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Rights of Nature and Tribal Sovereignty: Protecting Natural Communities, Wild Rice, and Salmon in the United States

JULIANNA SMITH[†]

I. INTRODUCTION

The transboundary nature of environmental harm has led to a vast and complex body of global environmental law.¹ As environmental issues grow and technologies improve, countries look to each other to develop new ways to combat environmental harms and create cross-cultural environmental policies.² Rights of Nature are an example of this and are largely based on Indigenous cultures from around the world.³ Rights of Nature emphasize the importance of protecting nature in its own right, distinct from human need by shifting the legal question from violations of human rights to violations of nature's rights.⁴ Globally, Rights of Nature laws have been adopted in connection with Indigenous philosophies regarding nature.⁵ In the United States, tribes have begun adopting and attempting to enforce Rights of Nature laws in federal and tribal court systems.⁶ This creates a unique situation due to the complexity of the obligations created by

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[†]J.D. Candidate (2024), University of Maryland Francis King Carey School of Law. The author would like to thank her friends and family for supporting her throughout law school and the process of writing this paper, as well as the entire staff at the *Maryland Journal of International Law* for their feedback and support.1. ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1073 (9th ed. 2021).

2. *Id.* at 1074.

3. *See infra* Part II. A.1–3.

4. *See infra* Part II.A.

5. *See infra* Part II.A.1;2.

6. *See infra* Part III.A;B.

the numerous treaties between the United States and tribes.⁷ As such, the tribal Rights of Nature cases gives the U.S. federal government the opportunity to accept Rights of Nature and reinforce tribal sovereignty.⁸

II. BACKGROUND

A. *Origins of Rights of Nature*

The concept of granting rights to nature is not a novel idea, but the formal adoption into the legal system has only begun in recent years.⁹ Broadly, “Rights of Nature” refers to the idea that nature should be granted rights as its own legal identity—frequently described as being enforceable through a guardian.¹⁰ The idea first entered the legal discourse in 1972 with the publication of the seminal paper by Christopher D. Stone, “Should Trees Have Standing?—Toward Legal Rights for Natural Objects.”¹¹ This paper laid the foundation for the theory behind and significance and administrability of an eco-centric legal framework.¹² Stone’s articulation of Rights of Nature is based on the already established concept of guardianship, suggesting rivers, forests, or any natural object could be legally represented by a designated group or individual.¹³ He argues that the current anthropocentric legal framework does not adequately consider, for example, the effects of pollution on the river but only addresses how that river pollution affects human health.¹⁴ Allowing the stream to take the polluter to court in its own right would foster greater environmental accountability by granting damages to “mak[e] the *environment* whole.”¹⁵ Stone’s argument was, and still is, highly controversial but led to numerous academic inquiries into the possibility.¹⁶ Much of the theory behind granting legal standing to nature is linked to ideas of moral standing and attempts to answer the question of when morality

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

8. *See infra* Part III.C.

9. MIHNEA TANASESCU, UNDERSTANDING THE RIGHTS OF NATURE: A CRITICAL INTRODUCTION 29–30 (2022).

10. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 464 (1972).

11. *Id.* at 450.

12. Louis J. Kotze & Paola Villavicencio Calzadilla, *Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, 6 TRANSNAT’L ENV’T L. 401, 412 (2017).

13. Stone, *supra* note 10, at 464.

14. *Id.* at 498.

15. *Id.* at 476 (emphasis added).

16. Tanasescu, *supra* note 9, at 25–30.

indicates legal standing is deserved.¹⁷ While Stone's argument was primarily grounded in law and established a pragmatic legal doctrine for nature, Godofredo Stutzin began a parallel scholarship grounded in morality.¹⁸ Stutzin highlighted that Rights of Nature should be *recognized*, not granted by humans and governments.¹⁹ Following Stone and Stutzin's work, several additional foundational principles arose that are often present in modern Rights of Nature laws.²⁰ Ecuador, New Zealand, and the United States illustrate three different approaches that have achieved varied success implementing Rights of Nature.²¹

1. Rights of Nature in Ecuador

In 2008 Ecuador became the first country to adopt constitutional Rights of Nature.²² Under the leadership of Indigenous President Rafael Correa, Ecuador drafted a new constitution that involved significant participation from civil society.²³ This allowed for Indigenous philosophies to make their way into law and, as such, the new constitution reflects the traditional Andean ideology of *sumac kawsay*.²⁴ This ideology embodies an eco-centric worldview that focuses on humans living in harmony with, instead of dominating, nature.²⁵ The constitution defines nature as "Pacha Mama" or Mother Earth and provides expansive protection for all nature.²⁶ There are concerns that the overbroad language used will prove difficult to enforce as it is left unclear what rights are protected, and whose rights should prevail when opposed.²⁷ Further, Ecuador does not have a clear

17. *Id.* at 23.

18. *Id.* at 25.

19. *Id.* at 25. This is analogous to the rights retained by tribes from the U.S. government. See *infra* text accompanying notes 106–07.

20. Tanasescu, *supra* note 9, at 29–30. One important addition to the foundational literature is the description of what rights are fundamental. *Id.* The right to exist, to have a habitat, and to evolve are now frequently listed in Rights of Nature ordinances. *Id.*

21. *Id.* at 1. Bolivia, Mexico, and India are among some of the additional nations to adopt Rights of Nature in some form. *Id.*

22. Stefan Knauß, *Conceptualizing Human Stewardship in the Anthropocene: The Rights of Nature in Ecuador, New Zealand and India*, 31 J. OF AGRIC. AND ENV'T ETHICS 703, 707 (2018).

23. Craig M. Kauffman & Pamela L. Martin, *Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand*, 18 GLOB. ENV'T POL. 43, 56 (2018).

24. *Id.* at 55–56.

25. *Id.* at 51.

26. Kotze & Calzadilla, *supra* note 12, at 418–19; Kauffman & Martin, *supra* note 23, at 48.

27. Mary Elizabeth Whitemore, *The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, 20 PAC. RIM L. & POL'Y J. 659, 669–70 (2011).

articulation of standing doctrine, which creates “fundamental uncertainty” about functionality.²⁸ The constitutional provisions have been challenged in court several times with mixed results,²⁹ but the emerging body of caselaw is likely to guide future efforts by other nations adopting Rights of Nature.³⁰

The very first Rights of Nature lawsuit was brought on behalf of the Vilcabamba River against the municipal government due to the environmental impact of road construction.³¹ The construction modified the course of the river, resulting in flooding of downstream property.³² The court recognized not only the rights of the Vilcabamba, but also of the property owners and ordered the municipal government to remediate the harm.³³ In that case, the judge concluded that the right to a healthy environment³⁴ outweighed the right to an improved road—but this kind of hierarchical ruling is not mandated by the Ecuador Constitution and is not binding precedent.³⁵ Another case came to the courts in 2013 on behalf of the Cordillera del Condor region.³⁶ The plaintiffs sued to prevent a planned mining operation from taking place in the region in violation of the constitutional Rights of Nature.³⁷ The judge here ruled exactly opposite to the Vilcabamba case and held that no violation had or was going to occur because resource extraction is certainly capable of occurring in an “environmentally responsible manner.”³⁸ These two cases illustrate the uncertainty of Rights of Nature in Ecuador, but also how even a Constitutional provision can be circumvented to favor corporate actors and extractivism.³⁹

2. Rights of Nature in New Zealand

In New Zealand, like Ecuador, the Rights of Nature movement centered around “local indigenous worldviews,” but resulted in a

28. *Id.* at 666.

29. *See infra* notes 31–39 and accompanying text.

30. *See* Tanasescu, *supra* note 9, at 123.

31. *Id.* at 122.

32. *Id.*

33. *Id.* at 123. This case is an example of how nature’s rights and property rights can work in tandem, instead of opposed to each other. *Id.*

34. This is technically still using an anthropocentric model, even though Ecuador’s Constitution explicitly provides Nature with its own constitutional rights. *Id.*

35. *Id.*

36. *See* Tanasescu, *supra* note 9, at 123.

37. *Id.* at 123–24.

38. *Id.* at 124.

39. *See id.*

different strategy for effectuating rights.⁴⁰ The relationship between the British settlers in New Zealand and the Maōri tribes began as early as 1642, but a turning point came when the settlers and several Maōri tribes signed the Treaty of Waitangi in 1840.⁴¹ The treaty was written in two languages (English and Maōri) and the translations are not equivalent.⁴² Most notably, the English translation states, “cede...all the rights and powers of Sovereignty” and provides Maōri “full exclusive and undisturbed possession of their Lands; but...Chiefs yield to Her Majesty the exclusive right of Preemption over such lands.”⁴³ While the Maōri translation simply grants the Crown governance and authority over land.⁴⁴ The difference was weaponized by the Crown to all taking of Maōri land and extraction of resources in violation of their supposed “exclusive” possession.⁴⁵ The 1970s brought protests against the New Zealand government regarding the failure to honor the treaty obligations.⁴⁶ The government responded with legislative action and created a tribunal with the authority to investigate breaches of obligations of the 1840 Treaty.⁴⁷ Fifteen years later, the Maōri made a claim of “rightful possession” of the Whanganui River.⁴⁸ This claim resulted in years of negotiations which led to the Te Awa Tupua Act in 2017.⁴⁹ Those involved with the negotiations said Stone’s work inspired the resulting agreement, which grants the Whanganui River legal personhood as “an indivisible and living whole.”⁵⁰ The Maōri perspective does not view nature as property, but instead emphasizes a duty to care for nature as their ancestor.⁵¹ Highlighting this view, the Act appointed a specific legal guardian, Te Pou Tupua, to the river.⁵² This entity is composed of both representatives of the Crown and local Maōri iwi (tribe).⁵³

40. Knauß, *supra* note 22, at 710, 712.

41. Sequoia L. Butler, “*I Am the River, the River Is Me*”: How Environmental Personhood Can Protect Tribal Food Systems, 38 WIS. INT’L L. J. 79, 86–87 (2020).

42. *Id.* at 87.

43. *Id.*; The Treaty of Waitangi (Te Tiriti o Waitangi), Eng.-Maori, Feb. 6, 1890, Archives NZ, <https://www.archives.govt.nz/discover-our-stories/the-treaty-of-waitangi>.

44. Butler, *supra* note 41, at 87.

45. *Id.*

46. *Id.*

47. *Id.* at 87–88.

48. *Id.* at 88.

49. *Id.* at 88–89; Kauffman & Martin, *supra* note 23, at 57–58.

50. Butler, *supra* note 41, at 89; Kauffman & Martin, *supra* note 23, at 57.

51. Kauffman & Martin, *supra* note 23, at 57.

52. Butler, *supra* note 41, at 89.

53. *Id.*

While negotiations for the Whanganui River were underway, Tuhoe (a Māori iwi) engaged in a parallel process for the forest Te Urewera.⁵⁴ Tuhoe filed a grievance with the Waitangi Tribunal regarding the treatment of Te Urewera National Park under the Treaty of Waitangi because the National Park was ancestral territory of the Tuhoe iwi.⁵⁵ The Tribunal recommended the Crown return legal title of the land to Tuhoe, but this was not legally feasible.⁵⁶ Learning from the negotiations over the Whanganui River, the Māori viewpoint once again prevailed as the negotiators determined that legal ownership was not necessary to satisfy the demands of the Tuhoe iwi.⁵⁷ The Te Urewera Act of 2014 granted legal personhood to the forest and created a guardianship council composed of representatives for both the Crown and Tuhoe.⁵⁸ Both the Te Urewera Act and the Te Awa Tupua Act attempt to bridge the gap between the Western and Māori worldviews and emphasizes “responsibility rather than rights.”⁵⁹

3. Rights of Nature in the United States

In the United States, Rights of Nature has been slowly developing at the local level.⁶⁰ Two years before Ecuador, a town in the United States enacted the world’s first Rights of Nature ordinance.⁶¹ In 2006, Tamaqua Borough in Schuylkill County, Pennsylvania, relying heavily on the principles from Christopher Stone, declared that “[b]orough residents, natural communities, and ecosystems shall be considered to be ‘persons’ for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems.”⁶² The “Tamaqua Borough Sewage Sludge Ordinance” sought to prevent toxic dumping and made it “unlawful for any corporation ... to interfere with the existence and flourishing of natural communities or ecosystems”⁶³ Since then, over fifty communities within the United

54. Kauffman & Martin, *supra* note 23, at 57.

55. Katherine Sanders, *Beyond Human Ownership: Property, Power and Legal Personality for Nature in Aotearoa New Zealand*, 30 J. ENV’T. L. 207, 214 (2018); Kauffman & Martin, *supra* note 23, at 57.

56. Sanders, *supra* note 55, at 215.

57. Kauffman & Martin, *supra* note 23, at 58.

58. *Id.*

59. *Id.*

60. Alexandra Huneus, *The Legal Struggle for Rights of Nature in the United States*, 2022 WIS. L. REV. 133, 149 (2022).

61. *Id.* at 54; TANASESCU, *supra* note 9, at 47.

62. Huneus, *supra* note 60, at 48; TANASESCU, *supra* note 9, at 49 (citing Borough of Tamaqua, PA, Sewage Sludge Ordinance Art. VII § 260–61(F)).

63. TANASESCU, *supra* note 9, at 49 (citing Borough of Tamaqua, PA, Sewage Sludge Ordinance Art. VII § 260–61(F)).

States have passed similar ordinances recognizing rights of natural communities with the goal of standing up against corporations that are extracting from and degrading local environments by “opposing corporate personhood with natural personhood.”⁶⁴ These ordinances, unlike in Ecuador and New Zealand, do not stem directly from local Indigenous culture, but instead are more procedurally focused and generally limit guardianship to citizens of the municipality and focus on economics and human wellbeing.⁶⁵

These ordinances, despite being primarily “regulatory instruments rather than declaration of rights” have rarely survived once challenged in U.S. courts.⁶⁶ A prime example comes from Grant Township, Pennsylvania, which had enacted a community ordinance giving the local watershed legal personhood.⁶⁷ A lawsuit arose when Pennsylvania General Energy (PGE) received federal and state permits to create a wastewater injection well in Grant Township but was met with opposition at the local level.⁶⁸ PGE challenged the ordinance, arguing both that it was preempted by state law and that it violated the corporation’s rights.⁶⁹ The Little Mahoning Watershed sought to intervene and asserted, through its representatives, that the injection well would violate its legal rights.⁷⁰ Because corporations are legal fictions in the same capacity as the Watershed, many of PGE’s arguments applied equally to both parties, but the judge was ultimately unwilling to recognize the Watershed’s legal personality and overturned much of the ordinance based on lack of legal authority.⁷¹ This lawsuit is just one example of the many ordinances that have been struck down as soon as they are tested in court.⁷²

64. Huneus, *supra* note 60, at 134, 141, 143; *Tamaqua Borough, Pennsylvania*, CELDF (Aug. 31, 2015), <https://celdf.org/2015/08/tamaqua-borough/>. A significant number of these ordinances have been passed in Pennsylvania due to the prevalence of the mining industry in the state. *Id.*

65. Kauffman & Martin, *supra* note 23, at 51; Huneus, *supra* note 60, at 144. Many states in the United States have also begun adopting the constitutional right to a healthy environment. This is still an anthropocentric right but emphasizes the importance of reducing pollution and environmental conservation generally. Other countries have adopted this as well; Ecuador included a right to a healthy environment in the new constitution alongside the Right of Nature. Kotze & Calzadilla, *supra* note 12, at 420.

66. Huneus, *supra* note 60, at 135–36.

67. David R. Boyd, *Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution*, 32 NAT. RES. & ENV’T 13, 14; Pa. Gen. Energy (PGE) v. Grant Twp., Case No. 1:14-cv-00209-JFM (W.D. Pa. Aug. 8, 2014).

68. Boyd, *supra* note 67, at 14.

69. *Id.*

70. *Id.*

71. *Id.*

72. Huneus, *supra* note 60, at 149.

U.S. tribes did not begin adopting formalized Rights of Nature provisions until 2018.⁷³ The organizations assisting with enacted municipal Rights of Nature ordinances more recently started to follow the path of other countries and started working with tribes in the United States to gain ground and combat the barriers imposed by the U.S. legal system.⁷⁴

B. Standing and Sovereignty: Barriers to Rights of Nature in the United States

1. Legal Standing

The doctrine of standing in the U.S. legal system requires that any party bringing a lawsuit satisfy three Constitutional elements: injury, causation, and redressability.⁷⁵ Standing has historically been a barrier for successful environmental litigation and has repeatedly been addressed by the Supreme Court in this context due to the uniqueness of environmental harms.

Massachusetts v. EPA is arguably the most notable case addressing environmental standing.⁷⁶ Prior to this case, several environmental groups filed a petition requesting that EPA use their authority under the Clean Air Act to regulate greenhouse gases due to their effects on climate change.⁷⁷ This case arose after the petition was denied, requesting judicial review of EPA's decision.⁷⁸ The agency argued, among other things, that Massachusetts did not have standing to bring such a lawsuit.⁷⁹

The Court relied on *Georgia v. Tennessee Copper Co.*⁸⁰ to hold the state had standing "in its capacity as quasi-sovereign" due to its interests "independent of and behind the title of its citizens."⁸¹ Further, the Court states that the widespread nature of the harms of climate

73. See *infra* text accompanying note 166.

74. Huneus, *supra* note 60, at 152.

75. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The doctrine of standing comes from Article III §1 of the U.S. Constitution which limits the jurisdiction of the federal courts to "Cases" and "Controversies." *Id.* at 559. In summary, the injury must be concrete and particularized and actual or imminent, the causal connection must be "fairly traceable" to the challenged action, and it must be likely that the court will redress the injury by a favorable decision. *Id.* at 560–561.

76. 549 U.S. 497 (2007).

77. *Id.* at 510–511.

78. *Id.* at 514.

79. *Id.* at 517.

80. 206 U.S. 230 (1907).

81. *Massachusetts*, 549 U.S. at 518–19 (quoting *Georgia*, 206 U.S. at 237).

change does not “minimize” the injury.⁸² Massachusetts’ status as a coastal landowner reinforced the injury, and showed that the state has a “particularized injury” because of the impact of sea level rise on the coastline.⁸³ The Court rejected EPA’s argument that “a small incremental step, because it is incremental” does not create standing.⁸⁴ The Court concluded that in cases of such vast injury as climate change, the courts do not “lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce*” such a harm.⁸⁵ *Massachusetts* showed a willingness to allow standing for climate change harms when the claim is brought by a state.⁸⁶

Many environmental statutes include “citizen suit” provisions which allow individuals to bring a lawsuit against the agency administering the statute.⁸⁷ However, these provisions do not automatically grant standing to anyone who wishes to sue.⁸⁸ The Court has determined that Congress is authorized to designate new legal rights, which when violated create standing if the party seeking redress was directly injured by the violation.⁸⁹ Statutory rights do not allow parties to bypass the Article III requirements.⁹⁰

In *Sierra Club v. Morton*, the Supreme Court affirmed the idea that aesthetic harms may be a sufficient injury to provide standing.⁹¹ While parties are still required to show how the claimed aesthetic harm causes a direct injury to themselves, the Court clearly found that standing could be allowed in such situations.⁹² Holding the Sierra Club lacked standing due to their failure to allege direct injury to the organization or its members, the Court clarified that “aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection.”⁹³ The dissenting opinion by Justice Douglas is additionally notable and

82. *Id.* at 522.

83. *Id.* at 519; 522.

84. *Id.* at 524.

85. *Id.* at 525.

86. *Id.* at 526.

87. PERCIVAL, *supra* note 1, at 1016.

88. *Lujan*, 504 U.S. at 576–77.

89. *Id.* at 575.

90. *Id.* at 575–76.

91. 405 U.S. 727, 734 (1972).

92. *Id.* at 735.

93. *Id.* at 734–35.

supports Rights of Nature.⁹⁴ He argued that environmental objects should have standing “to sue for their own preservation,” equating it to the legal personhood granted to ships in admiralty law or corporations in business law.⁹⁵ Those who “know its values and wonders” and “have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.”⁹⁶ Douglas would have granted Sierra Club standing to sue on behalf of the ecology community as its spokesperson to defend its inherent right to be.⁹⁷

In a more recent and targeted challenge to environmental standing, a group of young citizens, along with an environmental nonprofit, and a “representative of future generations” brought a claim against the U.S. government for violating their constitutional rights by not addressing climate change and requested an injunction essentially stopping all use of fossil fuels.⁹⁸ The Ninth Circuit accepted the plaintiff’s showing of injury and causation regarding climate change but denied the possibility of redressability and thus dismissed the claim.⁹⁹ According to the Court, the plaintiffs did not satisfy either prong of the analysis for redressability.¹⁰⁰ First, the injunction sought is not “substantially likely to redress their injuries” because a shift away from fossil fuels will not, on its own, ameliorate climate change impacts.¹⁰¹ Secondly, the relief is not “within the district court’s power to award” as granting the relief would require the court to participate in policy making outside the scope of its granted power and would be overstepping into the legislative branch.¹⁰² The case has yet to be appealed to the Supreme Court, but this decision to deny standing for climate change injuries could have dire consequences for future environmental litigation.¹⁰³

94. *Sierra Club*, 405 U.S. at 742 (Douglas, J., dissenting).

95. *Id.* at 742. Justice Douglas relied heavily on Stone’s work on Rights of Nature as his law review article was written in reaction to the Ninth Circuit’s decision to deny standing in the case and was published before the Supreme Court’s decision came down. TANASESCU, *supra* note 9, at 20–21.

96. *Sierra Club*, 405 U.S. at 745, 752 (Douglas, J., dissenting).

97. *Id.* at 752.

98. *Juliana v. United States*, 947 F.3d 1159, 1165 (9th Cir. 2020).

99. *Id.* at 1168–69, 1171.

100. *Id.* at 1170–71.

101. *Id.* at 1170.

102. *Id.* at 1172.

103. *Id.* at 1175. In 2022, the Supreme Court came full circle from *Massachusetts* and heard a case challenging EPA’s authority to regulate greenhouse gases under the Clean Air Act. *West Virginia v. EPA*, No. 20-1530, slip op. at 2 (U.S. June 30, 2022). The case

2. Brief History of Retained Rights and Tribal Sovereignty in the United States

Throughout the 1800s, the United States entered into over 400 treaties with tribal communities.¹⁰⁴ These treaties took the majority of the lands away from tribes in exchange for guarantees of sovereignty, which the Supreme Court has slowly striped away.¹⁰⁵ While there are countless distinct treaties for each federally recognized tribe (primarily divided on geography), much of the language is the same and the key provisions are conceptually similar.¹⁰⁶ The treaties generally reserve the rights to healthcare, education, sovereignty, and fishing and hunting, among others.¹⁰⁷ Through these legal agreements, the tribes *retain* their inherent sovereign authority.¹⁰⁸ This is importantly distinct from rights *granted* by the federal government.¹⁰⁹ As such, tribal authority is distinguished from state sovereignty and tribes are not subject to federal law in the same capacity as states.¹¹⁰ While the Constitution dictates the relationship between states and the federal

focused on a specific regulation and the facts are not explicitly tied to standing, but the holding has potentially wide-ranging implications for future environmental regulation. *Id.* at 11. The case arose after the EPA issued regulations under §111 of the Clean Air Act, the New Source Performance Standards program. *Id.* at 2. Through the “Clean Power Plan” the EPA was mandating a shift of coal-fired power plants to cleaner energy sources. *Id.* at 8. This plan was repealed by the agency and replaced by the Affordable Clean Energy Rule before the case reached the Supreme Court. *Id.* at 12. The repeal and replacement of the original Clean Power Plan was at issue in front of the Court. *Id.* The Court coined the “Major Questions Doctrine” which declared that agencies do not have authority to decide issues of “vast, economic and political significance” unless Congress has clearly stated the intent to delegate that authority. *Id.* at 11. It is unclear how courts will apply this new doctrine in the future, but it may indicate a lean in the Court against environmental enforcement.

104. Karla E. General, *Treaty Rights and the UN Declaration on the Rights of Indigenous Peoples*, INDIAN L. RES. CTR., <https://indianlaw.org/content/treaty-rights-and-un-declaration-rights-indigenous-peoples>.

105. Memorandum from the Advisory Council on Hist. Pres. et al., Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights (Nov. 2021).

106. See General, *supra* note 104. It is also important to note the numerous unrecognized tribal communities across the United States and their lack of legal authority.

107. See *supra* note 105.

108. Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 HUM. RTS. MAGAZINE (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/.

109. *Tribal Sovereignty: History and the Law*, NATIVE AM. CAUCUS OF THE CAL. DEMOCRATIC PARTY, <https://nativeamericancaucus.org/resources/tribal-sovereignty-history-and-the-law/> (last visited Apr. 1, 2023).

110. *Id.*

government, the legal link between tribes and the federal government comes from the treaties.¹¹¹

In the early 1800s, three cases—known as the Marshall Trilogy—came to the Supreme Court regarding federal and state jurisdiction over tribal nations.¹¹² The first case, *Johnson v. M’Intosh*, involved a property dispute; the Court held tribes can exclusively sell their property interests to the federal government, claiming federal supremacy in tribal affairs involving the states and individuals.¹¹³ The second case, *Cherokee Nation v. Georgia*, asked whether federal courts had jurisdiction to hear cases brought by a tribal nation against a State.¹¹⁴ Interpreting Article III, Section 2 of the Constitution, the Court held tribes are not a “foreign state in the sense of the constitution” and the Court did not have jurisdiction to hear this matter.¹¹⁵ The final case, *Worcester v. Georgia*, involved the Supremacy Clause and the potential application of state law to tribal territory.¹¹⁶ The Court found the state law in question unconstitutional as it interfered with both tribal and federal authority and held state law has “no force” over tribal nations.¹¹⁷ Combined, these three cases created the basis for the current legal relationship between tribes, states, and the federal government.¹¹⁸

In the 19th century, as more cases started coming to the courts, the sovereignty of the tribal nations started to erode as the rights supposedly retained were continually restricted.¹¹⁹ In 1903, Congress established an allotment plan as an amendment to the Medicine Lodge Treaty that would divide certain tracts of land and grant ownership to individual members of the tribes governed by the Treaty.¹²⁰ Lone Wolf, a member of one of the affected tribes, argued that the amendment to the treaty had been ratified against the procedural requirements included in Article 12 of the Treaty and could not stand.¹²¹ The Supreme Court upheld the amendment and impliedly held that Congress’s plenary powers over Indian affairs were not subject to

111. *Id.*

112. *See* Fletcher, *supra* note 108.

113. 21 U.S. 543, 572 (1823).

114. 30 U.S. 1, 15 (1831).

115. *Id.* at 20.

116. 31 U.S. 515, 561 (1832).

117. *Id.* at 561.

118. *Johnson v. M’Intosh*, 21 U.S. 543, 572 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831); *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

119. Fletcher, *supra* note 108.

120. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903).

121. *Id.*

judicial review, in practice a significant loss to tribal sovereignty.¹²² Over fifty years later the Supreme Court again deferred to the plenary powers of the federal government to the detriment of tribal sovereignty.¹²³ In *Tee-Hit-Ton Indians v. United States*, the Court determined that the Takings Clause of the Constitution did not apply to Alaska Natives because Congress did not vest formal property rights with the tribe.¹²⁴ As such, the Department of the Interior could authorize harvesting of natural resources from the tribal lands without any judicial interference or compensation to the tribe.¹²⁵ These cases are just some examples of the lack of power the Tribes held compared to the federal government and the broken promise of sovereignty.

Throughout the second half of the 20th century, legal battles over treaty violations proliferated and the Native American Civil Rights Movement slowly began.¹²⁶ One particular line of cases focused on the “the right of taking fish at all usual and accustomed places.”¹²⁷ In *United States v. Taylor*, the court granted the tribe members access to fish in customary grounds despite being outside the bounds of their designated reservation.¹²⁸ While this was a victory for the tribe, it was just one of a multitude of legal challenges to state and federal abrogations of historical rights and treaties, with courts creating a trail of unclear precedents and confusing policies regarding the right to take fish and other related treaty provisions.¹²⁹

In *Tulee v. Washington* a member of the Yakima tribe brought a claim against the state after he was convicted of fishing without a state-issued license.¹³⁰ The Supreme Court held that imposing fees on tribe members fishing on “usual and accustomed” grounds was in contradiction to the terms of the treaty.¹³¹ However, Washington continued to regulate Native American fishing and restrict their rights.¹³² In opposition to the imposed regulations, the Native Americans began a protest movement modeled after the “sit-ins” of the

122. *Id.* at 565.

123. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

124. *Id.* at 278.

125. *See id.* at 281.

126. Phil Dougherty, *Boldt Decision: United States v. State of Washington*, HIST. LINK (Aug. 24, 2020), <https://www.historylink.org/file/21084>.

127. *Id.*

128. 3 Wash. Terr. 88, 97–98 (1887).

129. Dougherty, *supra* note 126.

130. 315 U.S. 681, 682 (1942).

131. *Id.* at 685.

132. Dougherty, *supra* note 126.

concurrent Civil Rights Movement.¹³³ Their protests were in defense of the right to fish without interference by the state or federal governments and so members of the Puyallup tribe in Washington held “fish ins” and continued to fish off-reservation by methods barred by state laws.¹³⁴ This led to a series of arrests and the legal battle continued on.¹³⁵

During this movement, another legal challenge was brought against the state’s attempt to regulate Native American fishing practices, but this time the Court did not favor the Treaty.¹³⁶ In *Puyallup Tribe v. Department of Game of Washington*, the issue was whether Washington’s fishing regulations, which were implemented with the purpose of conserving local salmon populations, could be fairly imposed on Native Americans.¹³⁷ The state had regulations in place regarding when, where, and how fishing can occur within the state.¹³⁸ The Court once again was asked to interpret the fishing rights clause of the Treaty governing this tribe, finding no specification for methods of fishing safeguarded by the Treaty.¹³⁹ Further, the Court elaborated that the inclusion of the phrase “in common with all citizens of the Territory” indicates a non-exclusive rights guarantee.¹⁴⁰ Because the state has the authority to regulate the actions of its citizens, these regulations can be non-discriminatorily extended to Native Americans.¹⁴¹ In sum, the Court ruled that it is within the state’s police power to regulate the methods of fishing used by Native Americans so long as the state purpose is conservation.¹⁴²

A few years later, one of the most important cases revolving around Native American fishing rights came to the courts: *United States v. Washington*.¹⁴³ This case was the direct result of the fish-ins and Native American Civil Rights Movement and was filed just days

133. *Id.*

134. *Id.* The movement even gained celebrity support and actor Marlon Brando was arrested for his participation. *Id.*

135. *Id.*

136. *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 394 (1968).

137. *Id.* at 394–95.

138. *Id.* at 396.

139. *Id.* at 398.

140. *Id.*

141. *Id.*

142. *Id.* at 399.

143. 384 F. Supp. 312, 326 (W.D. Wash. 1974); Gabriel Chrisman, *The Fish-in Protests at Franks Landing*, UNIV. OF WASH. SEATTLE CIV. RTS. & LAB. HIST. PROJECT (2008), <https://depts.washington.edu/civilr/fish-ins.htm>.

after one of the largest arrests during the protest movement.¹⁴⁴ In 1974 the landmark “Boldt Decision” came down in favor of the Native Americans and secured their right to take fish.¹⁴⁵ The court upheld the treaty guarantee to take fish and determined the tribe is entitled to up to 50% of the fish harvestable in all usual and accustomed grounds.¹⁴⁶ Further, the Native Americans were granted equal management rights over the waters in question—a hugely significant win that returned a certain amount of sovereignty to the tribes.¹⁴⁷ The case was appealed and affirmed by the Ninth Circuit. The Supreme Court denied certiorari to hear the case, but indirectly affirmed the decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.¹⁴⁸ This Supreme Court case came several years after the Boldt Decision and followed a private challenge to the adopted regulations intended to protect the Treaty rights.¹⁴⁹ The majority held the Treaty guarantees a right to catch a share of each run that is on tribal fishing grounds and that the tribes have a right to an equitable share of at most 50% of the harvestable fish with the percentage to be decreased to that which is “reasonably require[d].”¹⁵⁰

The Native American people have continued to battle and protect their treaty granted rights, especially as environmental regulation and lack of conservation continue to negatively and disparately impact Tribal lands.

3. Tribal Legal System

As an extension of their sovereignty, tribal nations have the right to their own distinct judicial system and process outside of federal jurisdiction.¹⁵¹ This operates in a somewhat similar capacity as the distinction between state and federal judiciaries and is referred to as the “Tribal justice system.”¹⁵² While there is variation in the structure of the courts throughout Tribal nations, many of the judicial systems are modeled after the United States—due to the forced assimilation

144. Chrisman, *supra* note 143.

145. *United States v. Washington*, 383 F. Supp. at 341–42.

146. *Id.* at 343 (holding that a determination of quantity is to be made on a river-by-river and run-by-run basis).

147. *Id.*

148. 443 U.S. 658, 660 (1979).

149. *Id.* at 662.

150. *Id.* at 679, 687.

151. U.S. Department of the Interior, *Tribal Court Systems*, INDIAN AFF., <https://www.bia.gov/CFRCourts/tribal-justice-support-directorate> (last visited Apr. 1, 2023).

152. *Id.*

legislation adopted throughout history.¹⁵³ There is typically a trial level and at least one level of appellate court, but the specific manners in which the courts function and the legal proceedings can vary.¹⁵⁴

The Tribal justice system has an important jurisdictional limitation that stems from the divestiture of complete sovereignty through treaty-making with the United States.¹⁵⁵ Tribal courts do not have jurisdiction over nonmembers of the tribe, for both civil and criminal matters, with limited exceptions.¹⁵⁶ The exceptions for civil jurisdiction are referred to as the *Montana* exceptions, one of which allows for tribal jurisdiction over nonmembers when conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁵⁷ Additionally, Congress has the authority to create statutory exceptions to extend jurisdiction to nonmembers, either by authorizing federal enforcement of tribal law or tribal enforcement of federal law.¹⁵⁸ One notable example of this is the allowance of tribal prosecution of any party who violates tribal hunting and fishing licensing requirements on tribal land.¹⁵⁹ Generally, a nonmember who wishes to challenge the authority of the tribal court must first do so in the tribal court system and exhaust all tribal appeals procedures before taking the jurisdictional challenge to the federal arena.¹⁶⁰

Not all tribes have a Tribal justice system, and some instead rely on the Court of Indian Offences, also known as CFR Courts, which operate on the behalf of tribes.¹⁶¹ There are five CFR Courts across the country that serve multiple tribes within their geographic region.¹⁶² CFR Courts are governed by the Code of Federal Regulations as well

153. *Id.*

154. *Id.*

155. JANE M. SMITH, CONG. RSCH. SERV., R43324, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 1 (2013).

156. *Id.* at 1.

157. *Id.* at 8 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)). The other *Montana* exception allows for tribal jurisdiction in civil matters when the nonmember in question entered into a private, consensual relationship with the tribe and the lawsuit arises out of that relationship. *Id.* at 6–7. In criminal cases, there are exceptions for cases of domestic violence. *Id.* at 4.

158. *Id.* at 11.

159. *Id.*

160. *Id.* at 12.

161. *Court of Indian Offenses*, U.S. DEP’T OF THE INTERIOR, INDIAN AFF., <https://www.bia.gov/CFRCourts> (last visited Apr. 1, 2023).

162. *Id.*

as the applicable Tribal customary law so long as it is not contradictory.¹⁶³

III. ANALYSIS: TRIBAL RIGHTS OF NATURE IN THE UNITED STATES

Tribes across the United States have begun adopting Rights of Nature ordinances to protect the resources they rely on to survive.¹⁶⁴ Due to the nature of tribal authority, the enforcement of these ordinances against nonmembers has proven challenging.¹⁶⁵ But these ordinances present a unique opportunity to overcome both challenges to granting legal personhood to nature in the United States and the sovereignty issues.

A. *The Case for Wild Rice: Manoomin v. Minnesota DNR*

In 2018, the most hotly contested tribal Right of Nature provision was adopted within the United States by a tribe located in Minnesota.¹⁶⁶ The White Earth Band of Ojibwe of the Chippewa Nation (“the Band”) adopted the Rights of Manoomin Ordinance which states:

Manoomin, or wild rice, within all the Chippewa ceded territories possess inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation. These rights include, but are not limited to, the right to pure water and freshwater habitat; the right to a healthy climate system and a natural environment free from human-caused global warming impacts and emissions.¹⁶⁷

In August 2021, the Band filed a lawsuit in Tribal Court based on this ordinance following an amendment to a dewatering permit related to the Enbridge “Line 3” pipeline.¹⁶⁸ The amendment granted

163. *Tribal Court Systems*, U.S. DEP’T OF THE INTERIOR, INDIAN AFF., <https://www.bia.gov/CFRCourts/tribal-justice-support-directorate>.

164. See Huneus, *supra* note 60, at 152–55.

165. See *supra* Part II.B.3

166. Barbara With, *Overview of White Earth’s Case of Manoomin vs The State of Minnesota DNR Court Case*, WIS. CITIZENS MEDIA COOP. (Dec. 15, 2021), <https://wcmcoop.org/2021/12/15/overview-of-white-earths-case-of-manoomin-vs-the-state-of-minnesota-dnr-court-case/>.

167. Complaint at 45, *Manoomin v. Minn. Dep’t of Nat. Res.*, No. GC21-0428 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021).

168. *Id.* at 35. In 2014, the Enbridge Corporation proposed a project to reconstruct the “Line 3” oil pipeline that runs from Alberta, Canada to Superior, Wisconsin and crosses

Enbridge Corporation an increase of five billion gallons of water from sources that are directly connected to the wild rice beds that the Band rely on.¹⁶⁹ The Band brought the case with Manoomin as the lead plaintiff and sued the Minnesota Department of Natural Resources (MN DNR) for violations arising under of the Rights of Manoomin Ordinance.¹⁷⁰ The Band was a joint plaintiff and the complaint alleged multiple other violations to the Treaty, namely a violation of the rights of the tribe to gather and harvest wild rice.¹⁷¹ The primary factual argument is that the dewatering permit granted by MN DNR for Line 3 “impairs or threatens the growth of Manoomin on [land ceded under the 1855 Treaty] and therefore infringes on the treaty rights of Tribes and members to harvest Manoomin.”¹⁷²

Eight days after the complaint was filed, MN DNR filed a motion to dismiss with the tribal trial court based on both the state’s sovereign immunity and a lack of subject matter jurisdiction due to the complained of actions occurring “off-reservation.”¹⁷³ The tribal judge denied both arguments, first holding that the state’s sovereign immunity “must give way to the Band’s inherent sovereignty.”¹⁷⁴ The Court cited to the second *Montana* exception stating that the permit’s impact on the ecosystem of Manoomin has a “direct effect on the political integrity, political security or the health or welfare of the Tribe.”¹⁷⁵

MN DNR retaliated by suing both the Band and the tribal judge in federal District Court for the same claims of sovereign immunity and lack of jurisdiction.¹⁷⁶ The District Court dismissed the case on the grounds that both the Band and the judge are protected by sovereign immunity.¹⁷⁷ MN DNR appealed the decisions in both federal and tribal

treaty protected territory. With, *supra* note 166. There has been a plethora of litigation regarding Line 3, but this case is the only one arising out of the Rights of Nature ordinance. *Id.*

169. Minn. Dep’t of Nat. Res. v. Manoomin, No. AP21-0516, at *2 (White Earth Band of Ojibwe Tribal Ct. of App. Mar. 10, 2022).

170. With, *supra* note 166.

171. Complaint at 13, Manoomin v. Minn. Dep’t of Nat. Res., No. GC21-0428 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021).c

172. Minn. Dep’t of Nat. Res., No. AP21-0516, at *1.

173. *Id.* at *3.

174. *Id.*

175. *Id.* (quoting *Montana*, 450 U.S. at 566).

176. *Id.* at *3.

177. *Id.* at *4 n.5.

courts.¹⁷⁸ The Eight Circuit has yet to make a ruling, but the White Earth Band of Ojibwe Court of Appeals has ruled on the case.¹⁷⁹

1. The Court's Reasoning

On March 10, 2022, the Court of Appeals of the White Earth Band of Ojibwe dismissed the case for lack of subject matter jurisdiction.¹⁸⁰ The Court did not reach the issue of sovereign immunity.¹⁸¹ The Court begins its jurisdictional examination with the White Earth Band Judicial Code provision on Tribal Court Jurisdiction.¹⁸² The Code provides authority for the tribal courts to hear cases of tribal law, including enforcement of treaty rights and protection of resources outside the Reservation.¹⁸³ Concluding that the Code grants authority to hear this case, the analysis examines tribal jurisdiction over nonmembers which is a question of federal law.¹⁸⁴

The court held that the Tribal authority is superseded by federal law in this case due to the defendant being a nonmember of the Band.¹⁸⁵ Identifying the *Montana* doctrine as potentially applicable, the court articulated three factors that are routinely used to analyze the second *Montana* exception to nonmember jurisdiction: (1) whether the party allegedly subject to regulation is a nonmember, (2) whether the disputed activity occurred on reservation land or on fee land on the reservation, and (3) whether the effects of the activity “threaten the Tribe’s political or economic security.”¹⁸⁶ The primary dispute surrounds the second factor due to the physical location of Line 3 and the impacts of the dewatering permit.¹⁸⁷ The Band argues that the effects of the permit on-reservation create jurisdiction, relying on

178. *Id.* at *4.

179. *Id.*

180. *Id.* at *17.

181. *Id.* at *16.

182. *Id.* at *5.

183. *Id.* at *6. Section 1 of the Judicial Code states, in relevant part: “The White Earth Band of Chippewa Tribal Court shall have jurisdiction over all Band members, and over all persons whose actions involve or affect the White Earth Band of Chippewa or its members” and “to hear all actions arising under any code, resolution or ordinance enacted to protect, preserve, or regulate the rights reserved for Chippewa people in treaties negotiated with the United States government regarding off-reservation resources” and “to hear all actions arising under any code, resolution or ordinance enacted to conserve, manage, or protect the resources utilized by the Chippewa people, regardless of [being]...within or without the boundaries of the Reservation.” WHITE EARTH BAND JUDICIAL CODE tit. 1, chap. II, § 1(c),(j).

184. Minn. Dep’t of Nat. Res., No. AP21-0516, at *6–7.

185. *Id.* at *14.

186. *Id.* at *7–8 (quoting *Montana*, 450 U.S. at 544, 566).

187. *Id.* at *9.

Wisconsin v. EPA which upheld tribal authority under the Clean Water Act to regulate nonmembers' discharge into off-reservation waterways that flowed on-reservation.¹⁸⁸ MN DNR distinguished *Wisconsin* because the Clean Water Act provided express congressional authorization for tribal jurisdiction in the situation described.¹⁸⁹ The Court agreed as the present matter is based solely on tribal law and determined the tribal court lacks subject matter jurisdiction over the off-reservation activities.¹⁹⁰

The Band additionally argued that the tribal court has jurisdiction under Treaty law which now includes protection of Manoomin and as part of the usufructuary property rights retained on the 1855 Treaty ceded land.¹⁹¹ The Court recognizes that the Band does retain "usufructuary rights to fish, hunt and gather on 1855 Treaty ceded territory" but rejects the argument that this provides jurisdiction to regulate the activities of nonmembers on that territory and thus will not confer tribal court jurisdiction under the Treaty.¹⁹²

2. Motion for Reconsideration

Following the dismissal of the case by the Tribal Court of Appeals, the White Earth Band filed a motion for reconsideration on three grounds.¹⁹³ First, the court did not apply the correct law in determining jurisdiction.¹⁹⁴ The argument is premised around the application of tribal law, specifically the White Earth Judicial Code.¹⁹⁵ The Band argues that, under the Judicial Code, the court does not have discretion to say it cannot hear a case regarding a given Tribal law.¹⁹⁶ According to the Band, the Judicial Code should be read as requiring the location of the Tribal law violation to be within the boundaries of the reservation, as opposed to the location of the person who

188. *Id.* at *12 (citing *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001)). Prior to the *Wisconsin* case, an EPA policy of granting "treatment-as state" status to tribes under the Clean Water Act so that the tribes could adopt Water Quality Standards over their lands had been upheld. *See Montana v. EPA*, 137 F.3d 1135, 1137–38 (9th Cir. 1998). The Court had affirmed that this policy granted regulatory authority to tribes over nonmembers to ensure compliance with the Water Quality Standards. *Id.* at 1138.

189. Minn. Dep't of Nat. Res., No. AP21-0516, at *13.

190. *Id.* at *13–14.

191. *Id.* at *14–15.

192. *Id.* at *15.

193. Motion for Reconsideration at 1–2, Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. of App. Mar. 10, 2022).

194. *Id.* at 1–2.

195. *Id.* at 2–3.

196. *Id.* at 3.

committed the violation.¹⁹⁷ The Band explains that the Tribal law allegedly being violated is the “Rights of Manoomin” and that the complaint describes violations that occurred within the reservation boundaries.¹⁹⁸ Continuing, the Band argues that because “tribal courts are best qualified to interpret and apply tribal law” the Court should certainly have jurisdiction over the issues.¹⁹⁹ They claim the jurisdictional inquiry should have ended there but that the court wrongly expanded the analysis to consider federal law.²⁰⁰ “It is not the job of this Court to make predictions on how foreign courts might rule on questions before those courts, or second guess the jurisdictional grant set forth in the Band’s Judicial Code.”²⁰¹

The second argument raised is the failure of the court to properly consider the “on-reservation” impacts of the permit.²⁰² The Band explains that the court, in its motion to dismiss, only addressed the allegations in the complaint that relate to harms off-reservation (on the 1855 Treaty ceded land).²⁰³ However, the complaint directly includes claims regarding the impact of the permit *on-reservation*.²⁰⁴ The largest, continuously producing wild rice bed in the world is located inside the boundary of the reservation and the dewatering permit has already resulted in observable impacts to this wetland.²⁰⁵ The Band argues that these impacts were not adequately considered by the Court and require further factual inquiry by the Tribal Trial Court.²⁰⁶

The final argument the Band raises is that there is new evidence regarding the activities of MN DNR that needs to be considered by the trial court.²⁰⁷ First, there is a report detailing the environmental impacts of Line 3, specifically the negative impact on ecosystems such as the wild rice beds.²⁰⁸ Second, MN DNR has released information regarding several “aquifer breaches” which have released millions of gallons of groundwater which have the potential to impact the water that

197. *Id.*

198. *Id.* at 4.

199. *Id.* at 5 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1986)).

200. *Id.*

201. *Id.*

202. *Id.* at 6.

203. *Id.*

204. *Id.* (emphasis added).

205. *Id.* at 8.

206. *Id.* at 9.

207. *Id.*

208. *Id.*

Manoomin depends on.²⁰⁹ In summary, the Band argues for reconsideration based on the improper application of federal law to a tribal law issue, the lack of consideration of on-reservation impacts of the permit, and the need to include new evidence in the trial court record.²¹⁰

B. The Case for Salmon: Sauk-Suiattle Indian Tribe v. City of Seattle

On January 6, 2022, the second tribal Rights of Nature case was filed—this time on behalf of Tsuladwx, or salmon.²¹¹ The Sauk-Suiattle Indian Tribe filed a lawsuit against the City of Seattle in Tribal Court seeking recognition that Tsuladwx have the “inherent right to exist, flourish, regenerate, evolve, as well as an inherent right to restoration, recovery, and preservation.”²¹² The lawsuit arose after the construction of dams on the Skagit River which obstruct the passage of salmon along traditional tribal fishing grounds.²¹³ The challenge is based on a treaty between the tribe and the United States, which guaranteed tribal members rights to fish on their traditional territory.²¹⁴ This lawsuit comes after a long history of restricting tribal rights to take fish and presents a unique opportunity to use both tribal law and treaty law to challenge a government action.²¹⁵ Like *Manoomin*, the merits of the rights of Tsuladwx have yet to be reached, as the case was dismissed for lack of jurisdiction after being removed from state to federal court.²¹⁶ The Tribe appealed to the Ninth Circuit, where a panel affirmed the District Court’s decision and relied on the “futility doctrine.”²¹⁷ The Tribe petitioned the U.S. Supreme Court for a writ of

209. *Id.* at 10.

210. *Id.* at 2, 6, 10.

211. Press Release, Ctr. for Democratic and Env’t Rts., Sauk-Suiattle Indian Tribe Brings First “Rights of Salmon” Case (Jan. 11, 2022).

212. *Id.*

213. *Id.* The dams were constructed without consulting the Sauk-Suiattle Tribe along a river which provides habitat for five wild salmon species—two of which are federally protected as endangered. *Id.* The Tribe is arguing the dams are significantly contributing to a decline in salmon populations. *Id.*

214. Alexis Celeste Bunten, *Defending the Indigenous Rights of Nature*, 23 AM. INDIAN (2022), <https://www.americanindianmagazine.org/story/indigenous-rights-of-nature>.

215. *See supra* Part II.B.1.

216. *Sauk-Suiattle Indian Tribe v. City of Seattle*, No. 2:21-CV-1014, 2021 WL 5712163, at *6 (W.D. Wash. Dec. 2, 2021), *aff’d*, 56 F.4th 1179 (9th Cir. 2022).

217. *Sauk-Suiattle Indian Tribe v. City of Seattle*, 56 F.4th 1179, 1189 (9th Cir. 2022). The futility doctrine creates an exception to the statutory requirement that “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded [to state court].” *Id.* at 1189 (quoting 28 U.S.C. § 1447(c)). The futility exception, or doctrine, grants the district court authority to dismiss the case “if there is ‘absolute certainty’ that the state court would dismiss the action following remand.” *Id.*

certiorari regarding the application of the futility doctrine and is awaiting a response.²¹⁸

C. The Unknown Future of Rights of Nature and Tribal Sovereignty in the United States

The ordinances adopted by the tribes mentioned are similar to that of New Zealand as they focus on a specific component of nature, i.e., wild rice and salmon.²¹⁹ This piecemeal approach to Rights of Nature is likely to be more successful in the United States than a wholistic approach like that of Ecuador due to Western ideas of legal personhood that already exist in the United States.²²⁰ Stone's articulation of Rights of Nature was controversial fifty years ago and remains so today, with most of the arguments unchanged.²²¹ The ordinances are an attempt to overcome the challenge of standing by creating statutory standing for natural communities themselves, but the courts have not been favorable to this strategy and are denying the authority of municipalities.²²² In anticipation of claims that his proposition was a legal absurdity, Stone stated, "throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable."²²³ His paper begins by analogizing to other previously rightless entities, such as women, African-Americans, and Native Americans, as well as to other inanimate right-holders, such as corporations, ships, and municipalities.²²⁴ That same argument is made to support Rights of Nature across the globe; corporations are artificial persons under the law and trees, rivers, rice, and salmon need not be treated any differently.²²⁵

Arguments against administrability in the United States remain strong due to the fear of the exponentially expansive scope of Rights of Nature and the inability of courts to measure monetary damages to

(quoting *Glob. Rescue Jets, LLC v. Kaiser Found. Health Plan, Inc.*, 30 F.4th 905, 920 n.6 (9th Cir. 2022)).

218. *Petition for a Writ of Certiorari*, at 4, *Sauk-Suiattle Indian Tribe v. City of Seattle*, 56 F.4th 1179, 1189 (9th Cir. 2022) (No. 22-955).

219. *Minn. Dep't of Nat. Res. v. Mankato*, No. AP21-0516, at *1 (White Earth Band of Ojibwe C.A. Mar. 10, 2022); Press Release, Ctr. for Democratic and Env't Rts., *Sauk-Suiattle Indian Tribe Brings First "Rights of Salmon" Case* (Jan. 11, 2022); Kauffman & Martin, *supra* note 22, at 57–58.

220. Stone, *supra* note 10, at 452.

221. TANASESCU, *supra* note 9, at 51–52.

222. Huneus, *supra* note 60, at 136.

223. Stone, *supra* note 10, at 453.

224. *Id.* at 451–52.

225. Knauß, *supra* note 22, at 711.

an ecosystem.²²⁶ However, the calculation of damages would be no different than in any other legal context.²²⁷ Courts would be using normative judgements in the same fashion as routinely relied upon to make the plaintiff “whole,” the only difference being the identity of the plaintiff.²²⁸ Violations of Rights of Nature can be further analogized to intellectual property rights, as the same protections against improper use form the basis of any claims.²²⁹ The shift to an eco-centric viewpoint allows courts to balance environmental harm in all cases, not only those which impact human health.²³⁰ With the U.S. court system continually striking down the municipal ordinances, tribal law is one way of attempting to circumvent some of these barriers.²³¹

The tribal ordinances are similar to the Ecuador approach because they are essentially codifying long-held Indigenous beliefs and practices.²³² Because they are based on customary law²³³ and because of the unique legal relationship between tribes and the federal government, tribal Rights of Nature ordinances theoretically provide a higher likelihood of success in the United States.²³⁴ However, in addition to the general challenges of legal recognition of nature, tribal Rights of Nature laws have additional hurdles to overcome. The biggest challenge in enforcing tribal Rights of Nature laws is the limited jurisdiction of Tribal Courts.²³⁵ The court has an opportunity, through both the *Manoomin* and *Tsuladxw* cases, to overcome this challenge.²³⁶ There are two paths the court could take: first, allow jurisdiction to tribal courts for questions arising under Tribal Rights of Nature provisions, or second, interpret the second *Montana* exception to include off-reservation activities that have a substantial impact on-reservation.²³⁷ Considering the U.S. Supreme Court’s recent decision that further restricted tribal jurisdiction in the criminal context, it is

226. Stone, *supra* note 10, at 478.

227. *Id.*

228. *Id.* at 476, 479.

229. *Id.* at 476.

230. Stone, *supra* note 10, at 461–62.

231. *See* Huneus, *supra* note 60, at 155.

232. *Id.* at 153–54.

233. Customary law is “law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws.” *Customary law*, BLACK’S LAW DICTIONARY (11th ed. 2019).

234. Huneus, *supra* note 60, at 155.

235. *See supra* Part II.B.2.

236. *See supra* notes 187–190, 212–213 and accompanying text.

237. Motion for Reconsideration at 6. *Minn. Dep’t of Nat. Res. v. Manoomin*, No. AP21-0516 (White Earth Band of Ojibwe Tribal Court of App. Mar. 10, 2022).

unlikely tribes will be allowed full jurisdiction over Rights of Nature claims.²³⁸

The second possibility would give Tribal Courts limited authority to control only that which still impacts tribal territory. Ignoring the fact that off-reservation actions can have a pervasive effect on-reservation does not align with the prior caselaw governing civil jurisdiction of tribal courts.²³⁹ The *Montana* exceptions are specifically designed for actions by nonmembers that negatively affect tribes;²⁴⁰ violations of Rights of Nature conceptually fall under this category.²⁴¹ While the Supreme Court continues to limit the authority of tribes, the rights to take fish and use customary land in customary ways have never been fully denied.²⁴² As the *Tsuladwx* case demonstrates, the Rights of Nature laws are essentially a reframing of the treaty rights already inherently retained by the tribes.²⁴³ Examined from this perspective, federal courts have an obligation to uphold the treaty rights in alignment with the plethora of prior caselaw surrounding the issue—especially the right to take fish.²⁴⁴ A denial by the court of the claims raised by Sauk-Suiattle would be in contradiction to binding precedent created by the Supreme Court and could further lead to a case being brought to the International Court of Justice based on violations of treaty retained rights.²⁴⁵ With so many other nations adopting Indigenous based Rights of Nature, the United States' denial of these ordinances could have devastating consequences for the movement and for the legal authority of Indigenous peoples across the globe.²⁴⁶

IV. CONCLUSION

While the finality of the case for Wild Rice is still pending, it has already created a splash in environmental litigation, as the case for Salmon illustrates.²⁴⁷ As numerous other tribal communities pass

238. *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. (U.S. June 29, 2022).

239. *Montana*, 450 U.S. at 544, 565.

240. *Id.*

241. *Id.*

242. *See supra* text accompanying notes 148–150.

243. Press Release, Ctr. for Democratic and Env't Rts., Sauk-Suiattle Indian Tribe Brings First “Rights of Salmon” Case (Jan. 11, 2022).

244. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

245. *Bunten*, *supra* note 214.

246. *Id.*

247. *See supra* Part III.A;B.

Rights of Nature ordinances, this movement is only just beginning.²⁴⁸ In the United States, there has yet to be a successful court case upholding the Rights of Nature, due in large part to the lack of authority granted to tribal governments, as well as the limited jurisdiction granted to tribal courts to hear issues arising out of nonmember actions.²⁴⁹ Globally, the Rights of Nature movement is slowly gaining momentum, but the lack of court decisions create little guidance for countries developing new provisions.²⁵⁰ As the first of their kind, these U.S. cases have the unique potential to ignite the Rights of Nature movement in the United States while reinvigorating the promise of tribal sovereignty.²⁵¹

248. Bunten, *supra* note 214.

249. *See supra* Part II.B.3.

250. *See supra* Part II.A.

251. Bunten, *supra* note 214.

