CODIFYING THE RIGHTS OF NATURE

The Growing Indigenous Movement

By Geneva E. B. Thompson

On May 9, 2019, the Yurok Tribal Council passed a resolution declaring the rights of the Klamath River and provided a legal avenue for the Klamath River to have its rights adjudicated in Yurok Tribal Court.[1] The Yurok Tribe's goal in passing the resolution was to secure the highest protections for the Klamath River in direct response to its imperiled health. The Klamath River has seen increasing harms of point and nonpoint source pollutants entering its waters, rises in temperature due to dams and climate change, and large toxic algae blooms poisoning its waters. The Yurok Tribe is not the first indigenous nation[2] to pass legislation declaring rights to nature, but it is one of the leaders in the growing movement to ensure legal forums are available for representing nature when it suffers from ecological harm.[3]

For many indigenous nations, the advocacy for a healthy environment is deeply intertwined with the protection of traditional, historical, and cultural lifeways and practices. This connection between the environment and indigenous lifeways has been in place since time immemorial and will continue to be an important and sacred connection well into the future.[4] Within the borders of the current-day United States and predating the colonization period, Native nations have felt the urgency to protect land, the health of the environment, and their lifeways. The colonization of North America not only had horrific outcomes for the Native population but was also a destructive force to the ecological environment and caused destruction to many animal and plant species as an explicit act of ecological colonialization and genocide against Native people.[5]

Fast-forward to today. Native nations and indigenous peoples have lost the majority of their historical and ancestral homelands and waters; are continuously fighting to maintain their connection to sacred places, language, and traditional life ways; and are suffering from extreme poverty and violence.[6] Many Native nations are finding that one remedy to regaining cultural and ecological health, safety, and security is to develop laws, policies, and legal systems that will strengthen their ability to prosecute bad actors that continue to commit ecological colonization and genocide in ancestral territories.

A Western Legal Framework for Rights of Nature

In Western legal systems, the concept of the rights of nature was first popularized by legal scholar Christopher Stone in his 1972 law review article "Should Trees Have Standing?"[7] The article was published around the same time as the 1972 Supreme Court decision in *Sierra Club v. Morton*, finding that nature does not have standing on its own under the Administrative Procedure Act.[8] After this decision, several environmental organizations developed legal campaigns to find a legislative solution to implement laws and legal systems granting rights of nature in an attempt for nature to have legal standing in Western courts and a venue to adjudicate claims against polluters. Through one of these legal claims, in 2004, the Ninth Circuit Court of Appeals determined that Article III standing is not solely limited to humans, and Congress and other legislative bodies could authorize legal standing to animals.[9] Therefore, the question was and is whether Congress or other legislative bodies would pass laws granting standing for nature in court.[10]

As we move into a new decade, communities are advocating for rights-of-nature laws in response to the quickly advancing climate crisis. Legislative bodies are beginning to respond and working to find creative solutions to protect the environment and the people and species relying on its health. As these new laws are adopted, judges in Tribal, federal, and state courts will likely begin seeing rights of nature claims brought before them. When hearing these cases, judges are not evaluating whether nature has standing but what rights legislative bodies have codified for nature and what remedies to order; not only to make nature "whole," but to apply the enactments of the legislative body.

Tribal Sovereignty and Jurisdiction to Establish Rights of Nature Under Tribal Law

While there is debate on standing rights of nature in U.S. courts, it is clear that Native nations have the ability and authority to legislate rights of nature under their respective laws, to have those rights adjudicated in Tribal Courts and upheld in federal courts. Since time immemorial, Native nations have had inherent authority to develop, exercise, and enforce civil and criminal regulatory and adjudicatory authority over the individuals throughout their territories. Through colonialization, war, violence, and executive, legislative, and judicial actions, the U.S. government has worked to diminish this authority. Today, Native nations have retained the inherent authority to regulate the conduct of their members and, in limited situations, nonmembers.

While limited by U.S. law, Native nations do have regulatory and adjudicatory authority over nonmembers. The limitations to this authority have been developed through federal common law and the *Montana v. United States* line of cases, where Native nations can regulate nonmembers' conduct if it meets one or both of the two *Montana* exceptions.[11] The first *Montana* exception determines a Native nation "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the Tribe or its members, through commercial dealings, contracts, leases, or other arrangements," and there must be a nexus between the consensual relationship and the regulation.[12] The second *Montana* exception determines a Native nation "may also retain inherent power to exercise civil authority over the conduct of non-Indians on free 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."[13] To establish this exception, the nonmember's conduct must have a direct effect on the political integrity, economic security, or health and welfare of the Native nation and that this regulatory power does not reach "beyond what is necessary to protect tribal self-government or to control internal relations."[14]

While Native nations must navigate these complex regulatory and adjudicatory limitations, rights-of-nature laws can still be effective tools to regulate the conduct of members and nonmembers to ensure the protection of culturally significant natural resources and landscapes. As discussed below, Native nations are developing rights-of-nature laws with these jurisdictional limitations in mind to secure the highest protections of their sacred, cultural, and natural environments and landscapes.

Examples of Rights of Nature Under Tribal Law

Rights of Manoomin

On December 5, 2018, the White Earth Band of Ojibwe and 1855 Treaty Authority adopted the Rights of Manoomin for on- and off-reservation protection of wild rice and the resources and habitat in which it thrives.[15] In this law, the rights of Manoomin include (1) the right to clean water and freshwater habitat; (2) the right to a natural environment free from industrial pollution; (3) the right to a healthy, stable climate free from human-caused climate change impacts; (4) the right to be free from patenting; and (5) the right to be free from contamination by genetically engineered organisms.[16] The law also details the rights of Tribal members to harvest, protect, and save Manoomin seeds within the 1855 ceded territory and beyond and ensures Chippewa Tribal members collective and

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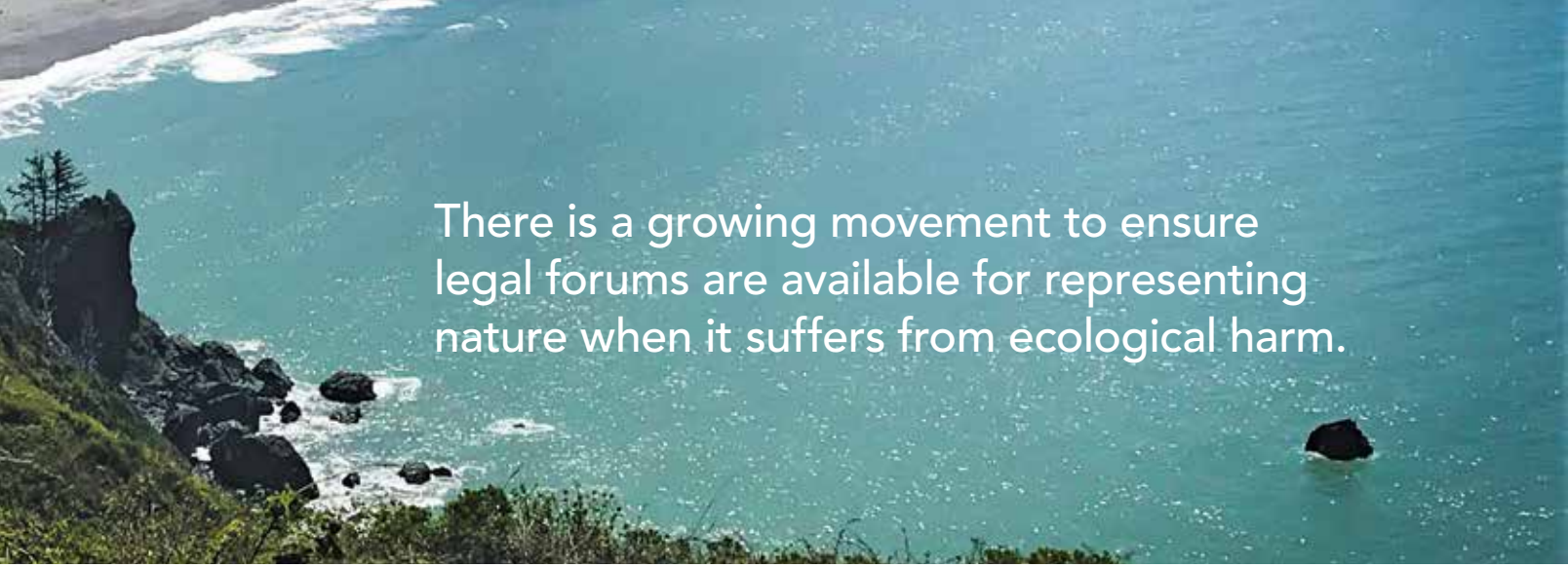

There is a growing movement to ensure legal forums are available for representing nature when it suffers from ecological harm.

individual rights of sovereignty, self-determination, and self-government.[17]

In the Rights of Manoomin resolution, it is unlawful for any business entity, government, or other public or private entity to engage in activities "which violate, or which are likely to violate, the rights or prohibitions of [the] law, regardless of whether those activities occur within, or outside of, the 1855 ceded territory."[18] The law also prohibits any government from issuing "any permit, license, privilege, charter, or other authorization issued to any business entity or government, or any other public or private entity" that would "authorize" the violation of the rights of the Manoomin.[19] Those who are in violation of the law will be subject to the maximum fine allowable under Tribal law and will be issued a fine to pay for the restoration costs of any environmental damage.[20] The hope for this new law is to strengthen the White Earth Band of Ojibwe and 1855 Treaty Authority's advocacy and protection of Manoomin and its ecosystem from new extractive industry projects and pipelines.

Rights of the Klamath River

The Yurok Tribe and its members have had a strong relationship with the Klamath River since time immemorial. Many aspects of Yurok culture, ceremonies, religion, fisheries, subsistence, economics, residence, and all other lifeways are intertwined with the health of the river. Since the beginning of colonization of what is currently known as Northern California, the Yurok people have been defending their rights to continue to live in relationship with the Klamath River. As time has passed, the Yurok people have seen and fought against the gold rush mining operations destroying the landscape and polluting the river, the intensive logging industry decimating the redwood forests, non-Native ocean and river fishing industries overharvesting and destroying the salmon and steelhead fish populations, increased uses of agricultural fertilizers and pesticides causing harmful water runoff into the river, and the construction of the four major dams preventing the free-flowing movement of the Klamath River waters and blocking the natural migration of fish species. The passing of the May 2019 resolution mentioned at the beginning of this article is just another advocacy step to protect the Klamath River and the Yurok people.

The Yurok Reservation's borders are set one mile from either side of the Klamath River and go upstream until the confluence of the Klamath River and the Trinity River. The modern-day Yurok government regulates this portion of the river to ensure compliance with the Yurok Tribe's environmental and fishing laws. While the Yurok Tribal Council passed a resolution declaring the rights of the Klamath River in May 2019, it is currently developing a more extensive ordinance detailing the rights of the Klamath River and establishing the legal authority of the Yurok Tribe and its members to adjudicate claims on behalf of the Klamath River in Yurok Tribal Court.[21] Even though the ordinance is newly developed, the principle has existed precontact, and the Yurok Tribe is simply codifying rights the Klamath River has always had, the rights to exist, flourish, naturally evolve, have a clean and healthy environment free from pollutants, have a stable climate free from human-caused climate change impacts, and be free from contamination by genetically engineered organisms.

Through this law, the Yurok Tribe will clarify its authority to represent the Klamath River and prosecute against any person or entity that violates the Klamath River's rights in Yurok Tribal Court. These claims can be combined with any other claims brought by the Yurok Tribe to allow for legal remedies for harms suffered by the Yurok Tribe and the harms suffered by the Klamath River. The Yurok Tribe serves as a trustee of the Klamath River's legal rights and has the fiduciary duty to ensure the remedies awarded to the river are used for the Klamath River's protection and restoration.

While the law is still in its final stages of development, once complete, the Yurok Tribe can bring cases to stop pollutants from entering into the Klamath River in violation of its rights and of Yurok law. Through these cases, the Yurok Tribe will not only be able to show the pollution is in violation of the rights of the Klamath River but that the Yurok Tribe has jurisdiction to adjudicate these claims because by harming the Klamath River, the actions also harm the political integrity, economic security, and health and welfare of the Yurok Tribe.

Conclusion

The rights of the Manoomin and the Klamath River being codified under Tribal law is just the beginning of the rights-of-nature movement. Native nations have the

jurisdiction to implement and enforce these laws and will do so to ensure the political integrity, economic security, and health and welfare of their nations are protected. As more and more jurisdictions develop the laws and regulations around the rights of nature, judges will likely begin to see these claims in court. As found by the Ninth Circuit, the question is not whether nature has standing, but what rights the legislative body has codified for nature. Judges across jurisdictions will have the opportunity to analyze this question, uphold rights-of-nature laws, and grant remedies to ensure nature's rights are protected. ■

Endnotes

1. The Yurok Tribal Council, Resolution Establishing the Rights of the Klamath River, Resolution 19-40 (May 9, 2019).

2. For this article, the author is using the term "indigenous nations" to include all indigenous governments both internationally and within the United States of America. The term "Native nations" is used to reference indigenous governments within the United States.

3. *See generally* Hannah White, *Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States*, 43 Am. Indian L. Rev. 129, 140–64 (2018) (discussing the rights of nature trend in Ecuador, Bolivia, Belize, New Zealand, India, and the United States).

4. Kristen A. Carpenter et al., *In Defense of Property*, 118 Yale L.J. 1022, 1112 (2009).

5. *See generally* William Cronon, Changes in the Land: Indians, Colonists, and the Ecology of New England (Hill and Wang 1983); Andrew C. Isenberg, The Destruction of the Bison (Cambridge University 2000).

6. *See generally* Frank Pommersheim, Broken Landscape: Indians, Indian Tribes, and the Constitution (Oxford University Press 2009).

7. Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972).

8. 405 U.S. 727, 741 (1972).

9. Cetacean Cmty. v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004).

10. *Id.* at 1176.

11. 450 U.S. 544, 564 (1981).

12. *Id.* at 565; Atkinson Trading Co. v. Shirely, 532 U.S. 645, 656 (2001).

13. *Montana*, 450 U.S. at 565–66.

14. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

15. 1855 Treaty Authority, Resolution Establishing Rights of Manoomin, Resolution Number 2018-05 (Dec. 5, 2018).

16. *Id.* § 1(a).

17. *Id.* § 1(b), (c).

18. *Id.* § 2(a).

19. *Id.* § 2(b).

20. *Id.* § 3(a)–(c).

21. Rights of the Klamath River Resolution, *supra* note 1, at i.