DO YOU NEED LEGS TO STAND?
WILD RICE STANDS IN TRIAL AND AN EXAMINATION OF THE USE OF LEGAL PERSONHOOD TO PROTECT THE RIGHTS OF NATURE IN COURT

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I. INTRODUCTION

In early October 2021, the Line 3 pipeline was scheduled to begin operating.[1] The pipeline was designed to carry 76,000 barrels of tar sands oil per day from Alberta, Canada to Wisconsin, United States via Minnesota.[2] Line 3 is a project from the company Enbridge to replace aging pipes in Minnesota at risk of corrosion.[3] However, the pipeline faced fierce opposition from advocates who argue that this project "violate[s] treaty rights, worsen[s] climate change and risk[s] spills in waters where Native Americans harvest wild rice."[4] Opponents of the pipeline claim replacing the pipes is too risky and unnecessary due to the projected decreased demand for fossil fuels, and that Line 3 is too dangerous to the environment to continue.[5] In fact, in September 2021, the Minnesota Department of Natural Resources ordered Enbridge to pay $3.32 million for violating environmental laws during construction when it dug too deeply and pierced an aquifer, causing a 24-million-gallon groundwater leak.[6]

Many individuals, including environmental rights groups and tribal communities, oppose the pipeline.[7] One party that also protests the pipeline as a violation of rights is Nature itself. Wild rice, through White Earth Nation of Ojibwe members, filed a lawsuit against the Minnesota Department of Natural Resources claiming a violation of *manoomin*'s (the Ojibwe word for wild rice) right to exist, flourish, and multiply.[8] As the pipeline pushes forward and advocates seek out new avenues to protect the Rights of Nature in court, lawsuits on behalf of Nature itself remain a viable option.

Under the legal personhood of Nature theory, a natural object, feature, or landscape has rights in and of itself and can bring a suit in court for the

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[1] Steve Karnowski, *Enbridge: Line 3 Replacement Complete; Oil Will Flow Friday*, ASSOCIATED PRESS (Sept. 29, 2021), https://apnews.com/article/business-environment-and-nature-wisconsin-minnesota-environment-314734912b51ea1f24c4e77d50f59170.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Jens Burchardt et al., *Have We Passed Peak Demand for Fossil Fuels?*, BOS. CONSULTING GRP. (June 22, 2020), https://www.bcg.com/publications/2020/have-we-passed-peak-demand-for-fossil-fuels.

[6] Mike Hughlett & Brooks Johnson, *Controversial Line 3 Done; Oil Set to Flow Friday, Enbridge Says*, STAR TRIB. (Sept. 29, 2021), https://www.startribune.com/controversial-line-3-substantially-done-oil-to-flow-oct-1-enbridge-says/600101928.

[7] Karnowski, *supra* note 1.

[8] Kirsti Marohn, *Line 3: White Earth Argues DNR Water Permit Violates Wild Rice Rights*, MPR NEWS (Aug. 5, 2021, 3:15 PM), https://www.mprnews.org/story/2021/08/05/line-3-white-earth-argues-dnr-water-permit-violates-wild-rice-rights.

protection of those rights.[9] The legal personhood of Nature is a not-so-novel legal theory that groups have used with varying degrees of success around the world to further environmental rights.[10] This Note examines the Rights of Nature leading to legal personhood and the movement around the globe, providing context for the current wild rice suit in Minnesota and the potential for a new way of protecting Nature.

II. RIGHTS OF NATURE

A. What is Legal Personhood?

Legal personhood imputes rights and duties to someone (or something, as it may be) and allows the legal person to bring a legal claim to court to defend those rights.[11] Legal personhood is a "legal fiction." Although the word "person" implies human, "'[l]egal personhood' is not necessarily synonymous with being human,"[12] and neither are human-like attributes, as not even "autonomy and self-determination [have] been considered bases for granting rights."[13] Legal personhood no longer solely applies to individuals. Organizations and corporations both have legal status and can go to court to protect their rights.[14] It is argued that "[t]he determination of legal personhood… is a matter of policy and not a question of biology."[15] That is, a policy that varies place to place and can be changed. Since non-physical corporations are granted legal personhood, similar theories of legal personhood should apply to more concrete natural objects that experience harm.[16] Legal personhood of Nature and the environment is also called Rights of Nature.[17]

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[9] Allison McKenzie, *Rights of Nature: The Evolution of Personhood Rights*, 9 JOULE: DUQ. ENERGY & ENV'T L.J., Spring 2021, at 1 (2021).

[10] While this theory has seen more use in recent years, the idea is seen in case law from the 1970s. *Id.*

[11] People *ex rel.* Nonhuman Rts. Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 250 (N.Y. App. Div. 2014).

[12] Nonhuman Rts. Project Inc. v. Stanley, 16 N.Y.S.3d 898, 911 (N.Y. Sup. Ct. 2015) (citing Byrn v. N.Y.C. Health & Hosp. Corp., 286 N.E.2d 887, 889 (N.Y. 1972)).

[13] *Id.*

[14] Nina Totenberg, *When Did Companies Become People? Excavating the Legal Evolution*, NPR: MORNING EDITION (July 28, 2014, 4:57 AM), https://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution.

[15] *Stanley*, 16 N.Y.S3d at 911.

[16] *Id.*

[17] Tiffany Challe, *The Rights of Nature – Can an Ecosystem Bear Legal Rights?*, COLUM. CLIMATE SCH.: STATE OF THE PLANET (April 22, 2021), https://news.climate.columbia.edu/2021/04/22/rights-of-nature-lawsuits.

B. What are the Rights of Nature?

The movement for legal personhood of Nature began in 1972 with Professor Christopher Stone's seminal article-turned-book, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*.[18] Professor Stone's central tenant is "that natural objects such as trees, rivers, lakes, and mountains be given certain legal rights."[19] Professor Stone suggested that Nature be appointed a guardian in court who could speak on its behalf.[20] His seminal article also influenced Justice Douglas's famous dissent in *Sierra Club v. Morton*.[21] In his dissent, Justice Douglas cited to the article, noting, "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."[22] Since then, the movement has continued to grow throughout the U.S. and globally. Organizations such as Earth Law Center emerged with the mission to "transform the law to recognize, honor and protect Nature's inherent rights to exist, thrive and evolve."[23] Other organizations include the Rights of Mother Earth, the Rights of Nature Sweden, the Earth Advocacy Youth, and the Global Alliance for the Rights of Nature.[24]

The specific rights included in the Rights of Nature may vary as laid out in each situation, but they generally connote a "form of ecological governance that both provides for and prioritizes Nature's right to flourish."[25] These rights commonly include the "right to exist, persist, maintain and regenerate."[26] The term "Rights of Mother Earth" is also used to describe this paradigm shift.[27]

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[18] CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT (Oxford Univ. Press 3d ed. 2010) (1972).

[19] Luther L. McDougal III, *Book Review: Should Trees Have Standing? By Christopher D. Stone*, 49 TUL. L. REV. 265 (1974).

[20] *Id.*

[21] Sierra Club v. Morton, 405 U.S. 727, 741-42, 755 (1972) (Douglas, Blackmun & Brennan, JJ., dissenting).

[22] *Id.* at 741-42.

[23] *Who is Earth Law Center?*, EARTH L. CTR., https://www.earthlawcenter.org/what-is-earth-law (last visited Sept. 24, 2022).

[24] *International Advocacy*, EARTH L. CTR., https://www.earthlawcenter.org/international-1 (last visited Sept. 24, 2022).

[25] Cameron La Follette, *Rights of Nature: The New Paradigm*, AM. ASSOC'N OF GEOGRAPHERS (Mar. 6, 2019), http://news.aag.org/2019/03/rights-of-nature-the-new-paradigm.

[26] *What are the Rights of Nature?*, GLOB. ALL. FOR THE RTS. OF NATURE, https://www.garn.org/rights-of-nature (last visited Sept. 24, 2022).

[27] PABLO SÓLON, *The Rights of Mother Earth*, *in* THE CLIMATE CRISIS: SOUTH AFRICAN AND GLOBAL DEMOCRATIC ECO-SOCIALIST ALTERNATIVES 107 (Vishwas Satgar ed., 2018).

III. AROUND THE WORLD

A. Generally

At the collective international level, Nature's rights are protected in several ways. Though there is no universal designation of legal personhood giving Nature rights, a few international treaties focus on environmental protections. One of the first instances of the recognition of environmental rights on the international scale was the Stockholm Declaration that emerged from the United Nations Conference on the Human Environment held in Stockholm in 1972.[28] The Declaration "placed environmental issues at the forefront of international concerns."[29] However, the Declaration advocated for environmental rights in an anthropocentric way.[30] In fact, the first word in Principle 1 is "man."[31]

Another important and commonly used treaty is the Convention Concerning the Protection of the World Cultural and Natural Heritage.[32] This convention takes a step further towards recognizing rights of Nature itself. The Convention prescribes that cultural and natural heritage need to be protected and defines natural heritage as:

> natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
>
> geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

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[28] Stockholm Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (1972) [hereinafter Stockholm Declaration].

[29] *United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm*, UNITED NATIONS, https://www.un.org/en/conferences/environment/stockholm1972 (last visited Sept. 24, 2022).

[30] A. Cafà, *The Anthropocentric Approach in International Environmental Law*, GEA RIGHTS (June 6, 2021), https://gearights.org/?p=533.

[31] Stockholm Declaration, *supra* note 28. Principle 1 states, "Man is both creature and moulder of his environment…. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself." *Id*. The use of "man" may also pose issues and discussion regarding gender politics and policies but at the time, "man" was meant to refer to "mankind" or all humans. *See also* SÓLON, *supra* note 27 (addressing the need to "leave the dominant anthropocentric paradigm").

[32] Convention Concerning the Protection of the World Cultural and Natural Heritage, *adopted* Nov. 16, 1972, 27 U.S.T. 37 [hereinafter World Heritage Convention].

> natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.[33]

While the World Heritage Convention does speak of natural beauty, the beauty is still appreciated by and protected within the context of human use and enjoyment. By the terms of the Convention, a specific natural feature is assigned value if it is considered valuable by a certain group of people, such as an indigenous population, or for the ongoing pursuit of scientific knowledge, rather than for any inherent value of beauty in and of itself.

Indigenous groups also have some opportunity to protect Nature internationally using the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[34] UNDRIP recognizes cultural rights and identities of indigenous peoples which are often tied to the land and Nature.[35] Thus, UNDRIP is a vehicle for some protection of Nature, again limited in scope by its relation to a specific group's purposes.[36] Although this may be helpful internationally or in other countries around the world, it does not provide much legal support in the United States. The United States "agree[d] to support" the Declaration but does not recognize the Declaration as binding law.[37] Rather, the Declaration carries only moral and political force in the United States, meaning it does not provide a legal cause of action.[38] The Declaration still does not allow Nature to stand on its own and protect itself.[39]

B. Case Studies and Examples

i. New Zealand

One of the most famous cases of the Rights of Nature is that of the Whanganui River in New Zealand.[40] The Whanganui River wound its way through

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[33] *Id.* at art. 2.

[34] G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[35] *Id. See also* Charlene Smith & Howard Vogel, *The Wild Rice Mystique: Resource Management and American Indians' Rights as a Problem of Law*, 10 WM. MITCHELL L. REV. 743, 746 (1984) (characterizing the issue of resource management, and specifically that of wild rice, as a clash of culture and law).

[36] *See Indigenous Peoples*, USAID, https://www.usaid.gov/environmental-policy-roadmap/indigenous-peoples (last visited Oct. 18, 2022) (summarizing UNDRIP as rights and freedoms "as they apply to the specific situation of indigenous peoples").

[37] *Id.*

[38] *Id.*

[39] *See id.*

[40] *See* Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, THE GUARDIAN (Mar. 16, 2017, 12:50 AM),

the New Zealand court system[41] in the years leading up to 2017 and was ultimately rewarded with legal personhood.[42] The importance of the case is highlighted by Kate Evans, as after the Whanganui River was granted rights, "the Ganges and Yamuna rivers in India and all rivers in Bangladesh also received legal rights – although, in India, the decision was later revoked."[43] New Zealand also granted legal personhood in 2014 to the Te Urewera park (the ancestral home of the Tuhoe people).[44] In 2018, Mount Taranaki – a 120,000 year-old stratovolcano sacred to the Maori – was awarded the same status.[45]

The case that granted the Whanganui River rights led to a legislative Act that recognized the river as a legal person.[46] The Act also provided a method for protecting those legal rights by "creat[ing] the office of Te Pou Tupua as the river's 'human face' to deal with everyday governance, establish[ing] a hierarchy of consultative bodies, and mandat[ing] a fund to support the river's legal framework."[47] Since this time, New Zealand increased its use of the Rights of Nature to protect the environment in court and is a model to others trying to bolster the movement.[48]

ii. Ecuador

Ecuador took legal personhood a step further by enshrining the Rights of Nature in its new Constitution, which it ratified in 2008.[49] The Constitution formally recognizes the Rights of Nature in Chapter Seven of the document.[50] Article 71 states:

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance

https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being.

[41] *Our New Zealand Court System*, MINISTRY OF JUSTICE, https://www.justice.govt.nz/assets/Documents/Publications/our-nz-court-system.pdf (last visited Sept. 27, 2022) (N.Z).

[42] Kate Evans, *The New Zealand River That Became a Legal Person*, BBC: TRAVEL (Mar. 20, 2020), https://www.bbc.com/travel/article/20200319-the-new-zealand-river-that-became-a-legal-person.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Cristy Clark et al., *Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance*, 45 ECOLOGY L.Q. 787, 800 (2018).

[47] *Id.*

[48] Evans, *supra* note 42.

[49] CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, Jul. 25, 2008, *translated in Constitution of the Republic of Ecuador*, GEO. UNIV. POL. DATABASE OF THE AMERICAS, https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html (Jan. 31, 2011).

[50] *Id.* at art. 71.

> 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.[51]

Article 71 formalizes the protection of Nature along with the other essential rights held in the country including "rights to freedom," "rights to protection," and "rights to participation."[52] By including the Rights of Nature in the Constitution, the law recognizes Nature's ability to stand up for itself in court.

IV. IN THE UNITED STATES

A. Current Methods Used for the Protection of Nature

Currently, the Endangered Species Act (ESA) does much of the heavy lifting when it comes to environmental protection of natural objects in the United States.[53] The ESA prohibits human actions that harm a species at risk of disappearing.[54] However, this falls short of fully protecting natural objects in several ways. First, species that receive the designation of "endangered" were already thoroughly harmed, making this a retroactive, last-ditch way to protect species because the endangered species list does nothing to stop the harm in the first place.[55] The concept underlying the ESA is still primarily anthropocentric because it focuses on preserving species and maintaining biodiversity for the benefit of humans, rather than for the inherent value of the individual species.[56] The biggest shortcoming of the ESA in terms of general protections of Nature is that it does not protect all of Nature—only species.[57] This excludes other aspects of the environment such as rivers and natural features from the ESA's protection.

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[51] *Id.*

[52] *See id.* at arts. 61-66, 75.

[53] Endangered Species Act of 1973, 16 U.S.C. § 1531-44 (1973).

[54] *See id.*

[55] Mike Saccone, *'Habitat' Definition Falls Short, Should Encompass Climate Change, Other Evolving Threats to Wildlife*, NAT'L WILDLIFE FED'N (July 31, 2020), https://www.nwf.org/Latest-News/Press-Releases/2020/07-31-20-USFWS-Habitat-Definition. This article notes that the proposed definition of 'habitat' under the ESA follows that of Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S.Ct. 361 (2018), which held that habitat designations were not as broad as previously designated.

[56] This assertion of value is not disputed by this Note; rather, it is the position here that this value should not be all there is.

[57] *See* Endangered Species Act of 1973, 16 U.S.C. § 1531–44 (1973).

In addition to the ESA, legal protections for Nature are found in the National Environmental Protection Act (NEPA).[58] NEPA, which has been called the "Magna Carta" of federal environmental laws, was the first major environmental law in the U.S. and lays the basis for many environmental protections.[59] However, NEPA also falls short of offering full protection of natural objects. While NEPA does require that major federal actions be evaluated for their impact on the environment through an impact statement of various levels, the statute does not require any specific action.[60] Nor does it protect natural objects individually, but rather looks at the effects of the overall project on Nature.[61] Again, the value of the environment is considered in relation to humans.

Application of the Rights of Nature would reframe the discussion of protection of natural objects in the U.S. from an anthropocentric one to a more encompassing understanding of rights and flourishing.

B. Rights of Nature Movement Within the United States

Although the Rights of Nature have not yet been recognized at the federal level in the United States, the movement is not unheard of. There have been many regional attempts to formally recognize the rights of nature all across the country.[62] Many communities are organizing to change their local governments, including Crestone, Colorado and Santa Monica, California.[63] In 2013, Santa Monica passed the Sustainability Rights Ordinance that recognized "both the rights of natural communities and ecosystems within Santa Monica to exist, thrive and evolve."[64]

Individual cases also recognized the changing trends. In the case of *Loggerhead Turtle v. County Council of Volusia County*, the U.S. Court of Appeals for the Eleventh Circuit overturned a lower court's decision to deny plaintiffs' motion for leave to amend their complaint to add leatherback sea turtles as a party.[65] This case may indicate that there is an increasing trend to protect the environment in new ways in court, including through the increased recognition of rights.

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[58] National Environmental Policy Act of 1969, 42 USCS § 4321–4370m-12.

[59] *Welcome*, NAT'L ENV'T POL'Y ACT, https://ceq.doe.gov (last visited Sept. 27, 2022).

[60] *Id*.

[61] *See, e.g*, 42 USCS § 4331.

[62] See Earth Law Center's interactive map documenting Rights of Nature around the world with indicators of efforts in the United States. *Ecocentric Communities*, EARTH L. CTR., https://www.earthlawcenter.org/towns-cities (last visited Sept. 27, 2022).

[63] *Id*.

[64] *See* SANTA MONICA, CAL., MUN. CODE art. 12, ch. 2, § 20 (2013).

[65] Loggerhead Turtle v. Cnty. Council of Volusia Cnty., 148 F.3d 1231, 1257 (11th Cir. 1998). However, it should be noted that the court ultimately held that the turtles lacked standing because of failure to show causality. *Id*. at 1250–51.

C. Clash of Cultural Ideas

Other routes to establishing legal personhood rely on what may be thought of as eccentric philosophical theories beyond the Western traditional understanding of what constitutes a person under the law. These include sentiency of animals and nature and humans' relation to the natural world.[66] Resistance to these theories highlights another tension in the law—that between traditional beliefs and American conceptualizations. For example, in many Native American belief traditions, the land is "an actual, living being."[67]

One theory used to further the legal rights of animals is that of "animal autonomy or compar[ing animals] with fully rights-vested marginal humans."[68] A similarity between the two is that of sentiency.[69] It is also typically argued that where Nature differs from animals and humans is that only the latter are sentient beings.[70] While American courts may struggle to determine if Nature is a legal person, partially because it is not a sentient being, the American courts are using general standards of personhood that are uniquely Western conceptualizations. Some other countries understand Nature and personhood in an entirely different way.[71]

Many indigenous groups believe that humans are a part of Nature and that our beings are not as separate or distinct as Western law currently categorizes humans and nature.[72] Native American tribes, including the White Earth Nation, believe that various natural objects and features have their own spirits.[73] Their history is tied to the physical location.[74] Tribal communities interact

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[66] *See* Hope Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L.Q. 1 (2016) (describing ideas of legal personhood).

[67] Joel Brady, *Land Is Itself a Sacred, Living Being: Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AM. INDIAN L. REV. 153, 154 (1999).

[68] Babcock, *supra* note 66, at 43.

[69] Sentient is defined as: (1) responsive to or conscious of sense impressions; *sentient* beings (2) aware (3) finely sensitive in perception or feeling. *Sentient*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

[70] *But see* Richard Schiffman, *Are Trees Sentient Beings? Certainly, Says German Forester*, YALE ENVIRONMENT 360 (Nov. 16, 2016), https://e360.yale.edu/features/are_trees_sentient_peter_wohlleben (explaining in a Western science way how trees are social beings that exhibit character and exercise independent judgment).

[71] Smith & Vogel, *supra* note 35.

[72] EARTH L. CTR., RIGHTS OF NATURE IN THE POST-2020 GLOBAL BIODIVERSITY FRAMEWORK 2 (2021).

[73] *See History*, WHITE EARTH, https://whiteearth.com/history (last visited Oct. 11, 2022); Hannah White, *Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States*, 43 AM. INDIAN L. REV. 129, 130-31 (2018) (citing Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 797 (1992)).

[74] *Id.*

with Nature in a reciprocal and respectful way with a similar deference to its interests as might be seen for another human being.[75]

Certainly, there is some room for traditional beliefs in court. And if this expanded concept of connection, respect, and perception of awareness was adopted, then perhaps Nature could attain legal rights under the same reasoning as some of the limited rights given to animals. However, as it is not yet widely adopted, advocates must likely use different arguments for natural legal personhood.

When two cultures come into contact in their system of laws, they will influence each other.[76] However, in a clash between the colonizer's legal system and that of the natives, there are many instances of perceived fundamental difference where the colonizer's legal system (and implicit cultural beliefs) are given priority.[77] Thus, while Nature as a "person" with rights might seem odd to those trained in the Western conceptualization of legal personhood, it is not so strange for others. Recognizing the "Rights of Nature . . . would help to avoid the complications of third-party standing, give recognition to tribal culture, and provide protective safeguards for natural resources in the United States from which we would all benefit."[78]

D. Wild Rice

In the case of *Minnesota v. Mille Lacs Band of Chippewa Indians*, the legal rights of the Chippewa to wild rice were affirmed.[79] However, the court affirmed the legal rights of Chippewa rice on the theory of treaty rights that were granted to the Chippewa Indians in the 1873 treaty.[80] The right to gather wild

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[75] *See White Earth Nation Division of Natural Resources*, WHITE EARTH, https://whiteearth.com/divisions/natural_resources/home (last visited Oct. 11, 2022). *See also Indigenous People and Nature: A Tradition of Conservation*, U.N. ENV. PROGRAMME, Apr. 26, 2017, https://www.unep.org/news-and-stories/story/indigenous-people-and-nature-tradition-conservation.

[76] For a series of essays highlighting examples of interactions between the systems of law of different cultures and the control that they exert on each other, see 2 FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF *LEX NON SCRIPTA* (Alison Dundes Renteln & Alan Dundes eds., Univ. of Wis. Press 1994).

[77] R.D. Kollewijn, *Conflicts of Western and Non-Western Law*, *in* 2 FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF *LEX NON SCRIPTA*, *supra* note 76, at 781 ("That is to say French law is the norm; indigenous law is abnormal, temporary, transient, '*jurisprudence d'exception*', and limited in its scope.").

[78] McKenzie, *supra* note 9, at 8.

[79] Minn. v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[80] *Id.* The court concluded:

> In 1837, the United States entered into a Treaty with several Bands of Chippewa Indians. Under the terms of this Treaty, the Indians ceded land in present-day Wisconsin and Minnesota to the United States, and the United States guaranteed to the Indians certain hunting, fishing, and gathering rights on the

rice was specifically delineated in the original treaty, and no later treaty or order displaced this right of wild rice.[81] In 2018, the White Earth Nation granted rights to wild rice by law.[82] That law provided that the:

> rights include[d] (1) the right to clean water and freshwater habitat; (2) the right to a natural environment free from industrial pollution; (3) the right to a healthy, stable climate free from human-caused climate change impacts; (4) the right to be free from patenting; and (5) the right to be free from contamination by genetically engineered organisms.[83]

The latest suit, *Minnesota Department of Natural Resources v. Manoomin*,[84] was the first test of the exercise of the limited grant provided. The case made its way through the tribal court system and appeals process.[85] The White Earth Nation Tribal Court denied a motion for reconsideration on July 26, 2022, and there has not been any new activity in the case since then.[86]

i. Tribal Court

That the suit is in tribal court adds another layer of complexity to the legal system. Tribal courts have jurisdiction over tribal territory and general jurisdiction over criminal and civil matters between tribal members.[87] Tribal courts, however, also interact with the federal court system and their decisions

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> ceded land. We must decide whether the Chippewa Indians retain these usufructuary rights today. The State of Minnesota argues that the Indians lost these rights through an Executive Order in 1850, an 1855 Treaty, and the admission of Minnesota into the Union in 1858. After an examination of the historical record, we conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty.

Id. at 175–76.

[81] McKenzie, *supra* note 9, at 6.

[82] 1855 Treaty Authority, *Resolution Establishing Rights of Manoomin*, Res. No. 2018-05 (Dec. 5, 2018). *See also* 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.

[83] Geneva Thompson, *Codifying the Rights of Nature*, 59 JUDGES' J. 12, 13 (2020).

[84] Minn. Dep't of Nat. Res. v. Manoomin, No. GC21-0428 (White Earth Band of Ojibwe Tribal Ct. of App.).

[85] *See Judicial Services*, WHITE EARTH, https://whiteearth.com/divisions/judicial/home (last visited Oct. 19, 2022).

[86] Order on Motion for Reconsideration, Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. of App. July 26, 2022).

[87] *Resource Guide: Tribal Courts*, NAT'L CTR. FOR STATE CTS., https://cdm16501.contentdm.oclc.org/digital/collection/traffic/id/89 (last visited Oct. 19, 2022).

can even be appealed to the United States Supreme Court. In this way, rights that originate in tribal court can have an impact on the federal system if they are sustained throughout the federal court system. However, federal jurisdiction only begins after the tribal court exhaustion rule has been complied with.[88] The tribal court exhaustion rule requires a party to utilize all remedies available in tribal court before their issue may be addressed in the federal system.[89] This is the stage that *Minnesota Department of Natural Resources v. Manoomin* is currently in.[90] This tension between court systems and the respective remedies available can lead to a jurisdictional impasse, as noted in the appeal of the wild rice case at hand.[91]

Attempting to enforce those rights afforded in tribal court causes substantial issues after tribal court rulings because the enforcement power of the tribal court is relatively limited.[92] Tribal courts have limited authority over nonmembers including those:

> that involve (1) tribal land; (2) consensual relationships on tribal land (or on fee lands within a reservation) between the nonmember and the tribe or its members, through commercial dealing, contracts, leases or other arrangements; or (3) conduct by the nonmember on tribal land (or on fee lands within a reservation) that threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.[93]

Thus, although the tribal court has authority over tribe members, tribes have many interactions with nonmembers, but limited authority over nonmembers' actions. Where the result of a court case gives the tribe or a tribal member rights against a non-tribal member, the tribal court can only enforce the outcome on tribal land.[94] At the same time, the rights afforded in tribal court may be significantly impacted by the actions of nonmembers and actions beyond the reservation borders. However, in a recent case before the U.S. Court of Appeals for the Ninth Circuit, the court held that such situations inherently involve a "federal question" which brings the case within the jurisdiction and authority of the federal court system beyond the borders of the

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[88] This jurisprudential rule was set forth in Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985).

[89] *Id*.

[90] Thompson, *supra* note 83.

[91] Notice of Appeal at Exhibit 2, p. 9, Minn. Dep't of Nat. Res. v. Manoomin, No. GC21-0428 (White Earth Band of Ojibwe Tribal Ct. of App. Sept. 13, 2021).

[92] Steven Gordon, *A Federal Pathway to Enforcing Tribal Court Judgments*, LAW360 (Aug. 19, 2019, 3:18 PM), https://www.law360.com/articles/1189750/a-federal-pathway-to-enforcing-tribal-court-judgments.

[93] *Id.*

[94] *Id.*

tribal lands.[95] This approach could increase enforcement of rights won at the tribal court level.

IV. WHY SHOULD NATURE BE GRANTED LEGAL PERSONHOOD?

Formally recognizing the Rights of Nature would legitimize bringing such suits in court. Such actions would allow people to protect Nature before irreparable harm occurs or when the harm is felt by Nature, even if not by humans. Recognizing these rights would also remove some of the barriers that make it so difficult to bring environmental claims in courts today.

The doctrine of standing is one of the main barriers currently preventing many natural features and environmental goals from being protected in court.[96] For a case to be heard in the United States federal court system, there are three requirements: (1) a case or controversy; (2) injury in fact; and (3) standing.[97] The doctrine of standing mandates that the party bringing the case has an interest at stake.[98] This is defined as being the one who was injured.[99] While environmental advocacy organizations and their members may feel that they have a stake in protecting the environment, the famous case of *Lujan v. Defenders of Wildlife* says a general appreciation for a specific site with only the abstract intention to personally benefit from it may not be enough to bring the case to court.[100] This concept was first seen in the case of *Sierra Club v. Morton* and continued in the more recent case of *Lujan*.[101] Environmental organizations may not have members in all of the jurisdictions that they would like to seek environmental protection for at the time of the harm being caused. These cases highlight how the standing doctrine limits cases that can be brought regarding protection of Nature's rights by a third party and suggest that granting Nature legal personhood would help alleviate the issue of standing.

Another barrier to using the current system to protect the environment is the timing of harms to Nature. Since many environmental harms occur because of actions over an extended period, the resulting harm may be more long

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[95] *Id*.

[96] Ann Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 934 (1998) ("[T]he Supreme Court has threatened that access by tightening standing rules in . . . environmental cases.").

[97] *Standing*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/standing (last visited Sept. 27, 2022).

[98] *Standing Requirement: Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/standing-requirement-overview (last visited Sept. 27, 2022).

[99] *Id*.

[100] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (holding that the organization did not demonstrate legal standing by having members who may be harmed by being deprived of the benefits of nature in a potential future visit).

[101] Sierra Club v. Morton, 405 U.S. 727 (1972); Lujan, 504 U.S. 555.

term, especially in its effects to humans. The imminence of the injury requirement could be addressed through the legal personhood of Nature theory as the natural object itself is currently being harmed. In addition, many environmental laws "actually legalize environmental harm by regulating how much pollution or destruction of Nature can occur within the law, in order to protect property and promote extraction- and consumption-based economic systems."[102] A Rights of Nature approach would shift the timing of the harms addressed.

Naturally, the next question is, who would be the literal voice of Nature? The fact remains that even if we respond to the sound of a tree falling in the forest, some person must speak for the tree in court. Professor Stone initially proposed a guardianship system, which is a plausible option.[103] Under the guardian system, the aspect of Nature will be appointed a certain representative to advocate on its behalf.[104] This method was critiqued even by Professor Stone himself as vaguely determining costs.[105] The guardian model would provide someone to stand and safeguard natural rights at times when Nature is not in court.[106] The guardian could be an environmental protection group or an indigenous group, and the model provides a practical route forward.[107]

New Zealand's approach, creating an office to represent nature, could also be a model for future Rights of Nature cases.[108] In the case with wild rice before the tribal court, the tribe is best suited to be the guardian of the Rights of Nature because the tribe has already been collectively taking care to safeguard the natural resource for hundreds of years.[109] This is supported by the previous ruling, which decided that wild rice is protected under treaty rights given to the White Earth Nation.[110] However, the option of an office may be more suited to other cases where there is not as clear cut of a community that has cared for and protected the natural resource before.

IV. TOWARD A RIGHTS OF NATURE TRIBUNAL

One proposal for how to protect the Rights of Nature is through a tribunal dedicated to just that. The International Rights of Nature Tribunal (the Tribunal) is an organization created in 2014 that hears cases on the Rights of Nature

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[102] *Ecocentric Communities*, *supra* note 62.
[103] McDougal, *supra* note 19, at 265.
[104] *Id.* at 266.
[105] *Id.* at 268.
[106] *Id.*
[107] *Id.*
[108] *See supra* discussion Part III(B)(i).
[109] Roy, *supra* note 40.
[110] *See supra* note 80 and accompanying text (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175-76 (1999)).

and delivers verdicts on the cases before it.[111] Their mission is "[t]o make the Rights of Nature an inextricable part of our legal system and society. . . ."[112] Although it was not officially adopted by the United Nations, the Tribunal "represents the agreed [upon] values of many thousands of members from civil society."[113] The Tribunal often meets parallel to other major international conferences on climate and nature including COP21,[114] COP23, and the recent COP26, heard this November 2021 in Glasgow, Scotland.[115] The aim of the Tribunal is:

> to create a forum for people from all around the world to speak on behalf of nature, to protest the destruction of the Earth—*destruction that is often sanctioned by governments and corporations*—and to make recommendations about Earth's protection and restoration. The Tribunal also has a strong focus on enabling Indigenous Peoples to share their unique concerns and solutions about land, water and culture with the global community.[116]

The Tribunal has four international locations, as well as several regional tribunals, and hears cases from around the world.[117] The Tribunal has heard cases about the Amazon (South America), the Balkan Rivers (Europe), and the British Petroleum Deepwater Horizon oil spill (North America).[118] The Tribunal's governing documents are the Universal Declaration of the Rights of Mother Earth (UDRME), internal statutes, and a guiding Constitution.[119]

Creating such a tribunal in the United States would address many of the current issues involved in the Rights of Nature discussion. This tribunal would, of course, have to first officially recognize the Rights of Nature in the United States. Declarations and constitutions from the United Nations and other countries around the world could serve as models. This could provide

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[111] *See* INT'L RTS. OF NATURE TRIB., https://www.rightsofnaturetribunal.org/ (last visited Sept. 27, 2022).

[112] *Id*.

[113] Michelle Maloney, *Building an Alternative Jurisprudence for the Earth: The International Rights of Nature Tribunal*, 41 VT. L.R. 129, 131 (2016).

[114] COP stands for Conference of the Parties. The abbreviation is followed by the number of the Convention. The "COP is the supreme decision-making body of the convention" which is a part of the United Nations Framework Convention on Climate Change. *Conference of the Parties*, UNITED NATIONS, https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop (last visited Sept. 27, 2022).

[115] *About Us*, INT'L RTS. OF NATURE TRIB., https://www.rightsofnaturetribunal.org/about-us (emphasis added) (last visited Sept. 27, 2022).

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] The governing documents are based in part on the Rights of Nature enshrined in Ecuador and Bolivia constitutions. Maloney, *supra* note 113.

the official standing needed to bring cases to court. The existence of a tribunal would address the jurisdictional issues and would mean that Nature would not need to litigate a case in a tribal or federal court. Rather, there would be one forum, just like the one environment that all live in.

IV. CONCLUSION

Wild rice was granted rights in 2018,[120] and a current case tests its right to stand in court.[121] The Rights of Nature approach is a resurgence of a theme from the 1970s[122] that is gaining traction in the United States and around the world.[123] Granting rights to Nature, along with the appropriate forum to litigate and defend those rights, could be the next step in environmental protection to recognizing the inherent dignity of the entire living world.

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[120] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[121] White Earth Nation Judicial Services has made the documents in this ongoing case publicly available, and updates will be maintained on the website. *Judicial Services*, WHITE EARTH NATION, https://whiteearth.com/divisions/judicial/home (last visited Sept. 27, 2022).

[122] McKenzie, *supra* note 9.

[123] *What We Achieved*, COP26 COALITION, https://cop26coalition.org/what-we-achieved (last visited Oct. 19, 2022).