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Nature's Personhood and Property's Virtues

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NATURE'S PERSONHOOD AND PROPERTY'S VIRTUES

Laura Spitz* and Eduardo M. Peñalver†

This Article evaluates the strategy of claiming personhood for natural objects as a way to advance environmental goals in the United States. Using the Colorado River Ecosystem v. Colorado litigation as the focus, we explore the normative foundation of the claim—elements of nature are legal persons—and the work personhood is being asked to do by the plaintiff and other environmental activists. We identify three possibilities: procedural work, substantive work, and rhetorical work. Of those, we suggest the plaintiff's strongest case is rhetorical. We say this not only because it will likely be difficult to convince a judge to extend standing or substantive rights to a natural object, but also because we are unconvinced that personhood would achieve the ends desired by the plaintiff and other rights of nature advocates. We contrast the rights of nature movement cases with progressive property strategies, and we conclude that existing legal tools rooted in the law of property offer a more certain and more promising pathway to achieving many of the goals articulated by rights of nature advocates in the United States.

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INTRODUCTION

In *Colorado River Ecosystem v. Colorado*,¹ the plaintiff asked a federal district court to find the Colorado River ecosystem to be a legal person,² arguing that “[t]he dominance of a culture that defines Nature as *property* enables its destruction.”³ In the plaintiff’s view, environmental laws accepting the status of nature as property “merely regulat[e] the rate at which the natural environment is exploited,”⁴ rather than support its overall health. The plaintiff’s principal claim rested on the assumption that legal personhood could protect the river’s ecosystem in ways that property law could not. In making its case, the plaintiff relied on the emergence of what it called a “new kind of environmental law,”⁵ pointing to examples where elements of personhood were ascribed to nature by courts and legislatures in India,⁶ New Zealand,⁷ Ecuador,⁸ and Colombia.⁹ In

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1. No. 1:17-cv-02316 (D. Colo. Sept. 25, 2017).
 2. The *Colorado River* case was not the first time that an attorney brought an action on behalf of a natural resource in the United States (although the plaintiff does not refer to those earlier cases). The plaintiff did cite *Sierra Club v. Morton*, 405 U.S. 727 (1972), but the issue in that case was whether the Sierra Club had standing to challenge a United States Forest Service decision to issue a permit to Walt Disney Enterprises, Inc. to develop Mineral King Valley, and not whether the valley had standing in its own right. While the court was not asked to find the area was a person, however, Justice Douglas observed in dissent:

The question of “standing” would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.

Sierra Club, 405 U.S. at 741 (Douglas, J., dissenting). Environmental advocates have regularly relied on this dissent in making the case for environmental personhood. See, e.g., Amended Complaint for Declaratory and Injunctive Relief at 18–19, *Colo. River Ecosystem*, No. 1:17-cv-02316 (D. Colo. Nov. 6, 2017) [hereinafter Amended Complaint].

3. Amended Complaint, *supra* note 2, at 17 (emphasis added).
4. *Id.* at 2.
5. *Id.* at 2, 20–21.
6. The Ganga and the Yamuna Rivers were both granted legal personhood by the High Court of Uttarakhand, India. *Mohd. Salim v. Uttarakhand*, (2017) Writ Petition (PIL) No. 126 of 2014, HC of Uttarakhand at Nainital (India), <https://perma.cc/D5EV-ZMV6>.
7. The Te Awa Tupua River became a “legal entity” through the settlement between the New Zealand Crown and the Whanganui *iwi* people. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.).
8. Ecuador adopted rights of nature in its constitution in 2008. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR Oct. 20, 2008, amended Jan. 31, 2011, tit. II, ch. 7 “Rights of Nature,” <https://perma.cc/8X4N-BKER>. But see generally Michael B. Kelley, *Ecuador to Sell a Third of Its Amazon Rainforest to Chinese Oil Companies*, BUS. INSIDER (Mar. 28, 2013), <https://perma.cc/W7MG-LKW6>.
9. In 2016, the Rio Atrato was recognized by Colombia’s Constitutional Court as possessing rights. Corte Constitucional [C.C.] [Constitutional Court], Nov. 10, 2016, Sentencia T-

its view, unless the court extended similar rights to the Colorado River, the legal system would “continue to fail to protect the human and natural communities that depend on the River.”¹⁰

In the end, *Colorado River* was dismissed by consent.¹¹ Nevertheless, in its motion to dismiss,¹² the plaintiff insisted that the doctrine of personhood continued to provide “a pragmatic and workable tool for addressing environmental degradation and the current issues facing the Colorado River.”¹³ Rights of nature advocates and activists continue to make that case.¹⁴ In this Article, we aim to evaluate this claim.¹⁵

622/16 (Colom.), <https://perma.cc/KEE2-PKHL>. In 2018, both the Colombian Amazon Region and the Páramo in Pisba were recognized as “subjects of rights.” Corte Suprema de Justicia [C.S.J.] [Supreme Court], Apr. 5, 2018, STC4360-2018 (Colom.), <https://perma.cc/4SD3-MT36>; see also Tribunal Administrativo de Boyacá, Aug. 9, 2018, Expediente 15238-3333-002-2018-00016-01 (Colom.), <https://perma.cc/HK7X-5UEK>. And most recently, the Rio Plata was recognized as a “subject of rights.” Juzgado Único Civil Municipal, La Plata—Huila [Juz. Mun.], Mar. 19, 2019, Expediente 41-396-40-03-001-2019-00114-00 (Colom.), <https://perma.cc/Z7EB-C2GH>.

10. Amended Complaint, *supra* note 2, at 3.

11. The plaintiff's agreement to the dismissal was obtained under threat of possible sanctions for having made a frivolous claim, see Lindsay Fendt, *Colo. River 'Personhood' Case Pulled by Proponents*, ASPEN TIMES (Dec. 4, 2017), <https://perma.cc/VM6R-K575>, or at least the plaintiff believed that to be the case. Telephone Interview by Jena Ritchey with Will Falk, Next Friend in *Colo. River Ecosystem v. Colorado* (June 25, 2019). Counsel's belief that it would be sanctioned was reasonable. A federal judge in Pennsylvania issued sanctions against two lawyers for using “implausible” legal tactics in asserting rights of nature. Pa. Gen. Energy Co., LLC v. Grant Twp., No. CV 14-209, 2018 WL 306679, at *5 (W.D. Pa. Jan. 5, 2018); see also Justin Nobel, *The Rights of Nature Movement Goes on Trial*, ROLLING STONE (Jan. 10, 2018), <https://perma.cc/7EZB-RZEM>.

12. Both parties filed motions to dismiss. Defendants' Motion to Dismiss Amended Complaint, *Colo. River Ecosystem v. Colorado*, No. 1:17-cv-02316 (D. Colo. Dec. 1, 2017); (Plaintiff's) Unopposed Motion to Dismiss Amended Complaint with Prejudice, *Colo. River Ecosystem*, No. 1:17-cv-02316 (D. Colo. Dec. 3, 2017) [hereinafter Unopposed Motion to Dismiss].

13. Unopposed Motion to Dismiss, *supra* note 12, ¶ 7, at 3. At the same time, however, the plaintiff acknowledged:

[T]he expansion of rights is a difficult and legally complex matter. When engaged in an effort of first impression, the undersigned has a heightened ethical duty to continuously ensure that conditions are appropriate for our judicial institution to best consider the merits of a new canon.

Id. ¶ 8, at 3.

14. In 2019, the highest court of Bangladesh granted all of the country's rivers legal rights. Ashley Westerman, *Should Rivers Have Same Legal Rights as Humans? A Growing Number of Voices Say Yes*, NPR (Aug. 3, 2019), <https://perma.cc/2W9A-R3QS>; see also TOLEDOANS FOR SAFE WATER, THE LAKE ERIE BILL OF RIGHTS CITIZENS INITIATIVE, <https://perma.cc/JFE9-YGWD>.

15. There are important and unresolved questions about the meaning of environmental goals, even among environmental advocates. See generally ERIC FREYFOGLE, WHY CONSERVA-

The concept of personhood for natural resources has been part of conversations about the environment for several decades in the United States. *Colorado River* is the most recent case, but it was not the first to make such a claim on behalf of a waterway. Claims have previously been made on behalf of a river, a marsh, a stream, and a watershed.¹⁶ More recently, dozens of American cities¹⁷ and Native American tribes¹⁸ have recognized enforceable rights of nature or natural features (rivers, lakes, mountains) and have established the authority of residents to bring suits on nature's behalf. Notwithstanding significant challenges to these developments, including losses in courts¹⁹ and legislatures,²⁰ interest in legal personhood as a way to protect natural resources is growing.²¹ In February 2019, for example, voters in Toledo, Ohio, passed the Lake Erie Bill of Rights to protect the lake²² and the White Earth Band of Ojibwe adopted

TION IS FAILING AND HOW IT CAN REGAIN GROUND 113–43 (2006). Presumably the plaintiff hoped to achieve a legal outcome that would improve the overall health of the Colorado ecosystem as an ecosystem, but even that goal requires agreement on highly contested questions about who and what counts in the ecosystem, and how interests and health are measured. Another possible goal might be more inclusive decision-making, as was presumably the case with the Whanganui River example in Aotearoa (New Zealand). A change in who makes decisions and on what bases they do so may lead to improvement in the ecosystem's health, of course, but it may not. *Id.*

16. These were not cited by the plaintiff. Compare Reply to Plaintiff's Brief in Opposition to Their Motion to Intervene, *with* Pa. Gen. Energy Co., LLC v. Grant Twp., 139 F. Supp. 3d 706 (W.D. Pa. 2015) (for an example of prior federal litigation where an organization attempted to name a watershed as an intervening party), and *Byram River v. Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975) (where the court recognized a river as a valid party to the suit), and *Sun Enters., Ltd. v. Train*, 532 F.2d 280, 284 (2d Cir. 1976) (where the court recognized a marsh and a brook as valid parties to the suit).
17. Amended Complaint, *supra* note 2, ¶ 54, at 22.
18. The Yurok Tribe passed a resolution declaring rights of personhood for the Klamath River. See Anna V. Smith, *Some Indigenous Communities Have a New Way to Fight Climate Change: Give Personhood Rights to Nature*, MOTHER JONES (Sept. 29, 2019), <https://perma.cc/8KQ3-G5KZ>. The White Earth Band of Ojibwe adopted a law protecting manoomin, or wild rice. See *infra* note 23.
19. See *supra* notes 1, 14.
20. See, e.g., *infra* note 22.
21. See, e.g., INVISIBLE HAND (Public Herald Studios 2020) <https://perma.cc/6E6M-AZJS> (a recent documentary selected for several film festivals); Council Res. 19-40, Yurok Tribal Council (2019), <https://perma.cc/SV4B-G4QJ>. This interest is fueled in part by recent successes in other parts of the world, for example, the July 2019 decision by the Bangladesh Supreme Court granting rivers legal rights. See Westerman, *supra* note 14.
22. TOLEDO, OHIO CHARTER ch. XVII, §§ 253–60 (2019) [hereinafter Lake Erie Bill of Rights]. Following the passage of the Lake Erie Bill of Rights (“LEBOR”), Drewes Farms Partnership filed a motion for a preliminary injunction alleging that LEBOR violated its state and federal constitutional rights. *Drewes Farms P'ship v. City of Toledo*, No. 3:19 CV 434, 2019 WL 1254011 (N.D. Ohio Mar. 18, 2019). In August 2019, the governor of Ohio signed the following statement into law (as part of an appropriations bill), effectively nullifying the LEBOR: “Nature of any ecosystem does not have standing to participate in or bring

the *Rights of Manoomin* to protect wild rice and wetland ecosystems.²³ This growing interest makes engagement with unanswered questions and critiques both timely and critical.

First, the *Colorado River* plaintiffs overstated the dichotomy between personhood and property law, simultaneously exaggerating the potential for personhood to bring meaningful change to the Colorado River's existing co-management system and undervaluing the rich and varied property relationships possible within the common law conception of ownership. In our view, the plaintiff displayed too little appreciation of the potential of legal tools existing within property law (e.g., conservation easements, trusts, etc.), and too much faith in legal personhood to do the hard work of fundamentally changing how human beings interact with the Colorado River. This may have been a litigation strategy, but the failure to acknowledge the potential for property law positioned the case as oppositional to progressive property law litigation and likely hurt the plaintiff's credibility with the court.²⁴

Relatedly, the plaintiff and other rights of nature advocates in the United States have consistently failed to acknowledge the ways in which property law doctrines continue to operate in jurisdictions where legal personhood has been extended to natural objects.²⁵ In the Whanganui River example in Aotearoa (New Zealand), Katherine Sanders observed that:

At its heart . . . property remains an organising principle of Te Awa Tupua legislation. The fee simple estate in the Crown-owned parts of the bed of the Whanganui River vests in Te Awa Tupua [itself]. This land is inalienable, but an easement, lease, or licence may be granted on behalf of Te Awa Tupua for a term of less than 35 years. While ownership of some minerals in the bed remains with the Crown, others vest in Te Awa Tupua. The Act also preserves a range of existing rights: public use and access rights and existing private property rights, including customary rights and title.²⁶

an action in any court of common pleas." OHIO REV. CODE ANN. § 2305.011(B) (West 2019); see also H. Claire Brown, *How Ohio's Chamber of Commerce Killed an Anti-Pollution Bill of Rights*, INTERCEPT (Aug. 29, 2019), <https://perma.cc/7FHY-RT2T>.

23. See White Earth Band of Ojibwe, *Chippewa Establish Rights of Manoomin on White Earth Reservation and Throughout 1855 Ceded Territory* (Jan. 11, 2019), <https://perma.cc/A3PU-PBAL>.

24. See, for example, the apparent threat of sanctions discussed *supra* note 11.

25. See, e.g., Te Awa Tupua Act, *supra* note 7; see also Katherine Sanders, 'Beyond Human Ownership'? Property, Power and Legal Personality for Nature in Aotearoa New Zealand, 30 J. ENV'T L. 207, 231 (2018). On the question of why the social pervasiveness of property as an institution makes it normatively resilient, see Jeremy Waldron, *The Normative Resilience of Property*, in PROPERTY AND THE CONSTITUTION 170, 190–92 (Janet McLean ed., 1999).

26. Sanders, *supra* note 25, at 226 (internal citations omitted).

Third, Deep Green Resistance (“DGR”)—the organization that brought the plaintiff’s claim—evinced no consideration for the potential financial and jurisprudential costs of pursuing its strategy on behalf of the Colorado River. Environmental litigation is expensive in terms of both time and money, and resources are obviously limited. A commitment of resources to one strategy necessarily means those resources are not available for other strategies. Perhaps more significantly, however, jurisprudential costs in this context are especially consequential. At best, the plaintiff and other rights of nature advocates focus their arguments on the potential legal implications for the ecosystem itself, but not on the larger legal, political, social and economic systems implicated by recognizing personhood for nature. This is not a case where litigation strategies are complementary, however, as might be the case where two different groups of prison reform activists challenge prison conditions through tort law on the one hand and constitutional law on the other. A determination that something previously understood as property (a legal object) is a person (a legal subject) would have significant legal consequences across all areas of law and, while it might open previously unavailable legal arguments, it would necessarily foreclose others.

Fourth, notwithstanding the rights enumerated by the plaintiff as “inherent” to the river—such as the right to exist, flourish, regenerate, be restored, and naturally evolve²⁷—it is not immediately obvious what legal entitlements would flow from personhood for a waterway or how a court would determine those entitlements. It is certainly not self-evident from the plaintiff’s case or broader rights of nature discourse how and when a court should recognize any particular legal right as belonging to nature. The evolution of constitutional rights in the context of corporations is instructive here. Corporations have been recognized as legal persons for many years but courts—and society more broadly—continue to struggle with what that recognition means in terms of the scope of corporate rights.²⁸ Importantly, litigants and courts regularly admit the difficulty of this struggle and address arguments accordingly.

Finally, even if we were to acknowledge certain natural objects as rights-bearing persons, it is not clear that modifying existing legal mechanisms—broadening standing doctrines or expanding conceptions of benefits and harms, for example—could accomplish the goals that nature’s rights activists hope to achieve. This is the question to which we turn in the following sections of this Article. These practical questions about the work personhood does seem to be particularly salient in a context like natural resources law, where the extension

27. Amended Complaint, *supra* note 2, ¶¶ 74–75, at 25.

28. See generally *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (majority opinion and Stevens, J., dissenting); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (majority and dissent).

of personhood by a judge seems unlikely to fundamentally change the locus of decision-making about how natural resources are to be used or protected.²⁹

These critiques are not offered to cast doubt on the magnitude of the environmental problems described by the *Colorado River* plaintiff, nor the sincerity of advocates in this context. Rather, they suggest that the most effective strategies for grappling with those problems require further consideration and clarification. This Article asks what it would mean to speak about natural resources as persons and what is being asked of the law by those who use the language of personhood. Unpacking the strategy in this way is useful for several reasons. First, judges invariably want to know the jurisprudential implications of a proposed ruling, so the practical implications of finding that a river is a person will be front of mind for any court being asked to extend the category. In order to explain those implications, precision about the work being asked of the concept is essential.

Second, clear articulation of objectives is essential for measuring outcomes. If personhood was being asked to do something substantive for the Colorado River, or if the plaintiff was hoping to meaningfully change the procedure by which decisions about the River would be made, then the plaintiff's action failed. But if the plaintiff's objective was rhetorical, perhaps we would evaluate the case differently. For example, the case provoked a conversation in the news—including the *New York Times*³⁰—drawing wide attention to the environmental degradation of the ecosystem. If that was DGR's intent, then it succeeded.

Finally, being precise about what work the concept of personhood is being asked to do forces a conversation about the strategy itself, including its costs, both financial and jurisprudential. Precision about these questions might confirm the soundness of the strategy for some purposes, but it might also counsel a different approach in others.

This Article proceeds as follows. In Part I, we summarize the factual background and legal claims made by the *Colorado River* plaintiff. In Part II, we explore the normative foundations of the claim that elements of nature are legal persons and in Part III, we examine the possible work personhood is asked to

29. In order to change how and by whom decisions are made, we see two ways forward. The first is property law litigation, where a declaration of public trust would put the onus on government to change its management of trust property, potentially shifting the method and locus for decision-making. The second is statutory. Again, we turn to the Aotearoa (New Zealand) example, where the “Te Urewera and Te Awa Tupua Acts [recognizing the legal personhood of a park and a river, respectively] focus particularly on who makes decisions on behalf of the legal person, and how those decisions should be made.” Sanders, *supra* note 25, at 231. The legislation essentially establishes new co-governance and co-management frameworks.

30. See Julie Turkewitz, *Corporations Have Rights. Why Shouldn't Rivers?*, N.Y. TIMES (Sept. 26, 2017), <https://perma.cc/QQ2W-35WC>.

do by the plaintiff and other environmental activists pursuing similar goals. We identify three possibilities: procedural, substantive, and rhetorical.³¹ Elaborating on these possibilities, we contrast the rights of nature movement cases with property law strategies. We conclude that the existing legal tools rooted in property doctrines offer a more certain and promising pathway to achieving many of the goals articulated by rights of nature advocates in the United States.

I. BACKGROUND: *COLORADO RIVER ECOSYSTEM V. COLORADO*

Members of DGR, a grassroots environmental organization based in Utah, filed *Colorado River Ecosystem v. Colorado*³² in September 2017. They filed the claim as “next friends” to “the Colorado River Ecosystem,” the named plaintiff.³³ With respect to the Colorado River, DGR was chiefly concerned with pollution and over-allocation of the river, including consequent effects on the river’s ecosystem, claiming that “[t]hreats to the Colorado River Ecosystem are threats to life.”³⁴

The case raised an issue of first impression for the U.S. District Court for the District of Colorado. Seeking a declaratory judgment that the Colorado River Ecosystem is a “person” entitled to rights and protection,³⁵ the plaintiff reasoned that so long as nature is treated as property, it will continue to deteriorate. “Environmental law has failed to protect the natural environment *because* it accepts the status of nature and ecosystems as property, while merely regulating the rate at which the natural environment is exploited.”³⁶ To support its argument, the plaintiff urged the court to consider the vital role played by the Colorado River Ecosystem in facilitating the diversity and abundance of life in the Colorado River Basin.³⁷ In addition, the plaintiff encouraged the court to take

31. Katherine Sanders (University of Auckland) suggests a fourth possibility in the specific context of Aotearoa (New Zealand)—namely constitutional work. She argues that the extension of personhood to a river and a park represented a compromise of Indigenous land claims and provided the opportunity to establish a set of practices that facilitates interaction between an Indigenous polity and the state, without requiring the Indigenous Peoples and the state to resolve questions of fundamental constitutional disagreement. Personhood facilitated the agreements underlying the legislation because it enabled a way forward on day-to-day management of the land and the river, without requiring either party to relinquish its claim to authority. We have not yet seen American claims asking personhood to do this kind of work in the United States.

32. Complaint for Declaratory Relief at 1, *Colo. River Ecosystem v. Colorado*, No. 1:17-cv-02316 (D. Colo. Sept. 25, 2017), 2017 WL 4284548 [hereinafter *Complaint*].

33. *Id.*

34. *Id.* at 17. See generally ARIC MCBAY, LIERRE KEITH, & DERRICK JOHNSON, *DEEP GREEN RESISTANCE: STRATEGY TO SAVE THE PLANET* (2011), <https://perma.cc/E6UB-HRRD>.

35. *Complaint*, *supra* note 32, at 22.

36. *Id.* at 2 (emphasis added).

37. *Id.* at 3–6 (describing the flora, fauna, native fish, and snails supported by the Colorado River Ecosystem).

notice of the “courts and legislatures around the globe [that] 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.”³⁸ Finally, the plaintiff urged the court to look to the history of legal personhood for women and African Americans as precedents for their case.³⁹

The State of Colorado quickly moved to dismiss the plaintiff's claim on several bases: Eleventh Amendment sovereign immunity, lack of constitutional and statutory standing, lack of federal jurisdiction, the raising of a non-justiciable issue of public policy, separation of powers and federal supremacy, and the plaintiff's failure to state a claim upon which relief could be granted.⁴⁰ In response, DGR on behalf of the plaintiff moved to amend its complaint.⁴¹ In its amended complaint, the plaintiff attempted to strengthen its arguments by, *inter alia*, expanding its claims about the relevance of corporate personhood rights for corporations in the United States, arguing that corporations are less deserving than nature of these rights:

It is courts that have found the rights of corporations in the U.S. Constitution, even though corporations are not mentioned anywhere in the Constitution. . . . The recognition of the Colorado River Ecosystem as a “person” is far less of a stretch than bestowing upon inanimate corporations the status of personhood. Recognizing the Colorado River Ecosystem as a “person” is indeed no stretch at all. It is dictated by the logic that ecosystems are living, and that human life is inextricably intertwined with, and dependent upon, ecosystems. Honoring this symbiotic relationship is much more profound than the idea that corporations are made up of people and that they, therefore, enjoy many of the same rights.⁴²

Additionally, the plaintiff made several arguments based on the First and Fourteenth Amendments of the U.S. Constitution. First, it argued that failing to recognize the personhood of the Colorado River Ecosystem violated the Fourteenth Amendment's guarantee of substantive due process.⁴³ In particular, the

38. *Id.* at 2; see also Amended Complaint, *supra* note 2, ¶¶ 35–37, at 17–18.

39. Complaint, *supra* note 32, at 2. The assertion that resistance to the personhood of trees or rivers is analogous to the historical resistance to the personhood of slaves in the United States is troubling, but not uncommon. See, e.g., Allison Katherine Athens, *An Indivisible and Living Whole: Do We Value Nature Enough to Grant it Personhood?*, 45 *ECOLOGY L.Q.* 187, 189 (2018).

40. Defendant State of Colorado's Motion to Dismiss, *Colo. River Ecosystem v. Colorado*, No. 1:17-cv-02316 (D. Colo. Oct. 17, 2017), 2017 WL 4284548 [hereinafter Motion to Dismiss].

41. See Amended Complaint, *supra* note 2.

42. *Id.* ¶¶ 44–46, at 19–20.

43. *Id.* ¶¶ 72–81, at 25–26.

plaintiff argued its right to life was guaranteed by the substantive Due Process Clause, and “[t]he failure to recognize the rights of living ecosystems, such as the Colorado River Ecosystem, while recognizing individual and corporate rights, [was] arbitrary and an abuse of power.”⁴⁴ Relatedly, it argued that the failure to recognize the plaintiff’s personhood violated the equal protection clause of the Fourteenth Amendment because corporations are recognized as legal persons and natural objects are not.⁴⁵ Where there are threats to life, as in the plaintiff’s case, the plaintiff also argued that procedural due process and petition rights guaranteed the plaintiff’s access to the courts under the First and Fourteenth Amendments,⁴⁶ especially the Petition Clause of the First Amendment.⁴⁷ Finally, the plaintiff insisted that there was an “actual case and controversy” as to whether the plaintiff had inherent rights guaranteed by the Fourteenth Amendment.⁴⁸ The State responded with a renewed motion to dismiss on essentially the same bases set forth in its original motion to dismiss.⁴⁹ Two days later, the plaintiff filed an unopposed motion to dismiss its own complaint⁵⁰ under threat of sanctions for filing a frivolous claim.⁵¹ Even in its motion to dismiss, the plaintiff asserted that the doctrine of personhood provided “American courts with a pragmatic and workable tool for addressing environmental degradation.”⁵² The plaintiff nevertheless acknowledged that “the expansion of rights is a difficult and legally complex matter,”⁵³ and it had a “heightened ethical duty to continuously ensure that conditions [were] appropriate for our judicial institution to best consider the merits of a new canon.”⁵⁴

II. NORMATIVE CLAIM: WHAT DOES IT MEAN TO CALL NATURAL RESOURCES PERSONS?

In seeking legal personhood for the Colorado River Ecosystem, the plaintiff asked the court to move the ecosystem from legal object to legal subject.

44. *Id.* ¶ 76, at 25.

45. *Id.* ¶¶ 82–89, at 26–27.

46. *Id.* ¶¶ 57–71, at 23–24.

47. *Id.* ¶ 64, at 23.

48. *Id.* ¶ 79, at 26.

49. Defendants’ Motion to Dismiss Amended Complaint, *Colo. River Ecosystem v. Colorado*, No. 1:17-cv-02316 (D. Colo. Dec. 1, 2017), 2017 WL 4284548.

50. Unopposed Motion to Dismiss, *supra* note 12. Moving forward, DGR intends to focus on encouraging local governments and municipalities to pass ordinances that support the rights of nature movement in the United States. By doing so, the organization hopes to build a new body of law within the United States that will support legal rights for and protection of rivers. Telephone Interview by Jena Ritchey with Will Falk, *supra* note 11.

51. *See supra* note 11.

52. Unopposed Motion to Dismiss, *supra* note 12, ¶ 7, at 3.

53. *Id.* ¶ 8, at 3.

54. *Id.*

Members of DGR argued that such a finding would produce better environmental outcomes.⁵⁵ Indeed, their position has been that it is the only way to save the planet.⁵⁶ This claim is consistently made by rights of nature advocates more broadly.⁵⁷ In order to evaluate this claim, however, we need to know what work personhood was and is being asked to do in American law. It seems to us that there are three possibilities: procedural, substantive, and rhetorical. Before we turn to those possibilities, we begin with a brief discussion of the normative underpinnings of personhood claims and their implications (and limits) as a basis for legal institutions.

At the heart of our concept of personhood is the human person.⁵⁸ This is not to say that only human beings can be persons or even that all human beings necessarily qualify as persons on every account of personhood. But when theorists talk about “persons” or “personhood,” human beings almost invariably serve as the paradigm case from which other extensions of the concept are evaluated.⁵⁹

Even as to human beings, there is disagreement about the basis for ascribing personhood. Is a human being a person by virtue of certain characteristics (e.g., intelligence, consciousness) she actually possesses?⁶⁰ Or, alternatively, is a human being a person by virtue of her membership in a natural kind that has unique value?⁶¹ Or should personhood be ascribed on the basis of the consequences of doing so? In our view, and as we will discuss below, when it comes to the conversation about personhood and natural resources, consequentialist considerations seem to be the most persuasive.

55. Eric Freyfogle points out that there is no social consensus, either nationally or globally, on the meaning of “better.” FREYFOGLE, *supra* note 15, at 216–18.

56. For a fuller understanding of DGR’s position on environmental degradation, see DEEP GREEN RESISTANCE, <https://perma.cc/2LL4-C37N>.

57. See, e.g., INVISIBLE HAND, *supra* note 21; *Champion the Rights of Nature*, CMTY. ENV’T LEGAL DEF. FUND, <https://perma.cc/4P7A-LBFX>.

58. See ERIC FREYFOGLE, JUSTICE AND THE EARTH 71 (1993) (“The moral philosophers who engage in this reasoning by and large begin with the individual human, to whom they attribute moral worth.”); JOHN F. KAVANAUGH, WHO COUNT AS PERSONS? 1 (2001) (“Philosophy springs from human persons.”).

59. See Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209, 221–22 (2005).

60. See *id.*; see also DEREK PARFIT, REASONS AND PERSONS 202 (1984) (“[T]o be a person, a being must be self-conscious, aware of its identity, and its existence continued over time.”); FREYFOGLE, *supra* note 58, at 72–73 (describing how some philosophers engage in the process of ascribing moral worth by identifying some key characteristic possessed by human beings and then asking whether other beings possess it as well).

61. See John Finnis, *The Priority of Persons Revisited*, 58 AM. J. JURIS. 45, 54 (2013).

A. Characteristic-Based Claims

Among those calling for the recognition of personhood in nature (or in discrete components of the nonhuman natural world), there are many who approach the question from the first, characteristic-based perspective. Supporters of animal rights, for example, typically ground their arguments for moral and legal recognition of the rights of these beings on characteristics that many animals possess. Most frequently, they point to “sentience” as the morally significant trait.⁶² Those who agree to ascribing personhood to human beings on the basis of certain morally salient characteristics, however, frequently run into trouble with boundary cases, such as species that typically display those characteristics to a marginal degree or individual human beings who happen to lack those characteristics, either temporarily or permanently (e.g., fetuses, or those in permanently vegetative states).⁶³

Some commentators have noted the fragility of human rights claims grounded in this characteristic-based approach.⁶⁴ We do not need to wade into this tangled philosophical debate. For our purposes, it is enough to observe that, at a minimum, all the same difficulties arise with regard to extending the characteristic-based approach to the natural world. Beyond sentient animals, this approach is not one that can sustain the more ambitious claims of those seeking personhood status for a broad range of natural resources. And so we set it to the side.

B. Intrinsic Moral Value Claims

A different approach treats personhood as reflecting intrinsic moral value possessed by all members of a natural kind that (as a kind) possesses certain characteristics that set it apart from others. As John Finnis puts it, “human rights and the justice of respecting them” are predicated on “all human persons . . . as beings *each and all* of whom have the dignity of having the at least radical capacity of participating in the human goods that are picked out in practical reason’s first principles . . . and that make sense of all human intending.”⁶⁵

62. See, e.g., SHERRY F. COLB & MICHAEL C. DORF, BEATING HEARTS: ABORTION AND ANIMAL RIGHTS 13–44 (2016).

63. See, e.g., Ohlin, *supra* note 59; KAVANAUGH, *supra* note 58 at 8–9.

64. See, e.g., Ohlin, *supra* note 59, at 214–15.

65. Finnis, *supra* note 61, at 54; see also KAVANAUGH, *supra* note 58, at 70 (“The dignity of the human person resides in the capacities with which such personhood is endowed: the capacity for self-consciousness, the capacity for freedom, and the capacity for affirmation of love. These endowments characterize that kind of being called human. As members of a kind, humans partake in a nature.”). Even this approach does not exclude the possibility of nonhuman persons. *Id.* at 62 (“There may be other persons that are not human. . . . If nonhuman animals, for example, are discovered to have reflexive consciousness . . . they would be persons—even if not of the human variety.”).

Focusing the attribution of value on characteristics of the natural kind—as Finnis does—similarly limits the utility of this approach to understanding personhood claims in nature. Only natural kinds that are capable of participating in “human goods” are deserving of “human rights.”⁶⁶

The basis of moral value could also be described in religious or spiritual terms that go beyond the observable characteristics of the natural kind. This kind of spiritual claim does seem to lie behind at least some calls for certain natural entities—lakes, rivers, mountains, etc.—to be treated as persons, despite their non-sentience. For example, many (though certainly not all) Indigenous communities do recognize animacy in nonhuman beings and things and have translated that conceptualization into law. The White Earth Band of Ojibwe, for example, adopted the *Rights of Manoomin*, or wild rice, in December 2018.⁶⁷ More recently, the Yurok Tribe passed a resolution allowing cases to be brought on behalf of the Klamath River in tribal court.⁶⁸ While the *Colorado River* plaintiff invoked international Indigenous examples in its claim,⁶⁹ the case is notable for its failure to explain significant differences between it and those examples,⁷⁰ to draw on Native American cultural and legal practices, or to consult any of the directly affected Native American tribes.⁷¹ Without wading into the difficult and important debate over the limits of public reason and the

66. See generally Ngaire Naffine, *Legal Personality and the Natural World*, 3 J. HUM. RTS. & ENV'T 68 (2012).

67. White Earth is part of the Minnesota Chippewa Tribe. Winona LaDuke, *The White Earth Band of Ojibwe Legally Recognize the Rights of Wild Rice*, NATION OF CHANGE (Feb. 4, 2019), <https://perma.cc/7V3R-NDGV>.

68. Smith, *supra* note 18.

69. See generally JOHN BORROWS, BEYOND EXPERIENCE? OBJECTIVITY, INDIGENEITY & FREEDOM OF RELIGION (forthcoming 2020) (on file with authors) (discussing the dangers of using our own interpretive frameworks when considering religion and laws that are beyond our own experience).

70. For example, in Aotearoa (New Zealand), the Te Awa Tupua or Whanganui River was declared a ‘legal entity,’ but there are several important differences that argue against its relevance for the plaintiff’s case. See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.). First, it was a negotiated land claim settlement between the New Zealand Crown and the Whanganui *iwi* people, and not a judicial decision. Second, it settled claims of political authority for the river by vesting it in neither the Crown nor the *iwi*. Third, the underlying property regime remains operative. Fourth, it is a unitary state. Finally, the designation of personhood rested on the acceptance and use of Māori legal and cultural practices as opposed to traditional common law doctrine. From the Māori perspective, the river is an ancestor, a fundamentally different concept from persons in the common law sense. Plaintiff evinces no understanding or recognition of these differences, notwithstanding DGR’s Code of Conduct, which provides: “2. Solidarity: Non-indigenous members of DGR remember that we are living on stolen land in the midst of an ongoing genocide. The task of the non-[I]ndigenous is to build solidarity with indigenous people in defending the land, preserving traditional cultures and protecting sacred ceremonies from exploitation.” *What Is Deep Green Resistance?*, DEEP GREEN RESISTANCE, <https://perma.cc/53R4-HGXS>.

71. Laura Spitz, *Red River, White Law*, TRIBAL L.J. BLOG 1 (2019).

correctness of basing public policy on particular religious or spiritual commitments,⁷² however, we simply note the thorny Establishment Clause concerns that would arise in response to such an approach.⁷³

C. Consequential or Pragmatic Claims

As an alternative to this kind of first-order moral analysis, a more indirect and pragmatic approach might begin by asking whether recognizing certain nonhuman entities as legal persons would lead to better legal *outcomes*. This seems to be the register in which the law considers whether and how to treat corporations as “persons.” No one really argues that a corporation is a person by virtue of the characteristics it possesses or the natural kind to which it belongs. Instead, the normative arguments for corporate personhood typically relate to the consequences of treating corporations “as if” they were persons.⁷⁴

Often, the outcomes of conferring legal personhood on nonhumans are analyzed in terms of aggregate utility or welfare.⁷⁵ But they can also be analyzed in terms of other kinds of consequences as well.⁷⁶ For example, courts have considered the impact of recognizing corporate rights on the ability of natural human beings to exercise their personhood-rights. As the U.S. Supreme Court put it in *Burwell v. Hobby Lobby Stores, Inc.*⁷⁷:

[I]t is important to keep in mind that the purpose of this fiction [of recognizing rights in corporate persons] is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory,

72. See, e.g., Kent Greenawalt, *On Public Reason*, 69 CHI.-KENT L. REV. 669 (1994).

73. See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 690 (1994) (striking down the creation of a school district whose boundaries were designed to coincide with those of a Hasidic Jewish enclave as a violation of the Establishment Clause); cf. *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688, 694 (9th Cir. 1986) (discussing the Establishment Clause concerns raised by the government in a case involving a claim for federal protection of sacred lands), *rev’d on other grounds*, 485 U.S. 439 (1988). But see Spitz, *supra* note 71.

74. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706–07 (2014).

75. See, e.g., Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 477 (2019) (describing the purpose of corporate law theorists as ensuring that “corporations further, rather than erode, “the public welfare as they diversely view it”).

76. Eric Freyfogle has lamented on more than one occasion that the conservation movement has failed to clearly articulate its goals so that the question of what counts as a “better outcome” cannot even be answered. See, e.g., FREYFOGLE, *supra* note 15, at 178–218.

77. 573 U.S. 682 (2014).

are extended to corporations, the purpose is to protect the rights of these people.⁷⁸

This kind of pragmatic, consequentialist analysis is indeed what many advocates of nature seem to be engaging in, as we discuss at greater length below. The question for these advocates is not whether a mountain or a river is a person in any philosophically defensible sense. It is instead whether recognizing a mountain or a river as a person will guide the legal system to produce “better” legal outcomes, where “better” is defined in terms of the consequences for human beings.

But we are doubtful that simply calling a river a “person” would—by itself—make much difference for legal outcomes. Recognition of personhood makes the greatest difference in legal proceedings when it changes the locus of decision-making about actions that have an impact on the person. Recognizing a child as a separate person—as opposed to, say, treating children as the property of their parents—can be the basis for removing decision-making authority from the parents and putting it in the hands of a guardian ad litem who acts on behalf of the child’s best interests.⁷⁹ Similarly, recognizing a fetus as a person could become the basis for shifting decision-making about the fetus from the mother to some third party.

The devil is in the details. The real-world impact of conferring personhood status on nonhuman entities would depend almost entirely on the matrix of procedural and substantive rules built around that recognition. Although the law recognizes children as persons, it defers to parental decision-making almost reflexively, stepping in only when the parental relationship breaks down or when parental behavior is so extreme as to justify state intervention. Recognizing trees as persons would have no impact on the treatment of trees located on private land unless some new rule shifts decision-making about those trees from the private landowner to some third-party guardian. (We discuss the possibilities for these sorts of shifts below, in connection with the issue of standing.)

Ultimately, then, an impact-based analysis of the wisdom of recognizing personhood in nonhuman entities turns on an analysis of these background procedural and substantive rules. In this regard, we see two questions as paramount. The first is: who is the relevant rule-maker? Most discussions of conferring personhood on natural resources assume that the decision-maker who will determine the impact of that change in status is a judge. The intuition seems to be that calling a river a person will yield different legal outcomes by forcing judges to entertain cases that would otherwise flounder on standing grounds and by empowering (or requiring) judges to import into their evaluation of legal

78. *Id.* at 706–07.

79. See Susan L. Thomas, *Liability of Guardian Ad Litem for Infant Party to Civil Suit for Negligence in Connection with Suit*, 14 A.L.R.5th 929 (1993).

cases doctrines that are drawn from other areas of the law. We set aside the undeniably important question of whether it is even desirable to confer such unbounded discretion on judges. We turn to a discussion of the potential impacts—both procedural and substantive—of recognizing natural resources as persons below in Parts III.A and III.B. Ultimately, our view is that anything that could be accomplished through recognition of personhood in nature could be accomplished using existing legal categories, and the latter is an easier lift.

Our skepticism about the substantive consequences of attributing personhood to nature leads us to consider our second key question—would adopting the language of personhood with regard to natural resources change the politics of environmental advocacy? That is, does the language of personhood have the power to shift the public conversation about environmental harms and benefits in ways that environmentalists want, even in the absence of any real legal impact? This is a question that seems almost impossible to answer in the abstract, but it is one we will consider below in Part III.C.

III. THE WORK OF PERSONHOOD ON BEHALF OF NATURE IN THE UNITED STATES

A. Procedural Work

Many rights of nature advocates—including the *Colorado River* plaintiff—arguably claim personhood for nature in order that natural objects may directly access certain procedural rights. These include the right to seek and receive information, the right to participate in decision-making, and the right of access to justice (including the right to file for injunctive relief⁸⁰ and the right to present and confront evidence). For the purposes of this Article, we will discuss these concepts in the general language of “standing,” but recognize that they involve complex and contested areas of law.⁸¹ The move to seek standing in the name of nature should not be surprising. Environmental justice organizations attempting to bring or defend claims on behalf of nature have often been stymied by standing doctrine, particularly in federal courts,⁸² and seeking standing in the name of a natural object—such as a mountain or river—is one strategy for overcoming those earlier losses.

80. Amended Complaint, *supra* note 2, ¶ 113(e), at 33.

81. See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 408 (2010) (“The nature and scope of the rights protected by the Due Process Clauses of the Fifth and Fourteenth Amendments are among the most debated topics in all of constitutional law.”).

82. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). But see *Juliana v. United States*, 947 F.3d 1159, 1168–69 (9th Cir. 2020) (holding that Plaintiffs satisfied the first two elements of Article III standing, at least at the summary judgment phase (discussed in Part III, *infra*)).

Perhaps the most often-cited judicial statement in favor of extending standing to nature was made by U.S. Supreme Court Justice Douglas in *Sierra Club v. Morton*.⁸³ In that case, the Sierra Club sought:

a declaratory judgment that various aspects of [a] proposed development [of the Mineral King Valley in the Sierra Nevada Mountains] contravene[d] federal laws and regulations governing the preservation of national parks, forests, and game refuges, and also [sought] preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with “a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country,” and invoked the judicial-review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*⁸⁴

The Supreme Court held (with Justices Douglas, Brennan, and Blackmun dissenting) that the Sierra Club lacked standing to sue because it failed to show it was adversely affected by the challenged actions. In his oft-quoted dissent, Justice Douglas wrote, “[c]ontemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.”⁸⁵ His reasons rested on the view that the question of standing would be simplified “if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate [natural] object.”⁸⁶ The normative basis for his dissent is unclear. At points, he described nature as a fictional person⁸⁷—inanimate, as in the previous quote—and at others, he described it as “living.”⁸⁸ But he clearly viewed either basis as supporting his proposed ruling.

Almost contemporaneously with the Court’s judgment in *Sierra Club v. Morton*, Christopher Stone published an article, *Should Trees Have Standing?*—

83. 405 U.S. 727 (1972).

84. *Id.* at 730.

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

86. *Id.* at 741.

87. *Id.* at 742–43 (“Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a ‘person’ for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes. So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life.” (citations omitted)).

88. *Id.* at 743 (“The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it.”).

Toward Legal Rights for Natural Objects.⁸⁹ In that article and a subsequent book by the same name, Stone argued that natural objects need standing in order to have and assert legal rights:

[F]or a thing to be a holder of legal rights, something more is needed than that some authoritative body will review the actions and processes of those who threaten it [T]hree additional criteria must be satisfied. . . . They are, first, that the thing can institute legal actions *at its behest*; second, that in determining the granting of legal relief, the court must take *injury to it* into account; and third, that relief must run to the *benefit of it*.⁹⁰

Together, Douglas and Stone are invariably cited by those seeking personhood for natural objects.⁹¹ Two common reasons are advanced for adopting Stone's approach. First, certain constitutional rights are reserved to "persons," and therefore personhood is a necessary condition for access to those substantive constitutional rights.⁹² Second, this move is necessary in order to place nature's well-being squarely before courts, given how narrowly standing doctrine has been applied in cases brought by concerned citizens and non-profit organizations in the past.

The first argument is true (as far as it goes) in the sense that several constitutional rights are reserved to "persons,"⁹³ but it does not assist in the hard work of determining whether those rights make sense in the context of nature, nor whether granting such rights would have a meaningful impact on legal outcomes—a point we take up in Part III.B, *infra*. The second argument also fails to convince us. By itself, a recognition of personhood would not answer the standing question. Personhood opens up the possibility for standing, of course,

89. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Stone claims that he got the article out in time for use by Justice Blackmun, i.e., that he coordinated the article's publication with the Justice.

90. *Id.* at 458.

91. The Colorado River plaintiff's arguments clearly track Stone's. The plaintiff reasoned that the "ability to protect itself . . . require[d] that Plaintiff Colorado River Ecosystem have access to the courts." Amended Complaint, *supra* note 2, ¶ 65, at 24. Further, it was "the real party in interest," and, "[b]y recognizing standing on behalf of the ecosystem itself, injuries caused to the ecosystem [would be] directly recoverable, rather than being dependent solely on harms caused to the users of those ecosystems." *Id.* at 2-3, ¶ 67, at 24.

92. *Id.* ¶ 66, at 24 ("Recognition of the capacity of Plaintiff Colorado River Ecosystem to possess rights requires a recognition that the Colorado River Ecosystem is a 'person' for purposes of asserting those rights . . . because the word 'person' is used in the U.S. Constitution and it is generally 'persons' who may appear in court.")

93. The Fifth and Fourteenth Amendments, for example, apply to "persons." U.S. CONST. amends. V, XIV. The First, Second, Fourth, and Tenth Amendments use the vocabulary of "people," *id.* amends. I, II, IV, X; the Fifteenth and Nineteenth Amendments extend rights to "citizens," *id.* amends. XV, XIX.

and in that sense, might be beneficial. But it is neither required for standing, nor does it guarantee standing.⁹⁴

First, not all persons have standing in all cases, even when they genuinely believe their interest is significant⁹⁵ or they satisfy the first two prongs of constitutional standing.⁹⁶ Indeed, many persons do not have standing in cases where they sincerely believe they have a concrete interest or injury—think here of the Internal Revenue Code and the fierce fights over which taxpayers have standing to challenge the constitutionality of specific provisions.⁹⁷ Even environmental protection statutes that provide for direct citizen action, such as the Endangered Species Act⁹⁸ and the Clean Water Act,⁹⁹ have been interpreted so as to deny standing to arguably affected persons.¹⁰⁰

Conversely, standing for nature is not necessary to open the courthouse doors to the kinds of claims Justice Douglas and Professor Stone would have liked to see litigated. True, in the context of environmental law, standing doctrine has been narrowed in ways that plainly limit the ability of environmental groups and concerned citizens to make environmental protection arguments when decisions are being made that directly impact the natural environment. But there is nothing inherent to the concept of standing that requires such an interpretation. Courts and legislatures could broaden standing rules, and some state courts do employ very broad standing doctrines.¹⁰¹ Even the relatively narrow confines of the current federal doctrine arguably leave room for a significant number of individuals and groups to assert a direct interest in a wide range of environmental cases. Thinking back to cases like *Sierra Club v. Morton*, for

94. For Stone, the conditions associated with standing were “necessary and sufficient for legal personhood.” Christopher D. Stone, *Response to Commentators*, 3 J. HUM. RTS. & ENV'T 100, 100 (2012). In other words, in his view, standing means personhood and personhood comes with standing rights. This is subject to debate in this country and would seem to conflate legal personhood with standing.

95. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984) (holding that African American parents lacked standing to challenge IRS's grant of tax-exempt status to racially discriminatory private schools).

96. The first two requirements for establishing standing are (1) injury in fact (2) fairly traceable to the challenged conduct of the defendant. See *Juliana v. United States*, 947 F.3d 1159, 1168–69 (9th Cir. 2020).

97. See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); cf. *Flast v. Cohen*, 392 U.S. 83 (1968) (finding standing for taxpayers on First Amendment grounds).

98. 16 U.S.C. § 1540(g).

99. 33 U.S.C. § 1365(a).

100. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (denying standing to a group of American environmental organizations under the Endangered Species Act).

101. California employs a broader definition of standing than permitted under the federal Constitution. See, e.g., *Weatherford v. City of San Rafael*, 395 P.3d 274, 278 (Cal. 2017) (“Unlike the federal Constitution, our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine.”).

example, it is increasingly difficult to say that ordinary humans do not have an interest in projects with significant environmental impact, as the lived effects of environmental degradation are increasingly obvious and accepted in our culture.¹⁰²

Assuming, *arguendo*, that a court recognized an element of nature as a person with standing, such recognition would be just the first step needed to make a difference for legal outcomes. Decision-makers would still need to identify someone to speak on nature's behalf. This raises questions about who decides who gets to speak on behalf of nature. The decisions about both—who gets to speak, and who decides who gets to speak—will be highly contested. As the defendant observed in the *Colorado River* case, the “Law of the [Colorado] River” implicates seven states, the Republic of Mexico, dozens of Native American Tribes, the federal government, and “water user, power and environmental groups throughout the southwestern United States,” not to mention millions of private landowners.¹⁰³ This list does not even account for the multitude of mammals, birds, insects, trees, and other elements of nature, each of which might have claims to standing in their own right on the plaintiff's theory. In such a complex environment, it is not immediately obvious who should speak on behalf of the Colorado River Ecosystem, nor how that determination would be made by a court.

Dr. Seuss made this question very easy in *The Lorax*.¹⁰⁴ But in the absence of a magical creature who announces to the world that he “speaks for the trees,” courts are likely to turn to the same parties who currently present themselves—landowners, neighbors, advocacy groups, responsible government agencies—and ask which ones, in any given case, are the most appropriate to speak in court on behalf of some particular natural resource. This inquiry into who—among the many possible voices—should speak on behalf of nature is very likely to recapitulate the kinds of inquiries raised in the standing context and perpetuate one of the central problems the plaintiff presumably sought to solve, namely, the tendency to approach environmental concerns from the relatively narrow perspectives of the parties before the court.

102. See, for example, the discussion of Article III standing in *Juliana v. United States*, 947 F.3d 1159, 1168–1175 (9th Cir. 2020), noting that the “[plaintiffs’] injuries are not simply ‘conjectural’ or ‘hypothetical;’ at least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked.” *Id.* at 1168. In addition to increasing recognition for the view that environmental impacts are felt widely and ordinary people have a direct interest in improving environmental outcomes, there is the practical point that courts evince more willingness to reconsider standing for human beings previously excluded than they do to extend standing to nonhumans.

103. Motion to Dismiss, *supra* note 40, at 10.

104. See *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 183 (4th Cir. 2018) (“We trust the United States Forest Service to ‘speak for the trees, for the trees have no tongues.’” (quoting DR. SEUSS, *THE LORAX* (1971))), *rev'd*, 140 S. Ct. 1837 (2020).

In any event, the ability to enter the courtroom to speak on behalf of natural resources is itself only the first step. It is difficult to see how problems of environmental degradation are assisted or solved by standing *per se*. Far more impact would come from some change in the rules of decision-making or in the substantive interests that courts (or other decision-makers) consider when resolving the natural resources claims. Whether recognizing the personhood of natural resources has an impact on these substantive questions is the issue to which we now turn.¹⁰⁵

B. Substantive Work

In the *Colorado River* case, by the terms of its complaint, the plaintiff sought personhood—at least in part—so that it could assert substantive, including constitutional, rights.¹⁰⁶ This is true in other American examples as well, including city ordinances such as Pittsburgh's 2010 fracking ban¹⁰⁷ and Toledo's 2019 Lake Erie Bill of Rights,¹⁰⁸ which recognize substantive rights for nature. Commonly asserted rights in this context include the right to life;¹⁰⁹ the right to exist, flourish, regenerate, be restored, and naturally evolve;¹¹⁰ and the right to equal treatment under the law.¹¹¹

Notwithstanding the plaintiff's and others' claims, however, courts regularly draw distinctions among legal persons—for example, humans and corpo-

105. Others have noted that asking personhood to do substantive work on behalf of a complainant serves a dual function: “[I]t [would help] to protect those considered persons against suffering the hurts and indignities that the selfish tendencies of human psychology could inflict on them, and it helps to justify treating those creatures not considered persons selfishly.” STEVE F. SAPONTZIS, *MORALS, REASON, AND ANIMALS* 67 (1987). In other words, it draws a line between those with substantive rights and those without.

106. The plaintiff argued that it was protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Petition Clause of the First Amendment of the U.S. Constitution. Amended Complaint, *supra* note 2, ¶¶ 61–64 at 23. For an argument that the concept of person is not necessary for making a human rights claim, see generally Ohlin, *supra* note 59.

107. Pittsburgh's City Council unanimously passed the ordinance. PITTSBURGH, PA., CODE tit. VI, art. I, ch. 618.03(b) (enacted Nov. 16, 2010), <https://perma.cc/U7FW-X3ZV> (recognizing that natural communities and ecosystems “possess inalienable and fundamental rights to exist and flourish”).

108. Lake Erie Bill of Rights, *supra* note 22, at 254(a) (recognizing the rights of the Lake Erie Ecosystem).

109. Amended Complaint, *supra* note 2, ¶ 75, at 25.

110. Lake Erie Bill of Rights, *supra* note 22, at 254(a) (“Lake Erie, and the Lake Erie Watershed, possess the right to exist, flourish, and naturally evolve”); see also Amended Complaint, *supra* note 2, ¶ 74, at 25.

111. The right to equal treatment is asserted vis-à-vis corporations in plaintiff's Amended Complaint. Amended Complaint, *supra* note 2, ¶¶ 83–89, at 26–27.

rations¹¹²—when making decisions about the application and scope of constitutional and other rights. The *Colorado River* plaintiff does not address itself to that jurisprudence. The plaintiff's Fourteenth Amendment claims are especially vexing. We are not aware of any court extending equal treatment protections to nonhuman persons by reference to other nonhuman persons.

Even if we could agree on what rights flowed from personhood for nature—for example, the right to “life”—the scope and meaning of those rights are neither immediately obvious nor easily ascertainable.¹¹³ The complexity of the Colorado River Ecosystem makes it nearly impossible to describe what “life” would look like as a “personal right” over time. The ecosystem is necessarily comprised of immeasurable numbers of flora and fauna; is the life of each to be measured in evaluating the life of the whole? How is a court to balance the competing rights to life presented by other nonhuman elements of nature within the system? Are the human members of the ecosystem relevant to these questions? This discussion points to a central problem of the rights framework in the context of rights of nature. Environmental degradation framed as a problem that might be solved by the assertion of rights posits the rights of nature *qua* person as in conflict with the rights of other persons, instead of promoting an understanding of the biotic community, including humans and nonhumans, that ultimately succeeds (or fails) as one.¹¹⁴ What Stone and others really appear to be saying is the river-as-a-river should be added into the balancing of interests considered when making decisions that will likely impact the river's health and survival (and consequently, our health and survival). We would go further: the river is not simply one interest among many; it transcends the interests of us all. But that is different from saying a river holds personal rights and points to a concern related to the dangers of rights discourse more generally. Some argue the use of rights “reflects and produces a kind of isolated individualism that hinders social solidarity and genuine human connection.”¹¹⁵ Without entering into the thicket of these arguments about the nature of human rights, it seems to us that the concerns they raise are even more compelling in the context of nature.

Finally, given the difficulty in determining the kind, scope, and meaning of rights in this context, it seems unlikely (although not impossible) a court would agree they exist within the framework of U.S. rights jurisprudence. Even in Aotearoa (New Zealand), where a detailed legislative framework has been enacted for co-managing the Whanganui River and Te Urewera Park, scholars and commentators largely agree that the granting of personhood to the river

112. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Ginsburg, J., dissenting).

113. See generally Mark Tushnet, *The Critique of Rights*, 47 S.M.U. L. REV. 23 (1993).

114. ERIC T. FREYFOGLE, A GOOD THAT TRANSCENDS 8–35 (2017).

115. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2188 (2013).

and the park was intended to be “procedural” in the sense of changing how decisions would be made about the environment and not determinative of specific outcomes. New Zealand’s approach has been described as a non-ownership model, where the incidents of ownership have been unbundled and reapportioned within a new co-management framework.¹¹⁶ This framework is not meant to determine outcomes or substantive rights *per se*; rather, the idea seems to be that new processes will facilitate the potential for different outcomes.

C. Rhetorical Work

The third kind of work personhood may be asked to do is rhetorical. This work aims to decenter human interests, reorient human relationships with the nonhuman natural world, and maybe even participate in the arduous process of producing a cultural shift in interpretative approaches to existing statutory and common law doctrines. In the international examples referenced by the *Colorado River* plaintiff, scholars and jurists acknowledge the symbolic and “reframing” functions of personhood, at least in the sense of reframing relationships between people, government, and the land. In seeking to reframe their claims along these lines, advocates may be engaging in what scholars of social movements call “frame alignment” or “frame bridging”—that is, seeking to make connections with, and leverage the power of, other successful movements by employing similar discursive strategies.¹¹⁷

Perhaps making arguments about nature’s personhood will have the kinds of dramatic impacts on human decision-making that advocates claim. On the other hand, it seems equally possible that speaking of nature as a person—a person whose interests are different from those of human beings—could lead to even worse decision-making by presenting the preservation of natural resources as adverse to human interests or as simply one interest among many to be considered and safely discounted.¹¹⁸ Claims about the impact of rhetoric are very hard to evaluate in any context, and especially in the context of American environmental law. We believe that human beings’ relationships to natural resources would be more effectively reoriented by showing how the wise stewardship and preservation of natural resources aligns with human beings’ true interests. The *Colorado River* plaintiff says as much when they argue in favor of recognizing the personhood of nature by analogy to the legal recognition of corporate personhood. Calling the relationship between human beings

116. Sanders, *supra* note 25.

117. See generally David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOCIO. REV. 464 (1986).

118. See, e.g., Nicholas Kristof, *Choosing Animals over People?*, N.Y. TIMES (Apr. 7, 2018), <https://perma.cc/N36W-ZAC4> (asking whether advocating for the protection of animals is a disservice to human beings in need before ultimately concluding that protecting animals is often in human beings’ interests); see also FREYFOGLE, *supra* note 114, at 8–35.

and nature “symbiotic,” the plaintiff argued that “ecosystems are living, and that human life is inextricably intertwined with, and dependent upon, ecosystems.”¹¹⁹

But the rhetoric of “property” is far less hostile to wise stewardship than the *Colorado River* plaintiff implied. The *Colorado River* plaintiff argued that “[t]he dominance of a culture that defines nature as *property* enables its destruction.”¹²⁰ The *Colorado River* plaintiff argued that environmental laws that accept the status of nature as property necessarily and “merely regulate the rate at which the natural environment is exploited.”¹²¹ In our view, however, this argument rests on an overly simplistic understanding of the nature and function of “property” within our common law legal system. As a consequence, this rejection of property fails to apprehend the many valuable tools within property law for fostering a culture of conservation and stewardship.

Far from representing the kind of Blackstonian “sole and despotic dominion”¹²² of owners that the *Colorado River* plaintiff associated with the institution of property, property concepts are more capacious.¹²³ This is not to deny that the Blackstonian concept of ownership has exerted a powerful influence over the American imagination. As Greg Alexander and many others have observed, the notion of property as commodity has been the dominant strain of American property discourse since the country’s founding.¹²⁴ Despite its rhetorical power this understanding has always been contested by a more socially constrained account of ownership as entailing obligation and “propriety.”¹²⁵ As Alexander has put it, the Blackstonian account of property ownership is “highly misleading.”¹²⁶ “[P]roperty owners owe far more responsibilities to others,” he explains, “than the conventional imagery of property rights suggests.”¹²⁷

Rather than reflecting a worldview of relentless exploitation and domination, property is more accurately understood as a legal vocabulary for the contestation and resolution of human beings’ conflicting interests in finite and

119. Amended Complaint, *supra* note 2, at 19.

120. *Id.* at 17 (emphasis added).

121. *Id.* at 2.

122. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979) (1765–69).

123. Numerous scholars over the years have mined the common law of property to demonstrate the rich tools it has developed for considering the interests of non-owners and for encouraging the wise stewardship of natural resources. See, e.g., ERIC T. FREYFOGLE, *THE LAND WE SHARE* (2003); JOSEPH SAX, *PLAYING DARTS WITH A REMBRANDT* (1999); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022 (2009); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

124. See GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY*, at 1–2 (1997).

125. *See id.*

126. Alexander, *supra* note 123, at 747.

127. *Id.*

scarce resources. Understood in this way, environmental regulations are part of the extended law of property, rather than external to it or reflective of wholly unrelated values.¹²⁸ A system of “private property” is one that provides a set of “rules governing access to and control of material resources” that are “organized around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual.”¹²⁹ But “private” property is just one property possibility among many others, and Blackstonian dominion is just one possible way of understanding private ownership, one that has never been reflected in the common law of property.¹³⁰

Property can be public or private, individual, or shared. Even a parcel of private, individually owned land is limited by the correlative rights of others. And it can be encumbered by servitudes reflecting the entitlements of neighbors and the interests of future generations. The constraints and obligations that operate within the law of private ownership are too numerous to list in an exhaustive way. The law of nuisance imposes reciprocal obligations on landowners to use their private property in ways that do not harm their neighbors' correlative rights to the use and enjoyment of their own property.¹³¹ Tens of millions of homeowners own their homes subject to elaborate and extensive servitudes that limit their freedom to use or alter their property in ways that their neighbors might find distasteful or obnoxious.¹³² Owners of property subject to future interests owe obligations to the holders of those interests. For example, they may not be able to take actions that harm the interests of those future owners, such as removing natural resources from the property.¹³³ So-called “conservation easements” deploy the private property device of the servitude to require landowners to permanently preserve lands with unique ecological, aesthetic, or historic value.¹³⁴

When it comes to protecting natural resources, the *Colorado River* plaintiff's rejection of “property” as a vehicle for accomplishing that goal makes the double mistake of employing a caricatured understanding of ownership as private ownership and private ownership as Blackstonian dominion. This mistake is common on both the left and the right ends of political and legal discourse.

128. See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 1–8 (2012); Eloise Scotford & Rachael Walsh, *The Symbiosis of Property and English Environmental Law—Property Rights in a Public Law Context*, 76 MOD. L. REV. 1010 (2013).

129. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 38 (1988).

130. See ALEXANDER, *supra* note 124, at 1–2.

131. See JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW 485–86 (7th ed. 2017).

132. See *id.* at 703.

133. See *id.* at 684–86.

134. According to the National Conservation Easement Database, roughly thirty-three million acres of land are currently encumbered by almost 200,000 conservation easements. See NAT'L CONSERVATION EASEMENT DATABASE, <https://perma.cc/R2MH-M9LW>. This is an area roughly the size of New York State.

On the far left, this mistake leads commentators to reject the notion of property as inherently exploitative without considering the community-strengthening possibilities of, for example, public or shared ownership.¹³⁵ On the right, so-called “free market environmentalists” make the converse mistake when they argue that private landownership readily aligns the financial incentives of owners with the long-term stewardship of their land.¹³⁶ This view derives some support from examples of situations in which owners’ self-interest aligns with the goals of environmental conservation.¹³⁷ But the problem of spatial and inter-temporal externalities, not to mention profit-minded owners’ tendency to focus narrowly on market-tradeable values, makes an unconstrained reliance on owners’ profit-motives a risky and incomplete strategy for environmental protection.¹³⁸

Dismissing private ownership altogether or, on the other hand, simply equating the decisions of private owners with wise land use reinforces some of the worst stereotypes of “property” rhetoric. But a broader perspective on the varieties of available “property” regimes, and a more accurate account of the qualified nature of property rights within our common law system, reveals the potential to reconcile the interests of “property” and nature. Scholars in the Progressive Property movement have adopted such a broad approach, pushing back against the tendency by both environmentalists and their adversaries, to equate “property” with unconstrained private prerogative and unregulated markets. Viewed from a thicker conception of the rights and duties of “owners,” one that is faithful to the roots of our own legal system, but also reflected in many other legal cultures, property can become a vehicle for transmitting values that can help to foster a culture of sustainability and respect for natural systems.¹³⁹ Unlike the “rights of nature” approach advocated by the *Colorado River* plaintiff, however, this is not an approach that pits human beings against nature in a zero sum contest. Rather, it views wise land use as aligned with human beings’ interests in thriving and flourishing.

135. Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1938–62 (2005). In addition to the Colorado River plaintiff’s anti-property views, *supra* notes 3, 4 and accompanying text, see, for example, VICKY OSTERWEIL, IN DEFENSE OF LOOTING 16 (2020) (“The right to property is innately, structurally white supremacist.”).

136. See, e.g., TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 4 (rev. ed. 2001) (arguing that, in a system of private ownership embedded within free markets, “a discipline is imposed on resource users because the wealth of the property owner is at stake if bad decisions are made”).

137. See, e.g., Greg Warchol & Brian Johnson, *Wildlife Crime in the Game Reserves of South Africa: A Research Note*, 33 INT’L J. COMPAR. & APPLIED CRIM. JUST. 143, 151 (2009) (finding security personnel in private game reserves to significantly outperform their counterparts in the public sector).

138. See Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 884–86 (2009).

139. See Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2008).

Like more market-oriented defenders of property rights (and unlike anti-property voices on the left), the Progressive Property approach has the conceptual tools to take seriously the value of private ownership as a vehicle for coordinating economically productive behavior and for yoking owners' self-interest to society's interest in that production.¹⁴⁰ At the same time, its recognition of values beyond the market enables it to take seriously the externalities that can lead private owners to make decisions about land and natural resources that are rational in narrow market terms, but nevertheless harmful, all things considered.

Among these possible externalities, the most intractable for narrowly market-based approaches are those that involve the intergenerational consequences of today's landowners. The notion that land has a "memory," that today's land use decisions echo far into the future, creates a genuine problem of intergenerational conflicting interests within a system of property.¹⁴¹ But, contrary to the arguments of the *Colorado River* plaintiff, this is a conflict that is well known and capable of being addressed by the rhetorical and substantive legal tools of property law (understood to include both the private law of property and the owner-constraining public law matrix within which that private law is situated).

One of us has argued previously that, properly understood and encouraged by appropriate land use regulation, even private land ownership can help owners develop the virtue of humility (literally, a closeness to the Earth) regarding their impact on the land¹⁴²:

Expressing humility in our land-use decisions does not mean that we should never alter the landscape around us, but it does suggest that we would be wise to err on the side of caution and comprehensiveness in our decision making about land. Consequently, the virtue seems to lend itself to a precautionary approach to land-use decisions. Although it comes in a variety of shapes and sizes, in most guises the precautionary principle is understood to recommend special sensitivity even to relatively small or uncertain risks of irreversible harms.¹⁴³

Historically, doctrines like nuisance law and the law of servitudes helped to mitigate and coordinate the local impacts of owners' decisions. The common law of riparian ownership limited owners to limited uses of neighboring waterways that do not impair the waterway itself or otherwise infringe on the correla-

140. See *id.*; see generally ALEXANDER & PEÑALVER, *supra* note 128, ch. 5 (discussing property and human flourishing).

141. See Eduardo M. Peñalver, *Property's Memories*, 80 *FORDHAM L. REV.* 1071, 1080–81 (2011).

142. See Peñalver, *supra* note 138, at 884–86.

143. *Id.* at 885.

tive property rights of other riparian owners and users.¹⁴⁴ More recently, the public regulation of private landowners at local, state, and federal levels—both to coordinate conflicting land uses and to protect sensitive lands—extends the harm-preventing and coordinating functions of these common law doctrines and refutes (at least as a descriptive matter) the caricature of ownership as absolute dominion. Guided by private and public constraints on their ability to exploit the land in ways that harm others, owners who reflect the virtue of humility with respect to their impact on the land can become a powerful ally of both natural systems as well as future generations.

Among the property tools with potential to bring the interests of human beings (considered over the long term) and nature into closer long-term alignment, the ancient doctrine of “trust” and—more specifically—the doctrine of “public trust” provide another possible vehicle for managing intergenerational interests. In his landmark 1970 article, *The Public Trust Doctrine in Natural Resource Law*, Joseph Sax revived interest in that ancient doctrine, which traces its roots into Roman law, as a vehicle for intergenerational stewardship of natural resources.¹⁴⁵ The doctrine recognizes certain resources—such as water and its attendant ecosystems—as the common heritage of humankind, in whose long-term interest the state has a special obligation to manage those resources.¹⁴⁶ As one court has put it:

“The duties imposed upon the state [as steward of resources subject to the public trust doctrine are] the duties of a trustee and not simply the duties of a good business manager.” Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.¹⁴⁷

Although the application of the public trust doctrine has largely been limited to waters, there is no conceptual reason why this must continue to be the

144. See, e.g., 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 617–22 (O.W. Holmes, Jr. & Charles M. Barnes eds., 13th ed. 1884); A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3.10 (2020).

145. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

146. *Id.* at 475–78.

147. *Ariz. Ctr. for L. in the Pub. Int. v. Hassell*, 837 P.2d 158, 168–69 (Ariz. Ct. App. 1991) (footnote omitted) (citations omitted) (quoting *Kadish v. Ariz. State Land Dep’t*, 747 P.2d 1183, 1186 (1987)).

case.¹⁴⁸ The interests and values the doctrine can consider are numerous. Sax discusses an important 2000 Hawaii case in which the Hawaiian Supreme Court required the restoration of the natural flow of waters down a mountain-side, taking into account both the ecological harm of diverting the water, as well as traditional Native Hawaiian understandings of the appropriate uses of those flows.¹⁴⁹ In her survey of western states' public trust doctrines, Robin Kundis Craig observes that California courts have extended public trust concepts to aquatic wildlife and their habitats.¹⁵⁰

More recently, a U.S. district court held open the possibility for application of the public trust doctrine to the federal government in the context of global climate change. In *Juliana v. United States*,¹⁵¹ a group of minors brought a claim against the United States and various federal officers, arguing in part that the defendants violated their obligations under the public trust doctrine by knowingly ignoring the impacts of continued fossil fuel consumption. In the district court, the plaintiffs' public trust claims survived not only a motion to dismiss, but also a motion for judgment on the pleadings and a motion for summary judgment. Specifically, the court held that (1) it did not need to determine whether the public trust doctrine applied to the atmosphere at the summary judgment stage in the litigation because the plaintiffs' claim was also based on public trust violations in connection with the territorial sea;¹⁵² (2) the case law did not foreclose the public trust doctrine from applying to the federal government;¹⁵³ (3) public trust claims were uniquely linked to the fundamental attributes of sovereignty and thus not displaced by statutory law;¹⁵⁴ and (4) the plaintiffs could properly bring their public trust claim in federal court because it was a substantive due process claim regarding the plaintiffs' fundamental rights.¹⁵⁵ "This lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss."¹⁵⁶

With respect to the public trust doctrine itself, the court found that it imposed three restrictions on government: "first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a

148. See Joseph L. Sax, *The Unfinished Agenda of Environmental Law*, 14 HASTINGS W.-NW. J. ENV'T L. & POL'Y 1, 9–10 (2008).

149. *Id.* at 10 (citing *In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000)).

150. Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 84–85 (2010).

151. 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

152. *Id.* at 1255.

153. *Id.* at 1256.

154. *Id.* at 1260.

155. *Id.* at 1261.

156. *Id.* at 1262.

fair cash equivalent; and third, the property must be maintained for particular types of uses.”¹⁵⁷ The court acknowledged that the plaintiffs’ claim was based on the fact that the defendants “violated their duties as trustees by nominally retaining control over trust assets while actually allowing their depletion and destruction, effectively violating the first and third restrictions by excluding the public from use and enjoyment of public resources.”¹⁵⁸

While the Ninth Circuit ordered the district court to dismiss the case for failing to satisfy the requirements of constitutional standing,¹⁵⁹ it did so without ruling on the plaintiffs’ public trust claims. In deciding that the case must be dismissed, the court left open the possibility for bringing such actions again in the future, provided that a plaintiff was able to prove the judiciary could provide a remedy. As of this writing, a motion for a rehearing *en banc* had yet to be decided.¹⁶⁰ Viewed from the perspective of the *Colorado River* litigation, an expansion of public trust doctrine along the lines advocated by the *Juliana* plaintiffs would be better suited to produce the kinds of consequences the plaintiff hoped to bring about by recognizing the personhood of nature (procedural, substantive, and rhetorical).¹⁶¹ But even without such an expansion, the traditional tools of property law—including public regulation of private property—provide more promising mechanisms to achieve the substantive goals of those who would confer personhood on natural resources.

CONCLUSION

The idea of conferring personhood status on nature—or on discrete natural resources—is a heady and seemingly radical notion. But there may be less to it than meets the eye. Unless such recognition would ultimately yield better legal outcomes or encourage more thoughtful analysis of decisions about those resources, it is difficult to understand why it is a step worth taking. Contrary to

157. *Id.* at 1254 (quoting Sax, *supra* note 145, at 477).

158. *Id.*

159. *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

160. In an even more recent decision on a claim by many of the same plaintiffs, the Oregon Supreme Court refused to extend the public trust doctrine beyond navigable waters and associated submerged lands or to acknowledge that the duties imposed on the state by the doctrine were the same fiduciary duties as a private trustee would have to prevent substantial impairment of trust resources. See *Chernaik v. Brown*, 367 Or. 143, 169–70 (Or. 2020). Nevertheless, in declining to expand the scope of the doctrine to meet the climate crisis, the majority agreed that the public trust doctrine could “be modified to reflect changes in society’s needs.” *Id.* at 156.

161. We note that the Ninth Circuit recently took an expansive view of the public trust doctrine in *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027 (9th Cir. 2018). The Ninth Circuit declined to rule on the issue of whether the public trust doctrine could apply to water rights already settled under the doctrine of prior appropriation, instead certifying this question to the Nevada Supreme Court. *Id.* at 1034.

the views of many advocates of the personhood approach, existing legal tools rooted in the law of property may offer a more certain pathway to achieving many of the same goals. In the end, we think property's virtues outweigh personhood's promise.

