Solving Standing is Simply the Start: Climate Litigation Lessons Learned from the Evolution of Rights of Nature

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Introduction

The global climate crisis continues to worsen. The Sixth Synthesis Report issued by the Intergovernmental Panel on Climate Change in 2023 unequivocally stated that "[w]idespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred" and that "[h]uman-caused climate change is already affecting many weather and climate extremes in every region across the globe."[1] This report expressly states that climate change has "led to widespread adverse impacts and related losses and damages to nature and people" and that the "projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming."[2] However, despite these clear and increasingly dire warnings from climate experts and the international community, the inaction by national governments and political figures persists.[3] In particular, the widening gulf between domestic public opinion and the policy decisions made by corporations and politicians highlights the difficulties inherent in achieving meaningful climate solutions, especially as the United States emerges from yet another highly

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1. Intergovernmental Panel on Climate Change [IPCC], *Synthesis Report for the Sixth Assessment Report, Summary for Policymakers*, at 5 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.

2. *Id.* at 5, 14.

3. Nicholas Nehamas & Patricia Mazzei, *DeSantis, Leading a State Menaced by Climate Change, Shrugs Off the Threat*, N.Y. TIMES (Sep. 8, 2023), https://www.nytimes.com/2023/09/08/us/politics/desantis-florida-storm-climate-change.html (discussing DeSantis's refusal to acknowledge that climate change is being accelerated by human behavior, while promising to implement policies that could worsen the effects of climate change).

divisive presidential election cycle and enters a new administration.[4] This mismatch extends beyond the United States. The fractious and drawn-out nature of the negotiations to establish a Loss and Damage Fund under the auspices of the United Nations and the lackluster initial funding commitments made at the Climate Change Conference ("COP28") in Dubai in the fall of 2023 underscore that this is a global failure to act with the requisite urgency.[5] Although establishing the Fund is an important step, observers point out that the amounts pledged fall far short of what is necessary, as they are "barely enough to get the fund running"[6] and are dwarfed by the approximately $7 trillion in subsidies that were paid to fossil fuel industries globally in 2022.[7]

Frustrations with addressing this policy mismatch via conventional political avenues have given rise to a host of climate change lawsuits.[8] However, the threshold barrier to climate change litigation is who has standing to sue in the interests of nature or a healthy environment.[9] Various solutions have emerged globally, from the personified right of nature in legislation or constitutions, to

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4. *Id*. (citing a May 2023 Ipsos poll showing that almost half of Americans believe climate change is "mostly" caused by human activity). Clifford Krauss, *Oil Giants Chase Mergers Despite Warnings of Peaking Demand*, N.Y. TIMES (Oct. 25, 2023), https://www.nytimes.com/2023/10/25/business/energy-environment/exxon-chevron-oil-mergers-peak.html. David Gelles et al., *The Clean Energy Future Is Arriving Faster than You Think*, N.Y. TIMES (Aug. 17, 2023), https://www.nytimes.com/interactive/2023/08/12/climate/clean-energy-us-fossil-fuels.html ("Corporations are building new coal mines, oil rigs and gas pipelines. The government continues to award leases for drilling projects on public lands and in federal waters and still subsidizes the industries . . . [s]ome politicians, including most Republicans, want the country to continue burning fossil fuels, even in the face of overwhelming scientific consensus that their use is endangering life on the planet."). Exec. Order No. 14162, 90 Fed. Reg. 8455 (Jan. 20, 2025) (withdrawing the United States from the Paris Agreement under the United Nations Framework Convention on Climate Change).

5. *Initial Pledges at COP28 to Finance the Loss & Damage Fund Fall far Short of What Is Needed*, AMNESTY INT'L (Nov. 30, 2023), https://www.amnesty.org/en/latest/news/2023/11/global-initial-pledges-at-cop28-to-finance-the-loss-damage-fund-fall-far-short-of-what-is-needed/ (noting that a paltry $423 million was pledged in the first day: $245 million by the European Union, $100 million by the United Arab Emirates, $51 million by the United Kingdom, $17.5 million by the United States, and $10 million by Japan).

6. *Id.*

7. *Fossil Fuel Subsidies*, INT'L MONETARY FUND, https://www.imf.org/en/Topics/climate-change/energy-subsidies (last visited Nov. 29, 2024).

8. Erin O'Donnell et al., *Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature*, 9 TRANSNAT'L ENV'T L. 403, 403 (2020).

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

Indigenous tribal stewardship, to a human right to a healthy environment; most climate change litigation globally hinges on either the human right to a healthy environment or a personified right of nature.[10] Since 2008, when Ecuador included language recognizing the rights of nature in its national constitution, these lawsuits have increasingly incorporated the personified rights of nature.[11] The extant rights of nature can be divided into three broad categories: constitutional, treaty and negotiation-based, and judicial. Despite an increase in interest and a UN General Assembly Resolution proclaiming the right to a healthy environment as a human right,[12] the outcomes of lawsuits based on these initiatives have been mixed,[13] as all of these aforementioned solutions to the standing problem create their own pitfalls later in litigation.

This Note seeks to apply the lessons learned from two versions of the personified right of nature and a recent victory in domestic litigation in the United States based on the human right to a clean environment to a recent local case—*Manoomin v. Minnesota Department of Natural Resources*—as a method of distilling best practices for climate litigation going forward. Part I explores the variety of conceptions of personified rights of nature around the world, focusing on (*i*) Ecuador, where the constitutional personified right of nature has been defined too broadly to be effective, and (*ii*) New Zealand, where the government has created Māori management boards to act in the name of, and on behalf of, natural entities. Part II discusses the recent success in *Held v. Montana* based on a state constitutional human right to a healthy environment. Part III examines the failure of *Manoomin v. Minnesota Department of Natural Resources* based on a treaty-based personified right of nature and applies the lessons learned in Parts I and II. This Note concludes that the differing rights structures relied upon have impacted the legal avenues available in litigation and have prevented the actualization of beneficial outcomes for the environment due to the further procedural hurdles created by creative solutions to standing. Ultimately, this Note advocates for greater exploration of state constitutional reform as a combined strategy for future domestic

10. *See generally* Erin Ryan et al., *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2447 (2021).

11. *See generally* O'Donnell et al., *supra* note 8; Alex Putzer et al., *Putting the Rights of Nature on the Map. A Quantitative Analysis of Rights of Nature Initiatives across the World*, 18 J. MAPS 89 (2022).

12. *See* G.A. Res. 76/300 (July 28, 2022).

13. *See generally* Ryan et al., *supra* note 10; Sam Bookman, *Rights of Nature in Comparative Perspective*, 37 NAT. RESOURCES & ENV'T. 4 (2023).

litigation after applying these lessons to *Manoomin v. Minnesota Department of Natural Resources*.

I. BACKGROUND ON THE EVOLUTION OF THE RIGHTS OF NATURE

In 2021, a study identified as many as 409 initiatives grounded in "an accessible legal document containing a semantic expression referring to [rights of nature]" in 39 countries.[14] The proliferation of the rights of nature has been global, with initiatives on every continent except Antarctica,[15] and 80% of them clustered in the Americas.[16] The largest portion—38% of these initiatives—are classified as "local regulations" while 26.2% are classified as "court decisions."[17] A vast majority—66.5% of all initiatives globally—protect "nature indistinctively," while the next-largest category of 17.8% protects "aquatic ecosystems" like river systems or lakes.[18] This current snapshot of the personified rights of nature as a trend around the globe highlights some issues with a personified right of nature as an effective tool to solve the problem of standing. A personified right of nature as a solution to standing issues in the United States is not a new idea, though recent attempts—both domestically and globally—have made it clear that the issues of federal supremacy and overbreadth are frequently fatal to the ability of rights of nature provisions to realize the rights they promise in ways that measurably improve climate outlooks.

A. PERSONIFIED RIGHTS OF NATURE: COMPETING WESTERN AND INDIGENOUS ORIGINS

Western legal traditions typically point to Christopher Stone's 1972 article as one of the first articulations of a personified right of nature.[19] However, it is misleading to say that the idea originated with

14. Putzer et al., *supra* note 11, at 90.
15. *Id*. at 90.
16. *Id*. at 92.
17. *Id*. at 91.
18. *Id*.
19. Stone, *supra* note 9. *See also* Anne Haluska, *Restorative Justice and the Rights of Nature Using Indigenous Legal Traditions to Influence Cultural Change and Promote Environmental Protection*, 49 MITCHELL HAMLINE L. REV. 92, 95 (2023); Bookman, *supra* note 13, at 5; Mauricio Guim & Michael A. Livermore, *Where Nature's Rights Go Wrong*, 107 VA. L. REV. 1347, 1368 (2021); Caelyn Radziunas, *Missing The Mark: A Critical Analysis of the Rights of Nature as a Legal Framework for Protecting Indigenous Interests*, 35 TUL. ENV'T. L.J. 115, 120 (2022).

Stone, as that would disregard the long history of Indigenous socio-cultural formulations of nature as sustaining independent and free-standing personhood or religious sanctity.[20] Shortly after Stone's article, Justice Douglas of the United States Supreme Court proposed circumventing the standing issue before the court by allowing parties to sue on behalf of inanimate objects of nature facing imminent harm.[21] This early discourse around the rights of nature focuses on endowing natural objects with rights to allow individuals standing to sue on their behalf.[22] As advanced by Stone and Douglas, the Western concept would allow courts to grant "guardianship" of natural objects to individuals.[23] Therefore, despite receiving credit for introducing the rights of nature to the Western legal discourse, Stone's scholarship remains anthropocentric or "human-centered" as opposed to ecocentric or "nature-centered."[24] This anthropocentric view is further evidenced in existing environmental regulations and protection schemes primarily focused on preserving nature for human use or enjoyment.[25] Although rights of nature are distinct from environmental rights, the liberal Western legal and philosophical view of nature—and to a larger extent property as well—makes adapting legal strategy and thinking within a Western court system to a truly personified view of nature difficult.[26]

The Indigenous concept of rights of nature is generally grounded in a fundamental belief in the interdependence of humans and nature.[27] Although there is undoubtedly variation among Indigenous populations and tribal affiliations, there is generally an ecocentric view that nature has intrinsic value and deserves protection, regardless of its usefulness to humans.[28] While Indigenous activism has been important in gaining recognition for the rights of nature and pushing the boundaries of the rights through litigation, this Note recognizes that care is needed in discussing Indigenous and ecocentric origins of the rights of nature. Western legal discourse can adopt a tone similar to the "noble savage" misconception propagated

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20. *See* Elizabeth Kronk Warner & Jensen Lillquist, *Laboratories of the Future: Tribes and Rights of Nature*, 111 CAL. L. REV. 325, 331–32 (2023).

21. Sierra Club v. Morton, 405 U.S. 727, 741–42 (1972) (4-3 decision) (Douglas, J., dissenting).

22. Radziunas *supra* note 19, at 120–21.

23. Haluska, *supra* note 19, at 95.

24. *Id.* at 95–96.

25. *See* Warner & Lillquist, *supra* note 20, at 333.

26. Radziunas *supra* note 19, at 117. The larger discussion about property rights is worthwhile but beyond the scope of this note.

27. Haluska, *supra* note 19, at 95–96.

28. *Id.* at 96.

throughout the colonial and expansionist periods of American history.[29] This Note strives to avoid participating in that discourse but feels it necessary to acknowledge the tone of much of the extant scholarship in citing portions of it in an attempt to contribute substantively to the conversation.

B. RECENT DOMESTIC LITIGATION IN THE UNITED STATES

Thus far, a majority of litigation in the United States has focused on the handful of municipalities in the United States which have attempted to codify a personified right of nature.[30] Approximately 50 municipalities within the United States have enacted some form of a right of nature,[31] and as of 2021, 74.8% of the rights of nature initiatives in the United States were situated in a local setting.[32] The two municipal rights of nature provisions that are most frequently discussed[33] are the Lake Erie Bill of Rights ("LEBOR") passed by the City of Toledo in Ohio[34] and an ordinance passed in Orange County, Florida[35]—both of which were vacated by federal district courts.[36] Notably, Toledo's LEBOR invalidates any state or federal permit within city limits that violates LEBOR, imposes criminal liability on any corporation or government that violates LEBOR, and allows it to be enforced by any resident or the city.[37] Unsurprisingly, the federal district court invalidated LEBOR on the grounds that "LEBOR is unconstitutionally vague and exceeds the power of municipal government in Ohio."[38]

The rights of nature provision in Florida, entitled the Wekiva River and Econlockhatchee River Bill of Rights [WEBOR], enshrined the rights of waterways to exist, flow, be free of pollution, and

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29. *Noble Savage*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/art/noble-savage (last visited Nov. 29, 2024).

30. *Id*. at 99–102; *see also* Warner & Lillquist, *supra* note 20; Radziunas, *supra* note 19, for lengthier discussions of municipal challenges and their strategic pitfalls.

31. *See* Warner & Lillquist, *supra* note 20, at 354.

32. *See* Putzer et al., *supra* note 11, at 91.

33. *See* Warner & Lillquist, *supra* note 20, at 355–56; Haluska, *supra* note 19, at 100–102.

34. *See* Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551, 558–60 (N.D. Ohio 2020) (reprinting Toledo's rights of nature ordinance).

35. *See* ORANGE COUNTY, FLA., CODE OF ORDINANCES § 704.1.A(1) (2024), https://library.municode.com/fl/orange_county/codes/code_of_ordinances?nodeId=PTICH_ARTVIIGEPR_S704.1RICLWASTEN [https://perma.cc/76EG-2U5G].

36. Haluska, *supra* note 19, at 100–02.

37. Warner & Lillquist, *supra* note 20, at 358.

38. Drewes Farms P'ship, *supra* note 34, at 558.

maintain healthy ecosystems.[39] However, the Florida Clean Waterways Act, which was passed several months before WEBOR, apparently after significant lobbying efforts by agriculture interests in the state, expressly prohibited any local government from passing rights of nature provisions.[40] Consequently, when advocates brought suit on behalf of the Wilde Cypress Branch of a protected waterway in April 2021 against a property developer, the case was dismissed due to the preemption of local authority by the state.[41] In affirming the trial court's order, Florida's Court of Appeals recently held that "[w]hile the authority given to cities and counties in Florida is broad, both the constitution and statutes recognize that cities and counties have no authority to act in areas that the legislature has preempted."[42]

As such, municipal ordinances granting personified rights of nature in the United States, despite being popular, have yet to survive any form of court challenge due to the preemption of local rules by state and federal laws.[43] Preemption is one of the primary obstacles for litigation brought when standing is founded in a local personified right of nature, as the Supremacy Clause of the United States Constitution prevents any such municipal ordinances from taking precedence over federal law.[44] It is unlikely, therefore, that municipal ordinances will provide successful litigation avenues on rights of nature in the United States, but it is nonetheless worth noting the existing alternate avenues that are being explored.

C. GLOBAL TRENDS IN CLIMATE RIGHTS

There has yet to be any successful litigation founded on a right of nature in the United States—here in Minnesota, the White Earth Band of Ojibwe recently failed in both tribal and federal court in their efforts to sue on behalf of manoomin (the Ojibwe word for "wild rice").[45] As discussed *infra* Section III, the personified right of nature at issue in Minnesota was grounded in Indigenous treaty law and precedents of

39. Warner & Lillquist, *supra* note 20, at 386.

40. *Id*. at 386–87; FLA. STAT. § 403.412(9)(a) (2020).

41. Warner & Lillquist, *supra* note 20, at 386–88.

42. Branch v. Hamilton, 386 So.3d 1020, 1021 (Fla. Dist. Ct. App. 2024) (citing Fla. Power Corp. v. Seminole Cnty., 579 So. 2d 105, 107 (Fla. 1991)).

43. Haluska, *supra* note 19, at 100.

44. U.S. CONST. art. VI, § 2.

45. Warner & Lillquist, *supra* note 20, at 388–92; *see* Manoomin v. Minn. Dep't of Nat. Res., Civil Case No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021); Minn. Dep't of Nat. Res. v. White Earth Band of Ojibwe, No. 21-CV-1869 (WMW/LIB), 2021 WL 4034582, at *1 (D. Minn. Sept. 3, 2021), *appeal dismissed and remanded*, No. 21-3050, 2022 WL 4229028, at *1 (8th Cir. Aug. 10, 2022).

tribal sovereignty rather than a constitutional rights infrastructure.[46] However, as discussed *infra* Section II, the recent Montana supreme court ruling in *Held v. Montana*, a case brought by youth climate activists, turned on the right to a healthy environment in the Montana state constitution.[47]

Globally, most climate change litigation parallels this divide in legal rights, and cases tend to hinge on either a personified right of nature or the human right to a healthy environment.[48] As a notable exception, litigation in the European Union surrounding climate change has been far more technical overall. The cases that arise in the European Union through the European Court of Justice are based primarily on European Union regulations and directives or prior precedent of the European Court of Justice. One such example is the so-called "People's Climate Case" which was brought by ten families and an Indigenous Saami youth organization against the European Parliament and the Council of the European Union for the insufficiency of their emissions reduction target.[49] The People's Climate Case utilized a strategy that has become increasingly popular in Europe as well as the United States: lawsuits brought by groups of plaintiffs alleging that they, or their futures, have been injured due to their governments' failures to properly mitigate or prevent the effects of climate change.[50] The case was dismissed on procedural grounds by the Lower Court; this dismissal was upheld by the Higher Court, and neither court reached the merits of the argument.[51] The case was dismissed due to case law from the 1960s that requires that an individual be "uniquely" affected by a legislative act of the European Union in order to have standing to challenge it.[52] The way the Court applied the uniqueness principle here meant that "the more universal and severe the problem, the fewer persons are able to seek legal protection in [the European Court of Justice]."[53] The trend of youth plaintiffs alleging a collective injury has been effectively precluded in the European Court of Justice due to the Court's application of the

46. Warner & Lillquist, *supra* note 20, at 388–92, 389 n.457.

47. Held v. Montana, No. CDV-2020-307, at *102 (Mont. Dist. Ct. Aug. 14, 2023) (Climate Change Litigation Databases); Held v. State, 560 P.3d 1235 (Mont. 2024).

48. *See generally* Ryan et al., *supra* note 10.

49. Case C-565/19 P, Carvalho v. European Parliament, ECLI:EU:C:2021:252, ¶¶ 1–2, 101 (Mar. 25, 2021).

50. *See* Press Release, Climate Action Network, EU Court Turn a Deaf Ear to Citizens Hit by the Climate Crisis (Mar. 25, 2021), https://caneurope.org/eu-court-turn-a-deaf-ear-to-citizens-hit-by-the-climate-crisis/.

51. *Id.*

52. *Id.*

53. *Id.*

uniqueness principle in the People's Climate Case. Circumventing this standing issue is one of the primary reasons why the personified right of nature was so exciting to legal scholars, as it is otherwise incredibly difficult to prove a specific injury.

There is also significant litigation in the European Court of Human Rights which is grounded primarily in the rights to life and private life guaranteed in Articles 2 and 8 of the European Convention on Human Rights.[54] One prime example is *Carême v. France*, in which a mayor in the Dunkirk region of France is suing the French government for failure to take sufficiently aggressive policy action to meet the 12% reduction target in greenhouse gas emissions for the 2024–2028 period.[55] In *Carême,* the plaintiff exhausted his domestic remedies after the French High Court found he lacked personal standing based on the particular susceptibility of his home to future flooding caused by increasingly erratic and extreme weather patterns due to climate change.[56] The French High Court found there were issues of imminency and severity in Mr. Carême's allegations of potential future harm.[57] Allegations of future harm to plaintiffs as a foundation for climate change litigation has also been a recent trend in Europe and the United States.[58] This is frequently combined with the group-of-plaintiffs strategy from the People's Climate Case brought before the European Court of Justice.[59]

However, litigation that uses these future harm and group-of-plaintiffs strategies to achieve standing suffer from an inability to point to a particular and immediate injury. One potential method to remedy this standing issue is combining the future harm with a demonstrated injury due to natural disasters that have already

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54. Convention for the Protection of Human Rights and Fundamental Freedoms ["European Convention on Human Rights"], arts. 2, 8, Apr. 11, 1950, 213 U.N.T.S. 221.

55. *See* Carême v. France, App. No. 7189/21, 1–2, (Jun. 7, 2022), https://hudoc.echr.coe.int/eng?i=002-13678.

56. Marta Torre Schaub, *The Future of European Climate Change Litigation: The Carême Case Before the European Court of Human Rights*, VERFASSUNGBLOG ON MATTERS CONS. (Aug. 10, 2022), https://verfassungsblog.de/the-future-of-european-climate-change-litigation/.

57. *Id.*

58. *See* Complaint for Declaratory and Injunctive Relief at 12, 16, 23, Held v. Montana, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 14, 2023) [hereinafter Held Complaint] (including some examples of plaintiffs who are concerned about future harms); Selin Girit, *Climate Change: Six Young People Take 32 Countries to Court*, BBC NEWS, (Sep. 26, 2023), https://www.bbc.com/news/world-europe-66923590 (discussing how the youth plaintiffs claim to have experienced significant impacts already, including "eco-anxiety", and claim that they will in the future).

59. *See* Held Complaint, *supra* note 58, at 1 (listing the multiple plaintiffs); Carvalho v. European Parliament, *supra* note 49, at ¶¶ 1–2 (listing the multiple plaintiffs in the case).

occurred and were caused by climate change.[60] In addition to being the exception that proves the rule that litigation tends to be based on either a human right to a healthy environment or a personified right of nature, these cases present the surface lesson that injury and standing must *both* be solved in order to succeed in climate litigation, however the deeper intricacies of European climate litigation are beyond the scope of this Note. Thus, we return to the personified right of nature and its success as the locus of litigation in Ecuador and New Zealand.[61] Indigenous concepts of nature have been crucial to the development of the rights of nature in both jurisdictions.[62]

1. Ecuador: Constitutional Success Story?

Turning our attention to the international landscape, there has been extensive discussion surrounding the *Pachamama* right of nature enshrined in Ecuador's Constitution in 2008[63] and the Indigenous origins of the conception of the right.[64] There is a significant Indigenous population in Ecuador composed of fourteen Indigenous nationalities, and although each group has their own traditions and customs, many Andean Indigenous populations hold to the concept of *sumac kawsay* in Quechua, or *buen vivir* in Spanish, which promotes living in harmony with nature.[65] The theory of *sumac kawsay* is "rooted in the idea that human welfare and the welfare of all Earth's ecosystems are intertwined and, therefore, recognizes the need for balance and harmony among the human and natural elements of a system."[66] However, while the inclusion of the Indigenous concepts of *sumac kawsay* and *Pachamama* in the new constitution speak to the significant influence and activism by

60. *See* Agostinho v. Portugal, No. 39371/20 (Jun. 2022), https://hudoc.echr.coe.int/eng?i=002-13724; Girit, *supra* note 58; Juliane Kippenberg & Katharina Rall, *Child-led Court Case Will Scrutinize Europe's Climate Response*, HUM. RTS. WATCH (Apr. 22, 2021, 7:00 AM), https://www.hrw.org/news/2021/04/22/child-led-court-case-will-scrutinize-europes-climate-response.

61. *See generally* Ryan et al., *supra* note 10.

62. *Id.*

63. *See* CONSTITUCIÓN DE REPÚBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, pmbl., arts. 71–72, *translated in* CONSTITUTE PROJECT, ECUADOR'S CONSTITUTION OF 2008, https://www.constituteproject.org/constitution/Ecuador_2008.pdf [https://perma.cc/L2W9-LN6Z].

64. Haluska, *supra* note 19, at 102–06; Warner & Lillquist, *supra* note 20, at 342–46; Ryan et al., *supra* note 10, at 2502–03; Guim & Livermore, *supra* note 19, at 1407–09; Radziunas, *supra* note 19, at 123–26.

65. Haluska, *supra* note 19, at 102–03.

66. *Id.* at 102.

Indigenous groups on even holding a constitutional assembly, let alone the ultimate adoption of the constitution, the conflation of these complex ideas with Western concepts of the whole of nature are not wholly accurate and can be problematic.[67]

The relevant language from the preamble states that the constitution is "celebrating nature, the Pacha Mama [sic] (Mother Earth), of which we are a part and which is vital to our existence . . . hereby decide to build [a] new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the sumac kawsay."[68] Article 71 states that "[n]ature, or Pacha Mama [sic], where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."[69] While Article 72 states that:

> Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.[70]

Ecuador has seen significant amounts of litigation around rights of nature. As of 2021, 79% of the initiatives concerning rights of nature were court decisions rather than any form of legislation.[71] However, this quantity of litigation means that the right of nature in Ecuador has now been tested sufficiently for the pitfalls to be evident and for scholars to develop several theories as to why the courts are either unable or unwilling to actualize the right as written in the constitution.[72]

These limitations range from the amusing—like when Ecuador's

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67. Warner & Lillquist, *supra* note 20, at 343–44.

68. CONSTITUCIÓN DE REPÚBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, pmbl., *translated in* CONSTITUTE PROJECT, ECUADOR'S CONSTITUTION OF 2008, https://www.constituteproject.org/constitution/Ecuador_2008.pdf [https://perma.cc/L2W9-LN6Z].

69. *Id.* art. 71.

70. *Id.* art. 72.

71. Putzer et al., *supra* note 11, at 91.

72. Guim & Livermore, *supra* note 19, at 1407–09; Radziunas, *supra* note 19, at 123–26.

Constitutional Court considered the validity of a writ of habeas corpus for a monkey that had been kept in captivity in a private home[73]—to the deeply concerning—like when foreign companies such as Chevron severely limited the ability of courts to enforce rights of nature provisions and managed to avoid paying the $9.5 billion in damages assessed to them by over a dozen different Ecuadorian judges.[74] Between 2008 and 2016, every challenge to "important infrastructure projects and development initiatives that invoked nature's rights ultimately failed," while during the same period "the government has prevailed in all cases in which it has invoked the rights of nature in its favor."[75] In one notable case in the Esmeraldas region, the government sought to develop the mining industry, but first had to eliminate the small illegal mining operations in the region.[76] The government successfully invoked the rights of nature to obtain a court order authorizing the deployment of military force to destroy mining equipment in the region.[77] A potential reason for this double standard is the broad construction of the right, which allows multiple parties to claim to speak on behalf of nature in a single case, with no obvious grounds on which to arbitrate these claims.[78] This stands in stark contrast to the primary flaw identified in the 'People's Climate Case' in the European Court of Justice, wherein the pool of plaintiffs who could speak to being uniquely affected by legislation was nonexistent because the problem was so universal.[79] Here, we find the opposite end of the standing spectrum to be equally, if not more, problematic.

Thus, the lesson to draw from this is that personified rights of nature may be a useful theoretical tool to provide standing, but the right must be specific and narrowly tailored to have any practical

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73. Nicole Pallotta, *Ecuador's Constitutional Court Rules Wild Animals Are Subjects of Legal Rights Under the Rights of Nature*, ANIMAL LEGAL DEF. FUND (Jan. 4, 2023), https://aldf.org/article/ecuadors-constitutional-court-rules-wild-animals-are-subjects-of-legal-rights-under-the-rights-of-nature/#:~:text=Summary%3A%20In%20January%202022%2C%20the,rights%20of%20nature%E2%80%9D%20constitutional%20provision.

74. Radziunas, *supra* note 19, at 125–26 (stating that Chevron has avoided liability by "moving the lawsuit from court to court across the international community"). Chevron has also countersued many of the activists in other jurisdictions. *See* Alec Baldwin & Paul Paz y Miño, *Chevron is Refusing to Pay for the "Amazon Chernobyl"—We Can Fight Back with Citizen Action*, GUARDIAN (Sept. 17, 2020), https://www.theguardian.com/commentisfree/2020/sep/17/chevron-amazon-oil-toxic-waste-dump-ecuador-boycott.

75. Guim & Livermore, *supra* note 19, at 1408–09.

76. *Id.* at 1409.

77. *Id.*

78. *Id.*

79. Climate Action Network, *supra* note 50.

value in litigation. Ultimately, the Ecuadorian constitutional model has received significant press coverage and positive scholarly attention in law journal articles over the years, but the provision's efficacy in actualizing beneficial environmental outcomes as a solution to the problem of standing in climate change litigation falls far short of its promise.[80] We turn our attention to an example of a more narrowly drawn right and its potential advantages in New Zealand next.

2. New Zealand: Indigenous Statutory Success

Similar to the evolution of the rights of nature in Ecuador, the statutory rights granted to discreet fixtures of nature in New Zealand were driven by Indigenous Māori concepts.[81] The Māori culture views natural fixtures like forests, rivers, and land as "intrinsically communal, intergenerational, and spiritually imbued with obligation."[82] The Māori conceive of property ownership as *rangatiratanga*, in reference to the collective's interests and rights, and *kaitiakitanga*, which is roughly aligned with the Western ideas of stewardship or guardianship.[83] New Zealand codified these Māori concepts in legislation designed to protect two Māori spiritual sites by creating management boards to act in the name of and on behalf of the natural entity.[84] The designation of personhood for one of the sites, the Whanganui river system or Te Awa Tupua, under the stewardship of the Te Pou Tupua in 2017, ended the longest-running water dispute in New Zealand's history.[85] This dispute had been running for 140 years and stemmed from a disagreement over the meaning of the original treaty language signing over ownership of the river to the British.[86] The use of the word "sovereignty" led the Māori to believe

80. Guim & Livermore, *supra* note 20, at 1409; *Planète Amazone, Pachamama Alliance: Land Rights and Fossil Fuels in the Grand to Protect the Amazon Forest and Indigenous Peoples*, U.N. CLIMATE CHANGE (Dec. 12, 2023), https://unfccc.int/event/planete-amazone-pachamama-alliance-land-rights-and-fossil-fuels-in-the-grand-to-protect-the-amazon.

81. Haluska, *supra* note 19, at 106–08; Warner & Lillquist, *supra* note 19, at 348–50; Ryan et al., *supra* note 10, at 2517–18; Guim & Livermore, *supra* note 19, at 1365; Radziunas, *supra* note 19, at 128–30.

82. Haluska, *supra* note 19, at 106.

83. *Id.*

84. *Id*. at 106–07.

85. Jeremy Lurgio, *Saving the Whanganui: Can Personhood Rescue a River?,* GUARDIAN (Nov. 29, 2019), https://www.theguardian.com/world/2019/nov/30/saving-the-whanganui-can-personhood-rescue-a-river.

86. Radziunas, *supra* note 19, at 129.

that they retained the right to manage their land, including Te Pou Tupua.[87] While some hold that the designation of Te Pou Tupua with legal personhood is a recognition and preservation of Māori cultural and spiritual beliefs,[88] others feel that this designation was not the result of environmental or cultural activism, but rather a means by which the government could avoid returning ownership rights to the Māori directly.[89]

The designation of Te Pou Tupua with legal non-human entity status has been compared to that of a corporation.[90] Each management board is charged with working on behalf of their respective natural feature in accordance with the Māori view that people have a duty to care for nature as kin; thus, the management boards must be involved in decisions about legislation or development that could potentially impact their natural charges.[91] The law recognizes Te Awa Tupua as an indivisible legal being and states that this being has "all the rights, powers, duties and liabilities of a legal person."[92] This statutory scheme has not faced serious challenges yet. Experts predict that the renewal of the Genesis Power Company's permit for diverting 7% of the water in the entire Whanganui river for the production of hydroelectricity in 2039 will be the true test of the system, since the powerplant produces four percent of New Zealand's electricity.[93] A substantial limitation of the legal regime is that, because the law only confers forward-looking rights on the Whanganui, it fails to address root causes of ongoing harms that predate its enactment, such as the agreement with Genesis Power Company.[94]

New Zealand's rights of nature are far more specific than the perhaps overbroad grant of rights in Ecuador and seemingly have solved the problem of too strict a standing requirement as well. However, the lack of a true litigation stress test makes this approach

87. *Id.*

88. *Id.*

89. Haluska, *supra* note 19, at 106–07.

90. Radziunas, *supra* note 19, at 129, 122–23 (discussing that some scholars have made further comparisons to more recent United States' Supreme Court decisions that bestow rights on otherwise inanimate entities, namely corporations and the idea of corporate personhood enshrined in the Citizens United v. Federal Election Comm'n, 558 U.S. 310, 371 (2010) decision); *see also* Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L.Q. 1, 38 (2016) (discussing how this line of reasoning by the Supreme Court supporting corporate personhood raises the potential for increased rights for other non-human entities, such as nature).

91. Haluska, *supra* note 19, at 106–07.

92. *See* Lurgio, *supra* note 85.

93. *Id.* Haluska, *supra* note 19, at 108.

94. *See* Lurgio, *supra* note 85.

appealing but hard to evaluate practically. Overall, the personified right of nature has been useful within traditional legal systems as a method to circumvent standing limitations exemplified by the procedural dismissal in the European Court of Justice in the People's Climate Case *supra* Section I.C.[95] However, an overbroad and undefined scope of the right has similarly plagued Ecuador by solving the issue of standing too well and allowing such a broad spectrum of plaintiffs to sue on behalf of nature that the environmental benefits of the right have been almost entirely diluted. The potentially appropriately cabined right in New Zealand has yet to be tested, and although this right is attractive, its untested nature means that it is ultimately unavailing. Solving standing via Māori management boards may be an impressive theoretical legal proposition in the abstract; however, without a demonstrated track record, it is difficult to foresee potential pitfalls further down the road of litigation and therefore difficult to recommend this approach as a future actionable strategy for climate litigation domestically. We turn our attention now to an alternative avenue: the human right to a clean and healthy environment.

II. THE DOMESTIC RIGHT TO A HEALTHY ENVIRONMENT IN THE UNITED STATES

The August 14, 2023 decision in *Held v. Montana*, and the suit filed by sixteen youth in March of 2020, generated a significant amount of press, as it is the first successful constitutional climate change litigation in the United States.[96] The group of plaintiffs based their claim on the language included in Montana's state constitution since 1972 which guarantees that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[97] The district court considered the intent of the delegates to the 1972 Constitutional Convention and concluded that they had "intended to adopt the strongest preventative and anticipatory constitutional environmental provisions possible to protect Montana's air, water, and lands for present and future generations."[98] The district court went on to find that the plaintiffs had

95. *See* Case C-565/19 P, Carvalho v. European Parliament, ECLI:EU:C:2021:252, ¶¶ 1–2 (Mar. 25, 2021).

96. Dharna Noor, *Young Montana Residents Bring Climate Change Case to Court for First Time Ever*, GUARDIAN (Jun. 12, 2023), https://www.theguardian.com/us-news/2023/jun/12/montana-young-residents-first-ever-climate-change-trial.

97. MONT. CONST. art. IX, § 1.

98. Held v. Montana, No. CV 22-137-BLG-SPW-TJC, slip op., ¶ 289, at 86 (Mont. 1st

proven injury, causation, and redressability of their claims.[99] The district court further found two pieces of state legislation facially unconstitutional:

> The 2023 version of the MEPA Limitation, Mont. Code Ann.§ 75-1-201(2)(a), enacted into law by HB 971, is hereby declared unconstitutional and is permanently enjoined. Mont. Code Ann.§ 75-l-201(6)(a)(ii), enacted into law by SB 557 from the 2023 legislative session, is hereby declared unconstitutional and is permanently enjoined because it removes the only preventative, equitable relief available to the public and MEPA litigants.[100]

The district court prohibited Montana from "acting in accordance with the statutes declared unconstitutional" and granted reasonable attorney's fees and costs to the successful plaintiffs.[101] The MEPA Limitation enacted by HB 971 forbids the State and its agents from considering the impacts of greenhouse gas emissions or climate change in their environmental reviews, including the "corresponding impacts to the climate in the state or beyond the state's borders,"[102] while the provision enacted by SB 557 stated that:

> [a]n action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review is inadequate based in whole or in part upon greenhouse gas emissions and impacts to the climate in Montana or beyond Montana's borders, cannot vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority unless the review is required by a federal agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a regulated pollutant.[103]

Remarkably, this far-reaching and decisive district court decision has been affirmed by the Supreme Court of the State of Montana in a

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Jud. Dist. Ct. Aug. 14, 2023)

99. *Id.* at 86–90.

100. *Id.* ¶¶ 8–9, at 102.

101. *Id.* ¶¶ 10, 12, at 102–03.

102. *Id.* ¶ 60, at 7 (citing Mont. Code Ann.§ 75-l-201(2)(a) (enacted by HB 971, 68th Legislature (2023))).

103. *Id.* ¶ 63, at 71 (citing Mont. Code Ann. § 75-1-201(6)(a)(ii) (enacted by SB 557, 68th Legislature (2023))).

6-1 decision issued on December 18, 2024, following oral arguments held on July 24, 2024.[104] The supreme court affirmed that the plaintiffs had standing and specifically stated that their injuries were sufficiently personalized despite being widely shared.[105] The court also explicitly held that the plaintiffs' injuries were to their constitutional rights and therefore capable of effective legal remedy sufficient to confer standing—pointedly dispensing with the argument that the legal relief sought must "effectively stop or reverse climate change" in order to satisfy the standing requirement, as including that would effectively immunize the state from any litigation over the right to a healthy environment.[106] By rejecting these arguments, the supreme court neatly circumvented the barriers to standing raised by the European Court of Justice in the People's Climate Case. Moreover, the wording of the right in the state constitution as a human right to a healthy environment allows the court to avoid the slippery slope that the constitutional right of nature has become in Ecuador.

One substantial potential drawback in this strategy is that actualizing it beyond Montana requires sufficient political will to amend other state constitutions to include similar rights. The potential for outright political hostility to this solution has been demonstrated by the groups that have filed *amicus curiae* briefs with the Montana supreme court in support of reversing the district court's order[107]—including an advocacy group espousing values commonly associated with conservative politics in the United States and a coalition of fifteen other states' Republican attorneys general[108]—as well as the recalcitrant comments made by Montana's Republican

104. Held v. State, 560 P.3d 1235 (Mont. 2024).

105. *Id.* at 1256. *See also id.* at 1251–52 ("Just because the harm and the area of harm here is larger should likewise not preclude standing to litigants who have demonstrated a sufficient stake in an infringement on their constitutional rights. Indeed, to so hold 'would mean that the *most* injurious and widespread Government actions could be questioned by nobody.'").

106. *Id.* at 1254–55.

107. Jonathon Ambarian, *"Unusually High" Number of Amicus Briefs Filed in Montana Teen Environmental Lawsuit*, KTVH HELENA MONT. (Feb. 23, 2024), https://www.ktvh.com/news/unusually-high-number-of-amicus-briefs-filed-in-montana-teen-environmental-lawsuit (citing nine different amicus briefs received at the time).

108. *See Frontier Institute Amicus Brief Filed in Held v. Montana*, FRONTIER INST. (Feb. 20, 2024), https://frontierinstitute.org/frontier-institute-amicus-brief-filed-in-held-v-montana-case/. *See also* Brief for the States of North Dakota, Alabama, Alaska, Arkansas, Idaho, Indiana, Iowa, Mississippi, Missouri, Nebraska, South Carolina, South Dakota, Utah, Wyoming, and the Commonwealth of Virginia as Amici Curiae in Support of Appellants and Reversal, Held v. Montana, DA 23-0575 (Mont. Jan. 16, 2024), https://law.alaska.gov/pdf/amicus/2024/022224-Amicus.pdf.

Governor and members of the state legislature following the court's decision.[109]

III. APPLYING THE LESSONS TO FUTURE CLIMATE LITIGATION STRATEGIES

As demonstrated above, the personified right of nature is no longer a new legal concept.[110] The primary issue that has emerged with broadly drawn rights of nature is the inability of courts to enforce their decisions, and their incapacity to remain stalwart in the face of powerful political or commercial actors.[111] However, even these methods are likely untenable domestically.[112] Thus, concretizing legal environmental rights in domestic state constitutions may provide a politically palatable legal avenue as a foundation for successful climate change litigation domestically. In addition, domestic litigation within the United States' robust tradition of an independent judiciary may lend legitimacy and weight to this middle road option more globally.

After examining the differing obstacles in later litigation presented by attempts to gain standing (i) through the use of a personified right of nature in Ecuador under a constitutional structure in Section I.C.i; (ii) under a treaty and negotiation based right of nature in New Zealand in Section I.C.ii; (iii) and under a right to a healthy environment grounded in a state constitution in Montana in Section II, this Note will now apply these lessons to *Manoomin v. Minnesota Department of Natural Resources* in order to recommend a combined strategy for future domestic litigation in the United States.

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109. Micah Drew & Blair Miller, *Montana Supreme Court Affirms Decision in Held, Historic Youth Climate Case*, THE DAILY MONTANAN (Dec. 18, 2024), https://dailymontanan.com/2024/12/18/montana-supreme-court-affirms-decision-in-held-historic-youth-climate-case/ (quoting Governor Gianforte's statement that the court "continues to step outside of its lane to tread on the right of the Legislature, the elected representatives of the people, to make policy" and the statement of State Senate President Regier and House Speaker Ler that the court had "turned the courtroom into a legislative policy committee, drastically overstepping its constitutional boundaries into the Legislature's role and violating the separation of powers").

110. See Stone, *supra,* note 9.

111. Guim & Livermore, *supra* note 19, at 1419.

112. Haluska, *supra* note 19, at 125

A. MANOOMIN V. MINNESOTA DEPARTMENT OF NATURAL RESOURCES: A CASE STUDY

Unfortunately, the tribal provision granting a personified right of nature to wild rice ("manoomin" in Ojibwe) was unsuccessful once brought to bear in litigation. However, the legal issues present in *Manoomin*—namely, extremely challenging federal Indian law precedent—were distinct in a way that suggests broader viability of a personified right of nature in the United States.[113] On December 31, 2018, the White Earth Reservation Business Committee, the governing arm of the White Earth Band of Ojibwe Tribe, adopted a Resolution on the Rights of Manoomin, which stated:

> Manoomin, or wild rice, within the White Earth Reservation possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation. These rights include, but are not limited to, the right to pure water and freshwater habitat; the right to a healthy climate system and a natural environment free from human-caused global warming impacts and emissions; the right to be free from patenting; as well as rights to be free from infection, infestation, or drift by any means from genetically engineered organisms, trans-genetic risk seed, or other seeds that have been developed using methods other than traditional plant breeding.[114]

The White Earth Reservation Business Committee further relied on the 1837 and 1855 Treaty language and the subsequent United States Supreme Court decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, which required that treaties be liberally construed in favor of tribes and held that neither treaty nor the admission of Minnesota as a state in the union had terminated their usufructuary rights as a tribe.[115] Usufructuary rights have been interpreted to mean the right, both on and off the reservation, to continue to exercise the "privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians" as specifically stated in the 1837

113. Warner & Lillquist, *supra* note 20, at 391–92.

114. White Earth Reservation Business Committee, Rights of Manoomin, Resolution No. 001-19-010, § 1(a) (Dec. 31, 2018), https://perma.cc/YSU2-BTZ6.

115. *Id.* at 2–3; Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 176 (1999).

Treaty.[116] The personified right of manoomin is further bolstered by language in the 1855 Treaty, which explicitly used the word "manoomin" in describing the Chippewa lands as where they had been guided by the Creator to the "place where the manoomin grows on the water."[117]

In declaring this right of nature, the White Earth Reservation Business Committee was specifically attempting to block the proposed Enbridge Energy Line 3 pipeline, which the tribe feared would further pollute lakes and rivers in Minnesota and therefore threaten their usufructuary rights and the ability of manoomin to continue to grow in said waters.[118] However, all of these impacts occurred outside of tribal lands. As such, the Resolution included language that extended the Rights of Manoomin beyond tribal entities or lands.[119] The Resolution explicitly states that it "shall include the right to enforce this law free of interference from corporations, other business entities, governments, or other public or private entities"[120] and that it shall apply "regardless of whether those activities occur within, or outside of, the White Earth Reservation."[121] Ultimately, it was these extra-territorial provisions that led to the failure of the case in federal court under existing restrictive Supreme Court precedent.

The Tribe initially filed suit in White Earth Band of Ojibwe Tribal Court for declaratory and injunctive relief against the Minnesota Department of Natural Resources ("DNR") after the DNR granted Enbridge Energy a permit to pump approximately 5 billion gallons of shallow ground water, which the tribe feared would worsen already extant drought conditions and significantly harm manoomin.[122] The complaint brought claims of "Violations of the Right of Manoomin" and specifically sought the recognition of the Rights of Manoomin as relief, in addition to an injunction of the DNR permit.[123] The DNR countersuit in federal district court to enjoin the enforcement of the Rights of Manoomin by the tribal court was initially dismissed on the grounds that tribal sovereign immunity shielded both the Tribe and the tribal judge from being enjoined, and that the federal district court

116. 1837 Treaty with the Chippewa, Chippewa Nation of Indians-U.S., July 29, 1837, 7 Stat. 537.

117. 1855 Treaty with the Chippewa, Mississippi Bands of Chippewa Indians-U.S., Feb. 22, 1855, 10 Stat. 1165.

118. *See* Resolution No. 001-19-010, *supra* note 114, at 2–5.

119. *Id*. §§ 1–2.

120. *Id*. § 1(c).

121. *Id*. § 2(a).

122. Complaint at 1, Manoomin. v. Minn. Dep't of Nat. Res., No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021).

123. *Id*. at 44–45.

lacked subject matter jurisdiction.[124] The DNR appealed the district court order to the Eighth Circuit and the tribal court order to the White Earth Band of Ojibwe Court of Appeals.[125] Although the Eighth Circuit dismissed the DNR's suit following the decision of the Tribal Court of Appeals, the DNR's brief to the Eighth Circuit notably acknowledged that a personified manoomin is able to bring suit in tribal court.[126]

However, the Tribal Court of Appeals interpreted existing United States Supreme Court precedent in *Montana v. United States,*[127] which curtails the ability of tribes to exercise civil authority over non-members on non-tribal land, to apply to the Rights of Manoomin when exercised beyond tribal lands. The Tribe had argued that the Rights of Manoomin met the so-called second *Montana* exception, which allows a tribe to "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[128] In denying that the Tribe had jurisdiction, the Tribal Court of Appeals did not contest the ability of the Tribe to pass a provision creating a right of nature—only the ability of the Tribe to enforce that right beyond the boundaries of tribal lands.[129] Remarkably, the personified Rights of Manoomin technically remain a valid tribal right despite the severe limitation of existing United States federal case law. Although the vehicle for the personified right of nature was imperfect due to the limitations of federal Indian law, the framework of the right embodied in *Manoomin* is still a robust and flexible one that retains utility for future advocates. While courts in the United States do not suffer from a lack of enforcement to the same extent as the courts in Ecuador do, they are bound by unfavorable precedent. It is highly likely that there will be further litigation founded on the Rights of Manoomin brought in tribal court, provided that these future cases do not fall afoul of federal precedent limiting tribal jurisdiction.

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124. *See* Manoomin v. Minn. Dep't of Nat. Res., Civil Case No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021).

125. Warner & Lillquist, *supra* note 20, at 391.

126. Appellants' Brief and Addendum at 3 n.3, Minn. Dep't of Nat. Res. v. White Earth Band of Ojibwe, No. 21-3050 (8th Cir. Sept. 28, 2021).

127. Montana v. United States, 450 U.S. 544 (1981).

128. *Id.* at 566.

129. Warner & Lillquist, *supra* note 20, at 391.

B. LESSONS TO BE DRAWN FROM ECUADOR, *HELD V. MONTANA*, AND NEW ZEALAND

The constitutional language in Ecuador and Montana's constitutions is significantly different, beyond the obvious difference that one is a national constitution and the other a state constitution. Both are the product of relatively recent constitutional reforms: Ecuador underwent a full-blown constitutional assembly in 2007,[130] likewise Montana underwent a constitutional convention in 1972.[131] Whereas Ecuador's constitutional language is predominantly aspirational in that it espouses the Indigenous values of both *sumac kawsay* and *Pachamama* in the preamble,[132] the Montana state constitution is far more direct in the language used.[133] Nevertheless, the Montana state constitution does include aspirational language, ensuring a healthful environment for "present and future generations."[134] The forward-looking construction of this right demonstrates a potential circumvention of the requirements for an immediate injury that have proved so troublesome to climate litigation in Europe, as the language of the right itself contemplates allowing the present group of youth plaintiffs to sue on behalf of their own future, and others.[135] Although the Montana supreme court ultimately found their argument unpersuasive, many of the amicus briefs filed with the supreme court challenged the district court's ruling on exactly these grounds.[136] The amicus brief of the state attorneys general also raised the issue of federal supremacy, alleging that the state ruling jeopardizes interstate commerce or other directly delegated federal powers.[137] Some amici attempted to frame this as a political question that is not within the purview of the courts at all—an approach that was also adopted by state elected officials following the supreme court's decision.[138]

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130. Radziunas, *supra* note 19, at 124.

131. Held v. Montana, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 14, 2023) (Climate Change Litigation Databases).

132. *See* CONSTITUCIÓN DE REPÚBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, pmbl., *translated in* CONSTITUTE PROJECT, ECUADOR'S CONSTITUTION OF 2008, https://www.constituteproject.org/constitution/Ecuador_2008.pdf [https://perma.cc/L2W9-LN6Z].

133. MONT. CONST. art. IX, § 1

134. *Id.*

135. *See id.*; Climate Action Network, supra *note* 50.

136. Held v. State, 560 P.3d 1235 (Mont. 2024). *See Frontier Institute Amicus Brief Filed in Held v. Montana*, *supra* note 108.

137. *See* Brief for the States, *supra* note 108.

138. *See Frontier Institute Amicus Brief Filed in Held v. Montana*, *supra* note 108. *See also* Drew & Miller, *supra* note 109.

Functionally, these two constitutional rights have been operationalized in extremely disparate ways. Not only has Ecuador had ample opportunity to test its constitutional right via litigation, but the right itself is also incredibly broad.[139] The use of the Indigenous concept of *Pachamama* as "Mother Nature" has made the right so broad that courts now struggle to enforce the right in a meaningful way.[140] The example of the government intervention in the Esmeraldas region using the personified right of nature to crackdown on one type of mining that did not profit it directly—to allow for more mining from which it did stand to profit—speaks to the potentially destructive nature of an overly broad personified right.[141] This should serve as a lesson on the value of deliberative and intentional progress for litigators in the United States—particularly in light of the recent success in Montana—because although it may be tempting to immediately push the bounds of the rights of nature through impact litigation, the long term interest of combatting climate change may be better served through cautious and strategic vindications of the right. There is potential for significant impact now that the Montana state supreme court has upheld the district court's decision on the merits, as despite the pushback from state officials, the Montana state courts are unlikely to suffer the same degree of difficulty enforcing their ruling as we have seen from courts in Ecuador. This is, in large part, due to the tradition of a strong judicial branch being able to overrule the executive and legislative branches in the interest of enforcement.

Ultimately, the creativity of the personified right of nature in Ecuador suffers from a lack of enforcement, while our domestic political climate does not allow for sweeping constitutional reform or national legislation needed to create a right of nature in the style of Ecuador. However, due to the nature of the judiciary in the United States, a cautious and measured litigation strategy will likely have the best results for longer-term mitigation of climate change. For though we do not suffer from the same degree of enforcement issues, we are far more susceptible to the creation of poor precedent.

Likewise, the success that New Zealand has had with a statutory right of nature, initially justified by treaty language, compared to the failure of the recent *Manoomin* cases here in Minnesota, speaks to the strengths and limitations of our court system. While both New Zealand and the Ojibwe Rights of Manoomin create personified rights of nature grounded in treaty language between Indigenous and state powers, the American tribes are severely limited by the existing

139. Warner & Lillquist *supra* note 20, at 343–44.
140. *Id.*
141. Guim & Livermore, *supra* note 19, at 1408.

Supreme Court tribal law precedents. While the acknowledgment by the Minnesota DNR of the ability of the tribe to create a personified right of nature is gratifying, it will likely have little functional impact if it cannot be applied beyond tribal lands or the actions of tribal members. Therefore, tribal rights of nature have significant potential for high impact over relatively small areas but will likely run afoul of the Supreme Court any time there is an attempt to apply them more broadly. As such, this is unlikely to be a reliable or winning litigation strategy in the near term.

Conclusion

Ultimately, the proliferation of climate change lawsuits globally has given rise to a variety of answers to the standing question that all have their own pitfalls further down the line in litigation. In Ecuador, the constitutional personified right of nature has been defined so broadly that it has allowed the government to sue to remove small illegal mining operations to clear the way for a larger, more profitable mining outfit. In New Zealand, the government has created Māori management boards to act in the name of and on behalf of natural entities as a treaty and negotiation based right of nature, but this solution is unlikely to face a true litigation test until 2039. In Montana, the state constitution contains a right to a healthy environment which recently proved successful in litigation, but the application of this strategy beyond Montana requires that there be sufficient political will to amend other state constitutions to include this right.

In applying the lessons drawn from these three disparate strategies to Minnesota, where the tribal right was precluded by existing federal case law on tribal jurisdiction, we see that the throughline issue for creative solutions to standing becomes the connection of the injury to the plaintiffs. The overbroad version of the right in Ecuador allows for anyone to allege an injury on behalf of nature, and with no arbitration of the claims. This often results in greater harm to nature. In New Zealand, there are ongoing environmental harms to the river that cannot be redressed by solely forward-looking rights. In Montana, the structure of the right allows for the connection between existing violations of environmental regulations and the potential for future harm—and the standing of the plaintiffs was affirmed as a sufficiently personalized harm. The contentious nature of the appeal in Montana demonstrates a significant potential pitfall: actualizing this outside of Montana requires sufficient political will not only to amend states'

constitutions to create the right but also a state judiciary willing to vindicate it. The quantity of outside political interests represented in the amici signal the ferocity of the opposition to such a strategy. Furthermore, a favorable ruling in a state supreme court can still be overturned by the United States Supreme Court. Even so, this risk is minimal as state supreme court decisions receive significant deference and the right in the state constitution itself could only be preempted if it was in direct conflict with the federal government's exercise of its constitutional powers or if it assumed any functions exclusively entrusted to the federal government.

This is an arena of legal argument in which both state and federal courts domestically are comfortable, well-versed, and appropriately situated to navigate, as opposed to the more unfamiliar territory of a personified right of nature. Thus, state constitutional reform to include the right to a healthy environment seems to hold the most potential as a realistic and actionable method of achieving favorable climate outcomes domestically. Based on the current political climate in the United States and the most recent litigation outcomes, the state constitutional level is likely an attainable level of political consensus, as opposed to attempting to achieve a movement for a national constitutional amendment. *Manoomin*'s failure to vindicate the right beyond tribal lands underscores that although the personified right of nature seems like a creative solution to standing at first glance, litigation based on a personified right often encounters additional barriers. These barriers are exacerbated by the court's lack of expertise in areas like federal Indian law. Pairing a personified right with state constitutional reform instead allows courts to operate in legal areas in which they are well-versed and allows advocates to better predict the second order effects of their legal strategies.