Nation and Others Move to Protect the Earth*, SHEPHERD EXPRESS (Apr. 16, 2019), <https://shepherdexpress.com/news/features/a-bill-of-rights-for-nature/> [<https://perma.cc/Y6ZH-V8FX>] (quoting a proponent of the Ho-Chunk amendment who said the amendment “hasn’t been put into the Ho-Chunk constitution, because it has to be passed by paper ballot to get into the constitution. . . . When the paper ballots went out [last year], it didn’t make it, because so few people responded.”).

383. Civil Complaint for Declaratory Judgment at 6, *Sauk-Suiattle Indian Tribe v. City of Seattle* (Sauk-Suiattle Tribal Ct. Jan. 6, 2022).



1. *The Ponca Tribe of Indians of Oklahoma*

In 2018, the Ponca Tribe of Indians of Oklahoma drafted a “Resolution Recognizing the Preexisting Ponca Tribal Law of Nature.”<sup>384</sup> The Resolution recognizes that nature and people are intertwined and that what impacts one affects the other.<sup>385</sup> It also recognizes that humans have negatively impacted nature through development activities,<sup>386</sup> and speaks of the Tribe’s ethical duty to protect nature.<sup>387</sup> The Resolution goes on to specify that:

- (1) Nature and all beings of which it is composed have the following inherent rights:
- a. the right to life and to exist, subject to the traditional roles and ethical harvesting of plants and animals by humans for sustenance;
  - b. the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being;
  - c. the right to clean water as a source of life;
  - d. the right to clean air as a source of life;
  - e. the right to a climate that is habitable, supports life, sustains culture, and is not disrupted by humans;
  - f. the right to be free from contamination, pollution and toxic or radioactive waste;
  - g. the right to not have its genetic structure modified or disrupted.<sup>388</sup>

The Ponca resolution blends traditional tribal knowledge, as referenced in Subsection (1)(a), with scientific knowledge of environmental threats, as referenced in Subsections (1)(e)–(1)(g).<sup>389</sup> Like other Tribes, the Ponca expressly recognize the impacts of climate on nature and the threat of genetic modification.<sup>390</sup> The Ponca resolution criminalizes any violation of the enumerated rights and makes minor infractions misdemeanors and major infractions felonies.<sup>391</sup> It also provides for “responsible and ethical taking and consuming of living beings.”<sup>392</sup>

---

384. Ponca Tribe of Indians of Oklahoma, *A Resolution Recognizing the Preexisting Ponca Tribal Law of Nature* (2018), <https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/5fbd1628f6f5f91feb704f8e/1606227497137/Revised+2019+Ponca+Tribe+Law+of+Rights+of+Nature.pdf> [https://perma.cc/A436-2JSM].

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at art. 2(1)(a)–(g).

389. *See id.*

390. *Id.*

391. *Id.* at arts. 3(2), 4.

392. *Id.* at art. 2(2).

### 2. *The Yurok Tribal Council of the Yurok Tribe*

On May 9, 2019, the Yurok Tribal Council of the Yurok Tribe approved a “Resolution Establishing the Rights of the Klamath River.”<sup>393</sup> The Resolution recognizes the strong relationship between the Tribe and the Klamath River: “Yurok culture, ceremonies, religion, fisheries, subsistence, economics, residence, and all other lifeways are intertwined with the health of the River, its ecosystem, and the multiple species reliant on a thriving Klamath River ecosystem.”<sup>394</sup> The Resolution “establishes the Rights of the Klamath River to exist, flourish, and naturally evolve; to have a clean and healthy environment free from pollutants; to have a stable climate free from human-caused climate change impacts; and to be free from contamination by genetically engineered organisms.”<sup>395</sup> The Resolution also explains that entities that threaten the right of the Klamath River are subject to legal action.<sup>396</sup>

Ultimately, the Tribe hopes the Resolution will give the Klamath River the highest protection possible.<sup>397</sup> In comparison, the Yurok’s resolution resembles the Ponca’s as both recognize the impacts of climate and genetic modification on nature.

### 3. *The Menominee Indian Tribe of Wisconsin*

On January 16, 2020, the Menominee Indian Tribe of Wisconsin adopted a resolution to recognize the rights of the Menominee River.<sup>398</sup> The Menominee River plays an important role for the Tribe, as the Menominee people originated from the mouth of the River.<sup>399</sup> Because of this strong connection, there are numerous sacred sites along the River.<sup>400</sup> The resolution identifies threats to the River’s survival, such as climate change and natural resource development.<sup>401</sup> In recognition of the importance of the River and the threats that it faces, the Tribe resolved:

The Menominee River possesses inherent and legal rights including the

393. Yurok Tribe, Resolution No. 19-40, *Resolution Establishing the Rights of the Klamath River* (May 9, 2019), at 1, <https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/5fbd0f6029c5e26690281697/1606225766698/YUROK+RESOLUTION+RIGHTS+OF+KLAMATH+RESOLUTION+2019.pdf> [https://perma.cc/AS3A-7JVY].

394. *Id.*

395. *Id.* at 2.

396. *Id.*

397. Thompson, *supra* note 373.

398. Menominee Indian Tribe of Wisconsin, Resolution No. 19-52, *Recognition of the Rights of the Menominee River* (Jan. 16, 2020), <https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/5fbd0f9829c5e26690282329/1606225816984/MENOMINEE+RESOLUTON+ADOPTED+JAN+16+2020+Resolution+19-52+Recognition+of+the+rights+of+the+Menominee+River+%281%29.pdf> [https://perma.cc/M9YH-CTCL].

399. *Id.*

400. *Id.*

401. *Id.*

right to naturally exist, flourish, regenerate, and evolve; the right to restoration, recovery, and preservation; the right to abundant, pure, clean, unpolluted water; the right to natural groundwater recharge and surface water recharge; the right to a healthy natural environment and natural biodiversity; the right to natural water flow; the right to carry out its natural ecosystem functions; and the right to be free of activities or practices, as well as obstructions, that interfere with or infringe upon these rights.<sup>402</sup>

The resolution does more than merely acknowledge the River's right to exist. Compared to other similar laws recognizing the rights of water, such as Toledo's LEBOR (which recognizes only the right to "to exist, flourish, and naturally evolve"),<sup>403</sup> the Menominee resolution is more expansive, yet also specifies with more detail which activities would violate the River's rights. However, unlike the Ponca's resolution, the Menominee resolution does not provide for penalties, enforcement, or duties.

#### 4. *The Nez Perce Tribal General Council*

In June 2020, the Nez Perce Tribal General Council approved a resolution recognizing the rights of nature.<sup>404</sup> The resolution states that the Tribe has long recognized that rivers, including the Snake River, "are alive."<sup>405</sup> The resolution notes that the Snake River plays a vital role in Tribe's sustenance and acknowledges its cultural, religious, and spiritual importance.<sup>406</sup> The resolution recognizes that the Snake River has been degraded and explains that "the underlying driver behind [that] degradation . . . is the legal system's overarching treatment of Nature as mere human property, to be exploited for short-term economic gains, rather than . . . as a life-giving entity with its own rights."<sup>407</sup> According to the resolution, "the Snake River and all the life it supports possess the following fundamental rights, at minimum: the right to exist, the right to flourish, the right to evolve, the right to flow, the right to regenerate, and the right to restoration."<sup>408</sup> The resolution also explains that the Snake River shall be represented by legal guardians to protect those rights, and recognizes work

---

402. *Id.*

403. *Drewes Farms P'ship v. City of Toledo*, 441 F. Supp. 3d 551, 558–60 (reprinting the LEBOR). Notably, the LEBOR also contains a provision establishing "the right to a clean and healthy environment" for Toledo residents. *Id.* at 554.

404. Nez Perce Tribe, Resolution SPGC20-02 (June 20, 2020), <https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/5fbd0f7ec7afe470b558f29f/1606225790657/NEZ+PERCE+SNAKE+RIVER+RESOLUTION+2020+%281%29.pdf> [<https://perma.cc/36CH-S7A9>].

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

related to rights of nature being done both among other Tribes and outside the United States.<sup>409</sup>

Like other Tribes, the Nez Perce point to the spiritual and cultural values of the River. However, the resolution more closely resembles those of many U.S. municipalities. This may indicate that the Nez Perce environmental ethics are closer to those of non-tribal communities than other Tribes, although to state that with certainty is beyond the scope of this Article.

### 5. *Considering the Resolutions*

These tribal rights of nature provisions have important similarities to and differences from those of U.S. municipalities. As described above, U.S. municipalities tend to recognize the right of nature, or a specific natural entity, to “exist, flourish, [and] evolve.”<sup>410</sup> Most of the tribal resolutions described above, on the other hand, focus on rivers. Only the Ponca Tribe is focused on nature generally. While some of the Tribes discussed here use the same or similar language as U.S. municipalities,<sup>411</sup> the Tribes take this language further in that they seek to prevent threats from climate change and genetic modification. Moreover, because of Tribes’ unique and long history in their respective geographic places, several tribal provisions recognize the cultural and spiritual aspect of the natural entities they seek to protect. Thus, not only do tribal rights of nature provisions exist in a different legal framework than those of U.S. municipalities, but they also contain some different rights. For example, the Menominee rights of nature provision protects specific places of cultural and spiritual significance along the river.<sup>412</sup> The White Earth Band of Ojibwe’s recognition of the rights of Manoomin is likewise unique, as it is the only provision in the world to recognize the rights of a plant.<sup>413</sup>

These resolutions emerge from complex relationships between Tribes, place, and nature, and reflect different sets of values than those embodied in many of the ordinances adopted by U.S. municipalities. These new variations on rights of nature laws may serve as foundations for experimentation in other Tribes, U.S. municipalities, states, and even other countries (nationally and sub-nationally).

409. *Id.*

410. Houck, *supra* note 24.

411. *See supra* Section II.B.4 (discussing the Nez Perce provisions).

412. Menominee Indian Tribe of Wisconsin, Resolution No. 19-52, *Recognition of the Rights of the Menominee River* (Jan. 16, 2020), <https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/5fbd0f9829c5e26690282329/1606225816984/MENOMINEE+RESOLUTON+ADOPTED+JAN+16+2020+Resolution+19-52+Recognition+of+the+rights+of+the+Menominee+River+%281%29.pdf> [https://perma.cc/M9YH-CTCL].

413. White Earth Band of Ojibwe, Resolution No. 001-19-009 (Dec. 31, 2018), <https://static1.squarespace.com/static/58a3c10abebafb5c4b3293ac/t/5c3cdbfe352f53368c1449bf/1547492352265/White+Earth+Rights+of+Manoomin+Resolution+and+Ordinance+combined.pdf> [https://perma.cc/YSU2-BTZ6].

## III.

PENDING RIGHTS OF NATURE CASES: *WILDE CYPRESS BRANCH* AND *MANOOMIN*

Two parallel cases in which groups attempt to enforce rights of nature laws illustrate the legal differences between municipal rights of nature provisions and tribal rights of nature provisions. In 2020, Orange County, Florida, amended its charter to include a rights of nature provision.<sup>414</sup> In 2021, proponents used the provision to file a lawsuit in state court against a residential developer.<sup>415</sup> Similarly, in 2018, the White Earth Band of Ojibwe enacted a rights of nature provision recognizing the rights of Manoomin, or wild rice.<sup>416</sup> In 2021, the Tribe filed a lawsuit in tribal court against the Minnesota Department of Natural Resources (DNR) for violating the rights of Manoomin.<sup>417</sup> Following the Tribe's lawsuit, the State sued the Tribe in federal court to attempt to enjoin the tribal court proceedings.<sup>418</sup> The provision enacted by the White Earth Band of Ojibwe stands a greater chance of enforceability than a municipal rights of nature provision, like that of Orange County, because challenges to the White Earth provision come from an entity outside of the Tribe and focus on jurisdictional arguments rather than the validity of the provision itself.<sup>419</sup> By contrast, challenges to non-tribal rights of nature provisions within the United States contest the very adoption of the provisions.

Professor William C. Canby aptly summarizes a relevant distinction between municipalities and Tribes:

When a question arises as to the power of a city to enact a particular regulation, there must be some showing that the state has conferred such power on the city; the state, not the city, is the sovereign body from which power must flow. A [T]ribe, on the other hand, is its own source of power.<sup>420</sup>

In other words, municipalities may struggle just to enact enforceable rights of nature provisions. Moreover, even if a municipality is not preempted from enacting a provision, that provision may be void for vagueness.<sup>421</sup> Conversely, Tribes face no similar issues in enacting rights of nature provisions because they possess inherent sovereignty. Their challenge lies in enforcing these provisions against non-Indian actors. These distinct challenges facing Tribes and municipalities are illustrated through the cases below.

---

414. See Surma, *supra* note 8; *infra* notes 422–429.

415. See *infra* note 435 and accompanying text.

416. See *infra* notes 449–453.

417. Complaint, *Manoomin v. Minn. Dep't of Nat. Res.*, Civil Case No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021), <https://turtletalk.files.wordpress.com/2021/08/manoomin-et-al-v-dnr-complaint-w-exhibits-8-4-21.pdf> [<https://perma.cc/DP9H-G6CR>].

418. See *infra* note 463.

419. See *infra* Part III.B.

420. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 84 (7th ed., West Academic 2020) (1981).

421. See *supra* Part I.B.2.

### A. Wilde Cypress Branch v. Beachline South Residential

Orange County's provision (also called the "Wekiva River and Econlockhatchee River Bill of Rights, or WEBOR")<sup>422</sup> reads: "The Wekiva River and Econlockhatchee River, portions of which are within the boundaries of Orange County, and all other Waters within the boundaries of Orange County, have a right to exist, Flow, to be protected against Pollution and to maintain a healthy ecosystem."<sup>423</sup> It grants standing to the County, to municipalities within the county, and to all citizens of the county "to bring an action in their own name or in the name of the Waters to enforce the provisions of this Section of the Charter."<sup>424</sup> It then proscribes intentional or negligent pollution of any water within the county, including waters on private property "where Pollution thereon interferes with or causes Pollution of other Waters within Orange County or unreasonably interferes with or is injurious to the health and welfare of others."<sup>425</sup> "Pollution," "flow," and "waters" are defined,<sup>426</sup> which lessens the chance of the law being struck as vague.<sup>427</sup> The remedy for violation is limited to injunctive and/or other equitable relief.<sup>428</sup> The provision does not criminalize pollution.<sup>429</sup>

Prior to the amendment's passage, however, the Florida Legislature enacted the Clean Waterways Act,<sup>430</sup> which contains a provision expressly prohibiting municipalities from recognizing rights of nature.<sup>431</sup> This legislation appears to be a result of political pressure from agribusiness.<sup>432</sup> Professor Ryan noted that "the statewide legislative effort to preempt rights of nature ordinances stands out for the speed with which the legislature acted," given that the preemption

422. Ryan et al., *supra* note 9, at 2532.

423. ORANGE COUNTY, FLA., CODE OF ORDINANCES Part I, art. VII, § 704.1.A(1), [https://library.municode.com/fl/orange\\_county/codes/code\\_of\\_ordinances?nodeId=PTICH](https://library.municode.com/fl/orange_county/codes/code_of_ordinances?nodeId=PTICH) [<https://perma.cc/M4FM-8EB7>].

424. *Id.* § 704.1.B.

425. *Id.* § 704.1.C.

426. *Id.* § 704.1.F.

427. *Cf.* *Drewes Farms P'ship v. City of Toledo*, 441 F. Supp. 3d 551, 556 (N.D. Ohio 2020) (finding the LEBOR unconstitutionally vague given the lack of "guidance" it offered).

428. Orange County Charter, art. VII, § 704.1.D.(1), [https://library.municode.com/fl/orange\\_county/codes/code\\_of\\_ordinances?nodeId=PTICH](https://library.municode.com/fl/orange_county/codes/code_of_ordinances?nodeId=PTICH) [<https://perma.cc/H9LZ-XGE4>].

429. *Cf.* *Drewes Farms P'ship v. City of Toledo*, 441 F. Supp. 3d 551, 555–57 (N.D. Ohio 2020) (noting that the LEBOR imposes criminal liability, and that heightened scrutiny applies).

430. *See* Surma, *supra* note 8.

431. FLA. STAT. § 403.412(9)(a) (2020) ("A local government regulation, ordinance, code, rule, comprehensive plan, charter, or any other provision of law may not recognize or grant any legal rights to a plant, an animal, a body of water, or any other part of the natural environment that is not a person or political subdivision as defined in s. 1.01(8) or grant such person or political subdivision any specific rights relating to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution."). *See* Surma, *supra* note 8.

432. *See* Surma, *supra* note 8 (noting that the Florida Farm Bureau Federation awarded the legislator responsible for inserting the rights of nature preemption its 2020 Legislator of the Year award for "ensuring the 2020 Clean Waterways Act 'contained the Rights of Nature preemption language'").

language appeared in four bills within Florida's two-month legislative session.<sup>433</sup> Orange County proceeded to enact the WEBOR despite the express preemption.<sup>434</sup>

In April 2021, advocates brought a suit on behalf of the Wilde Cypress Branch (one of the waterways protected by the amendment) against a residential developer and Noah Valenstein, the Secretary of the Florida Department of Environmental Protection (FDEP).<sup>435</sup> The Complaint asserted that the developer, Beachline South Residential (BSR), applied for permits to fill 115 acres of wetlands located within Orange County.<sup>436</sup> According to the complaint, this filling of wetlands violated the rights of the waters in Orange County to exist, to flow, to be free of pollution, and to maintain a healthy ecosystem.<sup>437</sup> The amended complaint asserted the following legal claims: that Valenstein violated the WEBOR by issuing Clean Water Act dredge and fill permits,<sup>438</sup> that BSR's proposed project violated the WEBOR,<sup>439</sup> and that Florida's express preemption was unconstitutional or otherwise unlawful.<sup>440</sup>

BSR, for its part, primarily argued that the WEBOR was expressly preempted by the Clean Waterways Act.<sup>441</sup> It argued that the Clean Waterways Act stripped the locality of its power to enact a rights of nature provision, because it is the state and not the locality that is sovereign.<sup>442</sup> In July 2022, the trial court granted BSR's motion to dismiss.<sup>443</sup> The court agreed with BSR that the Clean

---

433. Ryan et al., *supra* note 9, at 2533–34.

434. *See id.* at 2534. Ryan also notes that, despite the Clean Waterways Act, proponents have proposed rights of nature laws in “twenty-eight counties and municipalities throughout Florida,” as well as a state-wide ballot measure to recognize rights of nature.

435. Complaint at 3–4, *Wilde Cypress Branch v. Beachline South Residential, LLC*, No. 2021-CA-004420-O (Fla. Cir. Ct. Apr. 26, 2021). *See also* Kaminski, *supra* note 217; *First U.S. “Rights of Nature” Enforcement Case Filed*, CTR. FOR DEMOCRATIC & ENV'T RTS., (Apr. 27, 2021), <https://www.centerforenvironmentalrights.org/news/first-us-rights-of-nature-enforcement-case-filed> [<https://perma.cc/Y28Y-BK2T>]. For litigation updates, see *Court Records Search*, TIFFANY MOORE RUSSELL: ORANGE COUNTY CLERK, <https://myeclerk.myorangeclerk.com/Cases/search> [<https://perma.cc/HG27-4FP3>].

436. Amended Complaint at 18–20, *Wilde Cypress Branch v. Beachline South Residential, LLC*, No. 2021-CA-004420-O (Fla. Cir. Ct. Oct. 24, 2021).

437. *Id.* at 21–24.

438. *Id.* at 51.

439. *Id.* at 63.

440. *Id.* at 87 (summarizing the seven arguments for the statute's unconstitutionality, namely that the Clean Waterways Act is: an infringement upon local community self-government; a violation of the rights of charter counties; a violation of the rights of county voters; a violation of Florida's Natural Resources Amendment; void for vagueness; inapplicable “for lack of clear intention for express preemption”; and a “violation of the single subject rule”).

441. Defendant Beachline South Residential, LLC's Motion to Dismiss Amended Complaint at 12–29, *Wilde Cypress Branch v. Beachline South Residential, LLC*, No. 2021-CA-004420-O, 3 (Fla. Cir. Ct. Jan. 4, 2022). The defendants also asserted that plaintiffs lacked standing and failed to exhaust administrative remedies, among other claims. *Id.*

442. *Id.* at 12–20.

443. Order Granting Defendant's Motion to Dismiss, *Wilde Cypress Branch v. Beachline South Residential, LLC*, No. 2021-CA-004420-O (Fla. Cir. Ct. July 6, 2022).

Waterways Act preempts the WEBOR, and dismissed plaintiffs' constitutional challenges to the Clean Waterways Act.<sup>444</sup> This decision is consistent with the general hierarchy of powers between federal, state, and municipal governments. The plaintiffs appealed to Florida's Fifth District Court of Appeal,<sup>445</sup> although they face another uphill battle given the limited powers of municipal governments.

### B. *Manoomin v. Minnesota Department of Natural Resources*

In contrast to the Orange County provision litigated in *Wilde Cypress Branch*, the Tribe's ability to enact the rights of Manoomin provision is not at issue in *Manoomin v. Minnesota Department of Natural Resources*, as the Tribe possesses inherent sovereignty. Rather, the conflict focuses on whether the Tribe can enforce the provision beyond the boundaries of the reservation.

Manoomin plays a critical role within the White Earth Band of Ojibwe and other Tribes. It is part of the Ojibwe and Anishinaabe culture, and it is key to their creation story.<sup>446</sup> Additionally, "wild rice or *manoomin*, 'good berry' in the Ojibwe language, is like a member of the family, a relative. *Manoomin* is more than food, it is a conveyor of culture, spirituality and tradition."<sup>447</sup> For Ojibwe, "[i]t's logical to give rights to plants, animals, and the natural world . . . because the Ojibwe world view holds that everything in nature is a spiritual being, and there is an acknowledged relationship with humans."<sup>448</sup>

On December 31, 2018, the White Earth Reservation Business Committee, the governing arm of the Tribe, adopted a resolution recognizing the rights of Manoomin.<sup>449</sup> The Rights of Manoomin explains:

Manoomin, or wild rice, within the White Earth Reservation possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation. These rights include, but are not limited to, the right to pure water and freshwater habitat; the right to a healthy climate system and a natural environment

---

444. *Id.* at 4–13.

445. Notice of Appeal at 3, *Wilde Cypress Branch v. Beachline South Residential, LLC*, No. 2021-CA-004420-O (Fla. Cir. Ct. Jan. 4, 2022).

446. Dan Gunderson, *Advocates Hope White Earth Wild Rice Case Will Boost 'Rights of Nature'*, MPR NEWS (Sept. 1, 2021), <https://www.mprnews.org/story/2021/09/01/advocates-hope-white-earth-wild-rice-case-will-boost-rights-of-nature> [<https://perma.cc/58KX-ZAVY>] ("The story recounts how Ojibwe people migrated to Minnesota from the East Coast to fulfill a prophecy that they would find food growing on the water. That food was manoomin, or the 'good berry,' and it sustained generations of Ojibwe.").

447. Mary Annette Pember, *'Rights of Nature' Lawsuits Hit a Sweet Spot*, INDIAN COUNTRY TODAY (Aug. 15, 2021), <https://indiancountrytoday.com/news/rights-of-nature-lawsuits-hit-a-sweet-spot> [<https://perma.cc/X7AM-N8TK>].

448. Gunderson, *supra* note 446.

449. White Earth Band of Ojibwe, Resolution No. 001-19-009 (Dec. 31, 2018), <https://static1.squarespace.com/static/58a3c10abebafb5c4b3293ac/t/5c3cdbfe352f53368c1449bf/1547492352265/White+Earth+Rights+of+Manoomin+Resolution+and+Ordinance+combined.pdf> [<https://perma.cc/YSU2-BTZ6>].



free from human-caused global warming impacts and emissions; the right to be free from patenting; as well as rights to be free from infection, infestation, or drift by any means from genetically engineered organisms, trans-genetic risk seed, or other seeds that have been developed using methods other than traditional plant breeding.<sup>450</sup>

The Rights of Manoomin also anticipates the question of whether the rights can be applied against entities off the reservation. The resolution “include[s] the right to enforce this law free of interference from corporations, other business entities, governments, or other public or private entities,” and provides that “[i]t shall be unlawful for any business entity or government . . . to engage in activities which violate, or which are likely to violate, the rights or prohibitions of this law, *regardless of whether those activities occur within, or outside of, the White Earth Reservation.*”<sup>451</sup> The resolution also specifies that no governmental entity can approve a permit that would allow for these rights to be threatened.<sup>452</sup> The resolution grants the White Earth Reservation Business Committee the authority to enforce the rights of Manoomin in court.<sup>453</sup>

In June 2021, the DNR approved a request from Enbridge Energy (Enbridge) to temporarily pump up to five billion gallons of shallow ground water.<sup>454</sup> Enbridge requested the permit for dewatering, which occurs regularly during construction projects when water fills holes and trenches.<sup>455</sup> DNR officials explained that the permit would “only allow[] Enbridge to pump shallow groundwater from the construction area, not from lakes or wetlands.”<sup>456</sup> The Tribe worried the permit would exacerbate existing drought conditions, which could significantly harm Manoomin.<sup>457</sup>

450. *Id.* § 1(a).

451. *Id.* §§ Sec. 1(c), 2(a) (emphasis added).

452. *Id.* § 2(b).

453. *Id.* § Sec. 3(d).

454. Kirsti Marohn, *Line 3: White Earth Argues DNR Water Permit Violated Wild Rice Rights*, MPR NEWS (Aug. 5, 2021), <https://www.mprnews.org/story/2021/08/05/line-3-white-earth-argues-dnr-water-permit-violates-wild-rice-rights> [<https://perma.cc/4M6B-E8WU>]. Enbridge Energy is an energy infrastructure company.

455. Kirsti Marohn, *Line 3 Foes Worry Increased Pumping Could Threaten Minn. Water*, MPR NEWS (June 24, 2021), <https://www.mprnews.org/story/2021/06/24/line-3-foes-worry-increased-pumping-could-threaten-minn-waters> [<https://perma.cc/4VRQ-86QV>].

456. *Id.* (noting that even though the water is only temporarily stored, advocates are concerned that it is not clear “how quickly the water will return to the aquifers it came from” and how quickly the impacted areas will recharge).

457. Complaint at 10–11, *Manoomin v. Minn. Dept. of Nat. Res.*, Civil Case No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021), <https://turtletalk.files.wordpress.com/2021/08/manoomin-et-al-v-dnr-complaint-w-exhibits-8-4-21.pdf>; *Minn. Dept. of Nat. Res. v. White Earth Band of Ojibwe, Defendants-Appellees’ Response Brief*, No. 21-3050, 7 (8th Cir. Oct. 26, 2021) (“[Manoomin] is a delicate resource as it depends on stable water levels and other factors to thrive.”). The complaint explained that “[t]he stream flow downstream is insufficient to hold back tributaries of the upper Mississippi to support Manoomin (wild rice) habitats over many miles of rivers and lakes where Chippewa Treaty beneficiaries harvest Manoomin. Water levels have dropped during this extreme drought period impacting the growth, harvest and reseeding of

In response to the permit, Manoomin,<sup>458</sup> the White Earth Band of Ojibwe, and various tribal members brought suit in the White Earth Band of Ojibwe Tribal Court for declaratory and injunctive relief against the DNR.<sup>459</sup>

The complaint sought a declaration that “the DNR has intentionally and knowingly violated the Rights of Manoomin by unilaterally granting five billion gallons of water, without official notice to Tribes, without Chippewa consent, on and off White Earth Reservation in the Chippewa treaty ceded territories.”<sup>460</sup> For the purposes of this Article, the seventh claim (“Violations of Rights of Manoomin”) is of greatest interest as it deals explicitly with the DNR’s alleged interference with the rights of Manoomin.<sup>461</sup> As a remedy, the complaint requested that the court recognize the rights of Manoomin and enjoin the DNR permit.<sup>462</sup>

Following the Tribe’s suit, DNR sued in federal court to enjoin the tribal court from enforcing the rights of Manoomin.<sup>463</sup> The DNR requested that the federal court declare that the tribal court lacks subject matter jurisdiction.<sup>464</sup> Initially, the U.S. District Court for the District of Minnesota dismissed the complaint, finding that sovereign immunity shielded both the Tribe and Judge

Manoomin.” *Id.* at 37. *See also* Pember, *supra* note 447 (noting that even if there is enough moisture for wild rice to grow, tribal members report that there is not enough water in the water bodies to get canoes in to harvest).

458. Tribal law recognizes that Manoomin possesses “inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation.” These rights include a “right to pure water and freshwater habitat” and “the right to a healthy climate system and a natural environment free from human-causing global warming impacts and emissions.” Minn. Dep’t of Nat. Res. v. White Earth Band of Ojibwe, Defendants-Appellees’ Response Brief, No. 21-3050, 8 (8th Cir. Oct. 26, 2021).

459. Complaint at 1, Manoomin. v. Minn. Dep’t of Nat. Res., Civil Case No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021), <https://turtletalk.files.wordpress.com/2021/08/manoomin-et-al-v-dnr-complaint-w-exhibits-8-4-21.pdf> [<https://perma.cc/HM35-VMUR>]. The complaint described the importance of Manoomin to the Tribe:

Manoomin (Wild Rice), *the food that grows on water*, is the most important cultural and sacred food of the Chippewa, Ojibwe, Anishinaabe peoples. Manoomin has been a part of our traditional stories, teachings, lifeways and spirituality since the earliest times to the present day. For the Chippewa Manoomin is alive like all living creatures and they are our relations. We Chippewa have a sacred covenant with Manoomin and the water (Nibi) and all living creatures, without which we cannot live.

*Id.* at 1–2.

460. *Id.* at 14 (emphasis removed).

461. *Id.* at 44.

462. *Id.* at 45.

463. *Press Release: Federal Appeals Court Denies State of Minnesota’s Bid to Take ‘Rights of Nature’ Case Away from Tribal Court*, CTR. FOR DEMOCRATIC & ENV’T RTS. (Sept. 27, 2021), <https://www.centerforenvironmentalrights.org/news/press-release-federal-appeals-court-denies-state-of-minnesotas-bid-to-take-rights-of-nature-case-away-from-tribal-court> [<https://perma.cc/SY8V-8N3E>]; Complaint, Minn. Dep’t Nat. Res. v. White Earth Band of Ojibwe, No. 0:21-cv-01869-WMW-LIB (2021).

464. Complaint at 7, Minn. Dep’t Nat. Res. v. White Earth Band of Ojibwe, No. 0:21-cv-01869-WMW-LIB (2021).

DeGroat, the tribal judge who was acting in his official capacity, from suit.<sup>465</sup> The DNR then appealed the district court's denial to the U.S. Court of Appeals for the Eighth Circuit,<sup>466</sup> arguing that tribal sovereign immunity did not shield Judge DeGroat<sup>467</sup> and that its subject matter jurisdiction claim was likely to succeed.<sup>468</sup> Notably, the appeal acknowledged that Manoomin can bring suit in the Tribe's tribal court.<sup>469</sup>

On March 10, 2022, the White Earth Band of Ojibwe Court of Appeals held that the tribal court lacked jurisdiction over the dispute.<sup>470</sup> The Court of Appeals held that the second *Montana* exception, which recognizes tribal jurisdiction over nonmember activities that threaten the economic security or health and welfare of the Tribe, did not extend to off-reservation activities even if they might harm the Tribe.<sup>471</sup> Following this decision, the Eighth Circuit dismissed the DNR's suit to enjoin the tribal court as moot.<sup>472</sup>

There are several key takeaways from *Manoomin* and *Wilde Cypress Branch*. First, no party challenged the authority of the Tribe to enact a rights of nature provision, while in contrast, the dispute in *Wilde Cypress Branch* focused on preemption issues. Second, the reasoning of the Tribe's Court of Appeals highlights the limitations Tribes may face in enforcing rights of nature provisions: they might lack jurisdiction over a harmful activity, especially if it takes place off the reservation. The Supreme Court has severely limited Tribes' authority,<sup>473</sup> and this line of decisions will impact the enforceability of rights of nature provisions. Third, the reasoning of the Tribe's Court of Appeals highlights that rights of nature laws could be enforceable against on-reservation activities, since they would fall squarely into the second *Montana* exception. It remains an

---

465. Minn. Dep't of Nat. Res. v. White Earth Band of Ojibwe, No. 21-cv-1869, 2021 WL 4034582, at \* 2 (Sept. 3, 2021).

466. Minn. Dep't of Nat. Res. v. White Earth Band of Ojibwe, Appellants' Brief and Addendum, No. 21-3050, at 1 (8th Cir. Sept. 28, 2021).

467. *Id.*

468. *Id.* at 10. DNR contended that, because the work on Line 3 was outside of the Tribe's reservation, the second *Montana* exception did not apply to extend subject matter jurisdiction to the tribal court. *Id.* at 23. Because *Montana* involved non-Indian land within a tribal reservation, DNR argued that it did not apply to non-Indian lands off the reservation. *Id.* at 24 (citing *Montana v. United States*, 450 U.S. 544 (1981)). DNR concluded that "this would constitute an unprecedented direct interference with the DNR's administration of a State-law regulatory program concerning a project located off-reservation." *Id.* at 26–27.

469. *Id.* at 3 n.3.

470. Minn. Dep't of Nat. Res., v. Manoomin, File No. AP21-0516, 16–17 (White Earth Band of Ojibwe Ct. App. Mar. 10, 2022).

471. *Id.* at 7–14. In so ruling, the Court of Appeals distinguished several cases, namely, *Montana v. U.S. EPA*, 137 F.3d 1135 (9th Cir. 1998) and *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), in which courts upheld Tribes' authority to regulate off-reservation conduct when that exercise of authority both met the second *Montana* exception and was expressly granted by Congress through delegation of authority under the Clean Water Act. *Id.* at 12–13.

472. Minn. Dep't Nat. Res. v. White Earth Band of Ojibwe, 0:21-cv-01869-WMW, 2022 WL 4229028 (8th Cir. Aug. 19, 2022).

473. See generally COHEN'S HANDBOOK, *supra* note 283, § 7.02.

open question how a tribal rights of nature law would interact with an express congressional grant of authority under federal environmental law.<sup>474</sup> Although they face unique legal barriers, Tribes can continue to develop and refine rights of nature principles into legal doctrine, and, in doing so, provide guidance to other governments seeking to enact rights of nature laws.

#### CONCLUSION

Rights of nature laws continue to proliferate both within the United States and abroad. Indigenous Peoples and Tribes are often at the fore of developing and pushing for rights of nature.<sup>475</sup> Working collaboratively with Tribes and Indigenous Peoples will lead to “the emergence of a pluralist, truly transformative ecological jurisprudence” that will be of benefit to all in the field.<sup>476</sup>

International rights of nature laws developed at the national level have taken place constitutionally, legislatively, and judicially. They protect everything from nature as a whole to single natural entities. Often, Indigenous Peoples pushed for these developments. Likewise, many U.S. municipalities have sought to enact rights of nature provisions. This is consistent with a growing trend within the United States to look for creative environmental arguments given the federal government’s inability to enact federal statutes to address new environmental problems.<sup>477</sup>

U.S. municipalities, however, face significant legal hurdles in enacting enforceable provisions—namely, preemption, vagueness, and the potential for fines and sanctions. Tribes, on the other hand, occupy a space that might allow for enforcement of rights of nature. Because Tribes have both inherent sovereignty and different environmental ethics from most other communities within the United States, they are uniquely situated to serve as laboratories from which other governments can model their own rights of nature provisions.

---

474. See, e.g., *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (upholding EPA’s enforcement of the Pueblo of Isleta’s water quality standards outside the reservation under the Clean Water Act’s “Treatment as States” provisions); *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998) (upholding EPA regulations that permitted Tribes to exercise authority over non-members on non-Indian land).

475. O’Donnell, *supra* note 3, at 405. See also Jack Losh, *Uganda Joins the Rights-of-Nature Movement but Won’t Stop Oil Drilling*, NAT’L GEOGRAPHIC (June 2, 2021) (“Activists say they can draw a direct line from the disappearance of traditional belief systems and the loss of habitat and biodiversity—and to protect the environment successfully, those marginalized Indigenous voices must be restored.”).

476. O’Donnell, *supra* note 3, at 427.

477. Tribes and Indigenous Peoples not only make profound contributions to the development of rights of nature legal arguments, but their efforts also intersect with climate change mitigation and adaptation strategies. For example, the United Nations 6th Assessment on Climate Change dedicates an entire chapter to how Indigenous knowledge contributes to the development of these strategies. See Pember, *supra* note 447 (“According to the report, recognition of Indigenous rights, governance systems and laws are central to creating effective adaptation and sustainable development strategies that can save humanity from the impacts of climate change.”).

Several Tribes have already enacted effective rights of nature provisions that contain new formulations of rights of nature principles. Tribes often translate their environmental ethics into provisions that recognize the ancestry of natural entities, while also establishing rights aimed at combatting new environmental threats.

The differences between the *Wilde Cypress Branch* case and the *Manoomin* case illuminate the potential value of tribal rights of nature provisions. There is no question Tribes can enact rights of nature provisions; the only question is whether the rights of nature can be enforced on non-Indians operating outside the respective reservation. As Tribes further develop (and potentially enforce) rights of nature, they should serve as an example to which both Tribes and non-Tribes look when formulating their own provisions.

Ultimately, “[i]f ecological jurisprudence aims to be both effective and pluralist, it should seek recognition and validity *within* Indigenous law, as well as expanding dominant settler legal frameworks (the laws and legal systems of the settler colonial state) to *include* Indigenous law.”<sup>478</sup> As the great Indian philosopher Vine Deloria, Jr., explained, Tribes are “laboratories of the future.”<sup>479</sup> This could not be truer in the context of rights of nature. Tribes are leading the way in adopting legally effective rights of nature provisions, and, if the initial litigation is any indication, they are likely to do so well into the future.

---

478. O’Donnell, *supra* note 3, at 406.

479. To Protect the Constitutional Rights of American Indians, 1965: Hearing on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968, and S.J. Res. 40 Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary, 89th Cong., 1, 194–95 (1965) (statement of Vine Deloria, Jr., Executive Director of the National Congress of American Indians).