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Release the River: Recognizing Legal Rights for Natural Objects to Remedy Continuing Issues in American Environmental Law

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INTRODUCTION

The world is changing. The dangers and realities of manmade climate change have been known for decades.¹ In

† J.D. Candidate 2023, University at Buffalo School of Law. First, I would like to thank Professor Christen Civileto for introducing me to this topic and for always challenging our class to not merely identify problems but to think of workable solutions to them. Second, I would like to thank Professor Angelyn McDuff, without whom I never would have applied to *Buffalo Law Review* in the first place. Third, I'm greatly appreciative of the work of my colleagues at *Buffalo Law Review* and for their tireless efforts getting this piece ready for publication. Fourth and finally, I owe a sincere debt of gratitude to my friends and loved ones for supporting me throughout this process and law school in general.

1. See, e.g., Amy Lieberman & Susanne Rust, *Big Oil Braced for Global Warming While it Fought Regulations*, LA TIMES, Dec. 31, 2015. The possibility for climate change has been known about for even longer. In 1896, a Swedish Scientist, Svante Arrhenius, first predicted that alterations in atmospheric carbon dioxide levels could significantly impact Earth's surface temperature. *Evidence: How Do We Know Climate Change is Real?* NASA, n.2, <https://climate.nasa.gov/evidence/#:~:text=In%201896%2C%20a%20seminal%20paper,Earth's%20atmosphere%20to%20global%20warming> (last visited Aug. 26, 2022).

the United States, the past year alone has revealed the costs of inaction: the western states are in the throes of the worst drought in 1,200 years;² 61 tornadoes in eight states killed over 80 people in mid-December, the warmer conditions caused by climate change have been linked to creating the conditions for these storms;³ and in the course of five weeks, five instances of “1,000-year rain events” flooded parts of the United States from California to Kentucky, the precipitation punctuating abnormally prolonged periods of dryness.⁴ International instances of similar extreme weather in the past year abound.⁵ Unfortunately, decision makers at home and internationally have failed to confront, or opted to ignore, the enormity of this issue.⁶ These failures directly

2. Stephanie Elam, *The West’s Megadrought is Worst in 1,200 Years. Los Angeles is Taking Wastewater Recycling to the Extreme*, CNN (Feb. 14, 2022, 5:40 PM), <https://www.cnn.com/2022/02/14/us/west-megadrought-climate-wastewater-recycling/index.html>.

3. *The December 2021 Tornado Outbreak, Explained*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Dec. 20, 2021), <https://www.noaa.gov/news/december-2021-tornado-outbreak-explained>.

4. Matthew Cappucci, *Five 1,000-Year Rain Events Have Struck the U.S. in Five Weeks. Why?*, WASHINGTON POST (Aug. 23, 2022), <https://www.washingtonpost.com/climate-environment/2022/08/23/flood-united-states-climate-explainer/>.

5. See, e.g., Jibran Ahmad & Asif Shahzad, *Cataclysmic Floods in Pakistan Kill 1,100, Including 380 Children*, REUTERS (Aug. 31, 2022), <https://www.reuters.com/world/asia-pacific/un-issues-flash-appeal-160-million-help-pakistan-with-floods-2022-08-30/>; *‘It’s Getting Extremely Hard’: Climate Crisis Forces China to Ration Electricity*, GUARDIAN (Aug. 30, 2022), <https://www.theguardian.com/world/2022/aug/30/its-getting-extremely-hard-climate-crisis-forces-china-to-ration-electricity>.

6. See, e.g., *West Virginia v. EPA*, No. 20-1530, slip op. at 4 (U.S. June 30, 2022) (limiting the EPA’s ability to combat climate change by curtailing its authority under the Clean Air Act to implement emission caps under the generation shifting approach); Michael Sheldrick, *COP26: A Failure for the Planet and the World’s Poor*, FORBES (Nov. 15, 2021), <https://www.forbes.com/sites/globalcitizen/2021/11/15/cop26-a-failure-for-the-planet-and-the-worlds-poor/?sh=4a146d812275>. The Inflation Reduction Act has generated mixed responses. Although many provisions do signal a notable commitment to combating climate change, other

contrast with the growing concern domestically and internationally about climate change and its potential effects.⁷ Scientists have recently asserted that these failures have left mankind with precious little time to act to avoid the worst potential effects of climate change.⁸

provisions seem poised to hamstring the effectiveness of these efforts. *Compare What the Inflation Reduction Act Means for Climate*, EARTHJUSTICE (Aug. 16, 2022), <https://earthjustice.org/brief/2022/what-the-inflation-reduction-act-means-for-climate> (conceding that some provisions were necessary painful compromises, but stating that the Act overall “represents a huge step forward in the fight to preserve a livable planet and is one we need to take while we have the chance”), with Rebecca Hersher, *The spending bill will cut emissions, but marginalized groups feel they were sold out*, NPR (Aug. 17, 2022, 7:00 AM), <https://www.npr.org/2022/08/17/1117725655/the-spending-bill-will-cut-emissions-but-marginalized-groups-feel-they-were-sold> (detailing how the Act’s fossil fuel subsidies left many environmental groups, poor communities, Native American tribes, and Black Americans feeling like the negative consequences outweighed the positive benefits.).

7. See, e.g., Darryl Fears & Emily Guskin, *The Strong Winds of Climate Change Have Failed to Move the Opinions of Many Americans*, WASHINGTON POST (Nov. 12, 2021, 6:00 AM EST), <https://www.washingtonpost.com/climate-environment/2021/11/12/strong-winds-climate-change-have-failed-move-opinions-many-americans/> (showing that 69% of American adults believe that climate change is a serious national concern, and that 47% of Republicans believe that the federal government should regulate greenhouse gases, compared to 46% of Republicans who do not); Tosin Thompson, *Young People’s Climate Anxiety Revealed in Landmark Survey*, NATURE (Sept. 22, 2021), <https://www.nature.com/articles/d41586-021-02582-8>. These concerns have led to a similar concern about sustainability in the products they purchase. *Empowered Consumers Call for Sustainability Transformation*, FORBES (Jan. 21, 2021, 9:30 AM EST), <https://www.forbes.com/sites/forrester/2021/01/21/empowered-consumers-call-for-sustainability-transformation/?sh=5dd4bdfa2042> (demonstrating that 68% of American consumers planned to buy from brands that reduce their environmental impact and 61% purposely seek out energy-efficient labels.).

8. See CLIMATE CHANGE 2022: IMPACTS, ADAPTION AND VULNERABILITY 7 (Hans-Otto Pörtner & Debra C. Roberts et al. eds., 2022) (hereinafter IPCC REPORT 2022).

This is not the first time that the United States has seen significant public concern over the climate. Beginning in the 1960s with the publishing of Rachel Carson's *Silent Spring*,⁹ the nation became acutely aware of its collective impact upon the environment. This realization began to bear fruits on the very first day of the next decade, when Congress passed the National Environmental Policy Act (NEPA).¹⁰ NEPA was the first of a number of major framework statutes that were passed or significantly bolstered in the 1970s including the Clean Water Act (CWA),¹¹ the Clean Air Act (CAA),¹² the Resource Conservation and Recovery Act (RCRA),¹³ and the Toxic Substances Control Act (TSCA).¹⁴ In December 1980, Congress also passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁵ To wield these newly forged tools of environmental protection, President Richard Nixon created the aptly named Environmental Protection Agency (EPA) in 1970.¹⁶ Since then, the United States has largely left its environmental defense to the EPA, which has fulfilled that task by enforcing those framework statutes.

However, the 1970s also witnessed the inception of a different strategy for environmental protection: legal personhood for natural objects. The notion was first widely considered after an article by Christopher Stone asked, "Should Trees Have Standing?" in 1972.¹⁷ That same year,

9. RACHEL CARSON, *SILENT SPRING* (Houghton Mifflin Co., 1962).

10. National Environmental Policy Act, 42 U.S.C.A. § 4321 (West).

11. 33 U.S.C.A. § 1251 (West).

12. 42 U.S.C.A. § 7401 (West).

13. 42 U.S.C.A. § 6972 (West).

14. 15 U.S.C.A. § 2601 (West).

15. 42 U.S.C.A. § 9601 (West).

16. Stacy J. Silveira, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENV'T AFFS. L. REV. 497, 508 (2004).

17. Christopher D. Stone, *Should Trees Have Standing? Toward Legal*

Justice William O. Douglas, in his dissenting opinion in *Sierra Club v. Morton*, echoed Stone's beliefs that natural objects could have recognizable rights.¹⁸ Stone and Justice Douglas both asserted that if ships and corporations could be recognized as legal entities with rights so too could trees and rivers.¹⁹

The world is changing; the law must change with it. The way it ought to change, this Comment suggests, is to recognize the legal personhood of natural objects like rivers, forests, and similar ecosystems. That legal personhood would be made actionable through a sort of guardianship system. Under this system, recognized organizations would be able to litigate on behalf of natural entities. These organizations would include groups like the National Resource Defense Council (NRDC), the Environmental Defense Fund (EDF), and the Sierra Club, as well as Native American tribes.

This Comment will demonstrate the need for a shift in our nation's thinking about environmental protection and how to meet that need. Part I briefly defines the concept of legal personhood for natural objects in the United States as it originated in Stone's article. Part II asserts that legal personhood for natural objects is not nearly as outlandish a proposition as it seems. This is accomplished by looking at national trends towards recognizing such rights and examining international instances where legal rights for natural objects have already been recognized. Part III argues why environmental protection requires this recognition. It details the unduly burdensome procedural hurdles that plaintiffs in environmental protection actions face. It then makes clear that the suggested guardians, given the ability to litigate on behalf of natural objects, would materially strengthen environmental protection. Part III also

Rights for Natural Objects, 45 S. CAL. L. REV. 450, 453 (1972).

18. *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

19. Stone, *supra* note 17, at 452.

introduces a financial aspect to this argument. It demonstrates that the EPA has become severely underfunded and that creating a guardianship system would fortify environmental protections without necessitating increased federal spending. Finally, Part IV offers six different mechanisms that could be employed, from the federal to local levels, that could achieve recognition of rights for natural objects. These solutions draw on lessons learned from both successes abroad and failures of past attempts at recognition of these rights in the U.S.

I. THE ORIGINS OF LEGAL PERSONHOOD FOR NATURAL
OBJECTS IN THE UNITED STATES

Although Christopher Stone's 1972 article is credited for introducing the concept of legal rights for natural objects, Stone traces the origin back slightly further to 1970.²⁰ There, Justice Hugo Black's dissenting opinion in *San Antonio Conservation Society v. Texas Highway Department*, planted the seedlings that grew into the movement that Stone cultivated. In *San Antonio Conservation Society*, the group sought to prevent the construction of a federal highway through a city park.²¹ The group's argument was defeated on summary judgement and the Supreme Court then denied their petition for certiorari.²² Writing in dissent against this dismissal, Justice Black espoused a novel theory about what warranted legal protection. He lamented, "the birds and animals that make their home in the park will share their quiet retreat with an ugly, smelly stream of traffic pouring down a super six-lane 'North Expressway.'"²³ Justice Black continued: "[t]rees, shrubs, and flowers will be mown down. The cars will spew forth air and noise pollution

20. See Stone, *supra* note 17, at 501.

21. 446 F.2d 1013 (5th Cir. 1971).

22. *San Antonio Conservation Soc'y v. Tex. Highway Dep't*, cert. denied 400 U.S. 968 (1970).

23. *Id.* at 969 (Black, J. dissenting).

contaminating those acres not buried under concrete.”²⁴ Seemingly for the first time, a United States Supreme Court Justice was giving voice to the voiceless natural objects destroyed or displaced by federal programs. Justice Black certainly did not state that these natural objects had inviolable rights infringed upon by this project, but he recognized that the impact upon the natural objects mattered. This was a sizable step in the direction of recognizing that perhaps natural objects did have rights.

Stone’s article followed this up by directly arguing that natural objects should have rights and that this was not so farfetched as it seemed. He argued that natural objects remaining rightless was not a foregone conclusion: if history was to be a guide, it seemed unwise to bet against it.²⁵ He argued, “[t]hroughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable.”²⁶ Extending legal personhood to certain groups of people had once been “unthinkable,” but it had also been extended to ships, corporations, and municipalities.²⁷ As Laurence Tribe later asserted, there is nothing inherently logical about the recognition of legal personhood for corporations.²⁸ Tribe stated that the only factor that makes legal personhood for natural objects seem illogical compared to legal personhood for corporations is that we already have grown accustomed to the latter while the former is a relatively new concept.²⁹

24. *Id.*

25. Stone, *supra* note 17, at 453.

26. *Id.* at 453–54 (Stone used the historical examples of the opposition to granting legal rights to women, Black Americans, and children to point out that legal history is filled with seemingly “surprising” extensions of legal rights.).

27. *Id.* at 452.

28. Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1342–43 (1974).

29. *Id.* at 1343.

Stone explored beyond the truism that natural objects are rightless, pressing further to reveal three defining features of this rightlessness. First, natural objects lack standing to show an invasion of their own rights.³⁰ For instance, when a company pollutes a river, only those individuals whose property interests are affected downstream can bring a suit to prevent this pollution or seek damages.³¹ This has two negative consequences: (1) the property owner may not care about the pollution and do nothing about it; or (2) each property owner may suffer so little themselves individually they don't bother to bring legal action, even though the aggregate damage to the river is great.³² Second, injury that natural objects suffer are frequently left out of the calculus when weighing competing interests.³³ This weighing by the courts typically balances the economic interest of the polluting party against another's interest in enjoyment of their private property.³⁴ Rarely is harm to natural objects taken into account, and virtually never does it outweigh economic interests.³⁵ Thus, significant environmental harms have been ignored because the economic interest of one human party outweighed the private enjoyment interest of another human party.³⁶ Third, natural objects are not the beneficiaries of settlements in suits that concern their own pollution or destruction.³⁷ Instead, humans who were affected by the injury to the

30. Stone, *supra* note 17, at 459.

31. *Id.* at 459.

32. *Id.* at 459–60.

33. *Id.* at 461.

34. *Id.* at 460–61.

35. *Id.*

36. See *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658 (Tenn. 1904) (allowing smelting company to denude a scenic, forested valley because the company's annual profits vastly outweighed the economic value of the local subsistence farmers).

37. Stone, *supra* note 17, at 461.

natural object are the ones that benefit from settlements and damages awards.³⁸ Thus, in many cases, despite the despoiling of a natural object being the reason for an award for damages, there is nothing done to make that natural object whole.³⁹ In a cruel twist, showing significant harm to the natural object yields no relief for the natural object itself.

Stone proposed remedying this by creating a guardianship system for natural objects. Under this system “friends” of the environment like the NRDC, EDF, and Sierra Club would act as legal guardians of natural objects to protect their interests.⁴⁰ This system would operate similarly to that of a guardian of a child or a corporation deemed incompetent and given a trustee.⁴¹ In neither of these cases can the individual or entity speak rationally about its desires, yet their lawyers give them voice. Stone asserted that the very same could be done for forests and rivers.⁴²

From an administrative standpoint, the appointment of established groups as guardians of natural objects also has another desirable feature: it would prevent a flood of frivolous lawsuits. This fear was voiced by the court in *Alameda Conservation Association v. California*.⁴³ In dismissing the group’s attempt to bar certain land exchanges, the court wrote:

[T]hey may not by uniting create for themselves a super-administrative agency . . . over-seeing and . . . challenging the action of the appointed and elected officials of the state government . . . otherwise the various clubs, political, economic and social now or yet to be organized, could wreak havoc with the administration

38. *Id.*

39. *Id.* at 461–62.

40. *Id.* at 466.

41. *Id.* at 464–65.

42. *Id.* at 464.

43. 437 F.2d 1087, 1090 (9th Cir. 1971).

of government.⁴⁴

In short, the court feared that giving standing to non-governmental organizations would release a deluge of lawsuits initiated by ad hoc groups organized for the sole purpose of initiating those suits. The guardianship approach would quiet this fear. It would also ensure that the first of the three features of natural objects' rightlessness was met: guardians would be able to litigate to protect against invasion of their rights.

The guardianship approach would also remedy the third feature of natural objects' current rightlessness by helping to ensure that the natural objects injured by environmental harm would be the beneficiaries of an award for damages.⁴⁵ This would help to ensure that the award money would actually go towards trying to make the natural object as close to whole as possible.⁴⁶ Stone asserted that this method would be more favorable than attempting to enjoin all pollution of natural objects because it is actually realistic. It presents a workable compromise between man and nature instead of a fanciful ideal.⁴⁷

Finally, Stone anticipated and answered the question most likely to be posed in response to this suggestion: "What's in it for us?" First, Stone pointed out the "anthropocentric hedonis[m]" of even asking such a question.⁴⁸ The necessity of humans to seek some reward for helping any other species is an embodiment of the very rationale that Stone sought to pare back. He then answered:

[L]et me stress that the strongest case can be made from the perspective of human advantage for conferring rights on the environment. Scientists have been warning of the crises the earth

44. *Id.*

45. Stone, *supra* note 17, at 480.

46. *Id.*

47. *Id.* at 480–81.

48. *Id.* at 491.

and all hu-mans on it face if we do not change our ways—radically—and these crises make the lost “recreational use” of rivers seem absolutely trivial. The earth’s very atmosphere is threatened with frightening possibilities: absorption of sunlight, upon which the entire life cycle depends, may be diminished; the oceans may warm (increasing the “greenhouse effect” of the atmosphere), melting the polar ice caps, and destroying our great coastal cities; the portion of the atmosphere that shields us from dangerous radiation may be destroyed.⁴⁹

Fifty years after he wrote these words, his prescience has certainly become apparent.⁵⁰ This Comment urges recognition of legal rights for natural objects for the very same reasons that Stone initially did.

II. SHIFTING TIDES: THE RISING RECOGNITION OF RIGHTS FOR NATURAL OBJECTS

Although mankind has, for the most part, collectively failed to heed Stone’s prophetic 1972-warning, mounting evidence shows that recognition of legal rights for natural objects is increasing both in the United States and abroad. While these instances are still uncommon, their existence alone is remarkable, and they demonstrate that a path forward is possible.

A. *International Recognition of Rights for Natural Objects*

While American jurisprudence is generally not affected by legal developments abroad, in this case it bears examining the mechanics and impact of recognition of legal rights for natural objects in other countries. The extension of rights to nonhumans is still viewed by many in the United States as

49. *Id.* at 492.

50. Seth Borenstein, *Greenland’s Melting ‘Zombie Ice’ Will Raise Global Sea Levels by 10 Inches, Scientists Warn*, TIME (Aug. 29, 2022, 4:05 PM EDT), <https://time.com/6209385/greenland-melting-ice-sea-level-rise/>. See generally IPCC Report 2022, *supra* note 8.

absurd despite strong arguments to the contrary.⁵¹ Although historical examples of extending legal rights to the thitherto rightless in the United States exist, contemporary examples of extending legal rights to natural objects elsewhere is necessary.

In 2008, Ecuador became the first nation to guarantee the rights of the environment in its national constitution.⁵² It established both the rights of nature itself as well as the rights of humans to benefit from a healthy environment.⁵³ The Ecuadorian Constitution recognizes the rights of “Pachamama”: Mother Earth.⁵⁴ More meaningfully, the high court in Ecuador has given this recognition legal teeth. In a recent ruling, the Constitutional Court found that mining in a protected region of rainforest violated the constitutional right of nature and ordered the mining permits revoked.⁵⁵ The decision was a major victory in the campaign for natural rights around the world.

The rights of nature have been recognized on a smaller scale elsewhere. In 2017, the Whanganui River in New Zealand became one of the first rivers⁵⁶ in the world to receive legal personhood.⁵⁷ The grant came just one year

51. Stone, *supra* note 17, at 453–57; *Sierra Club v. Morton*, 405 U.S. 727, 742–743 (1972).

52. Katie Surma, *Ecuador’s High Court Affirms Constitutional Protections for the Rights of Nature in a Landmark Decision*, INSIDE CLIMATE NEWS (Dec. 3, 2021), <https://insideclimatenews.org/news/03122021/ecuador-rights-of-nature/>.

53. CONSTITUCIÓN DEL ECUADOR ch. 7, arts. 71–74.

54. Surma, *supra* note 52.

55. *Id.*

56. Philipp Wesche, *Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision*, 33 ENV’T L. J. 531, 533 (2021) (discussing the Atrato River, the first river to receive legal personhood).

57. Jeremy Lurgio, *Saving the Whanganui: Can Personhood Rescue a River?*, THE GUARDIAN (Nov. 29, 2019, 14:00 EST), <https://www.theguardian.com/world/2019/nov/30/saving-the-whanganui->

after New Zealand had similarly recognized the legal personhood of Te Urewera National Park.⁵⁸ This recognition of rights was accomplished in the passage of the Te Awa Tupua Act by the New Zealand Parliament.⁵⁹ The Act asserted, “Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.”⁶⁰ These rights were entrusted to the guardianship of Te Pou Tupua.⁶¹ Te Pou Tupua is an office established by the Act, “to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua.”⁶² The Act is a significant shift in thinking about how to value natural objects. A Senior Fellow at the University of Melbourne Law School observed, “[t]he act shifts us away from this resource construction where we ask, ‘what do we want from the river?’ and into a space where we can say, ‘what do we want for the river and how do we get there with the river?’”⁶³

This recognition of legal rights for the Whanganui inspired similar grants in the region: India granted legal rights to the Ganges and Yamuna Rivers in 2017, and Bangladesh granted all of its rivers legal personhood in 2019.⁶⁴

In South America, legal personhood has also been recognized for animals in zoos on multiple occasions. In 2016, Cecilia the Chimpanzee was freed from the Mendoza Zoo in

can-personhood-rescue-a-river.

58. See Bryant Rousseau, *In New Zealand, Lands and Rivers Can Be People (Legally Speaking)*, N.Y. TIMES (July 13, 2016), <https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html>.

59. Lurgio, *supra* note 57.

60. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, pt 2 cl 14(1) (N.Z.).

61. *Id.* at pt 2 cl 14(2).

62. *Id.* at pt 2 cl 18(2).

63. Lurgio, *supra* note 57.

64. *Id.*

Argentina in a habeas corpus proceeding after a judge recognized that the chimpanzee had “inherent rights.”⁶⁵ In so ruling, the judge pointed to the constitutional right to the environment of all citizens of Argentina.⁶⁶ The court did not presume to extend these rights to all natural objects. Instead, the opinion noted “[i]t is undeniable that great apes, including chimpanzees, are sentient beings, and therefore, they are non-human persons subject to rights.”⁶⁷ In 2017, a similar proceeding began in Colombia to free Chucho the Andean Bear from captivity in the Barranquilla Zoo.⁶⁸ There, the petitioner sought to free Chucho also using a writ of habeas corpus.⁶⁹ Initially, the writ was denied to Chucho by a lower court.⁷⁰ However, a superior court later reversed this decision.⁷¹ There, the court stressed Chucho’s sentience and his membership in an endangered species as reasons to recognize his legal rights.⁷² The court reasoned that being a member of an endangered species already conferred legal protection upon the bear, so to recognize Chucho as bearing rights was not so far-fetched.⁷³ However, this decision was later overturned itself by the Supreme Court in Colombia

65. Lauren Choplin, *Chimpanzee Recognized as Legal Person*, NONHUMAN RIGHTS BLOG (Dec. 5, 2016), <https://www.nonhumanrights.org/blog/cecilia-chimpanzee-legal-person/>.

66. MICH. ST. UNIV. ANIMAL LEGAL & HIST. CTR., *Acción de hábeas corpus presentada por la Asociación de Funcionarios y Abogados por los Derechos de los Animales (AFADA)*, <https://www.animallaw.info/case/afada-habeas-corporus-cecilia> (last visited Jan. 15, 2021).

67. *Id.*

68. Macarena Montes Franceschini, *Legal Personhood: The Case of Chucho the Andean Bear*, J. ANIMAL ETHICS, Spring 2021, at 36, 37.

69. *Id.*

70. *Id.*

71. *Id.* at 38.

72. *Id.*

73. *Id.*

based on a violation of the Barranquilla Zoo's rights.⁷⁴ Despite this setback, the recognition of Chucho's legal rights by the intermediate court marked a significant step towards legal personhood for natural objects.

B. *Toward Legal Rights for Natural Objects in the United States*

Now, perhaps more than at any time since the 1970s, American public pressure to protect the environment is at its zenith.⁷⁵ The tremendous outpouring of concern over the environment in that decade triggered not only the passage of numerous environmental statutes but also efforts to add an environmental amendment to the Constitution.⁷⁶ In 1968, and again in 1970, senators attempted to introduce amendments to the Constitution that would recognize Americans' right to a free and healthful environment.⁷⁷ One of those senators, Dean Ottinger, expressed that he was trying to respond to the strength of the environmental movement. He wanted to take bold actions that showed the American people that the government recognized the importance of a healthy environment.⁷⁸

Although federal legislative efforts have failed to pass an amendment guaranteeing a healthy environment, at the state level there has been more success. In 2021, voters in New York, by a margin of 70.12% to 29.88%, voted to add an environmental amendment to the state constitution.⁷⁹ The

74. *Id.* at 40–43.

75. *See supra* note 7.

76. *See* Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENV'T L.J. 107, 120–21, 130–31 (1997).

77. *Id.* at 120–21.

78. *Id.* at 122.

79. BALLOTPEDIA, *New York Proposal 2, Environmental Rights Amendment* (2021), https://ballotpedia.org/New_York_Proposal_2_Environmental_Rights_A

amendment simply reads, “[e]ach person shall have a right to clean air and water, and a healthful environment.”⁸⁰ Although a mere fifteen words, the amendment expresses the growing concern over the environment throughout the country. New York joined Hawaii,⁸¹ Illinois,⁸² Massachusetts,⁸³ Montana,⁸⁴ Pennsylvania,⁸⁵ and Rhode Island⁸⁶ in passing an environmental rights amendment.

In the judicial realm, at least one federal district court expressed its belief that a right to a healthy environment is actionable.⁸⁷ In *Juliana v. United States*, the plaintiffs, a group of teenagers, sought injunctive relief against the United States government for its role in perpetuating climate change.⁸⁸ The plaintiffs brought their claim as a violation of their constitutional due process rights,⁸⁹ attempting to make use of the standard recently heralded by *Obergefell v. Hodges*.⁹⁰ Applying the test prescribed in

mentment_(2021) (last visited Jan. 15, 2022).

80. N.Y. CONST. art. I, § 19.

81. HAW. CONST. art. XI, § 9; *In re Maui Elec. Co.*, 408 P.3d 1, 5 (Haw. 2017).

82. ILL. CONST. art. XI §§ 1–2.

83. MASS. CONST. art. XCVII.

84. MONT. CONST. art. IX, § 1.

85. PA. CONST. art. 1, § 27.

86. R.I. CONST. art. 1, § 17.

87. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

88. *Id.* at 1233.

89. *Id.* at 1248.

90. 576 U.S. 644, 663–64 (2015) (The “identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. . . . [I]t requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. . . . The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted

Obergefell, the court found that “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”⁹¹ Concluding, the court pointedly wrote, “[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.”⁹²

The growing recognition that the right to a healthy environment may be enforceable is a step in the right direction; coupling that recognition with legal rights for natural objects would make the court’s task of actually enforcing it far more straightforward. Recognition of a right to a healthy environment by itself would still leave environmental plaintiffs susceptible to a number of procedural hurdles discussed in Part III. Recognizing rights for natural objects would give this identified right to a healthy environment the legal teeth that it has lacked in the United States.⁹³

Concern for the environment has already created inroads towards the recognition of legal rights for natural objects. In 2019, voters in Toledo approved a controversial measure by a margin of 61% to 39%: the Lake Erie Bill of Rights.⁹⁴ The

to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”).

91. *Juliana*, 217 F. Supp. 3d at 1250.

92. *Id.* at 1262.

93. *But see* John C. Dernbach et al., *Recognition on Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 70 RUTGERS UNIV. L. REV. 803, 804–05 (2018) (explaining that after nearly 40 years of viewing Pennsylvania’s state constitutional right to a healthy environment as essentially non-actionable, the state supreme court reversed its stance and recognized the text of that amendment as self-executing and binding upon the state government.).

94. Daniel McGraw, *Ohio City Votes to Give Lake Erie Personhood Status Over Algae Blooms*, THE GUARDIAN (Feb. 28, 2019, 5:00 EST), <https://www.theguardian.com/us-news/2019/feb/28/toledo-lake-erie->

law allowed the citizens of Toledo to act as the legal guardians of the lake. It also created provisions for action against polluters and authorized the use of damages to clean up pollution.⁹⁵ In this way, it attempted to correct the third of the features that Stone identified in natural objects rightlessness.⁹⁶ The law was the first of its kind in the United States, and its scale was far greater than anything passed in the world.⁹⁷ However, it was challenged almost immediately by farmers concerned about the difficulties of avoiding pollution via runoff.⁹⁸ A district court struck the law down in February 2020.⁹⁹ The judge stated that the law was unconstitutionally vague, and a dramatic overreach of the municipal authority of the Toledo city government.¹⁰⁰ Yet in striking the law down, the judge did state, “[w]ith careful drafting, Toledo probably could enact valid legislation to reduce water pollution.”¹⁰¹ The Lake Erie Bill of Rights itself was fatally flawed; it was intrinsically hindered by the extent of Toledo’s municipal authority. The movement for recognizing legal rights for natural objects was itself not mortally wounded by the decision in *Drewes Farms Partnership*.

In 2017, an environmental group in Colorado sought to protect the Colorado River by recognizing its legal

personhood-status-bill-of-rights-algae-bloom.

95. *Id.*

96. Stone, *supra* note 17, at 458.

97. McGraw, *supra* note 95.

98. *Id.*

99. Nicole Pallotta, *Federal Judge Strikes Down ‘Lake Erie Bill of Rights’*, ANIMAL LEGAL DEF. FUND (May 4, 2020), <https://aldf.org/article/federal-judge-strikes-down-lake-erie-bill-of-rights/#:~:text=On%20February%2027%2C%202020%2C%20a,election%20on%20February%2026%2C%202019.>

100. *Drewes Farms P’ship v. City of Toledo*, 441 F. Supp. 3d 551, 558 (N.D. Ohio 2020).

101. *Id.* at 557.

personhood.¹⁰² The group was particularly concerned over the 2015 Gold Kings Mine release of heavy metals into the river system.¹⁰³ Deep Green Resistance brought suit as a “next friend” for the Colorado River Ecosystem.¹⁰⁴ In their complaint the group lamented how environmental law in the United States has largely failed to stop environmental degradation or climate change.¹⁰⁵ As an alternative to this continued deterioration, the group stated:

Faced with similar threats to important ecosystems, courts and legislatures around the globe have begun to create a new kind of environmental law, one which recognizes that ecosystems themselves possess certain rights, and which allows communities to sue on their behalf for damages caused to the ecosystem. By recognizing standing on behalf of the ecosystem itself, injuries caused to the ecosystem are directly recoverable, rather than being dependent solely on harms caused to the users of those ecosystems.¹⁰⁶

The group urged the court to find that the Colorado River Ecosystem had rights to “exist, flourish, regenerate, and naturally evolve.”¹⁰⁷ However, the plaintiffs voluntarily dismissed their complaint shortly after filing.¹⁰⁸ The group’s claim likely would have been dismissed for lack of standing, but even if it had not, it still likely would have failed for the

102. See Michael Nordskog, *Green Suit Seeks Colorado River Personhood Declaration: Colorado River Ecosystem v. Colorado*, 38 WESTLAW J. ENV'T L. 11 (2017).

103. *Id.* at 3; U.S. ENV'T PROT. AGENCY, *Emergency Response to August 2015 Release from Gold King Mine*, <https://www.epa.gov/goldkingmine> (last visited Apr. 8, 2022).

104. Complaint for Declaratory Relief at 7, *Colorado River Ecosystem v. Colorado*, No. 17-cv-02316. (D. Colo. 2017) 2017 WL 4284548.

105. *Id.* at 2.

106. *Id.*

107. *Id.* at 2–3.

108. See Michael Nordskog, *Next Friend Plaintiffs Drop Suit Seeking Colorado River Personhood: Colorado River Ecosystem v. Colorado*, 38 WESTLAW J. ENV'T 11 (2017).

vagueness of the asserted rights.

In 2018, the White Earth Band of Ojibwe recognized legal personhood for Manoomin, a type of wild rice.¹⁰⁹ Granting these rights to Manoomin was the first time that any tribal body had conferred legal rights upon a natural object in the United States.¹¹⁰ In August 2021, the White Earth Band sued to enjoin the construction of the Line 3 Pipeline in Minnesota naming an unlikely lead plaintiff: Manoomin.¹¹¹ The complaint alleged that the Minnesota Department of Natural Resources was infringing upon Manoomin's right to exist by allowing the oil company to pump up to 5 billion gallons of surface water and groundwater for construction purposes amidst a drought.¹¹² Not only would a victory in this case prevent significant environmental harm caused by the oil pipeline, but it would also signal a watershed moment for the recognition of legal rights for natural objects.

Further inroads towards rights for natural objects continue to be explored through rights for animals, despite recent setbacks. This past year, the New York Court of Appeals in a 5-2 vote refused to recognize rights for Happy, an Asian Elephant.¹¹³ The Nonhuman Rights Project had initiated a habeas corpus proceeding on behalf of Happy, an elephant confined in the Brooklyn Zoo.¹¹⁴ Writs of habeas

109. Jessica Douglas, *Wild Rice Sues to Stop Oil Pipeline*, HIGH COUNTRY NEWS (Sept. 2, 2021), <https://www.hcn.org/articles/latest-justice-wild-rice-sues-to-stop-oil-pipeline>.

110. *Id.*

111. *Id.*

112. *Id.*

113. Nonhuman Rts. Project v. Breheny, No. 52, 2022 WL 2122141 (N.Y. June 14, 2022).

114. Joshua Jowitt, *Happy the Elephant Was Denied Rights Designed for Humans –But the Legal Definition of ‘Person’ Is Still Evolving*, CONVERSATION (Jan. 6, 2021, 9:17 am EST), <https://theconversation.com/happy-the-elephant-was-denied-rights->

corpus were similarly used in the South American cases of Chucho the Bear and Cecilia the Chimpanzee.¹¹⁵ The New York Court of Appeals agreed to hear the case, marking the first time in American legal history that a court heard arguments on the legal personhood of animals.¹¹⁶ The Nonhuman Rights Project used the fact that Happy proved her self-awareness by passing a mirror test in 2005, a common test used to gauge an animal's ability to recognize itself, as evidence that she deserved legal rights.¹¹⁷ The recognition that animals are far more psychologically complex than previously thought has already motivated some states to change their divorce laws to account for the emotional well-being of pets when their owners separate.¹¹⁸ Unfortunately, these arguments fell short in this instance. The Nonhuman Rights Project has another case underway in California, and is planning similar cases in other states.¹¹⁹

The current era represents a unique opportunity for the environmental movement in the United States. Evidence, both foreign and domestic, demonstrates the growing trend towards recognizing the rights of nature.¹²⁰ Rights of nature

designed-for-humans-but-the-legal-definition-of-person-is-still-evolving-152410.

115. Francheschini, *supra* note 68, at 37; Choplin, *supra* note 65.

116. Melissa Chan, *In a Legal First, a Court Will Decide if an Elephant Deserves the Same Rights as a Person*, TIME (Oct. 21, 2021, 7:00 AM EDT), <https://time.com/6107549/happy-elephant-lawsuit-bronx-zoo/>.

117. *Id.*

118. See ALASKA STAT. ANN. § 25.24.160(a)(5) (West 2017); CAL. FAM. CODE § 2605 (West 2019); 750 ILL. COMP. STAT. ANN. 5/503(n) (West 2019).

119. Associated Press, *Happy the elephant is not a person, a court rules*, NPR (June 14, 2022, 4:26 PM ET), <https://www.npr.org/2022/06/14/1105031075/bronx-zoo-elephant-not-person-court-rules>.

120. See INTERNATIONAL RIVERS, ET. AL, RIGHTS OF RIVERS: A GLOBAL SURVEY OF THE RAPIDLY DEVELOPING RIGHTS OF NATURE JURISPRUDENCE RELATING TO RIVERS 6 (2020), <https://www.internationalrivers.org/resources/reports-and-publications/rights-of-river-report/>.

have been enshrined in state and national constitutions; natural objects have been recognized as legal entities; animals have been increasingly recognized as complex creatures whose emotional well-being has legal significance. This wave of recognition comes at a time when climate change is becoming increasingly apparent.¹²¹ The United States has a very real opportunity to position itself as a leader among developed nations in regards to environmental law.

III. THE CONTINUED NEED AND RATIONALE FOR GUARDIANSHIP OF NATURAL OBJECTS IN AN ERA OF ENVIRONMENTAL REGULATORY LAW

Christopher Stone first suggested that natural objects should be accorded legal rights in 1972, but that approach is nonetheless still needed. At that time, the EPA was still in its infancy. Many of the framework statutes that govern environmental law today had not been passed or augmented to their present stature. On the other hand, he wrote his piece fifteen years before *International Paper Company v. Ouellette*, wherein the Supreme Court essentially ended federal environmental common law.¹²² The environmental law landscape that Stone wrote in was quite different than the one present today. Despite that, his guardianship approach is still workable today.

This approach is desirable for three primary reasons explored below. First, it ensures that environmental suits are able to be actually litigated. Shifting the focus from injuries suffered by people to injuries suffered by natural objects negates the issue of specific causation that has plagued environmental law for years. Second, appointing recognized, well-established nongovernmental organizations as well as Native American tribes as guardians for natural

121. IPCC REPORT 2022, *supra* note 8, at vii.

122. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 481–82 (1987).

objects increases the overall workforce available to protect the environment. This sort of controlled expansion also ensures that courts are not flooded by frivolous lawsuits initiated by private citizens. Third, recognizing legal rights for natural objects helps the EPA meet its stated goals¹²³ while incurring no further cost to the federal government. In an era of partisan gridlock over budgetary concerns, this outcome would be particularly beneficial.¹²⁴

A. *Removing Procedural Hurdles for Environmental Suits Through Focusing on Harm to Natural Objects*

Due to their complex nature, environmental lawsuits have been particularly affected by a number of rulings regarding procedure. Environmental lawsuits based on toxic torts often focus on proving a given harm to an individual was caused by environmental damage perpetrated by some actor. Proving this A→B→C chain of causation is made more difficult by the specificity requirements of certain procedural standards. For instance, different chemicals cause different types of cancer. In some circumstances, individuals have been exposed to various chemicals that cause the same types of cancer, or that have unknown synergistic effects.¹²⁵ For instance, an individual suffering from liver cancer may have

123. U.S. ENV'T PROT. AGENCY, *Our Mission and What We Do*, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (June 13, 2022).

124. See, e.g., Amara Omeokwe, *Manchin Rejected Biden Bill Over Inflation, Debt Concerns. How Founded Are Those Worries?*, WALL ST. J. (Dec. 20, 2021, 10:15 am ET), <https://www.wsj.com/articles/manchin-rejected-biden-bill-over-inflation-debt-concerns-how-founded-are-those-worries-11639958265>.

125. See, e.g., N.Y. DEP'T HEALTH, LOVE CANAL: A SPECIAL REPORT TO THE GOVERNOR & LEGISLATURE: APRIL 1981 (1981), https://www.health.ny.gov/environmental/investigations/love_canal/lcreport.htm#:~:text=Laboratory%20analyses%20of%20soil%20and,have%20been%20identified%20to%20date (demonstrating that over 200 chemicals had been found at the Love Canal Site).

been exposed to seven different chemicals, three of which, chemicals X, Y, and Z, are known to cause liver cancer. Specific causation, discussed further below, would require a showing that X caused the liver cancer, not Y or Z. Thus, it can often be nearly impossible to prove that a given chemical caused, and was not merely correlated with, some adverse health effect.¹²⁶ These issues have been exacerbated by rulings in *Lone Pine v. Lore*,¹²⁷ *Bell Atlantic Corporation v. Twombly*,¹²⁸ and *Ashcroft v. Iqbal*.¹²⁹ Granting legal rights to natural objects would greatly alleviate this issue by allowing entities to focus on the harm to the natural objects themselves.

The Supreme Court decisions in *Twombly* and *Iqbal* transformed the pleading standard in federal courts, forcing plaintiffs' complaints to meet a significantly higher threshold. Together, these decisions created a "plausibility-plus" standard,¹³⁰ casting aside the previous "no set of facts" guidance from *Conley v. Gibson*.¹³¹ Following *Iqbal*, judges

126. Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2268–69 (2015); Clifford Fisher, *The Role of Causation in Science as Law and Proposed Changes in the Current Common Law Toxic Tort System*, 9 BUFF. ENV'T L.J. 35, 60–61 (2001) ("One of the major weaknesses in environmental law today is the power of tort law. In order to prove that a risk-creator, be it a company or government entity, was negligent in disposing of, using, or testing a chemical product, a victim must prove a direct causal link. The cause of the victim's illness must be directly related to the product and not be affected by any other outside force. In a world that is full of so many outside influences, an argument can be made that it becomes next to impossible to prove this direct causality in environmental law.").

127. No. L-33606-85, 1986 WL 637507, at *1 (N.J. Super. Ct. Law Div., Nov. 18, 1986).

128. 550 U.S. 544 (2007).

129. 556 U.S. 662 (2009).

130. *Id.* at 678–79.

131. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim.").

consider pleadings under a two-step process: they must (1) distinguish factual from legal conclusions, only accepting factual conclusions as true; and (2) based upon these factual allegations and their own “judicial experience and common sense” determine whether a plausible claim remains.¹³²

This new standard has had a disproportionate effect on certain types of lawsuits including environmental claims. Soon after this decision, the plaintiff’s bar, supported by environmental protection groups, asserted that this new standard acts as a powerful gatekeeping mechanism.¹³³ Critically, this “undermine[s] various state and national policies, and increase[s] the burden on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths in cases in which critical information is largely in the hands of defendants and is unobtainable without access to discovery.”¹³⁴ Attorneys who work in environmental law on the defense side have recognized that the most effective and efficient response to most environmental claims is now a simple motion to dismiss.¹³⁵ Even when citizens have attempted to bring suits under federal framework statutes like CERCLA, the transsubstantive nature of pleading standards has helped ensure curt dismissal of such claims.¹³⁶ Granting legal rights

132. *Iqbal*, 556 U.S. at 678–79.

133. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 16 (2010).

134. *Id.*

135. Kevin T. Haroff, *Open or Shut?—Pleading Federal Environmental Claims After Twombly and Iqbal*, ENV’T LITIG. & TOXIC TORTS COMM. NEWSL., July 2012, at 3, 6.

136. AM. BAR ASS’N, *Pleading Standards in Environmental Cases Following the Supreme Court’s Decisions in Twombly and Iqbal*, (Nov. 1, 2012) (citing *Chubb Custom Ins. v. Space Sys./Loral, Inc.*, No. C 09-4485, 2010 U.S. Dist. LEXIS 15624, at 11–12 (N.D. Cal. 2010)), https://www.americanbar.org/groups/environment_energ_y_resources/publications/trends/2012_13/november_december/pleading_standards_environmental_cases_following_supreme_courts_decisions_t

to natural objects would help protect some of these suits from brisk dismissal by allowing plaintiffs to instead prove damage to those objects. By shortening the chain of causation, fewer facts have to be proven, and thus the overall target for defendants' motions to dismiss is reduced.

An environmental lawsuit that makes it past the initial gatekeeping mechanisms of *Twombly* and *Iqbal* still faces the onerous possibility of confronting a *Lone Pine* order. *Lone Pine* orders originated as a case-management device that has since seen widespread use by defendants in environmental cases.¹³⁷ The order forces the plaintiff to make a tripartite showing: (1) the identity of a chemical or substance causing the injury; (2) the specific injury caused by that substance; and (3) a causal link between the substance and the injury that must be demonstrated through an expert affidavit or expert report.¹³⁸ Failure to submit this information by a court-mandated deadline, or submitting insufficient information can result in dismissal with prejudice.¹³⁹ Many courts that use *Lone Pine* orders enter them pre-discovery, forcing plaintiffs to produce expert statements of causation before any discovery may occur.¹⁴⁰ Demanding this specific

wombly_and_iqbal/.

137. David B. Weinstein & Christopher Torres, *Managing the Complex: A Brief Survey of Lone Pine Orders*, 34 WESTLAW J. ENV'T 1, 1 (2013) (demonstrating that in a survey of 83 cases in which *Lone Pine* orders were sought 66 of them were environmental cases.), [https://www.westlaw.com/Document/Icc5920940ae811e38578f7cc38dcbee/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Icc5920940ae811e38578f7cc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

138. John T. Burnett, Comment, *Lone Pine Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation*, 14 J. LAND USE & ENV'T L. 53, 56 (1998); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 20 (2019).

139. Engstrom, *supra* note 138, at 20.

140. *Id.* at 40. It must be noted that while many courts do use *Lone Pine* orders as a pre-discovery case-management tool, others view the order as only being proper after discovery occurred. Some courts take this view even further, and insist that pre-discovery *Lone Pine* orders are

causation, especially at the pre-discovery stage “demand[s] an unrealistic level of certainty.”¹⁴¹ It should be no surprise that defense attorneys view these as powerful procedural tools to employ against plaintiffs.¹⁴² Granting legal rights to natural objects would strip the *Lone Pine* order of its unduly sharp needles. Proving that a contaminant specifically caused harm to a natural object is more straightforward than proving the specific causal link between a contaminant and a human’s harm. Thus, meritorious claims that may otherwise fail for lack of proof of specific causation would be freed to proceed and the underlying environmental harm more likely to be remedied.

Recognizing natural objects as legal rights holders would help ensure that public policy goals continue to be met. Although these procedural bars were viewed as being beneficial due to their resource-saving nature for defendants and courts, these bars have created an environment in which meritorious claims may be thrown out even before discovery. Citizen suits function as a “mechanism for controlling

impermissible. *Id.* at 40–41.

141. *Id.* at 47–48. (“The problem is that, to prevail under the formal law, a plaintiff must show that the defendant caused her harm by the preponderance of the evidence. However, except on those rare occasions when exposure to a toxic agent manifests as a ‘signature disease’ . . . we, as a society, lack the ability to trace a particular substance to a particular individual’s illness or injury. We are reasonably good at assessing general causation (i.e., that a defendant’s toxic agent has the capacity to cause a particular disease), though assembling relevant evidence often requires significant effort, ample time, and considerable expense. But except for signature diseases, specific causation remains stubbornly speculative—regardless of whether the matter is assessed in a generalized or specialized tribunal, even when exposure and injury are not at issue, and even when the plaintiff’s case is otherwise strong.”).

142. David B. Weinstein & Christopher Torres, *An Art of War Lesson Applied to Mass Torts: The Lone Pine Strategy*, AM. BAR ASS’N ENV’T ENF’T & CRIMES COMM. NEWSL., Aug. 2013, at 14, 24; James Beck, *Considerations for Defense Counsel in Deciding to Seek, or Not to Seek, Lone Pine Orders in Mass Tort Litigation*, 85 DEF. COUNS. J. 1, 1 (2018).

unlawfully inadequate enforcement of the law.”¹⁴³ Preserving their utility is paramount as a “necessary supplement to and check on administrative enforcement power [because they] provide a constant possibility of enforcement in the ever-changing atmosphere of legislative, judicial, and executive action.”¹⁴⁴ By allowing these suits to be brought on behalf of natural objects, the policy goals of the EPA would continue to be met. Focusing on the harms caused to natural objects would help ensure that these suits are more likely to make it to discovery. From there, these suits could actually be litigated on their merits by recognized guardians.

B. *Appointing Well-Established Natural Guardians Augments Environmental Protection*

Guardianship for natural objects has historically been stymied by unwillingness to recognize the rights of those natural objects; it is not for want of competent guardians. As Stone recognized in 1972, “the potential ‘friends’ that such a statutory scheme would require will hardly be lacking.”¹⁴⁵ He identified “The Sierra Club, Environmental Defense Fund, Friends of the Earth, Natural Resources Defense Council, and the Izaak Walton League a[s] just some of the many groups” that could serve in this role.¹⁴⁶ Numerous other such groups could also be granted this ability, alongside federally recognized native tribes. Environmental nonprofit organizations dedicated to environmental protection and resource conservation are, of course, exactly

143. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

144. Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENV'T L. 359, 396 (2004).

145. Stone, *supra* note 17, at 466.

146. *Id.*

who Stone envisioned as the guardians in this system. Adding tribal authorities to this pool of guardians would certainly ensure more robust environmental protection. It would also help the United States to continue to uphold its various treaty obligations to these tribes.¹⁴⁷

Environmental nonprofits have long demonstrated their value in helping promote the public interest in conserving natural resources. These groups stand poised to be the natural mouthpieces should natural objects be recognized as having a legal voice.¹⁴⁸ The Sierra Club for instance originally began in 1892 as a group dedicated to the conservation of the Sierra Nevada Mountains.¹⁴⁹ Many other organizations evolved with broader goals, though the effects of those goals would still have significant impact upon local communities.¹⁵⁰ Regardless of their diverse original

147. See generally *About Us*, U.S. DEPT INTERIOR, <https://www.bia.gov/bia> (last visited Mar. 6, 2022) (explaining that their goal is to “enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives.”).

148. See, e.g., *Defenders Work*, DEFS. OF WILDLIFE, <https://defenders.org/our-work> (last visited Mar. 22, 2022) (asserting a guardianship approach word for word: “When wildlife is in danger, they can’t speak up for themselves—so we speak for them.”).

149. *About the Sierra Club*, SIERRA CLUB, https://www.sierraclub.org/about-sierra-club?gclid=CjwKCAiA1JGRBhBSEiwAxXblwW41TBW4yYeG4K4y1zK9oEWmq0_a4ACrGWoL_qqSi maYsq5vmBrs5BoCa50QAvD_BwE (last visited Mar. 6, 2022); *History and Archives*, SIERRA CLUB, <https://www.sierraclub.org/library/history-archives> (last visited Mar. 6, 2022).

150. See, e.g., *About Us*, NAT. RES. DEF. COUNCIL, https://www.nrdc.org/about?gclid=CjwKCAiA1JGRBhBSEiwAxXblwWZu4P_ImTuxJYRgkugn0N75Ngnm-xn—5aLVfDwRnndHV aSe_iLkhoCyRgQAvD_BwE&gclsrc=aw.ds (last visited Mar. 6, 2022) (stating, “NRDC fights for every person’s right to clean air, clean water, and a healthy community”); *About Us*, ENV’T DEF. FUND, https://www.edf.org/about?gclid=CjwKCAiA1JGRBhBSEiwAxXblwYz3hbiRcYSZV kKwGbsJulyP1S1Kns11JpydoZYDPzn43dlvhS2phoCh S4QAvD_BwE&gclsrc=aw.ds (last visited Mar. 6, 2022) (“We began in

intentions, these groups represent a significant force for environmental protection. Given their numerosity, a guardianship system could be established whereby these currently extant groups are recognized, and rigorous standards established for entry of new groups. This would help ensure that citizen groups could not simply form for the sake of obstructing some local development project as some judges feared would happen.¹⁵¹

Critically, granting these organizations the ability to litigate on behalf of natural objects would not require giving up the quality of representation. Many of these groups have been successfully litigating on behalf of the environment for decades.¹⁵² Granting them the right to litigate as guardians of natural objects would simply add a powerful arrow to their quivers. It would help them to take on fights that they would otherwise be unable to for the previously discussed causation issues.

A cursory look at just some of the cases these groups have successfully litigated shows that their guardianship of natural objects would reap real rewards for environmental protection. In *Natural Resources Defense Council v. United States Department of Interior*, the group successfully challenged a narrower definition of “taking” within the Migratory Bird Treaty Act that would have drastically reduced safeguards for protected species and their

1967, as a scrappy group of scientists and a lawyer on Long Island, New York, fighting to save osprey from the toxic pesticide DDT. Using scientific evidence, our founders got DDT banned nationwide.”).

151. *Alameda Conservation Ass’n v. California*, 437 F.2d 1087, at 1090 (9th Cir. 1971).

152. See, e.g., *Court Battles*, NAT. RES. DEF. COUNCIL, <https://www.nrdc.org/court-battles> (last visited Jan. 16, 2022); *Victories*, EARTHJUSTICE, https://earthjustice.org/our_work/victories (last visited Jan. 16, 2022); *Legal Action*, ENV’T DEF. FUND, <https://www.edf.org/solution/legal-action> (last visited Mar. 6, 2022); *Defenders Work*, *supra*, note 148.

habitats.¹⁵³ In *Friends of the Earth v. Haaland*, the group successfully blocked the lease of 80,000,000 acres in the Gulf of Mexico for oil and gas drilling.¹⁵⁴ In *Southeast Alaska Conservation Council v. United States Forest Service*, the group successfully thwarted plans to begin logging operations and road construction on Prince of Wales Island in the pristine Tongass National Forest.¹⁵⁵ These groups have already successfully litigated in defense of natural objects for decades. Allowing them to litigate on behalf of natural objects would only increase the efficacy and scope of their environmental protective work.

Governments in New Zealand and Ecuador have followed the examples of their indigenous peoples and asserted legal personhood for natural objects; the United States should do the same.¹⁵⁶ Already the White Band of Ojibwe have made inroads towards this, and the approach should become more common.¹⁵⁷ This development is particularly important because tribal lands are especially prone to pollution caused by energy production in the United States.¹⁵⁸ Tribal lands account for about 2% of land within the U.S., but significant energy and mineral production occurs there, including 5% of domestic oil production, 8% of gas production, and 2% of coal production.¹⁵⁹

153. 478 F. Supp. 3d 469, 472 (S.D.N.Y. 2020).

154. No. 21-2317, 2022 WL 254526 (D.D.C. Jan. 27, 2022).

155. 468 F. Supp. 3d 1148, 1148 (D. Alaska 2020).

156. Surma, *supra* note 52; Lurgio, *supra* note 57.

157. Douglas, *supra* note 109.

158. Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENV'T L. 42, 50 (2014).

159. *Id.* at 49. Further, not only is tribal land currently producing a significant amount of energy resources but it projects to into the future as well. The Office of Indian Energy and Economic Development has stated, "Indian lands contain up to 5.3 billion barrels of yet undeveloped oil reserves, 25 billion cubic feet of undeveloped gas reserves, 53.7 billion tons of undeveloped coal reserves, and prime target acreage for wind, geothermal, solar, and other renewable energy resources." *Id.* at 50.

Recognizing native tribes as guardians of natural objects would better effectuate the United States government's duties to the tribes. The United States government acts as a trustee for tribal lands, where the federally recognized tribes are the beneficiary.¹⁶⁰ The government has a fiduciary duty to safeguard the rights and interests of the tribes.¹⁶¹ Recognizing them as guardians of natural objects would help effectuate this responsibility. In recent years there have been no shortage of instances where indigenous sacred sites have been defiled and their waterways polluted.¹⁶² Recognizing natural objects as legal rights holders would make it far easier for tribes to protect their land from pollution. Doing so would also help fulfill the federal government's continued obligation to these tribes as trustee.

The Supreme Court has recognized that tribes may regulate non-Indians on reservation land when one of two conditions are present.¹⁶³ First, a tribe may regulate the activities of an individual on land within a reservation when

160. ERIC T. FREYFOGLE, *WILDLIFE LAW: A PRIMER*, 160 (2nd ed., 2019).

161. *Id.* at 160–61.

162. See, e.g., Adam Crepelle, *The Reservation Water Crisis: American Indians and Third World Water Conditions*, 32 TUL. ENV'T L. J. 157, 158 (2019); Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016, 4:02 PM EDT), <https://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>; Allen Brown & Sam Richards, *Prosecutors Hit Anti-Pipeline Protestors with Felony Charges to Send a Message, Defense Says*, INTERCEPT (Jan. 8, 2022, 7:00 am), <https://theintercept.com/2022/01/08/pipeline-protesters-prosecutions-felony/>; Debra Utacia Krol, *How Legal and Cultural Barriers Keep Indigenous People from Protecting Sacred Spaces off Tribal Land*, USA TODAY (Aug. 17, 2021), <https://www.usatoday.com/in-depth/news/nation/2021/08/17/indigenous-people-legal-barriers-protect-sacred-spaces/8152992002/>.

163. Elizabeth Ann Kronk Warner, *Returning to the Tribal Enforcement "Laboratory": An Examination of Environmental Enforcement Techniques in Indian Country*, 6 MICH. J. ENV'T & ADMIN. L. 341, 351 (2017) (citing *Montana v. United States*, 450 U.S. 544, 565–66 (1981)).

that individual has entered into consensual relations with the tribe or individual members.¹⁶⁴ Second, and more critically, tribes have “inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁶⁵ Certainly, this exception is limited because it applies only to the conduct of non-Indians on fee land. However, it crucially ensures that tribes may regulate non-Indian activities when they threaten the health or welfare of the tribe—as is often the case in the environmental context. Recognizing tribal ability to litigate on behalf of natural objects in federal courts would buttress this sovereign right of tribes.

Recognizing tribes as guardians of natural objects would benefit both those tribes¹⁶⁶ and the EPA as well. Tribes have recently displayed their willingness to fight in court for the protection of natural resources on multiple occasions.¹⁶⁷

164. *Montana*, 450 U.S. at 565.

165. *Id.* at 566.

166. See Sequoia L. Butler, Note, “*I Am the River, the River is Me*”: How Environmental Personhood Can Protect Tribal Food Systems, 38 WIS. INT’L L.J. 79, 81 (2020).

167. See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps. of Eng’rs*, 255 F. Supp. 3d 101, 111 (D.D.C. 2017) (attempting to block construction of an oil pipeline that threatened to spill into a lake that provided vital services to two Native reservations); *Minn. Dep’t Nat. Res. v. White Earth Band Ojibwe*, No. 21-CV-1869, 2021 WL 4034582 (D. Minn. 2021) (asserting the tribe’s rights of Manoomin, a wild rice, as a basis for granting injunctive relief against construction of an oil pipeline); *Trout Unlimited v. Pirzadeh*, 1 F.4th 738, 743–44 (9th Cir. 2021) (challenging the EPA’s decision to withdraw a proposed action under the Clean Water Act that would have prohibited the Army Corps of Engineers to issue a mining permit that would have significantly impacted local Native communities); *Ksanka Kupaqa Xa’lcin v. U.S. Fish & Wildlife Serv.*, 534 F. Supp. 3d 1261, 1273 (D. Mont. 2021) (blocking the approval of the first phase of a copper and silver mine that would have impacted grizzly bears, bull trout, and sacred tribal lands of the Ktunaxa Nation).

Allowing them to litigate as guardians of natural objects would remove some of the barriers tribes often faced in environmental suits.¹⁶⁸ In turn, the EPA would see a significant increase in overall environmental protective capacity throughout the United States. Allowing the 574 federally recognized tribes¹⁶⁹ to litigate on behalf of natural objects would augment the EPA's abilities with significant manpower, funding, and local knowledge.

This controlled recognition of guardianship would also assuage concerns that groups would form for the sole purpose of opposing certain projects.¹⁷⁰ Instead, dependent upon how guardianship is recognized as seen in Part IV, the pool of potential guardians can be selectively tailored. Through this tailoring, courts could ensure that only groups with a longstanding interest in the rights of a given natural object are bringing claims on its behalf. This would prevent groups from forming in a hasty manner and claiming guardianship over a natural object to oppose some unwanted development in their community. It is concern about this sort of "superadministrative" power that requires guardianship be carefully implemented. Thankfully, the United States has a wealth of potential candidates for these guardianship roles.

C. Administrative Efficiency of Environmental Protection Through Guardianship

Guardianship for natural objects would increase overall environmental protection without requiring any further federal spending. This grant of power would further the EPA's own mission of ensuring that "Americans have clean

168. Most notably, issues surrounding jurisdiction over non-Indians and non-tribal members on reservation land. *See Montana*, 450 U.S. at 565–66; *Nevada v. Hicks*, 533 U.S. 553, 357–59 (2000).

169. *About Us*, *supra* note 147.

170. *See Alameda Conservation Ass'n v. California*, 437 F.2d 1087, at 1090 (9th Cir. 1971).

air, land and water”¹⁷¹ without requiring any increased work for the EPA. This is not to say that the EPA would give up its current duties and obligations. Rather, it would continue to work side by side with private actors, a trend that has become increasingly common in the United States.¹⁷² This would allow for the combined resources of the EPA and the individual environmental organizations to be more directly used for environmental protection. This would benefit the EPA, the environmental organizations, and the American population as a whole. The EPA would see its own goals more adequately met without further expenditure and exertion on its part. The environmental organizations would be freed of the procedural restraints discussed above and allowed to more freely pursue their stated goals of environmental protection. The American population would be rewarded with a cleaner, healthier environment in the present and for generations to come. This shared benefit would create no increase in federal spending.

The EPA receives an almost infinitesimally small portion of the U.S. federal budget. In the 2021 fiscal year, the

171. U.S. ENV'T PROT. AGENCY, *Our Mission and What We Do*, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (June 13, 2022).

172. See, e.g., Randall S. Abate & Mark E. Bennett, *Constitutional Limitations on Anticompetitive State and Local Solid Waste Management Schemes: A New Frontier in Environmental Regulation*, 14 YALE J. REG. 165, 165 (1997) (exploring constraints on the power of state and local governments as market competitors of private companies in waste management); Jason B. Cook et al., *Government Privatization and Political Participation: The Case of Charter Schools*, 82 J. POLITICS 300, 301 (2020) (examining the impact of charter schools on public school boards); James F. Blumstein et al., *Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons*, 15 VA. J. SOC. POL'Y & L. 446, 448–49 (2008) (performing a cost analysis comparing states that utilize private prisons to those that do not). Of course, legitimate concerns over privatization of public services remain. See Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J. L. & PUB. POL'Y 111, 112–13 (2005).

United States government spent roughly \$7.249 trillion.¹⁷³ The reported budget for the EPA for the 2021 fiscal year \$9.237,153 billion or 0.13% of the total federal budgetary resources.¹⁷⁴ In 2021, the EPA had a recorded workforce of 14,297 employees, up slightly from the three previous years, but still down from the 10-year high recorded in 2012 of 17,106.¹⁷⁵

As a share of the total federal budget, the EPA's budget has steadily shrunk since 1980.¹⁷⁶ Throughout the 1970s, the budgetary fortunes of the EPA waxed and waned, but in the fiscal years 1978 and 1979 the EPA received 1.2% and 1.07% of the federal budget.¹⁷⁷ If the EPA received 1.2% of the federal budget for the 2021 fiscal year, its budget would have been \$86.988 billion: 9.4 times greater than it actually was. In 1980, that share was reduced to 0.79%.¹⁷⁸ In 1981 the EPA's share dropped further to 0.45% and remained around that number for the ensuing decades.¹⁷⁹ If even this allocation had been maintained, in 2021 the EPA would have received \$32.621 billion. In 2003, the EPA's allocation of the budget once again constricted, dropping to 0.37%.¹⁸⁰ For the most part, it has consistently shrunk since then.¹⁸¹

Not only has the EPA received a steadily shrinking portion of the federal budget, but the EPA's own budget is divided and there is relatively little money for legal action.

173. OFF. OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2022, 37 (2021).

174. U.S. ENV'T PROT. AGENCY, *EPA's Budget and Spending*, <https://www.epa.gov/planandbudget/budget>, (May 16, 2022).

175. *Id.*

176. *See infra* app. I.

177. *See infra* app. I.

178. *See infra* app. I.

179. *See infra* app. I.

180. *See infra* app. I.

181. *See infra* app. I.

The EPA does not just litigate, it also takes proactive and corrective steps to help ensure a clean and healthy environment. For instance, in the 2021 fiscal year the EPA's budget included \$170.7 million for Superfund removal¹⁸² and \$35.1 million for RCRA corrective actions.¹⁸³ The EPA also allocated \$243.4 million to ensuring the safety of chemicals in the marketplace.¹⁸⁴ The EPA's third goal was to "[i]ncrease certainty, compliance, and effectiveness by applying the rule of law to achieve more efficient and effective agency operations, service delivery, and regulatory relief."¹⁸⁵ This goal included, but was not limited to, legal action taken by the EPA to punish those who violated environmental law.¹⁸⁶ The EPA allocated \$1.727 billion to achieve this goal.¹⁸⁷ From this allotment, the Civil Enforcement Program received \$160.8 million.¹⁸⁸ The Criminal Enforcement Program received \$55.1 million.¹⁸⁹

182. U.S. ENV'T PROT. AGENCY, FY 2021: EPA BUDGET IN BRIEF 37 (2020) ("EPA's Superfund Emergency Response and Removal Program is charged with preventing, limiting, mitigating, or containing chemical, oil, radiological, biological, or hazardous materials released during and in the aftermath of an incident.").

183. *Id.* ("The RCRA Corrective Action Program is responsible for overseeing and managing cleanups at active RCRA sites. States have requested EPA participate in work sharing under this program, and the Agency serves in a lead or support role for a significant number of complex and challenging cleanups in both non-authorized and authorized states.").

184. *See id.* at 42.

185. *Id.* at 57.

186. *Id.* at 58.

187. *Id.* at 57.

188. *Id.* at 60 ("The overall goal of EPA's civil enforcement program is to maximize compliance with the Nation's environmental laws and regulations to protect human health and the environment. The Agency works closely with the U.S. Department of Justice and other federal departments, states, tribes, territories, and local agencies to ensure consistent and fair enforcement of environmental statutes.").

189. *Id.* at 61. ("EPA's Criminal Enforcement program enforces the

Finally, the Superfund Enforcement Program received \$162.5 million.¹⁹⁰ Thus, out of the \$9.237 billion that the EPA received, only \$378.4 million was used for legal action. In other words, in 2021 0.005% of the federal budget was used by the EPA in litigation for environmental protection.

The EPA is under-funded and over-burdened. In the best of times, this would be concerning; in the face of worsening climate change¹⁹¹ this urgently requires remediation. As global inflation increases, it seems unlikely that any sort of truly transformative social spending will increase any time soon, especially with the current partisan divide.¹⁹² This could perpetuate inaction in the face of climate change: the exact opposite of what is required.¹⁹³ Of course,

Nation's environmental laws through targeted investigation of criminal conduct committed by individual and corporate defendants that threaten public health and the environment. EPA collaborates and coordinates with the U.S. Department of Justice, as well as state, tribal, and local law enforcement counterparts to ensure the Agency responds to violations as quickly and effectively as possible.”).

190. *Id.* at 61 (“Through the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund), EPA will facilitate prompt site cleanup and use an ‘enforcement first’ approach that maximizes the participation of liable and viable parties in performing and paying for cleanups. The Agency will continue to work to protect communities by ensuring that potentially responsible parties (PRPs) conduct cleanups at Superfund sites, preserving federal taxpayer dollars for sites where there are no viable contributing parties, and recovering costs if EPA expends Superfund appropriated dollars to clean up sites.”).

191. *See, e.g.,* Zack Colman et al., *Landmark climate report details ‘an atlas of human suffering,’* POLITICO (Feb. 28, 2022, 12:06 PM), <https://www.politico.eu/article/landmark-climate-report-details-an-atlas-of-human-suffering/>.

192. *See, e.g.,* Mitt Romney (@MittRomney), TWITTER (Jan. 12, 2022, 12:19 PM), <https://twitter.com/MittRomney/status/1481314847010828289> (“Inflation hits a 40-year high—hurting the middle class and most vulnerable. Just as predicted given Biden and Schumer’s \$1.9 trillion spending extravaganza last March—passed without a single GOP vote.”).

193. *See, e.g.,* INTERGOVERNMENTAL SCIENCE POL’Y PLATFORM ON

transformative change on the national level is far more palatable when it comes at no further cost to the federal government. Recognizing the legal rights of natural objects and recognizing nongovernmental organizations as the guardians of those natural objects would provide exactly that.

Allowing nongovernmental organizations to litigate on behalf of natural objects would significantly increase the amount of resources available to ensure environmental protection. In the 2021 fiscal year, EarthJustice's expenses totaled \$112.868 million¹⁹⁴ Out of this sum, \$59,168,711 was spent on litigation and an additional \$1,874,741 in litigation services were donated.¹⁹⁵ That same year, NRDC's program expenses amounted to \$160.742 million.¹⁹⁶ Defenders of Wildlife spent \$22.42 million on "biodiversity conservation."¹⁹⁷ EDF expended \$156.258 million on program services excluding education.¹⁹⁸ Assuming that like EarthJustice, roughly 66% of these program costs are litigation costs, these four groups spent an estimated

BIODIVERSITY & ECOSYSTEM SERVS., THE GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES, XXXVII (2019) (stating, "[g]oals for conserving and sustainably using nature and achieving sustainability cannot be met by current trajectories, and goals for 2030 and beyond may only be achieved through transformative changes¹⁵ across economic, social, political and technological factors.").

194. EARTHJUSTICE, ANNUAL REPORT 2021 43 (2021).

195. *Id.*

196. NAT. RES. DEF. COUNCIL, CONSOLIDATED FINANCIAL STATEMENTS AND SUPPLEMENTAL SCHEDULES TOGETHER WITH REPORT OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANTS, 6 (2021). NRDC's program expenses include: "clean energy future," "international," "wildlife and wildlands," sustainable communities," and "membership services." However, assuming that like EarthJustice, roughly 66% of these program expenses are litigation, the NRDC would have expended \$106,090,018.

197. DEFS. OF WILDLIFE, 2021 ANNUAL REPORT 12 (2021).

198. ENV'T DEF. FUND, INC., CONSOLIDATED FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION 7 (2022).

\$285.061 million. Thus, allowing these groups to litigate on behalf of natural objects would effectively increase the total environmental protection litigation resources in the U.S. by 75%.

IV. PROPOSED IMPLEMENTATION OF LEGAL RIGHTS FOR NATURAL OBJECTS

Legal rights for natural objects could be recognized in a variety of ways. These methods have taken root across the globe in a range of socio-political habitats; in the U.S. the soil has mostly proven infertile. Despite this, legal rights for natural objects can be recognized in the United States, and appropriate terraforming of the legal landscape has begun taking place. Lessons from successes abroad and failures domestically indicate that there are at least six possible mechanisms for such recognition. In order of desirability these mechanisms are: (1) an amendment to the U.S. Constitution recognizing the rights of natural objects; (2) passage of a federal law recognizing the rights of natural objects, and creating the guardianship system through that law; (3) federal courts' recognition of these rights of natural objects in challenges brought by plaintiffs under an *Obergefell*-style recognition; (4) amendments to state constitutions, similar to those passed recognizing the right to a healthy environment; (5) passage of state laws; and (6) passage of local laws.

First, an amendment to the U.S. Constitution would create a powerful right for natural objects. Ecuador has successfully enshrined the rights of natural objects in their constitution, and it has given those rights real significance.¹⁹⁹ Congress and the states ratifying such an

199. CONSTITUCIÓN DEL ECUADOR ch. 7, arts. 71–74; see also Katie Surma, *Can Rights of Nature Laws Make a Difference? In Ecuador, They Already Are*, INSIDE CLIMATE NEWS (Feb. 21, 2022), <https://insideclimatenews.org/news/21022022/rights-of-nature-laws-ecuador/>.

amendment would send a clear signal to the nation that environmental protection is of paramount importance. The courts, like the courts in Ecuador, giving real effect to those rights would significantly bolster American efforts in the fight against climate change. Of course, this avenue seems the least likely. The last amendment to the federal constitution was added in 1992, addressing an issue that had natural bipartisan support among politicians.²⁰⁰ Given the unfortunate politicization of environmental protection, it would likely take a Herculean effort by an army of dedicated advocates to see such an amendment ratified. These odds do not make the struggle any less worthwhile.

Second, passing a federal law recognizing the rights of natural objects would create similarly strong protections across the country. New Zealand successfully passed and implemented such a law, albeit in limited scope.²⁰¹ Congress has acted before to take bipartisan action in the face of environmental crisis.²⁰² Many of the framework statutes in environmental law were passed with bipartisan support.²⁰³

200. U.S. CONST. amend. XXVII (“No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.”).

201. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, pt 2 cl 14(1) (N.Z.).

202. See, e.g., ROLL CALL VOTE ON S. 1630, 101st Cong., 2d Session (1990), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1012/vote_101_2_00324.htm (passing the 1990 Clean Air Act Amendment in the Senate by an 89-10 vote); E.W. Kentworthy, *President Vetoes Clean Water Bill*, N.Y. TIMES (Oct. 18, 1972), <https://www.nytimes.com/1972/10/18/archives/president-vetoes-clean-water-bill-nixon-acts-despite-strong.html> (explaining that the Clean Water Act initially passed by a vote of 74-0 in the Senate and 366-11 in the House; further the Senate then voted 52-12 to override President Nixon’s veto.).

203. RICHARD G. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 69 (2004) (“The average vote in favor of major federal environmental legislation during the 1970s was 76 to 5 in the Senate and 331 to 30 in the house, suggesting a broad bipartisan consensus. As one legislator put

Congress passing a law recognizing the rights of natural objects would also allow for a level of detail that an amendment likely would not. This law could recognize natural objects as rights holders; identify the groups, or class of groups, that could act as guardians of natural objects; and it could detail how new groups could enter this pool of potential guardians. The likelihood of passing such a law is diminished by the same polarization that would likely hinder the passage of a constitutional amendment. Congress last passed a major federal environmental law in 1996 when it passed the Federal Insecticide, Fungicide, and Rodenticide Act.²⁰⁴ However, TSCA was amended in 2016, providing hope that the rift between parties on environmental protection is not so wide that it cannot be bridged.²⁰⁵

Third, federal courts could recognize rights of natural objects in claims brought by plaintiffs. Recognition of rights along these lines was successful in a narrow application in Argentina²⁰⁶ and more broadly in Colombia.²⁰⁷ Plaintiffs could help courts with the burden of issuing such rulings by more carefully tailoring the rights for natural objects that they seek to be recognized. In *Drewes Farms Partnership v. Toledo*, the court's apprehension about the broad, amorphous nature of the proposed rights for natural objects led to the failure of that effort.²⁰⁸ Plaintiffs more carefully tailoring these assertions could very well lead to success in claims for the recognition of rights for natural objects. A similar right, a right to a healthy environment, was recognized by one

it in describing his reluctant vote in favor of safe drinking water legislation in 1974, "[a]fter all, if one votes against safe drinking water, it is like voting against home and mother."").

204. 7 U.S.C.A § 136 (West).

205. 15 U.S.C.A § 2601 (West).

206. Choplin, *supra* note 65.

207. Wesche, *supra* note 56, at 534, 538–39.

208. *Drewes Farms P'ship v. City of Toledo*, 441 F. Supp. 3d. 551, 558 (N.D. Ohio 2020).

federal judge applying *Obergefell*.²⁰⁹ With careful tailoring, and the correct judge, perhaps *Obergefell* could be the wellspring from which rights for natural objects in the United States flows.

Fourth, amendments to state constitutions could recognize natural objects as rights holders, a strong alternative in the absence of federal action.²¹⁰ This approach has worked for some states in recognizing the right to a clean environment.²¹¹ A similar approach could be taken to pass amendments that recognize the rights of natural objects in these states. Alternatively, litigants could assert these rights of natural objects as a means of enforcing the already established rights to a clean environment. State courts recognizing such claims would significantly bolster state environmental protections.

Fifth, states could pass environmental protection laws of their own recognizing the rights of natural objects. States like New York have already taken aggressive legislative action aimed at climate change.²¹² Passing laws that recognize the rights of natural objects would give potential plaintiffs even more options to help ensure environmental protection at the state level. Much like a law proposed at the federal level, this avenue to recognition would allow the states to carefully tailor such rights and their enforcement.

Sixth, local laws could help to protect smaller natural objects that fall solely within the jurisdiction of local

209. See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250, *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

210. See Kirsten Williams, *Fundamental Environmental Rights: State Constitutions as a Vehicle for Change*, JURIST (Nov. 1, 2021, 03:19:50 PM), <https://www.jurist.org/commentary/2021/11/kirsten-williams-environmental-rights-amendments/>.

211. See N.Y. CONST. art. I § 19; HAW. CONST. art. XI § 9; ILL. CONST. art. XI §§ 1-2; MASS. CONST. art. XCVII; MONT. CONST. art. IX § 1; PENN. CONST. art. 1 § 27; R.I. CONST. art. 1 § 17.

212. See S.B. 6599, 2019 Leg., Reg. Sess. (N.Y. 2019).

municipalities. Such laws could be useful in protecting local resources.²¹³ However, as evidenced by *Drewes Farms Partnership*, the limitation of these laws is their inherently local nature.²¹⁴ The law of Toledo, Ohio cannot possibly bind every American and Canadian municipality that abuts Lake Erie. However, these local laws in the aggregate could protect a great deal of natural objects.

CONCLUSION

The world is changing, and climate change is accelerating the rate of that transformation. American environmental law must change with it. As a global leader, the United States must wrest its environmental law from its decades long stasis to confront these changes. Recognizing the rights of natural objects would introduce a potent caffeine to the system. Allowing well-established groups to act as guardians of those natural objects would shore up our nation's environmental protections against the rising tide of climate change. Allowing these groups to act as guardians would also fortify environmental protections without increasing costs for the federal government. Inaction is no longer an option. Only through transformative action in the present can a sense of normalcy be maintained for the future.

213. See ORANGE CNTY., FLA., 2020 CHARTER REVIEW COMMISSION FINAL REPORT 21 (approving an amendment that recognized rights for the waters of Orange County, Florida).

214. *Drewes Farms P'ship*, 441 F. Supp. 3d. at 558 (N.D. Ohio 2020).

APPENDIX

EPA's Budget as % of the Federal Budget: 1970–2021

Fiscal Year	Federal Budget ²¹⁵	EPA Budget ²¹⁶	EPA's Budget as % of Federal Budget
1970	\$195,649,000,000	\$1,003,984,000	.51%
1971	\$210,172,000,000	\$1,288,784,000	.61%
1972	\$230,681,000,000	\$2,447,565,000	1.06%
1973	\$245,707,000,000	\$2,377,226,000	.97%
1974	\$269,359,000,000	\$518,348,000	.19%
1975	\$332,332,000,000	\$698,835,000	.21%
1976	\$371,792,000,000	\$771,695,000	.67%
1977	\$409,218,000,000	\$2,763,745,000	.68%
1978	\$458,746,000,000	\$5,498,635,000	1.2%
1979	\$504,028,000,000	\$5,402,561,000	1.07%
1980	\$590,941,000,000	\$4,669,415,000	.79%
1981	\$678,241,000,000	\$3,030,669,000	.45%
1982	\$745,743,000,000	\$3,676,013,000	.49%
1983	\$808,364,000,000	\$3,688,688,000	.46%
1984	\$851,805,000,000	\$4,067,000,000	.48%
1985	\$946,344,000,000	\$4,353,655,000	.46%
1986	\$990,382,000,000	\$3,663,841,000	.37%
1987	\$1,004,017,000,000	\$5,364,092,000	.53%
1988	\$1,064,416,000,000	\$5,027,442,000	.47%
1989	\$1,143,743,000,000	\$5,155,125,000	.45%
1990	\$1,252,993,000,000	\$5,461,808,000	.44%
1991	\$1,324,226,000,000	\$6,094,287,000	.46%
1992	\$1,381,529,000,000	\$6,668,853,000	.48%
1993	\$1,409,386,000,000	\$6,892,424,000	.49%
1994	\$1,461,752,000,000	\$6,658,927,000	.46%
1995	\$1,515,742,000,000	\$7,240,887,000	.47%
1996	\$1,560,484,000,000	\$6,522,953,000	.42%

²¹⁵ *Budget of the United States Government, Fiscal Year 2022*, GOVINFO, <https://www.govinfo.gov/app/collection/budget/2022/BUDGET-2022-TAB> (last visited Mar. 30, 2022).

²¹⁶ *EPA's Budget and Spending*, EPA, <https://www.epa.gov/planandbudget/budget> (last visited Mar. 30, 2022).

Fiscal Year	Federal Budget ²¹⁵	EPA Budget ²¹⁶	EPA's Budget as % of Federal Budget
1997	\$1,601,116,000,000	\$6,799,393,000	.42%
1998	\$1,652,458,000,000	\$7,363,046,000	.45%
1999	\$1,701,842,000,000	\$7,590,352,000	.44%
2000	\$1,788,950,000,000	\$7,562,811,000	.42%
2001	\$1,862,846,000,000	\$7,832,211,000	.42%
2002	\$2,010,894,000,000	\$8,078,813,000	.40%
2003	\$2,159,899,000,000	\$8,078,703,000	.37%
2004	\$2,293,006,000,000	\$8,365,420,000	.36%
2005	\$2,471,957,000,000	\$8,023,483,000	.32%
2006	\$2,655,050,000,000	\$7,617,416,000	.29%
2007	\$2,728,686,000,000	\$7,725,130,000	.28%
2008	\$2,982,544,000,000	\$7,472,324,000	.25%
2009	\$3,517,677,000,000	\$7,643,674,000	.22%
2010	\$3,457,079,000,000	\$10,297,684,000	.30%
2011	\$3,603,065,000,000	\$8,682,117,000	.24%
2012	\$3,526,563,000,000	\$8,449,385,000	.24%
2013	\$3,454,881,000,000	\$7,901,104,000	.23%
2014	\$3,506,284,000,000	\$8,200,000,000	.23%
2015	\$3,691,850,000,000	\$8,139,887,000	.22%
2016	\$3,852,616,000,000	\$8,139,887,000	.21%
2017	\$3,981,630,000,000	\$8,058,488,000	.20%
2018	\$4,109,044,000,000	\$8,824,488,000	.20%
2019	\$4,446,956,000,000	\$8,849,488,000	.20%
2020	\$6,550,396,000,000	\$9,057,401,000	.14%
2021	\$7,249,456,000,000*	\$9,237,153,000	.13%

*=estimate