UCLA School of Law

Public Law & Legal Theory Research Paper No. 24-26

RIGHTS OF NATURE:
FACT AND FICTION

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The morning of August 2nd, 2014, residents of Toledo, Ohio, were ordered not to use their tap water for drinking or bathing. The ban on contact with the city's water stayed in place for three days.[2] Everyone knew the cause – pollution in Lake Erie. Springtime would see huge algal blooms, sometimes producing toxins that contaminated the city's drinking water supply. Everyone knew the source of the algal blooms – nutrients from agricultural runoff. The nation's primary defense against water pollution, the federal Clean Water Act, was of no help because it exempts runoff from farms. Nor was the state willing to take effective measures. Enough was enough. With no obvious legal tools remaining, concerned residents tried a new strategy. What if Lake Erie could defend itself?

A petition campaign collected over ten thousand signatures, triggering a 2019 special election to adopt the Lake Erie Bill of Rights (LEBOR).[3] Passed with over 60% of the vote, LEBOR became part of Toledo's City Charter. LEBOR granted legal rights to Lake Erie and its watershed, which would now "possess the right to exist, flourish, and naturally evolve." It also granted legal rights to the people of the City of Toledo "to a clean and healthy Lake Erie and Lake Erie ecosystem." Going farther, LEBOR granted the ecosystem the power to enforce its rights through the City of Toledo or its residents against any corporation or government actor.

And what about defenses for those charged under the law? They were out of luck. LEBOR stated that corporations charged with a violation would not be legal persons and could not assert any defenses against the law. Nor, the new law stated, did the state of Ohio have the right to take any actions that would violate the rights established by LEBOR.

Not surprisingly, LEBOR was quickly struck down in federal court.[4] The judge ruled it was unconstitutionally vague but could equally have struck down the law's efforts to strip corporations of legal personhood or turn the Supremacy Clause on its head. As the judge concluded, LEBOR was a "textbook example of what municipal government cannot do."[5]

What is surprising is that LEBOR was proposed at all. Here's a first puzzle to consider: (1) Why would savvy lawyers propose a law that my first year law students (indeed, even students applying to law school) could have told you was unconstitutional?

LEBOR was not alone in its ambition. In recent years, a series of laws have been passed, constitutions amended, and lawsuits filed that have become broadly known as "Rights of Nature." This is an organic and international movement, with meaningful accomplishments around the globe, from Colombia, Ecuador and Bolivia to New Zealand, Canada, and Spain. There is no single accepted definition

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[2] Bill Chappell, *Algae toxins prompt Toledo to ban its drinking water,* NPR, August 3, 2014.

[3] https://www.beyondpesticides.org/assets/media/documents/LakeErieBillofRights.pdf

[4] Drewes Farm Partnership v. City of Toledo, 431 F. Supp. 3d 551 (N.D. Ohio 2020)

[5] *Id.* at XXX

of Rights of Nature. At its core, the movement seeks to protect the environment through granting legal rights to nature, though the types of rights and protected aspects of nature vary widely – from a river or forest to a lagoon or even Lake Erie.[6]

This essay will focus on Rights of Nature initiatives in the United States where there has also been active engagement. In fact, calling it active engagement is an understatement. There has been outright exuberance. A book on the subject calls Rights of Nature "A legal revolution that could save the world."[7] A flurry of law review articles on the topic has grown into a blizzard.[8] Heck, even I'm co-teaching a new course this Fall on The Rights of Nature, with the enticing tag line – "Can law save the planet?"[9]

Leaving aside all the activity overseas, 83 Rights of Nature laws or resolutions have been enacted around the United States, almost all since 2006.[10] But here's the weird thing. Not a single Rights of Nature law has survived judicial challenge in U.S. courts. Not one. Despite this failure, communities continue to consider seriously Rights of Nature ordinances and declarations. Scholars are fascinated, as are students. Our course quickly filled up, with a large waitlist. This all leads to the second puzzle: Why is there such interest and enthusiasm over what appears to be a singularly unsuccessful approach?

There is something happening here, but what it is ain't exactly clear.[11] This essay seeks to bring some form to this emerging field, explaining its current features and goals.

A good place to start is by making clear what Rights of Nature is *not*. In particular, it is not part of traditional environmental law nor is it animal rights.

Throughout the 1970s, a series of laws were passed that gave the new Environmental Protection Agency (EPA) the authority to regulate pollution and development. Unlike earlier legislation, this "modern era" of environmental law established uniform, tough national standards primarily to protect human health. Thus the Clean Air Act (CAA) orders EPA to protect the "public health" with "an adequate margin of safety."[12] It's true that some of these laws also have provisions protecting the environment. Secondary standards under the Clean Air Act protect public welfare and the Endangered Species Act (ESA) protects flora and fauna supposedly without regard to cost. But public welfare under the CAA is broadly defined to include effects not only on animals and wildlife but also on water and visibility, among others.[13] And, even

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[6] It's interesting to note that most of the laws protect water resources.

[7] DAVID BOYD, RIGHTS OF NATURE: THE LEGAL REVOLUTION THAT COULD SAVE THE WORLD (201X).

[8] *See,* e.g., Elizabeth Kronk Warner & Jensen Lillquist, *Laboratories of the Future: Tribes and Rights of Nature*, 111 CALIF. L. REV. 325 (2023); Erin Ryan, *How the Successes and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and the Rights of Nature Movement*, 73 CASE WESTERN L. REV. 475 (2022); Karen Bradshaw, *Identifying Contemporary Rights of Nature in the United States*, 95 SO. CAL. L. REV. 1439 (2022); David Takacs, *We are the River*, U. ILL. L. REV. 545 (2021); and many others. Not all of these articles have been supportive. Noah Sachs, for example, has criticized Rights of Nature both as a bad legal strategy and as anti-democratic.
See e.g. Noah Sachs, *A Wrong Turn for the Rights of Nature Movement*, 36 GEO. ENV'T L. REV. (forthcoming).

[9] Co-taught with Jill Lepore in the Fall 2024 term at Harvard Law School.

[10] Sam Bookman, *Semi-Radical Environmentalism: Nature's Rights As Political Resources*, UTAH LAW REVIEW (forthcoming). Hereinafter Bookman.

[11] With apologies to Buffalo Springfield

[12] 42 U.S.C. 7409(b)(1).

[13] 42 U.S.C. 7409 …

under the ESA, there are limits. Not all species have rights (such as agricultural pests) and there are explicit provisions permitting the killing of listed species.[14]

These laws have been very effective. By most measures, our environment is much cleaner than in 1970.[15] But the protections flow from determinations by expert agencies following statutory mandates, not from respect for the rights of different aspects of the environment. In ethical terms, environmental law is mostly anthropocentric. Legal authorities are held and exercised by humans, not natural objects. There is no place for cost benefit analysis.

Nor is Rights of Nature the same as animal rights law. In publicized cases such as the efforts to demand a writ of habeas corpus for the Bronx Zoo animal, Happy the Elephant,[16] arguments in court and in the press focus on individual welfare of the animal. Should a sentient being that feels pain and pleasure be accorded legal protections? Hence the focus by animal rights advocates on the rights of whales, elephants, and bonobos.[17] Considerations of consciousness and pain don't really fit when talking about a river or a forest.[18] Nor do Rights of Nature advocates tend to address, at least publicly, traditional animal rights targets such as animal testing and factory farming

So if we are at least clear on what Rights of Nature is not, how we do figure out what it is? The best place to start is where a good many great things start: with Dr. Seuss.

As many of you will recall from your childhood, Seuss' 1971 classic ode to environmental protection, *The Lorax,* features a furry creature, face overgrown by bushy moustache. The Lorax stands atop a stump and tells the Once-Ler to stop cutting down Truffula Trees,[19] stop polluting the waters of the Swomee-Swans, stop removing the food of the Brown Bar-ba-loots. The Lorax declares, in a cry that echoes through today, "I speak for the trees!" In the book, the Lorax persuades the Once-Ler of his errors and the reader is left with hope that the Truffula Trees may one day return.

Just one year later, the law review version of *The Lorax* was published in a more serious tone by a scholar with a similarly playful nature, Chris Stone. He titled his law review article with the pun, *Should Trees Have Standing?*[20] Stone was a legal philosopher who taught corporate law (not environmental law, as many assume). Stone's argument was direct. He wrote, "I am seriously proposing that we give legal rights to forests, oceans, rivers and other so-called 'natural objects' in the environment – indeed, to the natural environment as a whole."[21]

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[14] Section 10 of the ESA allows incidental take permits for the legal killing of listed species. The Endangered Species Committee is authorized to waive the Section 7 prohibition on federal actions that adversely modify critical habitat or jeopardize species.

[15] RICHARD LAZARUS, THE MAKING OF ENVIRONMENTAL LAW at xiv (2004).

[16] Jill Lepore, *Happy Is an Elephant. Is She Also a Person?,* The Atlantic, Nov. 16, 2021.

[17] *See, e.g.,* Steven Wise, *Legal Rights for Nonhuman Animals: The Case for Chimpanzees and Bonobos,* 2 ANIMAL LAW REVIEW 179 (1966).

[18] Though it's worth noting this may not be the view of some cultures that regard rivers as spiritual beings. There also is intense interest among animal law scholars to pursue common goals with rights of nature advocates. *See, e.g.,* Kristen Stilt, *Rights of Nature, Rights of Animals,* 134 HARVARD L.REV. F. 276 (March 2021).

[19] DR. SEUSS, THE LORAX (1971).

[20] Christopher D. Stone, Should Trees Have Standing: Toward Legal Rights for Natural Objects. 45 S. Cal. L. Rev. 450 (1974) [hereinafter Stone].

[21] Stone, *supra note XX,* at 4456.

His argument was both philosophical and historical. If you look through the arc of Anglo-American law, there has been a steady process of expanding recognition of rights. The Magna Carta expanded rights from the king to nobles, the Constitution to white property-owning males, emancipation to freed slaves, the 19th amendment to women's suffrage, etc. It was only natural that this trend continue to natural objects.

There is, of course, an obvious objection to this argument. All the beneficiaries of expanding rights were people. Stone was a smart guy and saw this coming. His response was simple yet powerful. We have no problem treating corporations and ships as legal persons. Indeed, it seems commonplace. They surely are not people, so why not extend rights to natural objects, as well? Stone also took on what might be called "the Lorax Problem." Why should the Lorax speak for the trees instead of you or me? In response, Stone provided sophisticated examples of how guardians or advocates could represent the interests of natural objects in court.

Supreme Court Justice William Douglas had earlier agreed to serve as Guest Editor for the University of Southern California law review issue containing Stone's article. Stone and the student editors rushed to finish the article so that Douglas would read it before issuing his opinion in the *Mineral King* case argued in the Court that term. The case challenged Disney's efforts to build a ski resort in the Sierra Nevada mountains.

Their efforts paid off. Douglas not only cited Stone's article but declared,

> Public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation… So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life… The river as plaintiff speaks for the ecological unit of life that is part of it.[22]

This was, and remains, the most powerful U.S. legal decision supporting Rights of Nature. It also, notably, was a dissent. Since the 1972 opinion, Rights of Nature has remained aspirational in the United States. But it has not been for lack of trying. If one looks at the timeline of Rights of Nature initiatives in the United States, the recency is striking. Almost all the initiatives date since 2006.[23]

While Rights of Nature initiatives come from many advocates, two groups have played a central role: The Community Environmental Legal Defense Fund (CELDF) and a group that later broke off, the Center for Democratic and Environmental Rights (CDER). These two groups have helped draft many of the Rights of Nature laws. Sam Bookman's excellent article in the Utah Law Review, *Semi-Radical Environmentalism: Nature's Rights as Political Resources,* provides the most comprehensive analysis of Rights of Nature initiatives to date. He found that of the 119 laws in his dataset (including those proposed or withdrawn), CELDF and CDER had been involved in over 70%.[24]

Bookman identifies four common aspects of Rights of Nature laws.[25] The first two are found in virtually all Rights of Nature Laws – defining the rightsholder and the content of the right. Thus, (1), the beneficiary of the rights needs to be identified. This is often some aspect of nature, from rivers and streams

[22] Sierra Club v. Morton, 405 U.S. 727, XX (1972)
[23] Bookman, *supra* note XX.
[24] *Ibid*.
[25] *Ibid.*

to aquifers, mountains, or even ecosystems. Next, (2), the substance of the right needs to be defined. LEBOR, for example, granted Lake Erie the right "to exist, flourish, and naturally evolve." Initiatives drafted by CELDF and CDER also often provide for, (3), powerful community rights. Thus LEBOR states that there is a "Right of Local Community Self-Government" and, as a result, rejects preemption by state or federal government. Finally, (4), CELDF and CDER proposals are hostile to corporate interests. Hence LEBOR states that corporations violating the law do not possess legal personhood.[26]

With this brief overview on the origins and scope of Rights of Nature laws in the United States, let's now consider the goals of advocates. As noted above, we face a puzzle. It's not obvious how to reconcile the rising interest and adoption of Rights of Nature initiatives with their singularly unsuccessful record in U.S. courts. Repeated failure rarely spurs enthusiasm. But perhaps we need to think differently, think more carefully about what "success" might means in this setting. As with any ambitious, emerging, and diffuse legal movement, those involved are motivated by different interests and seek different goals. As a result, they also have different metrics of success.

Put simply, lack of success in the courtroom need not mean lack of success in other places, such as in the legislature, in the court of public opinion, in the community, or around the table. Thus I set out below different motivations for Rights of Nature initiatives – how different advocates measure success.

It's important to keep in mind two points as you read the categories below. First, these motivations are not mutually exclusive. Sometimes several will be in play at the same time – such as a legal campaign and movement building. Second, this is very much a U.S.-focused analysis. We have neither a constitutional provision (as in Ecuador), legislation (as in New Zealand), nor Supreme Court decision (as in Bangladesh) providing Rights of Nature.

Jumping on the Bandwagon – Rights of Nature as Virtue Signaling

Nederland, Colorado, is a beautiful town in the front range of the Rockies. Its over 400 square mile watershed provides the flow for Boulder Creek that tumbles down to the politically progressive university town of Boulder. In 2021, Nederland's town board of trustees adopted a resolution. Stating that the town "is defined and distinguished by its bond with the natural world that encircles, permeates, and enlivens" the community, the resolution cited Rights of Nature constitutional provisions and statutes in Ecuador, Bolivia, and other countries and states.[27] It granted to Boulder Creek and its watershed the rights to maintain natural flow, exist free of pollution, and maintain native biodiversity, among others, "free of activities, practices, or obstructions that unreasonably interfere with or infringe upon these rights."[28] The resolution ended by calling on the state of Colorado to recognize Rights of Nature.

In 2024, seeking to make the rights meaningful, the Board of Trustees adopted a resolution allowing the town's Sustainability Advisory Board to appoint "environmental guardians." The guardians were allowed to attend town meetings as observers and report on the watershed ecosystem. They explicitly were

[26] For a much more detailed and comprehensive analysis of the different formats, justifications, mechanisms, and underlying theories of Rights of Nature laws, *see* Erin Ryan, *How the Successes and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and the Rights of Nature Movement*, 73 CASE WESTERN L. REV. 475 (2022).
[27] Town of Nederland, Resolution 2021-11
[28] *Ibid.*

not given authority to speak on behalf of the town nor sue on behalf of the watershed.[29] Alan Apt and Rich Orman were the first two guardians appointed. So far so good. Boulder Creek and its watershed now had human voices on their behalf.

A few months later, though, a group known as Save the World's Rivers sued to oppose a dam the town had proposed on a branch of Boulder Creek. In quick order, the Board of Trustees unanimously voted to repeal all the Rights of Nature resolutions. The meeting agenda information stated that "There is now concern that the Town's Rights of Nature Resolution may be being used in ways that the Town did not understand or anticipate at the time of adoption, and in ways that could jeopardize the Town's water security."[30] It appears that Save the World's Rivers had advocated for the original Rights of Nature resolutions but the town felt betrayed by the group's later opposition to the proposed dam.

In adopting the Rights of Nature resolutions, it seems officials were looking more for a slogan than a policy tool. The moment there appeared even a hint of opposition to the town's dam, the entire Rights of Nature project was abandoned. For such groups of advocates, Rights of Nature laws are popular and low-cost preening. Little is expected and little will result.

Enough is Enough – Rights of Nature as Something Different

It's hard to read headline after headline about ever more powerful floods and droughts, increasing concentrations of greenhouse gases, and the continuing loss of biodiversity without wondering whether the environmental laws established in the 1970s are adequate to address the dire challenges of the 21st century. But if our current laws manifestly are not up to the test, then what?

One of the attractions of the Rights of Nature approach is that it explicitly is *not* traditional environmental law.[31] The CELDF website goes even farther, laying the blame not just on inadequate laws but upon a legal system explicitly designed to further monied interests. It states:[32]

> ***Traditional environmentalism will not protect our communities.*** The current legal system is designed to allow, regulate and permit destructive corporate activity. Whatever issue your community is facing, protesting, petitioning and prosecuting all have utility, but cannot stop corporations from causing harm long term. They can only delay it… Today, communities find that corporations – along with our state and federal government – are forcing factory farming, fracking, and other threats into their communities.

I largely disagree with this view. Mainstream environmental advocacy and dedicated agencies have achieved a great deal since the 1970s. Our air and water are much cleaner than fifty years ago despite increased economic activity. The planet's ozone hole is almost fully healed. It is undeniable, though, that our environmental laws are not proving adequate in the face of mounting dangers from climate change and loss of biodiversity. Rights of Nature may or may not work better against these threats, this group of

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[29] Christopher Kelly, *Ned repeals "Rights of Nature",* THE MOUNTAIN EAR, May 9, 2024.
[30] *Id.*
[31] For an argument that rights of nature laws relating to water result from frustration with shortcomings of the Clean Water Act, *see* Ryan, Erin, *How the Successes and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and the Rights of Nature Movement* (2023). 73 CASE WESTERN RESERVE L. REV. 475 (2022).
[32] https://celdf.org/about-celdf/

advocates might say, but we know the current system is not working well enough. Given dangers that some view as existential, we need a different and more forceful approach.[33]

The Arc of Justice – Rights of Nature as a Legal Campaign

Some talk about Rights of Nature as comparable to other campaigns from the past such as the civil rights movement and lawsuits against tobacco companies. In this movement and many others, one must play the long game. Early lawsuits or other efforts may fail. And the next generation of cases may fail, too. The goal seems crazy, until it doesn't. We are seeing this dynamic right now with climate litigation. Lawsuits against fossil fuel companies routinely failed until a few cases broke through in the Netherlands, the European Court of Human Rights, and a growing number of other jurisdictions.[34]

It remains to be seen whether Rights of Nature laws (or litigation against fossil fuel companies) will prove successful in the United States. This group of advocates would say that the puzzle identified above – why there is such excitement over a legal strategy that has uniformly failed in courts – is no puzzle at all. Focusing on early losses is short-sighted.

As Thomas Linzey, the CDER Senior Counsel, has made clear, "This is about picking fights. You don't change existing systems of law unless you pick fights with them. It's about confrontation. So a lot of this is about communities putting in systems of law that will be the systems of law in sixty or seventy years but aren't yet."[35] This is a long game.

The Court of Public Opinion – Rights of Nature as Political Strategy

LEBOR lost in the 2020 courtroom decision striking down the law but it may already have won. Just a few months earlier, Governor Mike DeWine had announced a statewide water quality program known as "H2Ohio." The program's website describes strategic actions to address serious water issues in the state, with the very first highlighted example: "harmful algal blooms on Lake Erie caused by phosphorous runoff from farm fertilizer."[36] Perhaps winning in court was never the strategy behind LEBOR.

Indeed, some of LEBOR's supporters claimed that the law was only one means to an end.[37] The goal was to highlight Lake Erie's water quality program and push politicians to act. Even if Lake Erie did not have recognized legal rights in the courts, it should in practice!

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[33] The group, Extinction Rebellion, for example, is a campaign group in the United Kingdom that takes direct action such as blocking roads, spraying fake paint on buildings, and members gluing themselves in public places. Its website makes their concerns very clear, "We are on the brink of a global catastrophe. Life on Earth is in danger, with scientists agreeing we are entering a period of climate and ecological breakdown. From wildfires to heatwaves, droughts to rising sea levels, the symptoms of our inaction will only worsen, the longer we take to address the causes of this crisis." < https://rebellion.global/>

[34] Add cites for NL Urgenda and ECHR Swiss senior citizens. The Sabin Center's Global Climate Change Litigation database summarizes cases around the globe.

[35] https://www.youtube.com/watch?v=dT_Ol589nSY at 1:31:00

[36] https://h2.ohio.gov/about-h2ohio/

[37] *See, e.g.,* Tom Henry, *Fight to save Lake Erie needs uprising, a battle against Norms, Lucas County lawyer says,* Toledo Blade, May, 4, 2024.

In retrospect, it appears to have been a successful strategy. To be sure, H2Ohio is not as forceful as LEBOR, but it provided far greater government attention and resources than had been the case before the referendum. This group of advocates would argue that Rights of Nature laws can prove more effective in the court of public opinion than in the court of law and, therefore, an effective political strategy.[38]

This may well be what happened, but correlation is not causation. The state might have recognized the problem without the LEBOR campaign. And one would expect unsuccessful advocates to rationalize, after the fact, that their plan all along was to use the lawsuit to achieve political goals. But if this was what happened, it raises a significant legal ethics question. Should lawyers bring cases they know will not succeed?[39]

In reading the LEBOR text, its vagueness, preemption, and due process flaws seem overwhelming. Did the lawyers behind LEBOR really think the statute would survive legal challenge? If not, was it ethical to gain the help and resources from supporters being told the lawsuit could win? And what about the farmers who had to pay tens of thousands of dollars in litigation to challenge these laws?[40]

Perhaps the lawyers did think there was a chance of success. Perhaps, as described above, they were playing the long game. In an email exchange with CELDF's Senior Legal Counsel, Thomas Linzey, I posed this question. I asked for his response to the argument that the Rights of Nature laws might have little chance of being upheld but were nonetheless valuable in community organizing. His response (printed below with his permission), was clear.

> We only draft laws that are intended to be enforced and in places where we believe that they can be enforced. I do think that they have value in changing the culture, but without actual enforcement, that's pretty worthless, in my opinion."[41]

But it seems a more complicated issue. In an earlier interview with Sam Bookman, Linzey recognized there are benefits in losing and not gaining actual enforcement.[42]

> … the losses in the system, this organizing system, whatever you want to call it, really are positive. They can be leveraged, that's the best way to put it. Losses can be leveraged because they're proof that what you've been saying is correct, that the system is openly hostile to these concepts, and will try to take them apart.

Power to the People – Rights of Nature as Community Empowerment

This last quote by Linzey suggests a separate goal for Rights of Nature. Indeed, CELDF and CDER make quite clear that their Rights of Nature efforts are part of a larger strategy. As their website states,[43]

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[38] Sam Bookman makes this argument at greater length, describing it as "winning by losing." Bookman, *supra note* XX. Bookman's best example of this approach is Grant Township, a Pennsylvania community fighting a fracking project that lost every legal battle but ultimately prevailed when the developer abandoned the project.
[39] Thanks to Dave Owen for this insight.
[40] Thanks to Noah Sachs for this insight.
[41] Email correspondence with Thomas Linzey, May 21, 2024. Linzey may also be emphasizing his group's focus on laws that are written with enforcement in mind rather than more general declarations, as in the Nederland example.
[42] *As quoted in* Bookman, *supra* note XX.
[43] https://celdf.org/about-celdf/

> CELDF helps communities by providing the education, tools and legal advice they need to create Community Rights ordinances. These laws give power back to the people, so they can protect their own communities.

This closely mirrors the view of Luke Cole, one of the early pioneers of the environmental justice movement, who argued over thirty years ago that community empowerment has to be the primary goal of EJ advocates, with lawsuits as a means to that end.[44] If you believe that the legal system is explicitly designed to favor corporate over community interests, then a counter-movement strengthening community's capacity to claim their rights is necessary.

Through this vantage, Rights of Nature laws are part of a campaign with the focus on community empowerment. This explains a key feature of Rights of Nature examples in the United States – they are all local. This also explains why CDER not only litigates but also offers "Training for grassroots leaders, activists, and lawyers, tribal nations and indigenous communities, as well as governments and elected officials, working to secure the rights of nature."[45] Through this vantage, rights of nature laws and litigation can serve as one from a range of strategies employed to achieve a local objective that the legal system has not adequately addressed, whether cleaning up Lake Erie or blocking fracking in Grant Township, Pennsylvania.[46]

Thinking Like a Mountain – Rights of Nature as Alternative Governance

Consider a thought experiment. How would management of a river change if the river could actually express its views alongside other stakeholders? We tend to focus on Rights of Nature in the legislature and the courtroom, in laws and lawsuits, but in a number of instances outside the United States they are more important just getting a seat at the table.

One of the best known examples of Rights of Nature is in New Zealand and the Wanganui River. In the Whanganui River Claims Settlement Act 2017, the government granted legal personhood to the Whanganui River and legal title to its property. In practical terms, even more important than the granting of rights was the creation of a guardian system to act on behalf of the river's interests. Addressing what I described as the "Lorax Problem" earlier – who should speak for the trees? – the law entrusted the guardians of the river with the fiduciary duty to uphold the river's status and protect the river's interests as a living entity. One guardian is drawn from the local Māori communities (known as the iwi) that have lived by the Whanganui for over 700 years and the other a government representative.

The iwi's interests are not identical to the river and there are management challenges over a hydroelectric facility and pollution discharges, but the discussions with the iwi guardian are qualitatively different than if agency officials were simply determining optimal waterflows and water quality standards.

Having a seat at the table gives the official voices of nature the opportunity to be represented, to be heard and, equally important, to be answered. This approach is particularly important in the United States

[44] Find Luke Cole article that sets out different models for representing communities.
[45] https://www.centerforenvironmentalrights.org/what-we-do
[46] For the Grant Township story, *see supra,* note XX, where after years of unsuccessful litigation the proponent of the injection well simply gave up.

as "Land Back" efforts to return native lands to Native Americans gather steam. If the land is not literally given back in fee simple to tribes, then what types of management authority, what form of voice, should the native groups have?

Having a seat at the table also forces advocates to think more clearly about what they mean when they claim rights. Being at the table means bargaining (which would bring a smile to Ronald Coase).[47] Rights are proud but slippery things. The attraction of rights, of course, is that they trump. What's not so attractive is that managing natural resources doesn't work in a world of absolute rights. The practice of environmental protection is necessarily full of hard trade-offs.

LEBOR granted Lake Erie the right to exist and evolve. The town of Nederland granted Boulder Creek and watershed the right to exist free of pollution. A river might have a right to exist, but should it really have a right to be free of any and all pollution? If we want economic development, we need some level of pollution. So what is the "right level"? The level that does not harm public health? The level that provides for the greatest benefits compared to costs? The level that grants Lake Erie the right to exist?

It remains to be seen whether the lack of specificity in many of the laws establishing Rights of Nature will prove more of a feature or more of a bug. Personhood can take many forms. As David Boyd has argued, for example,[48]

> Orcas don't need access to the voting booth. Orcas don't need human rights. They don't need the right to vote. But orcas do need the right to a clean environment. They need the right to an adequate supply of food, and they should have a right not to be disturbed and harassed by humans.

Rights are not self-defining. One benefit from organic nature of Rights of Nature initiatives around the globe is not only that they are taking different forms, but they are being implemented in different ways.

Thinking Like a Mountain – Rights of Nature as Worldview

While not always acknowledged, it's important to recognize the indigenous contribution to Rights of Nature thinking. It shouldn't be surprising that the most significant laws have been adopted in countries with large indigenous populations – such as the Maori in New Zealand and the mestizo in Ecuador. A number of American tribes and first Nations in Canada also have adopted Rights of Nature laws. The White Earth Band of Ojibwe in Minnesota has granted rights to freshwater rice and the Innu Council in Quebec has granted rights to the Magpie River.

These cultures offer a different jurisprudential foundation for environmental governance. They have less of an anthropocentric culture than the Anglo-American tradition and the Rights of Nature approach fits more easily within their communities' respect and reverence for the environment.[49] Many

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[47] While Coasean bargainging has not been raised in the Rights of Nature academic literature, its presence looms in the background. A law and economics analysis would argue that the main benefit of granting rights to nature is that they can serve as the basis for negotiation to an efficient outcome. Guardians of a forest of river can negotiate with other interests that want to impact the forest through roads or logging. Arguably this is a more efficient result rather than delegating this decision to agency officials.

[48] Boyd, *supra* note XX, at XX.

[49] *See, e.g.,* Ryan, *supra note* XX, at 2536.

Rights of Nature laws make no reference to these origins, but the defining essence is still there – respect for nature expressed through legal personhood. One of the most interesting questions going forward is the extent to which such indigenous governance concepts will influence more traditional environmental management.

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By any measure, the explosion of interest in rights of nature approaches forces environmental law to sit up and take notice. Dismissing it merely as hyperbole, the latest fad, or a way for local groups to fund raise is too easy. The phrase, rights of nature, holds a rhetorical power. It makes an intuitive and emotional connection with the need, with the responsibility, to protect our natural world that environmental law simply does not. It's an approach that excites people.

Nor is it going away. The impacts of climate change and loss of biodiversity are getting worse. Local efforts to block fracking and other development that feel forced on their communities will continue. And, in particular, the younger generations are fed up. They are looking for new approaches.

To be sure, the excitement around rights of nature does mix fact and fiction. Ironically, the term's very looseness and multiple unrealized potentials makes it all the more enticing. As these efforts continue, strategies will take shape and play out differently in different settings.

If one looks at the history of American environmental law, there have been several distinct periods – the conservation movement of the early 20th century, the environmental movement in the 1970s, environmental justice starting in the 1980s, partisanship and polarization from the 1990s, and gridlock through today. It's too early to tell, of course, but we may be in the beginnings of what will be viewed in later years as the rights of nature period. What seems fiction today may evolve into fact with the passage of time.