# Fluid Standing: Incorporating the Indigenous Rights of Nature Concept into Collaborative Management of the Colorado River Ecosystem

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## INTRODUCTION

Across the globe, what was once unthinkable is now coming into practice: national governments have acquiesced to their indigenous peoples' beliefs that natural resources such as trees and rivers deserve the same rights generally reserved for humans.[1] These governments are starting to recognize the rights of nature by bestowing legal personhood. Black's Law Dictionary defines a legal person as "a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being."[2] The rights that flow from legal personhood form a basis for judicial activism by conferring certain rights and recognition normally reserved for humans and legal fictions such as corporations.[3]

In the United States, individuals who would like to represent natural resources such as rivers may only sue on a case-by-case basis as next friends[4] because the judicial system affords no specific legal guardianship

1 *See generally* Christopher Stone, *Should Trees Have Standing?*, 45 S. CAL. L. REV. 450, 452–53 (1972); Elaine C. Hsiao, *Whanganui River Agreement: Indigenous Rights and Rights of Nature*, 42 ENVTL. POL'Y & L. 371, 375 (2012).

2 *Person*, BLACK'S LAW DICTIONARY (10th ed. 2014).

3 *Id.*

4 A "next friend" is someone who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian. *Next Friend*, BLACK'S LAW DICTIONARY (10th ed. 2014).

for natural resources. These next friends operate as third parties advocating on behalf of an injured party.[5] In general, there is no way for these third parties to represent the interests of a river absent an injury to the third party.[6] For example, both states and tribes are currently limited to claims for economic injuries rather than direct environmental injuries to rivers.[7] This lack of recourse is written into the National Environmental Policy Act ("NEPA"), which requires preparation of an Environmental Impact Statement ("EIS") whenever a proposed major federal action will significantly affect the quality of the human environment.[8] Notably, NEPA only requires an EIS when the *human* environment might be significantly affected, not only when the particular ecosystem itself.[9]

If the United States were to recognize the rights of nature, such rights might grant an entity recognition for purposes of the Due Process and Equal Protection Clauses. This would remove the need to ask courts to stretch their imagination to consider roots and rivulets citizens for purposes of the Privileges and Immunities Clauses in Article IV Section 2 and the Fourteenth Amendment of the United States Constitution.[10] Recognizing the legal rights of nature might provide a more direct way for environmental advocates to represent the interests of rivers and other natural resources without having to claim third-party injury.[11]

This Note will begin with an introduction to the recent global development of the rights of nature. From South America to Oceania, national judiciaries and legislatures have reached back to their indigenous

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5 *Id.*

6 Stone, *supra* note 1, at 485. Professor Stone argued that courts should be compelled to make findings with respect to environmental harm—showing how they calculated it and how heavily it was weighed—even in matters outside the present Environmental Protection Act.

7 New Mexico on behalf of New Mexico Env. Dept. v. U.S. Envtl. Protec. Agency, No. 16-CV-465 MCA/LF, 2017 WL 4232999 (D.N.M. Jan. 23, 2017).

8 42 U.S.C. § 4332(C) (1976).

9 *Id.*

10 U.S. CONST. art. IV § 2, cl. 1; U.S. CONST. amend. XIV, § 1.

11 *See* Catherine J. Iorns Magallenes, *Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment*, 21 WIDENER LAW REVIEW 273, 283 n. 43 (2015) (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)). In that case, Californian tribes tried to prevent the building of a logging road through sacred sites in the Siskiyou mountains of northwest California. The Court denied the injunction because the road would not compel a change in religious belief behavior and therefore did not violate the First Amendment. Following the decision, Congress then designated parts of the Siskiyou mountains under the Wilderness Act to prevent the logging roads from being built. This legal workaround could have been prevented had the federal government recognized the indigenous peoples' sacred interest in natural resources.

roots to recognize how the rights of nature can be used to protect natural resources from wanton degradation. In Part II, this Note will review how the United States has developed environmental policies apart from any recognition of the rights of nature aside from the human environment, and how Justices Douglas' and Blackmun's dissenting views in the landmark environmental standing case, *Sierra Club v. Morton*, lay dormant until recent years when grassroot movements revived independent protection for natural resources through legislative and judicial advocacy. Part III will discuss local government attempts to recognize the rights of nature in the face of corporate resistance, and the ill-fated recent attempt to obtain judicial recognition of the rights of nature in *The Colorado River Ecosystem, et al. v. State of Colorado*. Part IV will explore a co-management framework that would allow a currently resistant American culture to blend our own indigenous knowledge with the existing environmental advocacy mechanisms in the case of the Colorado River Ecosystem. This Note recommends that Congress consider establishing a strategic Colorado River Ecosystem guardianship group that incorporates federal, state, and tribal representation, as well as a non-governmental, appointed citizen representative for the Colorado River Ecosystem. This approach could ensure sustainability of multiple interests in the river and the river itself without rocking the boat.

# I. FLOW: INCREASING WORLDWIDE RECOGNITION OF THE LEGAL RIGHTS OF NATURE

## *A. Constitutional Recognition of the Rights of Nature: The Vilcabamba River in Ecuador*

In 2008, the Ecuadorian government was the first national government to recognize the rights of nature as a constitutional right.[12] With help from the Pennsylvania-based environmental advocacy group, the Community Environmental Legal Defense Fund ("CELDF"), Ecuador dedicated an entire chapter of its Constitution to codify the rights of nature:[13]

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[12] CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, arts. 71–74, last amended Jan. 31, 2011, http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

[13] Clare Kendall, *A New Law of Nature*, THE GUARDIAN (Sept. 23, 2008), https://www.theguardian.com/environment/2008/sep/24/equador.conservation.

> **Article 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. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.
>
> The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.
>
> **Article 72.** Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.
>
> In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.
>
> **Article 73.** The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles.
>
> The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.
>
> **Article 74.** Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.
>
> Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.[14]

This declaration was tested in the judiciary just two years later. In 2010, downstream property owners on the Vilcabamba River sued public road contractors who deposited construction debris upriver.[15] Although

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[14] CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, arts. 71–74, last amended Jan. 31, 2011, http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

[15] NICHOLAS A. ROBINSON, ET AL., COMPARATIVE ENVIRONMENTAL LAW & REGULATION § 18B:40 (Sept. 2018 update); Lidia Cano Pecharroman, *Rights of Nature:*

the claimants in *Richard F. Wheeler et. al. v. Director de la Procurator General del Estado en Loja et. al.* could have sued in their own right, the property owners relied on the constitutional provision that gave nature the right "to exist, to be maintained and to the generation of its vital cycles, structures and functions."[16] The court allowed the suit to proceed, recognizing the right of Ecuadorean citizens to defend the rights of nature in court.[17] Notably, the court embraced the rights of nature argument by ruling for the claimants with a precautionary comment that even though there was no constitutional rights conflict, if one *had occurred*, Nature would prevail because of the courts' constitutional duty to protect the environment.[18]

### *B. Legislative Recognition of the Rights of Nature: The Whanganui River in New Zealand*

On the other side of the globe the New Zealand Crown Government legislated legal recognition of personhood for natural resources.[19] In 2012, the New Zealand Crown Government recognized the legal personhood of the Whanganui River.[20] While the media reported that the Whanganui River Claims Settlement Bill gave the river the same legal status as a person,[21] the Bill actually created a new legal entity, *Te Awa Tupua*.[22] By naming the Whanganui River a legal entity, the New Zealand courts

*Rivers That Can Stand in Court*, 7 RESOURCES 1, 7 (Feb. 14, 2018), https://www.mdpi.com/2079-9276/7/1/13/pdf.

16 Pecharroman, *supra* note 15, at 7.

17 *Id.*

18 Wheeler v. Director de la Procuradoria General del Estado en Loja, No. 11121-2011-0010, at 5 (Sentencia Corte Provincial de Loja [Provincial court of Loja] Mar. 30, 2011) (Ecuador), https://www.elaw.org/system/files/ec.wheeler.loja_.pdf; Erin Daly, *Ecuadorian Court Recognizes Constitutional Right to Nature*, WIDENER ENVTL. L. CTR. BLOG (July 12, 2011, 3:32 p.m.), http://blogs.law.widener.edu/envirolawblog/2011/07/12/ecuadorian-court-recognizes-constitutional-right-to-nature.

19 Jeremy Rose, *Kiwi Legal Innovation goes Viral*, RADIO N.Z. (Sept. 11, 2016), http://www.radionz.co.nz/national/programmes/mediawatch/audio/201815369/kiwi-legal-innovation-goes-viral.

20 *Whanganui River Agreement Signed*, WANGANUI CHRON., Aug. 30, 2012, http://www.nzherald.co.nz/wanganui-chronicle/news/article.cfm?c_id=1503426&objectid=11073502.

21 Shannon Haunui-Thompson, *Whanganui River to Gain Legal Personhood*, RADIO N. Z. (Mar. 16, 2017), http://www.radionz.co.nz/news/te-manu-korihi/326689/whanganui-river-to-gain-legal-personhood.

22 Tutohu Whakatupua [Advocacy Instructions], The Crown-Whanganui Iwi, § 2.6 (Aug. 30, 2012) (N.Z), http://www.wrmtb.co.nz/new_updates/TuutohuWhakatupuaFinalSigned.pdf.

removed the necessity of several third parties claiming their own injury in order to protect the river's interests.

This recognition came after over 140 years of treaty negotiations between the native Whanganui Iwi people and the New Zealand Crown government and represented nearly a half century of progressive integration of indigenous Maori beliefs into New Zealand jurisprudence.[23] And the acknowledgement came nearly forty years after the establishment of the Waitangi Tribunal, which reviewed possible treaty breaches by the New Zealand Crown government and made recommendations for redress.[24]

The government acknowledged that the English language text of the original Treaty of Waitangi differed from the Maori translation, resulting in over a century of misunderstanding over natural resources ownership.[25] Language played a major role in this misunderstanding.[26] In the English version of the treaty, the Maori fully ceded the sovereignty of New Zealand to the British government, giving the British the exclusive right to buy and sell land on the island.[27] But some Maori believed that they retained the right to manage their own affairs, including the lands, forests, and fisheries, because the translation of "sovereignty" during treaty negotiations was "kawanatanga"—"governance"—not "tino rangatiratanga"—"full authority."[28] Because of this misunderstanding, the Whanganui riverbed was considered state property, and mined for gravel for years.[29] New Zealand's efforts to rectify treaty misinterpretation call to mind the United States' own decades-long efforts to implement reserved federal water rights on tribal lands.[30]

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23 *Whanganui River Agreement Signed*, *supra* note 20. In 1987, New Zealand courts ordered consideration of "the spiritual, cultural and traditional relationships of the particular and significant group of Maori people with natural water or the interests of the public generally in those relationships." *See* Magallenes, *supra* note 11, at 296 (citing Huakina Dev. Trust v. Waikato Valley Authority [1987] 2 NZLR 188 (HC)).

24 *See* Magallenes, *supra* note 11, at 291 (citing Treaty of Waitangi Act 1975 s 6(1, 3) (N.Z.), http://www.legislation.govt.nz).

25 Treaty of Waitangi Act of 1975, pmbl. (N.Z.).

26 MINISTRY FOR CULTURE AND HERITAGE, THE TREATY IN BRIEF: PAGE 1- INTRODUCTION, https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief (last updated May 17, 2017).

27 *Id.*

28 *Id.*

29 WAITAINGI TRIBUNAL, THE WHANGANUI RIVER REPORT 3–4 (1999) https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68450539.

30 Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963), Nevada v. United States, 463 U.S. 110 (1983). More recently, the Big Horn stream adjudication in Wyoming spanned three decades from the initial complaint in 1977.

In the Whanganui River Claims Settlement Bill, the government compared Whanganui's personhood to a charitable trust or incorporated society which would now have trustees legally obliged to act in the river's best interest.[31] In that way, the Whanganui would no longer be just a natural resource reliant on next friends for representation; it would be a legal entity that could claim its own injury and seek redress from other legal entities.[32]

In 2015, the United Nations Special Rapporteur on the Rights of Indigenous Peoples called this settlement one of the most important recognitions of indigenous peoples' historical and ongoing struggles for legal recognition.[33] Governments around the world began to recognize personhood of other natural resources such as rivers.[34] Indeed, the Whanganui River was not the only natural resource recognized for personhood by the New Zealand government, nor the first river.[35] The Te Urewera Act of 2014 established personhood status for Te Urewera, an 821-square-mile area former national park.[36] As a result of this Act, Te

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Ramsey Kropf, *Wyoming's Big Horn River Adjudication*, http://waterlaw.com/media/UnivDenverIndian.pdf.

31 Haunui-Thompson, *supra* note 21.

32 Abigail Hutchison, *The Whanganui River as a Legal Person*, 39 ALTERNATIVE L.J. 179, 182 (2014).

33 S. James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples in the Situation of Maori People in New Zealand*, 32 ARIZ. J. INT'L & COMP. L. 1, 2 (2015).

34 *See* Michael Safi, *Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings*, THE GUARDIAN (Mar. 21, 2017), https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings (establishing a three member board to act as legal custodians responsible for conserving and protecting the Ganges and Yamuna Rivers and their tributaries); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, arts. 71–74, last amended Jan. 31, 2011, http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html; *see also Study on the need to recognize and respect the rights of Mother Earth*, United Nations Economic and Social Council Permanent Forum on Indigenous Issues (9th Session), New York, Apr. 18–30, 2010; Andrew C. Revkin, Opinion, *Ecuador Constitution Grants Rights to Nature*, N.Y. TIMES (Sept. 29, 2008), https://dotearth.blogs.nytimes.com/2008/09/29/ecuador-constitution-grants-nature-rights (recognizing the inalienable rights of nature to "exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution").

35 Haunui-Thompson, *supra* note 21. The first river granted personhood was New Zealand's longest river, the Waikato. Notably, the Act stressed the indivisibility of the river and the riverbed. *See* Waikato River Settlement Act 2010, s 8(3) (N.Z.), http://www.legislation.govt.nz/act/public/2010/0024/latest/DLM1630002.html.

36 Te Urewera Act of 2014, s 4 (N.Z.). These rights were specifically cited in the abandoned case of first impression in the United States, discussed in Part III. Amended Complaint for Declaratory and Injunctive Relief. The Colorado River Ecosystem, et al. v. State of Colorado, No. 1:17-cv-02316-NYW (Nov. 3, 2017) ("On July 27, 2014, Te

Urewera was granted "[a]ll the rights, powers, duties and liabilities of a legal person."[37] Further, the Act decreed that Te Urewera could now bring causes of action on its own behalf without having to prove direct injury to human beings.[38] Naturally, parks and rivers cannot speak, so the legislation appointed indigenous guardians to speak directly on behalf of the interests of these specific natural resources.

Recognition for these natural resources reflects New Zealand's commitment to recognizing their indigenous peoples' beliefs and providing adequate representation for natural resources.[39] This was a victory for environmentalists around the globe. The guardianship established for historically indigenous lands and waters, on behalf of the intrinsic value of the resource itself, reflected American legal scholar Christopher Stone's groundbreaking idea that was published decades ago: natural resources may deserve standing.[40]

However, recognition of the Whanganui River as a legal person was not unanimously accepted in New Zealand.[41] At the time the legislation was enacted, New Zealand Attorney-General Chris Finlayson said, "Some people will say it's pretty strange to give a natural resource a legal personality, but it's no stranger than family trusts, or companies, or incorporated societies."[42] Per legislation, the river would not speak for itself, but instead one member of the Whanganui iwi [indigenous group] and one representative of the New Zealand Crown would speak on behalf of the river.[43]

Whether river representation could take hold in the United States depends on stakeholders' openness to adding legal rights of nature to the conservation toolkit. Currently, it appears that those in a place to recognize this movement judicially, perhaps finding the federal legislative

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Urewera, an 821-square mile area of New Zealand, was designated as a legal entity with "[A]ll the rights, powers, duties and liabilities of a legal person." Te Erewera Urewera Act of 2014 § 11(1). Te Urewera can now bring causes of action on its own behalf without having to prove direct injury to human beings.").

37 Te Erewera Urewera Act of 2014, s 11(1) (N.Z.).

38 *Id.*

39 Isaac Davison, *Whanganui River Given Legal Status of a Person Under Unique Treaty of Waitangi Settlement*, N. Z. HERALD (Mar. 15, 2017), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11818858.

40 Stone, *supra* note 1, at 500–01.

41 Jamie Whyte, Opinion, *Old man river law a case of legislative lunacy*, N. Z. HERALD (Mar. 20, 2017), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11821417.

42 *Id.*

43 Zaryd Wilson, *Whanganui River Representatives Appointed*, N.Z. HERALD (Sept. 5, 2017), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11916893.

protections from the 1970s sufficient to address modern environmental concerns, do not see a need for additional tools. The interplay of state adjudication of water rights and federal regulation of water quality is ripe for innovation because of states' ability to tailor site-specific solutions for conservation within the federal framework. Recent ecological challenges to the Colorado River Ecosystem, such as the forecasted extended drought over the next several years, have shown that voluntary water restrictions by states, federally-recognized interstate compacts, and tribal funding alone may not be sufficient to protect the river.[44]

# II. EBB: DECADES OF RESISTANCE—DESPITE SOME DISSENT—IN THE UNITED STATES

## *A. Development of American Environmental Law*

The 1970s could be considered the heyday of American Environmental Law. At the beginning of the decade, the National Environmental Policy Act ("NEPA") heralded a new era in which the federal government was first required to consider the environmental effects of their proposed actions prior to making decisions on agency actions such as resource extraction permit applications, adopting federal land management actions, and constructing publicly-owned facilities.[45] The Act was conceived as a broad national framework for protecting the environment, with the specific goal of encouraging "productive and enjoyable harmony between man and his environment," "promot[ing] efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man" and "enrich[ing] the understanding of the ecological systems and natural resources important to the Nation."[46] Over time, however, NEPA was reduced to a

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44 Brent Gardner-Smith, *Mandatory Curtailment of Water Rights Raised as Possibility*, ASPEN TIMES (Oct. 19, 2018), https://www.aspentimes.com/news/local/mandatory-curtailment-of-waterrights-in-co-raised-as-possibility. Colby Pellegrino, who handles Colorado River issues for the Southern Nevada Water Authority (the Las Vegas metro area's water utility) says current conservation programs won't be enough to avoid a crisis. Future water supply crises may invoke water quality issues, further entwining state and federal governance.

45 ENVTL. PROT. AGENCY, *What is the National Environmental Policy Act?*, https://www.epa.gov/nepa/what-national-environmental-policy-act (last updated Jan. 24, 2017).

46 42 U.S.C. § 4321.

procedural safeguard rather than substantive protection of the environment.[47]

Just two years later, Congress amended the Water Pollution Control Act of 1948, renamed and now commonly known as the Clean Water Act, to give the Environmental Protection Agency ("EPA") the authority to regulate pollutant discharge in the waters of the United States as well as maintain existing requirements to set water quality standards.[48] The Clean Water Act ("CWA") was subsequently modified to streamline the municipal construction grants process, build EPA-state partnerships to address water quality needs and funding, and reduce toxic pollutants.[49] While the CWA does provide for financial assistance to states to establish and administer programs for the prevention, reduction, and elimination of water pollution, that help only extends to tribes if they are federally recognized, have a governing body carrying out substantial governmental duties and powers, have legal authority and jurisdiction over tribal lands, and have the capacity to comply with the CWA.[50] Despite funding tribes, as well as providing for states to implement enforcement of the CWA, the EPA itself acknowledges widespread violations and uneven enforcement.[51]

In 1973, Congress enacted the Endangered Species Act ("ESA") to provide a way to protect ecosystems that host endangered and threatened species.[52] Administered by the United States Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS"), the ESA prohibits the taking—defined as harassing, harming, pursuing, shooting, wounding, killing, trapping, capturing, collecting, or attempting to engage in any such conduct—of endangered and threatened species.[53] Designation of habitat critical to the survival of such species to "the maximum extent prudent and determinable," is tempered with broad carve-outs for economic considerations, national security and "other

47 Myrl L. Duncan, *The Rights of Nature: Triumph for Holism or Pyrrhic Victory*, 31 WASHBURN L.J. 62, 66 (1991).

48 ENVTL. PROT. AGENCY, *The History of the Clean Water Act*, https://www.epa.gov/laws-regulations/history-clean-water-act (last updated Aug. 8, 2017).

49 *Id.*

50 Clean Water Act, 33 U.S.C. §§ 1377; ENVTL. PROT. AGENCY, *Overview of EPA's Guidance for Discussing Tribal Treaty Rights*, https://www.epa.gov/water-pollution-control-section-106-grants/tribal-grants-under-section-106-clean-water-act#tribalconsortium (last updated Mar. 12, 2018).

51 ENVTL. PROT. AGENCY, *Cleanwater Enforcement Action Plan* 1 (Oct. 15, 2009), https://www.epa.gov/sites/production/files/documents/actionplan101409.pdf.

52 Endangered Species Act, 16 U.S.C. §§ 1531–44.

53 *Id.* §§ 3, 9, 10, 19.

relevant impact[s]."[54] Because the ESA only provides protection for potentially narrow slices of ecosystems that host specific, listed species, it is not substantively sufficient to completely protect entire river ecosystems.

### *B. Sierra Club v. Morton*

During the same decade that Congress passed NEPA, the CWA, and the ESA, the Supreme Court handed down the long-lasting opinion that would limit environmental advocacy to claims of injury to humans.[55] As a result of *Sierra Club v. Morton*, successful environmental litigation now depends on a duly-injured advocate with access to the courts—often termed "next friend"—claiming injurious impact on a human.[56]

*Sierra Club v. Morton* is the closest that the United States federal government has come to granting personhood to natural resources.[57] In that case, a conservation group brought suit for declaratory judgment and an injunction to prevent the United States Forest Service from approving a ski development proposed by Walt Disney Productions near the Sequoia National Forest.[58] The Sierra Club alleged no personal injury to any specific member, but argued that the ski development would adversely affect the forest.[59] Justice Stewart held that although the Sierra Club amply demonstrated their affinity for the forest and environmental expertise, absent concrete "injury in fact" to Sierra Club's members, the club had no standing to sue on behalf of the forest.[60] Because the Sierra Club's members did not allege facts showing that they would be personally adversely affected by the ski development, the Court determined that the club did not "have a direct stake in the outcome," and it would undermine the goal of the Administrative Procedure Act to "authorize judicial review at the behest of organization or individuals who seek to do no more than vindicate their own value preferences through the judicial process."[61]

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54 *Id.* §§ 3(5)(A)–(B), 4(a)(3)(B)(2)

55 Sierra Club v. Morton, 405 U.S. 727 (1972). *See also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014) (noting that the Court holds an expansive notion of corporate personhood); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–41 (2010).

56 *Sierra Club*, 405 U.S. at 735, 739. *See also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 556 (1992).

57 405 U.S. at 727.

58 *Id.* at 730.

59 *Id.* at 734.

60 *Id.* at 735.

61 *Id.* at 740.

### *C. The Douglas Dissent*

In his famous dissent, Justice Douglas asserted that perhaps injury to the forest itself would be concern enough for the Court to consider.[62] Douglas opined that environmental issues might be better litigated in the name of the natural resource that would potentially be injured.[63]

The Court at the time already considered inanimate objects such as ships and corporations as parties in litigation, and Douglas offered an extension of that consideration.[64] Douglas reasoned that rivers have even more at stake in litigation because they are an entire ecological unit that is not only living but supports and sustains both other wildlife and human life.[65] He highlighted the irony of judicial protection of fictional entities at the expense of protection for actual, natural entities:

> The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a 'person' for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes. So, it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves or trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it.[66]

Douglas suggested that "contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."[67] He urged citizens to speak on behalf of the natural resources that form "the very core of America's beauty."[68] Instead of relying on federal agencies notorious for aligning with private interests that are at odds with such beliefs, or transferring the responsibility to environmental groups who may be swayed by Zeitgeist, Douglas recommended that the "people who have so frequented the place as to know its values and wonders . . . speak for the

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62 *Id.* at 741–42 (Douglas, J., dissenting).

63 405 U.S. at 742.

64 *Id.*

65 *Id.* at 743.

66 *Id.* at 742–43.

67 *Id.* at 741–42.

68 *Id.* at 745.

entire ecological community."[69] Douglas concluded with Aldo Leopold's land ethic, which urges an understanding of community to include "soils, waters, plants, and animals, or collectively: the land."[70]

### *D. The Blackmun Dissent*

Justice Douglas was not alone in his concern about the danger of narrowing environmental advocacy to redress for human injury. His colleague, Justice Blackmun, warned that *Sierra Club v. Morton* "poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances."[71] Justice Blackmun's concern foreshadowed the danger of a judicial system tied to the legal fictions it creates when he asked, "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"[72]

While the majority set a new standard for bringing cases on behalf of natural resources, Justice Blackmun, seconded by Justice Brennan, urged the court to consider the dangers of limiting judicial review to human injuries.

## III. BORETIDE: THE WORLDWIDE THRUST FOR RECOGNIZING THE RIGHTS OF NATURE AGAINST TRADITIONAL FLOW

Following *Sierra Club v. Morton*, environmental advocacy was limited to a duly-injured advocate with access to the courts claiming injurious impact on a human.[73] Over the past decade, however, American legal and social scholars have begun to question whether this third-party advocacy is the best way to advocate for the environment.[74]

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69 405 U.S. at 752.

70 *Id.*

71 *Id.* at 755 (Blackmun, J., dissenting).

72 *Id.* at 755–56.

73 *Id.* at 735, 739; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 562–63 (1992).

74 *See* Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 50 (2018); Maria Akchurin, *Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador*, 40 L. & SOC. INQUIRY 937 (2015);

### *A. Grassroots Rights of Nature Legislative Campaigns Take on Well-Funded Oil and Gas Industry*

From their Mid-Atlantic base, the Community Environmental Legal Defense Fund ("CELDF") has promoted the rights of nature by providing legislative language to communities around the country.[75] In 1995, CELDF began a dual mission to promote local self-government and the rights of nature.[76] Since then, over 200 communities have adopted CELDF-drafted local legislation.[77]

In New Mexico in 2013, the Mora County Board of Commissioners passed a CELDF-drafted ordinance "protecting the rights of human communities, nature, and natural water."[78] The main thrust of the ordinance was the county's desire that "corporations may not drill, extract, or contract for any oil and gas development."[79] An energy exploration firm filed suit against both the county and its board of commissioners, seeking an injunction to prohibit the defendants from enforcing the ordinance proscribing extractive uses within the county.[80] In a 138-page opinion, the United States District Court for the District of New Mexico struck down the ordinance, holding, as pertinent here, that the ordinance violated the Supremacy Clause and was impermissibly overbroad, in violation of the First Amendment.[81] Nevertheless, local extractive use industry publications warned that "[w]hile industry, the media and the public might ignore all the commotion created about the hydraulic fracturing discussion, this issue is the beginning of a social movement that is greater than just the oil and gas industry, it is a potential game changer for all of corporate America."[82]

In that same year, sixty percent of voters in the town of Lafayette, Colorado, approved the CELDF-drafted "Lafayette Community Rights

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Michelle P. Bassi, *La Naturaleza O Pacha Mama De Ecuador: What Doctrine Should Grant Trees Standing?*, 11 OR. REV. INTL. L. 461 (2009).

75 *CELDF Celebrates 20 Years!*, COMMUNITY ENVTL. LEGAL DEF. FUND (Dec. 2, 2015), https://celdf.org/2015/12/celdf-celebrates-20-years.

76 *Id.*

77 *U.S. Communities*, COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND), https://celdf.org/join-the-movement/where-we-work/u-s-communities (last updated Nov. 19, 2015).

78 Swepi, LP v. Mora Cty., 81 F. Supp. 3d 1075, 1090 (D.N.M. 2015).

79 INDEP. PETROLEUM ASS'N OF N. M., ENERGY NEW MEXICO: OIL IS THE LIFEBLOOD OF THE MODERN WORLD 16 (2014), https://web.archive.org/web/20140626093851/http:/www.ipanm.org/images/library/File/Energy%20New%20Mexico%202014.pdf.

80 *Swepi*, 81 F. Supp. 3d at 1088.

81 *Id.*

82 INDEP. PETROLEUM ASS'N OF N. M., *supra* note 79.

Act."[83] Supported by the League of Women Voters and a local grassroots group, East Boulder County United, this measure targeted the hydraulic fracturing oil extraction technique ("fracking") and proposed "certain rights for city residents and ecosystems as part of the city charter such as clean water, air and freedom from certain chemicals and oil and gas industry by-products."[84] Less than a year later, the Boulder District Court ruled in favor of the ballot measure's opponent, the Colorado Oil and Gas Association.[85] Finding the regulation of oil and gas to be a matter of mixed state and local concern, Boulder County District Judge D. D. Mallard held that Lafayette did not have the authority to prohibit practices authorized and permitted by the state.[86]

Similar legislative and judicial attempts by CELDF to codify the rights of nature continue to meet resistance in federal court. In perhaps the organization's most publicized anti-fracking and rights of nature case, CELDF's opponent, Pennsylvania General Energy, filed a Motion for Sanctions for $52,000 in attorneys' fees following the utility's successful yet prolonged litigation in district and circuit courts.[87] The court reluctantly fined CELDF's lawyers the full $52,000 for the "continued pursuit of frivolous claims and defenses."[88]

### *B. Untested Tribal Recognition of the Rights of Nature*

On a reservation in Wisconsin in late 2018, the Ho-Chunk Nation (formerly Winnebago) General Council overwhelmingly voted to amend their tribal constitution to recognize that "[e]cosystems, natural communities, and species within the Ho-Chunk Nation territory possess inherent, fundamental, and inalienable rights to naturally exist, flourish, regenerate, and evolve."[89] While the Ho-Chunk Nation set precedent as

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[83] *City of Lafayette "Community Rights Act" Fracking Ban Amendment, Question 300 (November 2013)*, BALLOTOPEDIA (Nov. 2013), https://ballotpedia.org/City_of_Lafayette_%22Community_Rights_Act%22_Fracking_Ban_Amendment,_Question_300. CELDF maintains the template at http://celdf.org/wp-content/uploads/2015/10/Colorado_Amendment.pdf.

[84] *Id.*

[85] Cathy Proctor, *Colorado Fracking Ban Scorecard: 3 Ruled Illegal, 2 Remain*, DENVER BUS. J. (Aug. 29, 2014), https://www.bizjournals.com/denver/blog/earth_to_power/2014/08/colorado-fracking-ban-roundup-shows-3-ruled.html?page=all.

[86] *Id.*

[87] Pennsylvania Gen. Energy Co. v. Grant Township, C.A. No. CV 14-209, 2018 WL 306679, at *13 (W.D. Pa. Jan. 5, 2018).

[88] *Id.*

[89] Press Release, Community Environmental Legal Defense Fund, Ho-Chunk Nation General Council Approves Rights of Nature Constitutional Amendment (Sept. 17, 2018),

the first tribal nation to amend their constitution with the help of CELDF, this amendment has not yet been tested in court.[90] Because tribal court jurisdiction only extends beyond tribal members in limited circumstances, judicial enforcement of this amendment may not be tested anytime soon.[91]

https://celdf.org/2018/09/press-release-ho-chunk-nation-general-council-approves-rights-of-nature-constitutional-amendment.

90 *Id.*

91 Montana v. United States, 450 U.S. 544, 565–66 (1981). Tribal jurisdiction may extend beyond tribal members in limited circumstances such as regulating the activities of non-tribal members who have entered into a consensual agreement with the tribe, or to protect the political integrity or economic security of the tribe when the health and welfare of the tribe is directly at stake.

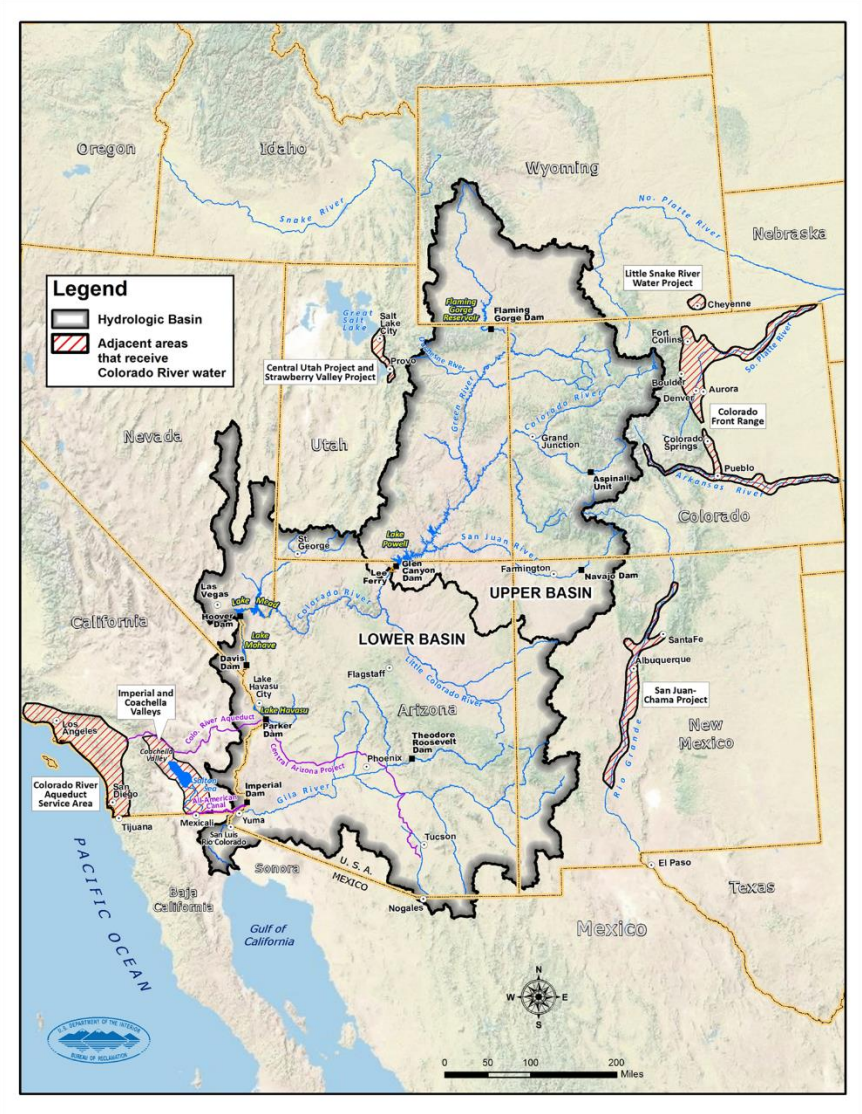


*Figure 1. The Colorado River Basin.*[92]

[92] Department of the Interior. Map of the Colorado River Basin. https://www.doi.gov/water/owdi.cr.drought/img/detailedbasinmap.png.

### *C. Radical Environmental Groups Try the Courts: The Colorado River Case*

Justice Douglas's hope that natural resources would gain an individual voice in federal litigation lay dormant for forty-five years.[93] In September 2017, radical environmental group Deep Green Resistance ("DGR") revived Justice Douglas's argument that "contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation" when it petitioned the federal District Court of Colorado to recognize legal personhood for the Colorado River System.[94] Joined by citizens of Colorado and Utah, DGR asked the United States District Court in Denver to declare the Colorado River Ecosystem a "person" in order to represent its interest in court.[95] DGR argued that the federal District Court had diversity jurisdiction in this action against the State of Colorado to hear both a claim arising under the Constitution and a civil rights claim.[96]

To bolster their claim, the group named the Colorado River Ecosystem as plaintiff, alongside next friends DGR, the Southwest Coalition, and five DGR members.[97] DGR claimed that the State of Colorado should be held liable for violating the Colorado River's rights to exist and flourish by approving permits and regulations for certain actions that might violate rights DGR would like the court to declare for the Ecosystem.[98] DGR recommended the appointment of a special master pursuant to Federal Rules of Civil Procedure 53.[99] A special master, or a commission of interested parties, could screen claims brought in the name of the Colorado River Ecosystem.[100] In an amended complaint, DGR also

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93 Complaint for Declaratory Relief. Colorado River Ecosystem et al. v. State of Colorado, No. 1:17-cv-02316-RPM (D. Colo. Sept. 25, 2017), at 12–13.

94 *Id*. at 12.

95 Brent Gardner-Smith, *Colorado AG Moves to Dismiss Request Seeking "Person" Status for Colorado River* (Oct. 20, 2017), THE ASPEN TIMES, http://www.aspentimes.com/news/colorado-ag-moves-to-dismiss-request-seeking-person-status-for-colorado-river.

96 Complaint for Declaratory Relief, *supra* note 9393, at 11.

97 *First-In-The-Nation Lawsuit Seeks Recognition of Rights for The Colorado River*, DEEP GREEN RESISTANCE NEWS Service (Sept. 21, 2017), https://dgrnewsservice.org/resistance/indirect/lobbying/first-nation-lawsuit-seeks-recognition-rights-colorado-river.

98 *Id.*; Complaint for Declaratory Relief, *supra* note 9393, at 16–18.

99 Fed. R. Civ. P. 53.

100 This would be an extension of a special master's typical duties. A special master is a parajudicial officer specially appointed to assist the court with a particular matter or complex case. *Master*, BLACK'S LAW DICTIONARY (10th ed. 2014). An attorney usually fills this position, appointed by a judge whose role is to review the special master's actions and decisions. *Officer*, BLACK'S LAW DICTIONARY (10th ed. 2014). A special master is

named a Colorado riverkeeper as plaintiff and appointed a guardian for the Colorado River.[101]

Counsel for the plaintiff, Jason Flores-Williams, analogized legal standing for nature to legal standing for another non-person legal entity: corporations.[102] He reasoned that it was unjust that non-person corporate entities that depend on nature have legal standing, but nature alone does not merit legal rights.[103]

In their original complaint, DGR claimed that the Colorado River System has "the right[] to exist, flourish, regenerate, and naturally evolve."[104] The main thrust of the argument was that the current system of law fails to protect the natural environment on which communities depend for survival and livelihood.[105] The current legal system, the plaintiff argued, limits environmental advocacy to diminished human use of that ecosystem.[106] Drawing an analogy between this environmental paradigm shift and the recognition of the legal personhood of women and African Americans in the 1800s,[107] DGR argued that the United States should follow international precedent and grant the Colorado River System legal standing.[108]

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different than a guardian ad litem, which is usually a court-appointed lawyer who appears on behalf of an incompetent party. HOMER H. CLARK JR. & ANN LAQUER ESTIN, DOMESTIC RELATIONS: CASES AND PROBLEMS 1078 (6th ed. 2000); *Guardian*, BLACK'S LAW DICTIONARY (10th ed. 2014). The special master role is also different than a next friend, which is a person who appears in a lawsuit "for the benefit of an incompetent" but who is "not a party to the lawsuit and is not appointed as a guardian." *Next friend*, *supra* note 5.

101 Amended Complaint for Declaratory and Injunctive Relief, Colorado River Ecosystem et al. v. State of Colorado, Docket No. 1:17-cv-02316-NYW (D. Colo. Nov. 3, 2017). The Colorado Riverkeeper, John Weisheit, is a member of the Waterkeeper Alliance, a national grassroots group that advocates for clean water. The Colorado River Waterkeeper Alliance is a non-governmental organization of citizens who speak for and protect the Colorado River from threats of dams and diversions, pollution, and climate change. *See* WATERKEEPER ALLIANCE, https://waterkeeper.org (last visited Feb. 10, 2019).

102 Telephone interview with Jason Flores-Williams, Attorney, Law Offices of Jason Flores-Williams (Feb 6, 2018)*; see also* Amended Complaint for Declaratory and Injunctive Relief, *supra* note 101.

103 Telephone interview with Jason Flores-Williams, *supra* note 102; *see also* Amended Complaint for Declaratory and Injunctive Relief, *supra* note 101.

104 Julie Turkewitz, *Corporations Have Rights. Why Shouldn't Rivers?*, N.Y. TIMES (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/us/does-the-colorado-river-have-rights-a-lawsuit-seeks-to-declare-it-a-person.html.

105 Complaint for Declaratory Relief, *supra* note 93, at 2.

106 *Id.*

107 *Id.*

108 *Id.*

DGR further argued that if the Colorado River Ecosystem had legal standing, injuries to the ecosystem would be directly recoverable without relying on injury to the human environment.[109] Conservationists concerned with protecting the Colorado River would not have to engage in judicial gymnastics to prove aesthetic or economic injury to themselves. In the complaint, the plaintiff detailed the flora and fauna that depend on the Colorado River Ecosystem.[110] The direct injuries that the plaintiff claimed included the droughts that have resulted from climate change diminishing the Colorado River's ability to reach its ocean terminus.[111]

DGR's claims were met by resistance from the State of Colorado. The State asked the court to dismiss the case because a declaration that an ecosystem is a person would not address the alleged injuries to the river.[112] Further, the State claimed that the complaint failed on procedural grounds, arguing that the complaint failed to establish jurisdiction and failed to state a claim upon which relief can be granted.[113]

The Colorado attorney general set forth four reasons why the district court did not have jurisdiction: (1) the Eleventh Amendment to the Constitution grants the State sovereign immunity; (2) the plaintiff lacked constitutional standing under Article III of the United States Constitution because there is no traceable injury to the State of Colorado nor redressability; (3) the plaintiff failed to demonstrate jurisdiction under federal statute; and (4) the complaint presented a non-justiciable issue of public policy.[114] Additionally, the state argued that whether rights of nature exist is a matter reserved to Congress by the Constitution.

Under the Eleventh Amendment, the State argued that the plaintiff must demonstrate that Colorado either voluntarily waived its sovereign immunity or Congress acted to affirmatively waive Colorado's immunity.[115] Because the plaintiff failed to demonstrate either action, the State recommended that the suit be dismissed with prejudice.[116]

Second, the State argued that neither the Colorado River Ecosystem nor its next friends had standing because the complaint failed to

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109 *Id.* at 2–3.

110 *Id.* at 3–5.

111 Complaint for Declaratory Relief, *supra* note 93, at 2.

112 Motion to Dismiss, No. 1:17-cv-02316-NYW (D. Colo. Oct. 17, 2017); *see also* Gardner-Smith, *supra* note 93.

113 Motion to Dismiss, *supra* note 112.

114 *Id.* Additionally, the defendants argued that a claim under statute would fail even if the Eleventh Amendment did not apply because the plaintiff failed to obey the notice provisions of the Endangered Species Act. *Id.*

115 *Id.* at 4.

116 *Id.*

demonstrate injury in fact.[117] Citing the seminal environmental standing case *Lujan v. Defenders of Wildlife*, the State argued that the plaintiffs did not demonstrate sufficient injury to justify legal standing as defined by either Article III of the United States Constitution or by state or federal statute.[118] Further, the State argued that any injury claimed was neither sufficiently concrete nor traceable to the State.[119] The State argued that even if Colorado declared an ecosystem a person with legal rights, the plaintiff failed to demonstrate how that recognition would redress the alleged injuries.[120]

Third, the State argued that the district court did not have subject matter jurisdiction under any federal statute.[121] In addition to the arguments under the Eleventh Amendment previously discussed, the State claimed that diversity jurisdiction does not exist because a state is not a citizen of a different state for purposes of diversity jurisdiction.[122] The State also claimed lack of jurisdiction because the complaint neither invoked a civil rights statute nor identified any violation of the Colorado River Ecosystem's civil rights.[123] Finally, the State claimed that the Declaratory Judgment Act offers no relief because the plaintiff failed to demonstrate an actual case or controversy.[124]

Fourth, the State claimed that determining the rights of nature is a non-justiciable political question of public policy better answered by either the executive or legislative branches.[125] The State claimed the Court lacks judicially discoverable and manageable standards for resolving this question.[126]

In response, DGR amended its complaint to request injunctive relief on behalf of the entire Colorado River Ecosystem.[127] The complaint clarified the injury component of standing, invoking the ESA to note specific potential injuries to four endangered fish and seven endangered

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117 *Id.* at 7, 13.

118 504 U.S at 560–61; Motion to Dismiss, *supra* note 112, at 7–10.

119 Motion to Dismiss, *supra* note 112, at 9–10.

120 *See id.* at 11 (arguing that jurisdiction did not exist under 28 U.S.C. §§ 1331, 1332, 1343, 2201, 2202).

121 *Id.* at 14–15.

122 *Id.* at 14 (holding "[t]here is no question[,] a State is not a 'citizen' for … diversity jurisdiction [purposes].") (citing Moor v. Alameda Cty., 411 U.S. 693 (1973)).

123 *Id.* at 15.

124 *Id.* at 15–16.

125 Motion to Dismiss, *supra* note 112, at 16.

126 *Id.* at 17; *see* Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 132 (2012).

127 Amended Complaint for Declaratory and Injunctive Relief, *supra* note 101.

birds dependent on the Colorado River Ecosystem.[128] The amended complaint also recognized unquantified Native American water rights not contemplated in earlier litigation, even though plaintiff asserted no tribal affiliation.[129]

Instead of claiming third-party standing, DGR asked for recognition as a potential guardian of the Colorado River Ecosystem.[130] In that way, the complaint mirrored the Whanganui strategy.[131] The complaint added other plaintiffs for consideration as guardians of the Colorado River Ecosystem, including an "on the-water" riverkeeper designated by the international nonprofit Waterkeeper Alliance.[132] Like the Whanganui, DGR argued the appointment of a permanent guardian would provide an avenue of relief for the voiceless Colorado River Ecosystem.

Additionally, the amended complaint clarified the logical progression from the court recognizing personhood of inanimate corporations to recognizing that the Colorado River Ecosystem deserves similar legal rights.[133] The plaintiffs claimed that they were more than just "next friends" of the Colorado River Ecosystem.[134] Because the plaintiffs live and interact with the Colorado River Ecosystem, the plaintiffs claimed that they are the human part of the Colorado River Ecosystem.[135]

In response, the State filed a Motion to Dismiss the Amended Complaint.[136] In that motion, the State repeated its Constitutional standing arguments of redressability, injury, and justiciability.[137] Most significantly, the State threatened sanctions against plaintiff's counsel.[138]

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128 *Id.*at ¶¶ 10, 11, 15.

129 *Id.* at ¶ 19.

130 *Id.* at ¶ 23.

131 *See Whanganui River Agreement Signed*, *supra* note 20; Haunui-Thompson, *supra* note 21; Tutohu Whakatupua, Whanganui Iwi-N.Z., § 2.6, Aug. 30, 2012, N.Z, http://www.wrmtb.co.nz/new_updates/TuutohuWhakatupuaFinalSigned.pdf.

132 Amended Complaint for Declaratory and Injunctive Relief, *supra* note 101, at ¶¶ 49–50.

133 *Id.*at ¶¶ 38–48.

134 *Id.* at ¶ 21.

135 *Id.*

136 Motion to Dismiss, *supra* note 112, at 1.

137 *Id.* at 2.

138 Chris Walker, *Attorney to Withdraw Colorado River Lawsuit Under Threat of Sanctions*, WESTWORD (Dec. 4, 2017), http://www.westword.com/news/colorado-river-lawsuit-to-be-withdrawn-due-to-potential-sanctions-9746311. This is part of a trend to deter environmental litigation. *See generally*, Mark Hand, *The New Legal Threat to Environmental Attorneys: Sanctions from Judges and Attorneys General*, THINKPROGRESS (Feb. 5, 2018), https://thinkprogress.org/environmental-attorneys-under-attack-ed3c865aac4b.

Shortly after the State filed its Motion to Dismiss, DGR filed a Motion to Dismiss with Prejudice.[139] Counsel for the plaintiff, Jason Flores-Williams explained that he does not consider the case a failed effort.[140] Rather, Mr. Flores-Williams considered the case a success because it brought into the public consciousness the idea of litigating for the rights of nature.[141]

## IV. CONFLUENCE: COLLABORATIVE INJECTION OF TRADITIONAL ETHNIC KNOWLEDGE AND THE INDIGENOUS VIEWS OF THE RIGHTS OF NATURE

Federal recognition of the rights of nature would (1) ameliorate standing doctrine without requiring wholesale overhaul of the environmental advocacy scheme, (2) provide a moral victory for tribes that already recognize the legal rights of nature, (3) set a necessary framework for protecting natural resources within the U.S. legal system, and (4) allow for an implementation of a system of guardians for major natural resources. This proposed recognition comes at a time when it is becoming more apparent that the federal government might not reasonably be relied upon to advocate successfully for natural resources' best interests. As renowned Western water legal scholar Charles Wilkinson remarked, "the water laws that . . . arose for good reason in a particular historical and societal context, the westward expansion of the nineteenth century . . . simply do not square with the economic trends, knowledge, and social values of the modern West."[142]

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139 Unopposed Motion to Dismiss Amended Complaint with Prejudice, Colorado River Ecosystem v. Colo., No. 1:17-cv-02316-NYW, at 1 (D. Colo. Dec. 3, 2017).

140 Telephone interview with Jason Flores-Williams, *supra* note 102. The plaintiff voluntarily agreed to dismiss the case following the defendant's threats of Rule 11 sanctions. *Id.* This is not the first time that plaintiffs advocating for the rights of nature have been threatened with sanctions; in Pennsylvania, attorneys representing the Community Environmental Legal Defense Fund were threatened with sanctions and ordered to pay $50,000 in attorneys fees based on "the continued pursuit of frivolous claims" despite the attorneys' "first-hand knowledge of their insufficiency." Opinion and Order, Pennsylvania Gen. Energy Co., LLC v. Grant Township, Docket No. 1:14-cv-00209-SPB at 24–25 (Jan. 5, 2018).

141 Telephone interview with Jason Flores-Williams, *supra* note 102.

142 CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST, at xiii (Island Press ed., 1992).

### *A. Acknowledging the Rights of Nature Would Further American Environmental Goals*

While federal laws such as NEPA, the ESA, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the American Indian Religious Freedom Act mandate that federal land management agencies consider certain indigenous cultural resources on and near the lands they manage, natural resource conservation goals may be more effectively met if land managers consider traditional ethnic knowledge to complement Western views.[143] Rather than a blanket application of federal laws aimed at an amalgam of initiatives, local incorporation of the indigenous rights of nature tailored specifically to the resource to be managed would fill the gaps between the variety of procedural and substantive environmental laws.

### *B. Indigenous Background*

While recognition of the rights of nature may seem to be a foreign concept in the United States, it has roots in some indigenous American cultures. In his exploration of the sharp division between American federal government and American Indian views of nature, American Indian scholar Walter Echo-hawk stated that "tribal religions cannot be considered in a vacuum, but must be understood within the context of the primal world, for tribes in their aboriginal places are embedded in their indigenous habitats so solidly that the line between nature and the tribe is not easy to establish."[144] In describing tribal views of nature, Echo-hawk quoted Black Elk (Lakota), "[T]he Great Spirit . . . is within all things; the trees, the grasses, the rivers, the mountains, and the four-legged animals, and the winged peoples."[145] Incorporating such indigenous viewpoints in the United States federal courts has been inconsistent to date.

Inconsistent federal recognition of such views may reflect the differing values of the more than 500 federally-recognized tribes within

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143 WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 136 (2013).

144 *Id.* at X. In the foreword, former United Nations Special Rapporteur on the Rights of Indigenous Peoples, S. James Anaya, noted that while the Declaration "is not itself legally binding," the commitment by signers can serve "as a beacon for executive, legislative, and judicial authorities," and complement accepted traditions. *Id.* at X.

145 Paul Goble, ALL OUR RELATIVES: TRADITIONAL NATIVE AMERICAN THOUGHTS ABOUT NATURE (2005) (citing JOSEPH EPES BROWN, THE SACRED PIPE (1953)); WALTER R. ECHO-HAWK, *supra* note 143, at 147.

United States borders.[146] Some tribes have introduced indigenous viewpoints of natural resources into federal litigation, but judicial responses have not appeared consistent.[147] In 2001, a federal district court recognized the Klamath and Yurok tribes' culture and tradition when weighing tribal and non-tribal reliance on the Bureau of Reclamation's regulation of the Klamath River during a severe drought.[148] The Klamath River ecosystem hosted three fish species listed as "endangered" or "threatened" under the ESA.[149] Indirectly supporting indigenous views, the court ruled for the tribes based on the plain language of the ESA, stating that the Bureau of Reclamation had a responsibility under the ESA that overrode the rights of non-tribal irrigators.[150]

In 2016, the Blackfeet Nation in Montana succeeded in protecting sacred lands from oil development.[151] The United States Department of the Interior cited deference to sacred tribal lands when it cancelled drilling leases in the Badger-Two Medicine area.[152] However, that success was short-lived. In September 2018, the District Court for the District of Columbia held that the decision to cancel one of the oil and gas leases was arbitrary and capricious.[153] Judge Richard J. Leon's decision made no reference to sacred tribal lands.[154]

Perhaps one of the strongest federal recognitions of indigenous views came via the permanent protection of the Taos Pueblo Nation's "most

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146 83 FR 24863 (2018). The federal government currently recognizes 573 tribal entities. Individual examination of each entity's viewpoints would require further study. For purposes of this Note, "indigenous viewpoints" are construed within the broad classification of traditional ethnic knowledge of sovereigns with which the United States holds a special trust relationship.

147 *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (finding no First Amendment protection for tribe trying to preclude timber harvesting on Indian religious grounds).

148 Kandra v. United States, 145 F. Supp. 2d 1192 (D. Or. 2001).

149 *Id.* at 1196–97.

150 *Id.* at 1204.

151 *See* Rob Chaney, *US Cancels Drilling Leases in Sacred Badger-Two Medicine Area*, INDEP. REC. (Nov. 16, 2016), https://helenair.com/news/state-and-regional/us-cancels-drilling-leases-in-sacred-badger-two-medicine-area/article_ad7f7c0b-cb82-545c-aeed-1527b686a8bc.html.

152 *Id.*

153 Solenex LLC v. Jewell, 334 F. Supp. 3d 174, 182 (D.D.C. 2018).

154 *Id.* at 183 (statement of Judge Leon) ("[D]efendants appear to argue that no time-period, however long, would be too attenuated to reconsider the issuance of the lease under newly discovered legal theories. Horsefeathers!"). The court's dismissal of new legal theories, as well as indigenous property rights that date back to "time immemorial," bookends American jurisprudence in a static time frame.

sacred shrine:" the Blue Lake in northern New Mexico.[155] The Taos Pueblo Nation believed that the lake was a living entity, and that if the lake ceased to exist, the tribe itself would cease to exist.[156] Even though the Taos Pueblo Nation persuaded the federal government to protect the Pueblo Nation's sacred waters from recreational overuse, this victory—and that of the temporary reprieve at Badger-Two Medicine—remains rare.[157] In *Idaho v. Coeur d'Alene Tribe of Idaho*, the Court affirmed state control of waterbeds seemingly without concern for location or import to native tribes.[158] The federal courts' reasoning did not appear to rely on indigenous peoples' views of natural resources, even in those cases the tribes won. However, non-indigenous environmental groups continue to challenge the Western utilitarian view that natural resources are to be used and not heard.

### *C. Proposed Guardianship Framework*

The United States is likely not yet ready to incorporate indigenous beliefs into of the rights of nature, but if the government assigned non-governmental coalitions of guardians—a kind of *guardian ad litem* for natural resources—to major rivers, environmental advocates would be permitted to: (1) proffer a guardian who can focus exclusively on the long-term representation of one river; and then (2) delegate funding to protect other resources adequately. Further financial support from federal or state governmental agencies could be considered as well, but the reduction in plaintiffs bringing suits on behalf of the river would perhaps balance the costs of permanent guardianship.

This framework would ensure legal representation of the natural resource's long-term interests. For example, legally-appointed river guardians might advise federal and state agencies on permit applications for multiple nearby mining operations. The guardians would have a stronger, more sustained case for the river because their advocacy would not be limited to case-by-case scenarios. Because the Colorado River Ecosystem would have permanently appointed guardianship, advocacy for the ecosystem would be broader than just ad hoc participation in notice

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155 Michelle Bryan, *Valuing Sacred Tribal Waters Within Prior Appropriation*, 57 NAT. RES. J. 139, 161 (2017). For a more in-depth explanation, *see* Sarah Merfeld, *Taos Blue Lake: The Taos Pueblo and Their Struggle to Regain Blue Lake*, COLORADO COLLEGE: INDIGENOUS RELIGIOUS TRADITIONS, http://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/taos-blue-lake (last visited Feb. 8, 2019); *see also*, *About Taos Pueblo*, TAOS PUEBLO, http://taospueblo.com/about (last visited Feb. 8, 2019).

156 Bryan, *supra* note 155, at 161–62.

157 *Id.* at 162.

158 Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 265–66 (1997).

and comment rulemaking every time there was a perceived threat to the ecosystem. In litigation, the Ecosystem would be a named party rather than property, developing reliance for opposing parties whose interests in the river may be currently subject to litigation by multiple adversaries. In that way, guardians for the Ecosystem could develop a co-management plan that focused on long-term health of the river.

Additionally, appropriating water rights would be considered not only by seniority but with consideration of the effects of the appropriator's use on the river. This seismic shift in water law would effectively establish the most senior water right as that of the river itself.[159] Although this would upend Colorado's water doctrine of prior appropriation, challenges to the "first in time, first in right" doctrine are not without precedent.

An exception to the prior appropriation doctrine in Colorado was realized in 2009 when the Colorado legislature recognized the acequia water management system.[160] The acequia water management system does not appropriate water in order of seniority but instead recognizes a pre-American system that apportions the water equally among property owners along a communal ditch.[161] Because Colorado recognizes one exception to the prior appropriation doctrine, it is feasible that the state might also consider excepting river-ecosystem guardianship.

Like the legislative establishment of guardians for the Whanganui River, Congress could be the instrument for creating guardianship of the Colorado River Ecosystem. By establishing the guardianship through the legislature and not the judiciary, the State's constitutional claims would be countered by providing a private right of action. Additionally, rather than two guardians as seen in New Zealand, or one special master as recommended by Deep Green Resistance, a strategy group of parties from federal and state governments, private environmental non-profits, and tribal representation would best represent the diversified needs of those citizens who value and depend on the Colorado River Ecosystem. This legislatively established panel could balance the divergent needs of each entity in relation to the river.

*1. Federal Representation*

The guardianship of the Colorado River Ecosystem would include a federal representative. Obvious choices would include a nominee from an agency already entrusted with representing administration's principles, such as the EPA, NMFS, or USFWS. This would capitalize on expert

159 For a more in-depth analysis, see Bryan, *supra* note 155, at 178–79.

160 GETCHES-WILKINSON CENTER, UNIV. OF COLO. LAW SCH., COLORADO ACEQUIA HANDBOOK 6 (Jens Jensen et al. eds., revised 2016).

161 *Id.* at 14.

knowledge at the federal level and acknowledge federal interests in protecting natural resources. As administrations change and their policies on natural resources fluctuate, this federal representation might be tempered by the viewpoints of the other members of the strategy group. Even though some federal agencies like those listed above were conceived as guardians for public lands, the Colorado River Ecosystem would also need representation outside of the government because the river flows past—and is appropriated by owners of—private and locally-held lands.[162] Additionally, federal agencies may have directives for natural resource use that conflict with those of the proposed strategy group.[163]

The challenge with a federal representative is how and whether to appoint or elect the representative. If the federal representative were appointed by the executive branch, the Colorado River Ecosystem might fall prey to political whims. Further, if this representative's term was tied to who is in office, continuity would be a concern. One solution would be to internally elect or appoint a career staffer from within the executive branch, perhaps from the Department of the Interior, and establish five- to ten-year terms that may exceed a single administration.

*2. Non-government Citizen Representation*

Just as with the Whanganui, the Colorado River Ecosystem should include representation by individuals not specifically directed by the federal government, state government, or tribal interests. Appointing a non-governmental citizen as guardian for the Colorado River Ecosystem would relieve environmental groups of the burden of showing human injury for every case. These groups could still advocate for the river but would need only show injury to the river and not to themselves.[164] Several water-resources groups are already in place and could nominate an advocate to speak for private environmental interests.[165]

The challenge with selecting a non-government citizen representative is twofold. First, the interested parties could run the gamut from non-profit environmentalists to corporate natural-resource extractors. Second, a mechanism for electing or appointing this guardian would need to be created. An election might empower the local citizenry,

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162 *See generally* Stone, *supra* note 1, at 472.

163 *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (finding the public interest of skiing more compelling than the tribal interest of sacred natural resources); *see generally* 43 U.S.C. § 1732 (2018).

164 *See* Amigos Bravos v. U.S. Bureau of Land Mgmt., 816 F. Supp. 2d 1118 (D.N.M. 2011) (finding that environmental groups lacked standing because they failed to demonstrate (1) an injury-in-fact, (2) concrete and particularized interest in the land at issue, and (3) causation).

165 Amended Complaint for Declaratory and Injunctive Relief, *supra* note 101.

but lobbying could result in representation by the wealthiest entity rather than the one most committed to the river ecosystem's health and integrity. Alternatively, appointment by any state party to existing river management agreements could either result in representation by an individual committed to the river ecosystem's health and integrity or a political favor by whichever political party is in power at the time.

*3. Tribal Representation*

The Colorado River Ecosystem is fortunate to already have a coalition of tribal and state representatives that share ideas and perspectives about the use and management of the river.[166] The Ten Tribes Partnership has navigated "the Law of the River"—the intricate network of state and federal statutes, regulations and judicial decrees, interstate compacts, and treaties that affect water management decisions in the Colorado River Ecosystem—for more than two decades.[167] Such long-term, large scale tribal coordination to protect natural resources reflects a trend of increased tribal collaboration in the West. Recently, the Bears Ears Inter-Tribal Coalition brought together the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Pueblo of Zuni, and Ute Indian Tribe with the goal of restoring the Bears Ears National Monument in southern Utah.[168] These intertribal coalitions show promise for future intertribal coordination and collaboration with external governments and agencies aligned to protect natural resources.

Native American tribes in the Colorado River Ecosystem recognized water as a centerpiece of life well before our current legal system placed restrictions on its use.[169] Redress for injury to a tribe's water rights has generally been limited to interference with court-defined beneficial uses rather than intrinsic value or sacred use.[170]

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166 *Ten Tribes Partnership*, COLO. RIVER WATER USERS ASSOCIATION, https://www.crwua.org/colorado-river/ten-tribes (last visited Feb. 10, 2019).

167 *Id. See generally* U.S. BUREAU OF RECLAMATION, COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP TRIBAL WATER STUDY REPORT (DEC. 2018).

168 *Who We Are*, BEARS EARS INTER-TRIBAL COALITION, https://bearsearscoalition.org/about-the-coalition (last visited Feb. 10, 2019).

169 Bryan, *supra* note 155, at 140.

170 *See generally* Winters v. United States, 207 U.S. 564 (1908) (recognizing tribal water rights off-reservation, in an amount "sufficient to fulfill the purposes of the reservation"); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1998); *see also* Montana v. United States, 450 U.S. 544 (1981); Arizona v. California, 373 U.S. 546, 600 (1963), *judgment entered sub nom.* Arizona v. California, 376 U.S. 340 (1964), *amended sub nom.* Arizona v. California, 383 U.S. 268 (1966), and *amended sub nom.* Arizona v. California, 466 U.S. 144 (1984) (setting the practicably irrigable acreage ("PIA") standard for quantifying federal reserved Indian water rights).

Tribal co-management could turn the tide on litigation based on protecting for rivers for their sacred value. In 2016, the Navajo Nation sued the EPA in response to the Animas River spill.[171] Following the release of nearly three million gallons of toxins into the Animas River, the Navajo Nation sued the EPA for economic injuries to the Nation and its people, noting that the EPA "incredibly did not inform the [Navajo] Nation that a toxic plume was advancing toward their sacred [San Juan] River for nearly two days."[172] The Nation claimed that the river held sacred importance to their people, embodying their principle of "hozho," or beauty, order, and harmony in the Navajo universe.[173] Disrupting *hozho* would disrupt the entire Navajo way of life.[174]

The district court first consolidated the Navajo Nation's case with that of the State of New Mexico.[175] Because the State of Utah and plaintiffs with property interests adjacent to the river also brought suit for damages to the Animas River in other jurisdictions, the court consulted a Multidistrict Litigation Panel.[176] The Tenth Circuit, *sua sponte*, consolidated *Navajo Nation v. EPA* with *New Mexico v. EPA*.[177] This case has now been in litigation for over two years without ever getting to the opening brief stage because plaintiffs cross multiple jurisdictions. The case is now pending further consolidation with non-tribal interests, potentially diluting the impact of tribal views.

In the Whanganui River Report, the New Zealand Crown Government recognized the importance of tribal authority and ownership of the Whanganui River aside from the common law conception of river ownership.[178] In this way indigenous peoples along the Colorado River,

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*But see* In re Gen. Adjudication of All Rights to Use Water in Gila River System and Source, 35 P.3d 68, 80 (Ariz. 2001) (*Gila V*), in which the court expanded the standards by which Indian tribes could implement their *Winters* rights beyond PIA to include water use of particular cultural significance within a tribe's homeland.

171 Complaint, Navajo Nation v. United States, No. 1:16-cv-00931, at 1–2 (D.N.M. Aug. 16, 2016); *see also* Julie Turkowitz, *Navajo Nation Sues E.P.A. in Poisoning of a Colorado River*, N.Y. TIMES (Aug. 16, 2016), https://www.nytimes.com/2016/08/17/us/navajo-nation-sues-epa-in-poisoning-of-a-colorado-river.html.

172 Complaint, *supra* note 101, at 4.

173 *Id.* at 10.

174 *Id.*

175 Memorandum Opinion and Order, New Mexico v. U.S Envtl. Protection Agency, No. 1:16-cv-00465, at 1 (D.N.M. Mar. 09, 2018).

176 *Id.* at 2–3.

177 Complaint, *supra* note 101; Memorandum Opinion and Order, *supra* note 175, at 1.

178 THE WHANGANUI RIVER REPORT, *supra* note 29, at 343.

like the Maori indigenous people,[179] might be able to reclaim management of lands lost in settlement. Ironically, it was the civil rights movement in the United States that led the Maori to begin their fight for recognition of tribal authority and ownership of the Whanganui; it is only fitting that the Maori now lead indigenous peoples on the other side of the globe in their quest for repatriation of natural resource control.[180]

The counterargument to tribal representation on the Colorado River Ecosystem is that, unlike the one Whanganui iwi tribe, multiple tribes hold an interest in the Colorado River.[181] Electing just one tribal guardian might be efficient but surely not representative of all tribal interests.

*4. State Representation*

Because of the competing interests of state and federal governments, state representatives would be needed to address state concerns as the Colorado River passes through their territories. This could lead to multiple state appointees because the Colorado River crosses state boundaries. Multiple state representatives would allow for competing upstream and downstream interests to have equal voices. Because of the number of state representatives interested in ensuring the health and use of the river within their boundaries, bureaucratic bloat could be a concern.

Framework for interstate collaboration is already in place. In December 2017, the Bureau of Reclamation asked representatives from the seven Colorado River Basin States—Colorado, Wyoming, Arizona, New Mexico, Nevada, California, and Utah—to draft Drought Contingency Plans.[182] These plans mark the most recent cooperative effort in a long history of multistate cooperation resulting from the binding and obligatory compact signed by those states in 1922.[183] While states may resist ceding control over what was traditionally well within their sphere of influence, states' histories of considering economic development over

179 Magallenes, *supra* note 11, at 290 (showing how the Maori indigenous people lost land during the settlement).

180 *Id.*

181 Over two dozen tribes dwell within the Colorado River Basin. U.S. BUREAU OF RECLAMATION, COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP TRIBAL WATER STUDY REPORT (DEC. 2018), app. 1B. *See generally* David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573 (1997). Getches advocated a consortium to advise the Secretary of the Interior and "promote cooperative [Colorado River] basin solutions that fulfill federal legal obligations." *Id.* at 574.

182 Press Release, Bureau of Reclamation, Colorado River Basin Drought Contingency Plans (Oct. 10, 2018), https://www.usbr.gov/dcp.

183 COLO. REV. STAT. § 37-61-101 (2018); *see generally* Getches, *supra* note 181.

other public interests makes it necessary to have a heterogeneous strategy group.[184]

## CONCLUSION

Co-management guardianship of the Colorado River Ecosystem could provide the meaningful protection necessary for the long-term survival of the River and the communities that depend on it. Because legal personhood based on the inherent rights of nature may still be a long way off, this guardianship framework could provide a model for the protection of other river ecosystems across the United States.

To ensure that these limited rights of nature are protected effectively in the case of the Colorado River Ecosystem, a guardianship council like the one used to represent the interests of the Whanganui River could be appointed, perhaps as a result of negotiations localized to the river ecosystem. To provide for a variety of viewpoints on the best representation of the natural resource, this council should include federal, state, local non-governmental, and tribal representatives as necessary. While formation of this council may initially appear unwieldly or politically charged, over time this type of guardianship may mature into a legally-recognized device capable of replication across the United States. Weaving natural resources guardianship into the federal government's current interpretation of Article III standing might invite traditional ethnic knowledge into American federal jurisprudence so that moral rights of nature, now absent among American legal fictions, once "made visible can no longer be denied."[185]

184 Bryan, *supra* note 156, at 153–54 (citing Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 9 U. DENVER WATER L. REV. 485, 488 (2006)).

185 *See* Stone, *supra* note 1, at 500–01.