

LEVERAGING EARTH LAW PRINCIPLES TO PROTECT OCEAN RIGHTS

by Nadine Nadow, Hayley-Bo Dorrian-Bak, and Eleanor Maloney

Nadine Nadow is an attorney and an LL.M. candidate at Lewis & Clark Law School. Hayley-Bo Dorrian-Bak is an International Biodiversity Advisor for the Joint Nature Conservation Committee. Eleanor Maloney is an Associate Attorney at Homer Law, Chtd.

SUMMARY

Communities around the world are seeking to acknowledge nature's rights through legal tools and litigation. This Article provides an overview of recent developments in earth law movements, including Rights of Nature, Rights of Rivers, and Ocean Rights, and considers the potential impacts these ecocentric conservation measures could have on Indigenous peoples and local communities. It summarizes the three most prominent methods of navigating these movements, and highlights the ways in which each method may serve to promote earth law, while continuing to consider small-scale communities that depend upon natural resources.

Cultures and laws are transforming to provide a powerful new approach to protecting the planet and the species with whom we share it. Around the world, more and more laws are being passed recognizing that ecosystems have legally enforceable rights. And if nature has rights, then humans have responsibilities.¹

Earth and its living beings (including ecosystems, species, plants, microorganisms, animals, and abiotic components)² are threatened by climate change and development, resulting in inequitable and unjust distributions of burdens. Communities around the world now seek to promote, respect, and protect the earth by acknowledging nature's rights through legal tools and litigation for the health of current and future generations.³ The changes in

nature driven by humans' social values and use of land and oceans result in both direct and indirect impacts contributing to climate change, pollution, and invasive species.⁴ The negative impacts result in a need for earth law to be applied as a mechanism to protect ecosystems and to reverse biodiversity loss.⁵ Earth law is a philosophy of law proposing new legal mechanisms through movements, including the Rights of Nature, Rights of Rivers, and Ocean Rights, to help encourage recognition of the inherent environment and balance the needs of humans.⁶

Ecosystem destruction also threatens human legal, social, and ethical rights. Although there are current legislative strategies to address threats, they do not always result in solutions to environmental injustice and environmental racism. In some cases, today's national and state constitutions further promote colonialism, racism, and anthropocentric ideologies.⁷ Through earth law movements, those threats are evaluated and confronted in legal and policy mechanisms. Earth law works to emphasize the importance of tackling the global ecological crises,⁸ and seeks to promote sustainable development to reduce impacts on

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1. DAVID R. BOYD, *THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD* (2017).
2. Michelle Bender et al., *Living in Relationship With the Ocean to Transform Governance in the UN Ocean Decade*, 20 PLOS BIOLOGY e3001828 (2022), <https://doi.org/10.1371/journal.pbio.3001828>:
Earth law is a philosophy of law based upon "the interdependence among humans and the environment" and guided by principles of holism, mutual enhancement, and reciprocal responsibilities, among others. Earth law promotes a greater respect for all living things on Earth by recognizing that nonhumans have inherent rights and value, merely by existing.
3. Mother Earth Law and Integral Development to Live Well, Law No. 300, art. 2, §4 (2012) (Bol.).

4. Convention on Biological Diversity, *Kunming-Montreal Global Biodiversity Framework*, U.N. Doc. CBD/COP/15/L.25, at 4 (Dec. 18, 2022), <https://www.cbd.int/doc/c/e6d3/cd1d/daf663719a03902a9b116c34/cop-15-l-25-en.pdf> [hereinafter *Kunming-Montreal Global Biodiversity Framework*].
5. *Id.* at 4-5.
6. See Bender et al., *supra* note 2; MICHELLE BENDER ET AL., *EARTH LAW CENTER & LEGAL RIGHTS FOR THE SALISH SEA, RIGHTS FOR THE SOUTHERN RESIDENT ORCAS: CAMPAIGN TOOLKIT 2022*, at 9, <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/627986e9e87a346246c1c633/1652131572782/SRO+Campaign+Toolkit+%282%29-compressed.pdf>.
7. See Bender et al., *supra* note 2.
8. Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 HARV. L. REV. 276 (2021).

communities threatened by climate change and various human impacts.⁹

Although humans have rights to healthy environments and the maintenance of sustainable environments, the environment itself also needs rights to exist, thrive, and evolve.¹⁰ Earth law¹¹ is a philosophy of law. Its environmental movements work to protect the future by addressing the interconnected and inextricable relationship between humans and ecosystems (such as water, air, land, and wildlife) and highlight nature's intrinsic value.¹² It promotes the nexus of equity and conservation while declaring that the environment has inherent fundamental rights.¹³ Earth law has a holistic and improvement-based approach perspective.¹⁴

This Article explains earth law's national and international legal provisions,¹⁵ among other legal instruments. Earth law movements incorporate various environmental legal rights, representation, governance principles, decisionmaking, cost-benefit analyses, evolution acceptance, and more.¹⁶

We also review the inequitable distributions of burdens associated with negative environmental impacts. Human interactions with the environment and biotechnology have negative impacts leading to the global land surface experiencing degradation of about 23%.¹⁷ Such impacts result in pollution, ocean acidification, deforestation, sea-level rise, temperature increase, extreme weather, mass migration, extinction, and climate change. There are a variety of risks due to this degradation, like crops that experience pollinator loss and hundreds of millions of people who experience extreme floods and exacerbated impacts from hurricanes due to the loss of coastal habitat protection.¹⁸ Political and societal initiatives will help raise awareness about the impact of consumption on nature, and will lead to protection of local environments and communities while promoting sustainable economics and restoring destroyed areas.¹⁹

Part I reviews the purposes and strategic considerations of earth law's various movements, and raises awareness about potential obstacles. Part II highlights how Rights of Nature encourages promoting Water Rights (Part III) and Ocean Rights (Part IV), and protecting environments and communities through the implication of rights, laws, and litigation. The discussion highlights the synergy of ecosystem equity and conservation by addressing increasing concerns about the well-being of communities threatened by climate change, pollution, recreation, and development.

Recognizing the competing demands for preservation and avoiding inequitable burdens on Indigenous and local communities, Part V recommends leveraging these rights-based movements through governance implementation and organizational developments to protect the integrity of the marine environment and the communities that depend on it. Part VI concludes.

I. Earth Law

Earth law²⁰ movements emphasize balancing human needs with the needs and lives of other species and ecosystems, as life on earth is interdependent and interconnected. The relationship between nature and humans must be healthy and equitable.²¹ Recognizing the environment as a living entity with inherent rights increases the understanding that the environment should be afforded representation and democratization. Due to the complexity of ecosystems and continued evolution, earth law movements are productive and informative frameworks recognizing ecosystems' rights and well-being.²²

Earth law movements have missions to equally respect humans *and* the environment by acknowledging inherent rights, including culture, life, autonomy, adequate food resources, access to naturally occurring sources, fights against pollution, and freedom from conditions causing mental and physical pain.²³ Rights-bearing entity declarations are a recognition of the inseparable human-nature relationship.²⁴ These declarations recognize that environments are sacred; all living entities should possess fundamental rights (specific to the different needs of species and ecosystems), and each entity should have the right to secure legal standing in courts.²⁵ "[T]his not only requires complying with the scientific evidence of dependency of humanity on nature but forces the conservation community to analyze its concept of nature and clarify the ethical grounds for valuing life."²⁶ The concept is rooted within

9. Press Release, Earth Law Center, Biodiversity Treaty Shows Renewed Support for the Rights of Nature (June 11, 2022), <https://www.earthlawcenter.org/elic-in-the-news/2022/6/biodiversity-treaty-shows-renewed-support-for-the-rights-of-nature>.

10. INTERNATIONAL JOINT COMMISSION, RIGHTS OF NATURE FAQ 2 (2019), <https://www.ijc.org/system/files/commentfiles/2019-10-Nicolette%20Sla/FAQ.pdf> [hereinafter RIGHTS OF NATURE FAQ].

11. Also known as Mother Earth or earth-centered law.

12. See Press Release, Earth Law Center, *supra* note 9; Bender et al., *supra* note 2.

13. See Bender et al., *supra* note 2.

14. *Id.*

15. Provisions include constitutions, statutes, local laws, guidelines, policies, resolutions, judicial provisions, and treaties.

16. United Nations Harmony With Nature, *Rights of Nature Law and Policy*, <http://harmonywithnatureun.org/rightsOfNature> (last visited Sept. 16, 2023) [hereinafter *Rights of Nature Law and Policy*]; Universal Declaration of the Rights of Rivers pmbl., at 3, Jan. 31, 2019, https://static1.square-space.com/static/55914fd1e4b01fb0b851a814/t/5c93e932ec212d197abf81bd/1553197367064/Universal+Declaration+of+the+Rights+of+Rivers_Final.pdf.

17. UN Report: *Nature's Dangerous Decline "Unprecedented"; Species Extinction Rates "Accelerating,"* U.N. SUSTAINABLE DEV. GOALS (May 6, 2019), <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/> [hereinafter *Nature's Dangerous Decline*].

18. *Id.*

19. *Id.*

20. Earth law is also referred to as "earth jurisprudence" and "wild law."

21. See Press Release, Earth Law Center, *supra* note 9.

22. Grant Wilson & Darlene May Lee, *Rights of Rivers Enter the Mainstream*, 2 ECOLOGICAL CITIZEN 183 (2019), available at <https://www.ecologicalcitizen.net/pdfs/v02n2-13.pdf>.

23. See Bender et al., *supra* note 2, at 2.

24. Al Bergstein, *Port Townsend City Council Recognizes Rights of Whales in WA*, OLYMPIC PENINSULA ENV'T NEWS (Dec. 6, 2022), <https://olyopen.com/2022/12/06/port-townsend-city-council-recognizes-rights-of-whales-in-wa/>.

25. *Id.*

26. See generally Claudio Campagna et al., *Sustainable Development as Deus ex Machina*, 209 BIOLOGICAL CONSERVATION 54 (2017), available at <https://linkinghub.elsevier.com/retrieve/pii/S0006320717301362>.

a framework based on natural law and science and with respect for the intrinsic value of the environment as the decisionmaking takes place.²⁷

A. Purpose of Earth Law

Earth law is a body of law inclusive of the environment's values.²⁸ The purpose is to enhance healthy biodiversity, identify the related damages, and balance the connections to humans.²⁹ It holds accountable those who are violating the human and ecosystem communities' rights to a healthy environment.³⁰

Rights of Nature, Ocean Rights, and Rights of Rivers are earth law movements in the forms of governance frameworks intended to help protect human and nonhuman communities. Most environmental statutes do not allow ecosystems, nor any other nonhuman being, to have statutory claims or to sue.³¹ For the past several decades, environmental regulatory systems have involved anthropocentric³² governance systems, which ultimately legalize harmful activities and destruction of health and well-being of nature.³³ However, earth law movements work toward extending coverage by *complementing*, not replacing, the existing laws.³⁴

New legislation is being implemented around the world to recognize nature's rights and authorize its legal standing.³⁵ When implemented, these frameworks do not interfere with private-property rights; rather, property owners are regulated to not cause "substantial harm" to all who live and depend on the property's resources.³⁶ The legal changes recognizing earth law have the potential to be mechanisms for protecting and speaking for ecosystems and species.³⁷

Existing legal responses to environmental degradation focus only on the environmental decline rather than proactively working to avoid degradation.³⁸ In the United States, ambitious federal environmental protection laws

were enacted in and around the mid-20th century³⁹ to address environmental harm. Unfortunately, these regulatory approaches simply manage the exploitation of natural resources to ensure the protection of human health and safety but, in most instances, still leave the environment and disproportionately impacted communities more degraded.⁴⁰ Earth law is a new paradigm working to shift the burden of proof to those harmful activities.⁴¹ Earth law intends to motivate the implementation of protection to proactively prevent harm and damages and to restore environmental health, rather than implement reactive responses.

A recurring question is how far and in which direction the law should go to incorporate the belief in nature rights. These rights movements give human and nonhuman species justice. Both are represented and accounted for in the decisionmaking procedures under legal personhood or legal guardianship.⁴² Legal personhood rights seek to improve the ecosystem's quality, quantity, and integrity to protect the health and safety of plants, wildlife, and humans. Legal personhood refers to entities that are treated as a person for limited legal purposes,⁴³ but is not synonymous with "human."⁴⁴ It focuses on the "allocations of rights under the law, asking who counts under our law."⁴⁵

Legal guardianship,⁴⁶ or trusteeship, of a voiceless, rights-bearing entity comes from a third party⁴⁷ with the responsibility to defend, protect, and enforce rights of the environment they are representing.⁴⁸ Legal guardians act in nature's best interest, provide a voice, oversee the payments recovered from damages, enforce the resolution needed for full restoration, and represent the nonhuman entity in legal proceedings and before government bod-

27. See Bergstein, *supra* note 24; see Universal Declaration of the Rights of Rivers, *supra* note 16; see Wilson & Lee, *supra* note 22.

28. See Bender et al., *supra* note 2.

29. See *Nature's Dangerous Decline*, *supra* note 17.

30. CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* (2d ed. 2011).

31. Lindsey Schromen-Wawrin, *Representing Ecosystems in Court: An Introduction for Practitioners*, 31 TUL. ENV'T L.J. 279, 290 (2018):

[Federal Rule of Civil Procedure 17(b)] provides rules for determining who has capacity to sue and be sued. It provides specific rules for individuals and corporations, then states that "for all other parties, by the law of the state where the court is located." Obviously, these rules do not contemplate ecosystems as parties.

32. Anthropocentrism regards the environment as property used for the human benefits of livelihood, businesses, resources, and other human-centric means.

33. See RIGHTS OF NATURE FAQ, *supra* note 10, at 1.

34. See Schromen-Wawrin, *supra* note 31.

35. There are corporations and other nonhuman entities who are legally identified as legal persons and have rights. See Stilt, *supra* note 8.

36. Tilo Wesche, *Who Owns Nature? About the Rights of Nature*, 65 ESTUDIOS DE FILOSOFÍA 49 (2022), available at <https://doi.org/10.17533/udea.ef.347573>; PETER D. BURDON, *EARTH JURISPRUDENCE: PRIVATE PROPERTY AND THE ENVIRONMENT* (2014).

37. See Wilson & Lee, *supra* note 22.

38. See CULLINAN, *supra* note 30; see RIGHTS OF NATURE FAQ, *supra* note 10, at 1.

39. See, e.g., Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (revised by later amendments into the Clean Water Act, 33 U.S.C. §1251 (1977)); Air Pollution Control Act, Pub. L. No. 84-159, 69 Stat. 322 (1955); Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (totally revised by later amendments); Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964); Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965); Federal Coal Mine Health and Safety Act, Pub. L. No. 91-173, 83 Stat. 742 (1969); Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973).

40. See Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (revised by later amendments into the Clean Water Act, 33 U.S.C. §1251 (1977)); Air Pollution Control Act, Pub. L. No. 84-159, 69 Stat. 322 (1955); Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (totally revised by later amendments); Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964); Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965); Federal Coal Mine Health and Safety Act, Pub. L. No. 91-173, 83 Stat. 742 (1969); *but see* Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973).

41. See generally Wilson & Lee, *supra* note 22.

42. See CULLINAN, *supra* note 30.

43. Cornell Law School: Legal Information Institute, *Legal Person*, https://www.law.cornell.edu/wex/legal_person (last updated June 2023).

44. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014).

45. *Id.*

46. A "guardian" has the legal authority and duty to care for another person or property. BLACK'S LAW DICTIONARY (11th ed. 2019).

47. Third parties include citizens, local politicians or a governmental entity, environmental organizations or activists, eco-lawyers, researchers, scientists, Indigenous communities, individuals, or others.

48. See RIGHTS OF NATURE FAQ, *supra* note 10, at 2.

ies.⁴⁹ Incorporating environmental rights does not impact the recognition of the current legal rights held by humans and corporations. These personifications are set out to adequately protect nature and allow ecosystems to have statutory representation.

Earth law's framework elevates and promotes the protection of nature's rights under the law. Its purpose is to incentivize cosmobiocentric approaches to the living while recognizing the failure of human rights protection⁵⁰ to address nature's interests.⁵¹ It provides an emphasis on environmental justice by encouraging fair treatment and meaningful involvement. Additionally, environmental justice⁵² addresses equalizing the rights of all humans and communities, including Indigenous people, people in vulnerable situations, and local communities, and seeks to promote equity for groups based on age, gender, race, disabilities, and political power.⁵³ Traditional knowledge and best available science set precedent for how laws and regulations should be amended to protect future generations of humans and ecosystems to function interconnectedly and to promote successful interdependence.

B. Indigenous Peoples and Local Communities

Indigenous peoples and local communities (IPLCs) are ethnic groups conserving and protecting land and sacred spaces from time immemorial. Traditional cultures and Indigenous communities often consider humans to be part of nature rather than property owners of nature, and live in an interconnected environment between people and nature.⁵⁴ Indigenous people make up 5% of the global population and protect 80% of the world's remaining biodiversity.⁵⁵ More than one-quarter of earth's land is physically owned, managed, used, or occupied by Indigenous people; some of which is formally protected and some of which remains terrestrial with very low human intervention.⁵⁶

IPLCs are communities with the most biodiverse space left on earth because of their effective stewardship of the land and ocean. IPLCs, who recognize their relationships with nature in terms of "rights," have significantly contributed to the framework of earth law.⁵⁷ They note that identification, culture, spirit, and lifeways of IPLCs are grounded

in biodiversity.⁵⁸ IPLCs' traditional ecological knowledge centers their values in conservation and continued advocacy for their communities and nature.⁵⁹ Indigenous peoples and their communities promote and influence the application of free, prior, and informed consent (FPIC) that improves fair and equitable sharing of benefits in managing strategies with local communities.⁶⁰

There are concerns that governments implement environmentally focused goals at the expense of IPLCs' territorial and land use rights. The expansion of environmental conservation always has the potential to result in a limitation of the rights of IPLCs and their contributions.⁶¹ For example, Indigenous representatives involved in an Ecuadorian constitutional amendment process acknowledged both the benefits and disadvantages of the Rights of Nature implementation.⁶² The Indigenous peoples were worried that the amendment would block their access to natural resources upon which they rely.⁶³

Earth law movements have the potential to be threatening. These rights movements for land and water could lead to a violation of IPLCs' territorial and land rights, as IPLCs' cultures and livelihoods are embedded in the space.⁶⁴ Although different IPLCs have different cultural and spiritual beliefs and practices, they share valued holistic and human-incentivized views of nature.⁶⁵

Indigenous communities are stewards of land, waters, and wildlife. However, not all Indigenous peoples use the term "rights" to express the interconnectedness of humans and the environment.⁶⁶ Indigenous peoples' relationship to land and water is a critical acknowledgment to develop

49. See Universal Declaration of the Rights of Rivers, *supra* note 16, at 3; RIGHTS OF NATURE FAQ, *supra* note 10, at 2.

50. Human rights have inequity in need of reconsideration. Involvement in environmental governance increases the quality of life and influences the goals of global resource sustainability. See *Nature's Dangerous Decline*, *supra* note 17.

51. See generally Press Release, Earth Law Center, *supra* note 9.

52. U.S. Environmental Protection Agency, *Learn About Environmental Justice*, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> (last updated Aug. 16, 2023).

53. See generally Press Release, Earth Law Center, *supra* note 9.

54. See Stilt, *supra* note 8.

55. Angelo Villagomez et al., *5 Ways Scientists, NGOs, and Governments Can Support Indigenous-Led Conservation*, CTR. FOR AM. PROGRESS (Dec. 13, 2022), <https://www.americanprogress.org/article/5-ways-scientists-ngos-and-governments-can-support-indigenous-led-conservation/>.

56. See *Nature's Dangerous Decline*, *supra* note 17.

57. See Stilt, *supra* note 8.

58. Campaign for Nature, *Indigenous Peoples and Local Communities—Essential Partners in Protecting at Least 30% of the Planet by 2030*, <https://www.campaignfornature.org/indigenous-peoples> (last visited Sept. 16, 2023).

59. See Villagomez et al., *supra* note 55.

60. See *id.*; Len Necefer, *The Federal Government Has a Long History of Stealing Land From Tribes. But CoManagement Is a Step in the Right Direction*, OUTSIDE (Dec. 13, 2022), <https://www.outsideonline.com/adventure-travel/news-analysis/government-tribes-co-management/>.

61. See Villagomez et al., *supra* note 55; Necefer, *supra* note 60. Environmental conservation efforts, like reducing emissions from deforestation and forest degradation (REDD+), may not be suitable market-based options for IPLCs, as climate action efforts could result in IPLC detriment. Beatriz Garcia et al., *REDD+ and Forest Protection on Indigenous Lands in the Amazon*, 30 RECIEL (AMAZON RAINFOREST) 207 (2021), available at <https://doi.org/10.1111/reel.12389>; *Forest Equity: What Indigenous People Want From Carbon Credits*, YALE ENV'T 360 (Dec. 15, 2022), <https://e360.yale.edu/features/levi-sucre-romero-indigenous-lands-carbon-credits>; Levi Sucre & Fermin Chimatani, *Carbon Credit Rule-Makers Must Engage Indigenous People*, CLIMATE HOME NEWS (Mar. 28, 2023), <https://www.climatechangenews.com/2023/03/28/carbon-credit-rule-makers-must-engage-indigenous-people/>; Nina Kantcheva, *Indigenous Peoples and Climate Finance for the Forest Sector*, UN-REDD PROGRAMME (June 3, 2022), <https://www.un-redd.org/post/indigenous-peoples-and-climate-finance-forest-sector>.

62. Rogelio Luque-Lora, *Chile's Social Uprising and Constituent Process: Toward a More-Than-Human Understanding*, 13 J. FOR & ABOUT SOC. MOVEMENTS 323 (2021), available at <https://www.interfacejournal.net/wp-content/uploads/2022/03/Interface-13-2-Luque-Lora.pdf>.

63. Maria Akchurin, *Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador*, 40 LAW & SOC. INQUIRY 937, 968 (2015), available at <https://doi.org/10.1111/lsi.12141>; see Luque-Lora, *supra* note 62.

64. Noah Sachs, *A Wrong Turn With the Rights of Nature Movement*, GEO. ENV'T L. REV. (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4402290.

65. See *id.*

66. See Bender et al., *supra* note 2, at 2.

through legal approaches and implementations.⁶⁷ The same applies to their relationship with earth law movements. There are situations where governments have failed to protect, respect, and implement productive interactions and environmental justice relationships between humans and the environment.⁶⁸

C. Challenges of Earth Law

Earth law movements face several challenges in seeking to fulfill their objectives. There are conflicting interests and difficulties in appointing appropriate guardians to incorporate property and commercial interests, which are known to complicate enforcing earth law, and to factor in considerable local community rights needed to progressively apply the law.⁶⁹ Although earth law movements are promoted for the ability to provide respect, protection, and ecological governance, some people predict that the movements will restrict access to natural resources and become another branch of environmental racism.⁷⁰ There are questions about which rights nature should have and how to conceptualize, recognize, and conduct those rights.⁷¹

The more the earth law movement concept is applied and utilized, the more normalized it will become in the global community. It will help build international legal norms and provide the political will for solutions to all the interconnected global problems.⁷² If earth's ecosystems secure legally enforceable rights, then humans have the responsibility to protect and respect these rights.⁷³ Most of these earth law movements will aim to focus on positively addressing ecosystem, social justice, and human rights concerns that would be impacted by these approaches.

II. Rights of Nature

Rights of Nature is a leading movement under earth law, and is the foundation for other rights movements, like Rights of Rivers and Ocean Rights. Rights of Nature is based on an ecocentrism theory of the integrity of all components of the ecosystem, including biocentrism (value in living things) and zoocentrism (value in animals).⁷⁴ The rights-based approach (RBA) applied to nature seeks to recognize the rights of all species, biocultural rights, and other rights for generations to come.⁷⁵ Rights of Nature's RBA supports change and enables conditions of all liveli-

hoods through protection, restoration, and promotion of biodiversity.⁷⁶ The Rights of Nature advocates argue that current environmental governance fails to provide sufficient environmental protection, and the Rights of Nature initiative can be an effective way to improve it.⁷⁷

Advocating on behalf of living beings in the legal system will work to protect and promote their interests and will provide education about their cognitive, emotional, and physiological values and capacities.⁷⁸ Rights for living beings seek to recognize and identify well-being, implement enforcement mechanisms to protect, and establish appropriate remedies.⁷⁹

A. Purpose of Rights of Nature

The purpose of Rights of Nature is to serve as an ecocentric RBA that acknowledges the interconnectedness of all living beings—flora and fauna—on the planet. It is a global movement focusing on earth governance by addressing processes and decisionmaking across all institutional levels and finding an equitable intermediate ground between humans and nature. It integrates specifically to community needs depending on the location's ecosystems, rather than a single overarching concept applied universally. Rights of Nature is not intended to prevent the taking of nature's resources, but rather to prevent the destruction of the environment's health and to regenerate the integrity of ecosystems and restore biodiversity.⁸⁰

There are four defining characteristics of Rights of Nature: (1) rights (nature is a rights-bearing entity); (2) connectivity and the primacy of life (nature elements, including humans, are interconnected and ensure the ongoing health of life-supporting ecosystems with a societal goal); (3) reciprocity (human use requires respect, restoration, and regeneration through a variety of maintenance mechanisms); and (4) representation and implementation (human responsibilities are executed and require humans, in addition to States, to speak for nature).⁸¹

The Rights of Nature movement has the goal of developing a sustainable society that respects nature.⁸² Nature not only has its ecosystem functions, but is a service provider, as humans depend on it as a resource. Humans extract eco-

67. *See id.*

68. *Id.*

69. *See generally* Wilson & Lee, *supra* note 22.

70. Grant Gutierrez, Western Washington University, *Environmental Justice and River Restoration in Puget Sound*, VIMEO, <https://vimeo.com/804501166>.

71. *See* Luque-Lora, *supra* note 62.

72. *See generally* Wilson & Lee, *supra* note 22.

73. *See* BOYD, *supra* note 1.

74. Paul Cryer et al., *Why Ecocentrism Is the Key Pathway to Sustainability*, MAHB (July 4, 2017), <https://mahb.stanford.edu/blog/statement-ecocentrism/>.

75. EARTH LAW CENTER ET AL., RECOMMENDATION: RIGHTS OF NATURE IN THE POST-2020 GLOBAL BIODIVERSITY FRAMEWORK (2021), https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/614a1113b591707960e3266c/1632244021740/CBD_Recommendation_Final+%281%29.pdf [hereinafter CBD RECOMMENDATION].

76. *See generally id.*

77. *See* Luque-Lora, *supra* note 62 (noting that a widely regarded essay on Rights of Nature by Godofredo Stutzin, a well-known Chilean lawyer and environmentalist, opens with the claim that these legal reforms are a matter of "practical necessity").

78. Kathy Hessler & Amy P. Wilson, *Making Waves: Changing the Status Quo for Aquatic Animals*, LEWIS & CLARK L. SCH. (Mar. 25, 2021), <https://law.clark.edu/live/news/45584-making-waves-changing-the-status-quo-for-aquatic>.

79. *See* Bender et al., *supra* note 2, at 8.

80. *See* Press Release, Earth Law Center, *supra* note 9; *see* Stilt, *supra* note 8. Many nations, including Spain, France, Portugal, Greece, and Finland, are expanding legal rights for humans to highlight their right to a healthy environment. *See* RIGHTS OF NATURE FAQ, *supra* note 10, at 2.

81. Harriet Harden-Davies et al., *Rights of Nature: Perspectives for Global Ocean Stewardship*, 122 MARINE POL'Y 104059 (2020), available at <https://linkinghub.elsevier.com/retrieve/pii/S0308597X20303365>.

82. Marsha Jones Moutrie, *The Rights of Nature Movement in the United States: Community Organizing, Local Legislation, Court Challenges, Possible Lessons, and Pathways*, 10 ENV'T & EARTH L.J. 5 (2020).

system services from the natural environment, including food, drinks, medicines, protection from natural disasters, clean air and water supply, renewable and nonrenewable energies, cultural inspiration, and recreation.⁸³

However, only 15.1% of the land is currently protected.⁸⁴ Unlawful and arbitrary natural environmental destruction is causing widespread, long-lasting, and egregious offenses to the environment.⁸⁵ Oil spills, plastic pollution, overfishing, and industrial fishing cause damages to oceans; arson, mining, hunting, logging, farming, and agriculture cause deforestation; and chemicals, mining,⁸⁶ and hydraulic fracturing cause water and soil pollution.⁸⁷ Rights of Nature laws have fought, and continue to fight, against those who plan projects or activities that threaten negative impacts on nature conservation and violate the substantive and procedural rights protected by governance.⁸⁸

Rights of Nature is also used as an environmental justice tool to help mitigate the unsustainable practices negatively impacting the health and well-being of marginalized communities.⁸⁹ Lawsuits will set a precedent for governments on conservation and draw attention to environmental justice issues that marginalized communities encounter.⁹⁰ Rights of Nature is expected to conserve the world more effectively than in the past. Canada, Mexico, Panama, Brazil, the United States, France, Colombia, Pakistan, Bangladesh, Bolivia, India, New Zealand, Ecuador, and Uganda are taking legal, administrative, and policy measures to require respect and protection for a safe, clean, healthy, and sustainable environment.⁹¹

Other national, state, regional, and local initiatives include law and regulation in the form of state and national constitutions, local resolutions, conservation amendments, treaties, community-based public support, and resource-user management. There is an expectation that leaders pass legislation, judicial rulings, constitutional amendments, and other policy initiatives to compel citizens, corpora-

tions, and businesses to implement equitable procedures to restore biodiversity and to create innovative natural resource compromises.⁹²

B. History of Rights of Nature

The Rights of Nature movement first appeared in a constitution in 2008, as Ecuador became the first State to recognize the rights of Pachamama (World Mother, or Mother Earth) in the country's constitution as a means to protect the State's natural resources.⁹³ Article 17 states, "Nature, or Pachamama, where life is reproduced and occurs, has the right to integral respect for its existence for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes."⁹⁴

In 2010, Bolivia followed suit in recognizing Mother Earth by enumerating rights to life, diversity of life, water, clean air, equilibrium, restoration, and pollution-free living in a piece of legislation known as the Ley de Derechos de la Madre Tierra, or Law of Mother Earth.⁹⁵ Bolivia also hosted the World People's Conference on Climate Change and the Rights of Mother Earth with a mission to draft the Universal Declaration of the Rights of Mother Earth as an approach for sustainable development.⁹⁶

However, the idea of affording great respect to the rights of Mother Earth originated long before major world leaders introduced it into their governance initiatives.⁹⁷ Distinct from common western colonial worldviews, many Indigenous communities view humans as being a part of nature, both equal and independent, which in turn provides an impetus to care for and better honor nature.⁹⁸

Before Ecuador recognized Rights of Nature in its constitution,⁹⁹ there were few scholarly works and local ordinances that called for the recognition of Rights of Nature to protect natural resources from human-made impacts.¹⁰⁰ In the United States, Rights of Nature-based ideology in scholarship traces its origins to Christopher Stone's book *Should Trees Have Standing? Law, Morality, and the Environment*, which proposed that natural resources should have redress for human-made harms in the court system.¹⁰¹ Stone's work, on which many other scholars, activists, and lawmakers have relied in promoting Rights of Nature prin-

83. Additionally, nature provides humanity with clean air, natural carbon storage, flood defense, erosion controls, and pollination. A coastal example of an ecosystem service is the natural flood protection that coastal wetlands provide shorelines. Food and Agriculture Organization of the United Nations, *Ecosystem Services and Biodiversity (ESB)*, <https://www.fao.org/ecosystem-services-biodiversity/en/> (last visited Sept. 16, 2023); see *Kunming-Montreal Global Biodiversity Framework*, *supra* note 4, at 4.

84. Eric Dinerstein et al., *A "Global Safety Net" to Reduce Biodiversity Loss and Stabilize Earth's Climate*, 6 *SCI. ADVANCES* eabb2824 (2020), available at <https://www.science.org/doi/10.1126/sciadv.abb2824>.

85. Iberdrola, *Ecocide*, <https://www.iberdrola.com/sustainability/ecocide> (last visited Sept. 16, 2023).

86. Mining processes are usually conducted in deep seabed around 200 meters or more below the surface. The mining processes could disturb animal breeding grounds, create noise pollution, and be toxic to marine life. Esmé Stallard, *Ocean Treaty: Historic Agreement Reached After Decade of Talks*, BBC (Mar. 5, 2023), <https://www.bbc.com/news/science-environment-64815782>.

87. See Iberdrola, *supra* note 85.

88. See CBD RECOMMENDATION, *supra* note 75.

89. United Nations Department of Economic and Social Affairs, *Implementation of the Rights of Nature in Aruba (Possibly in the Constitution)*, <https://sdgs.un.org/partnerships/implementation-rights-nature-aruba-possibly-constitution> (last visited Sept. 16, 2023).

90. Tiffany Challe, *The Rights of Nature—Can an Ecosystem Bear Legal Rights?*, COLUM. CLIMATE SCH. (Apr. 22, 2021), <https://news.climate.columbia.edu/2021/04/22/rights-of-nature-lawsuits>.

91. See Press Release, Earth Law Center, *supra* note 9.

92. See CBD RECOMMENDATION, *supra* note 75.

93. See Challe, *supra* note 90.

94. See Stilt, *supra* note 8; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] 2008, art. 17, translated in *WORLD CONSTITUTIONS ILLUSTRATED* (Jefri Jay Ruchti ed., Maria del Carmen Gress & J.J. Ruchti trans., 2018).

95. Ley de Derechos de la Madre Tierra [Law of the Rights of Mother Earth], Ley 071 (2010) (Bol.); WORLD PEOPLE'S CONFERENCE ON CLIMATE CHANGE AND THE RIGHTS OF MOTHER EARTH, UNIVERSAL DECLARATION OF THE RIGHTS OF MOTHER EARTH (2010).

96. See RIGHTS OF NATURE FAQ, *supra* note 10, at 3.

97. Mallory Jang, *Rights of Nature and Indigenous Peoples: Navigating a New Course*, PETER A. ALLARD SCH. L. (Sept. 2, 2021), <https://allard.ubc.ca/about-us/blog/2021/rights-nature-and-indigenous-peoples-navigating-new-course>.

98. See *id.*

99. See generally *id.*

100. Community Environmental Legal Defense Fund, *Rights of Nature: Timeline*, <https://celdf.org/rights-of-nature/timeline/> (last visited Sept. 16, 2023).

101. See CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT* (3d ed. 2010).

ciples, recognized that other nonhuman entities, such as corporations, have standing in court to defend their legal interests.¹⁰² Stone further suggested that nature be treated similarly to corporations.¹⁰³ However, this is not the current reality for environmental advocates in court—instead, they must attempt to establish standing using more creative methods.¹⁰⁴

Around the same time that Stone pondered the question of granting standing to trees, the U.S. Supreme Court case *Sierra Club v. Morton* was decided.¹⁰⁵ In this landmark case, the Sierra Club, an environmental organization based in the United States, sued to block the development of a ski resort in the Sierra Nevada Mountains.¹⁰⁶ Although the Sierra Club was unable to prove that it had standing because the advocates were outside the “zone of interest” of those who could bring standing, Supreme Court Justice William O. Douglas reasoned in a dissenting opinion that natural resources should have personhood, just as certain corporations do.¹⁰⁷

The Rights of Nature movement would provide nature with the same freedoms provided to corporations—that is, it would be able to claim certain constitutional rights and standing in the court systems as legal persons.¹⁰⁸ This principle, which Stone and Justice Douglas articulated a half century ago, continued to develop throughout the late 20th century and into today’s environmental protections surrounding the Rights of Nature concept.¹⁰⁹

Years after Stone’s work and Ecuador’s constitutional recognition of Rights of Nature, many States and international organizations slowly began to build on Rights of Nature, drawing from each other’s influences and existing human rights treaties.¹¹⁰ In the past century, the following States have implemented Rights of Nature protections into their own laws and court systems: Bolivia,¹¹¹ Colombia,¹¹²

New Zealand,¹¹³ Panama,¹¹⁴ Mexico,¹¹⁵ Canada,¹¹⁶ and multiple state, local, and tribal governments in the United States.¹¹⁷ In addition to this non-exhaustive list of States acknowledging the benefits of recognizing rights to nature, in July 2022, the United Nations passed a resolution acknowledging the importance of the natural environment for human survival.¹¹⁸

Although recently Rights of Nature laws have taken root in more than 30 local regions in states around the United States (including Ohio, Colorado, Pennsylvania, Minnesota, California, Washington, and Florida), no court has explicitly upheld Rights of Nature laws.¹¹⁹ Recently, the Boulder Rights of Nature coalition, a Colorado-based environmental activist group, has been advocating for Rights of Nature protections for the Boulder River in Colorado.¹²⁰ In 2014, San Francisco and Malibu, California, each passed resolutions protecting the free and safe passage of whales and dolphins in the state’s coastal waters.¹²¹

In 2018, Affiliated Tribes of Northwest Indians¹²² passed Resolution No. 18-32 to protect southern resident orcas.¹²³ The resolution explains that the sacred obligation to orcas “ensure[s] all [their] relations are treated in a dignified manner that reflects tribal cultural values that have been

www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem.

113. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, No. 7 (N.Z.) (Te Awa Tupua Act).
114. Press Release, Center for Democratic and Environmental Rights, Panama Enacts Law That Recognizes Rights of Nature (Feb. 24, 2022), <https://www.centerforenvironmentalrights.org/news/press-release-panama-enacts-law-that-recognizes-rights-of-nature>.
115. Earth Law Center, *Rights of Nature in Mexico*, <https://www.earthlawcenter.org/mexico> (last visited Sept. 16, 2023).
116. Jack Graham, *Canadian River Wins Legal Rights in Global Push to Protect Nature*, REUTERS (Feb. 24, 2021), <https://www.reuters.com/article/us-land-rights-nature-tfnn/canadian-river-wins-legal-rights-in-global-push-to-protect-nature-idUSKBN2AO2I3>.
117. PITTSBURGH, PA., CODE tit. 6, art. 1, ch. 618.03(b); Emma Hynek, *Local Rights of Nature in the Rocky Mountains*, EARTH L. CTR. (Apr. 12, 2022), <https://www.earthlawcenter.org/blog-entries/2022/4/local-rights-of-nature-in-the-rocky-mountains>; Resolution of the Board of Trustees of Nederland in Support of Recognizing and Implementing the Inherent Legal Rights of Boulder Creek and the Boulder Creek Watershed, Resolution No. 2021-11 (2021) [hereinafter Resolution of the Board of Trustees of Nederland]; Michael Booth, *Ridgeway Grants “Rights” to Its River, Joining Several Colorado Towns in Push for New Water Protections*, COLO. SUN (Nov. 17, 2021), <https://coloradosun.com/2021/11/17/river-natural-rights-personhood-for-the-river-colorado/>.
118. *In Historic Move, UN Declares Healthy Environment a Human Right*, U.N. ENV’T PROGRAMME (July 28, 2022), <https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>.
119. Katie Surma, *Does Nature Have Rights? A Burgeoning Legal Movement Says Rivers, Forests, and Wildlife Have Standing, Too*, INSIDE CLIMATE NEWS (Sept. 19, 2021), <https://insideclimatenews.org/news/19092021/rights-of-nature-legal-movement/>.
120. *Rights of Rivers Global Map*, INT’L RIVERS (Sept. 26, 2021), <https://www.riverresourcehub.org/resources/rights-of-rivers-global-map/>; see also Boulder Rights of Nature, *About Us*, <https://boulderrightsofnature.org/about-us/> (last visited Sept. 16, 2023).
121. See Bergstein, *supra* note 24; Michelle Bender & Elizabeth Dunne, *From Regulation to Responsibility: A Call to Recognize the Southern Resident Orcas’ Inherent Rights*, 99 ENV’T COASTAL & OFFSHORE MAG. (MARINE MAMMALS) 97 (2022), available at <http://digital.ecomagazine.com/publication/frame.php?i=745267&p=97&pn=&ver=html5&view=issueViewer>.
122. This includes Alaska Natives and tribes in Washington, Idaho, Oregon, Montana, Nevada, northern California, and Alaska.
123. See Bender & Dunne, *supra* note 121.

102. *See id.*

103. *See id.*

104. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 2 ELR 20192 (1972); Center for Biological Diversity v. University of N.C., No. 1:19-CV-1179, 2021 U.S. Dist. LEXIS 163459 (M.D.N.C. Aug. 30, 2021); Spokeo v. Robins, 578 U.S. 330 (2016).

105. *See* 405 U.S. 727.

106. *See id.*

107. *See id.* (Douglas, J., dissenting).

108. Ciara Torres-Spelliscy, *Does “We the People” Include Corporations?*, HUM. RTS. MAG., https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/we-the-people/we-the-people-corporations/ (last visited Sept. 16, 2023).

109. MIHNEA TĂNĂȘESCU, UNDERSTANDING THE RIGHTS OF NATURE: A CRITICAL INTRODUCTION 20, 24 (2022), <https://library.oapen.org/bitstream/handle/20.500.12657/53088/9783839454312.pdf>.

110. For example, in drafting their resolution recognizing the rights of the Klamath River, the Yurok Tribe drew from other similar tribal resolutions and the United Nations Declaration on the Rights of Indigenous People (UNDRIP). 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://www.motherjones.com/environment/2019/09/some-indigenous-communities-have-a-new-way-to-fight-climate-change-give-personhood-rights-to-nature/>; see Community Environmental Legal Defense Fund, *supra* note 100.

111. PLURINATIONAL STATE OF BOLIVIA CONSTITUTION arts. 33, 34; see generally Mother Earth Law and Integral Development to Live Well, Law No. 300 (2012) (Bol.).

112. Nicholas Bryner, *Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem*, INT’L UNION FOR CONSERVATION NATURE (Apr. 20, 2018), <https://>

passed down for generations.¹²⁴ This movement is understood to be in the context of inherent rights, treaty rights, and the rights of ecosystems.¹²⁵ Even though these orcas are protected under the Endangered Species Act (ESA),¹²⁶ the southern resident orcas of Puget Sound, Washington, are still highly endangered and experience threats from pollution, harassment, and negative impacts from structures like the Snake River dam resulting in a lack of prey.¹²⁷

As of December 2022, five cities and three counties of the Puget Sound area of Washington passed resolutions recognizing the inherent rights of southern resident orcas and the ecosystems on which they rely.¹²⁸ Similarly, New Zealand and the United Kingdom¹²⁹ recognized animals as sentient beings, and the Uttarakhand High Court of India ruled that the entire animal kingdom is a legal entity with rights.¹³⁰

In 2018, the White Earth Band of Ojibwe¹³¹ of the Chippewa Nation and the 1855 Treaty Authority adopted tribal law recognizing Rights of Manoomin, wild rice.¹³² Modeled off of Rights of Nature, Rights of Manoomin codified “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 and more.”¹³³ The Tribe stated in the resolution that “it has become necessary to provide a legal basis to protect wild rice and fresh water resources as part of our primary treaty foods for future generations.”¹³⁴ Following this, in 2021, the White Earth Band of Ojibwe became the first tribe to file a lawsuit regarding Rights of Nature in tribal court and to recognize the legally enforceable rights of a plant species against the Enbridge Line 3 tar sands oil pipeline.¹³⁵

In December 2022, the Kunming-Montreal Global Biodiversity Framework (GBF) was adopted during the 15th meeting of the Conference of the Parties (COP15).¹³⁶ GBF has four key element goals for 2050 and 23 targets for 2030.¹³⁷ Among the considerations for successful implementation of GBF is the recognition of Rights of Nature and Rights of Mother Earth as diverse value systems and concepts.¹³⁸ Parties to the United Nations Convention on Biological Diversity (CBD) have stated that they are committed to setting national targets and goals to achieve GBF.¹³⁹

In 2023, the president of the Republic of Panama, Laurentino Cortizo, signed a Rights of Nature law¹⁴⁰ specifically supporting the rights of sea turtles in Panama.¹⁴¹ The law is intended to support the rights of sea turtles to live in their ecosystems free from harm, pollution, incidental fishery capture, and coastal developments, and imposes regulation of tourism and recreation within their habitats.¹⁴² During Earth Day 2023, Aruba celebrated its creation of a stronger relationship between people and nature by proposing to amend its constitution to incorporate Rights of Nature.¹⁴³ There is a strong likelihood Aruba will adopt the constitutional amendment, as Aruba recognizes that this Rights of Nature movement protects earth’s ecological integrity, preserving wildlife and ensuring a sustainable future for future generations.¹⁴⁴

While the Rights of Nature movement has a long way to go, the sheer number of nations and policymakers that the movement has reached in such a short period is telling of the impact that it may have in future environmental protection efforts.¹⁴⁵ However, as Rights of Nature continues to develop as it is implemented through governance structures, stricter blanket law making may lead to overinclusive legislation that disproportionately affects certain

124. *See id.*

125. *See id.*

126. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

127. Lori Marino, *Extinction Is Personal*, AUSTRALASIAN ANIMAL STUD. ASS’N (Jan. 20, 2021), <https://animalstudies.org.au/archives/8153>; *see Bergstein, supra* note 24 (explained by Elizabeth Dunne, Earth Law Center’s director of legal advocacy).

128. Peter Segall, *In One Month, Three Cities Proclaim Rights for Southern Resident Orcas*, PENINSULA DAILY NEWS (Jan. 6, 2023), <https://www.peninsuladailynews.com/news/in-one-month-three-cities-proclaim-rights-for-southern-resident-orcas/>; *see Bender et al., supra* note 2, at 2.

129. The United Kingdom recognizes lobsters, crabs, and octopus as “sentient” beings.

130. *See Bergstein, supra* note 24; *see Bender & Dunne, supra* note 121.

131. 1855 Treaty Authority, Resolution Establishing Rights of Manoomin, Resolution No. 2018-05 (2018), <https://static1.squarespace.com/static/58a3c10abebaf5c4b3293ac/t/5c3cdbc940ec9ab9b9fde9d/1547492298497/1855+Treaty+Authority+Resolution+for+2018-05+Rights+of+Manoomin+12-5-18.pdf>.

132. Press Release, Center for Democratic and Environmental Rights, Sauk-Suiattle Indian Tribe Brings First “Rights of Salmon” Case (Jan. 11, 2022), <https://www.centerforenvironmentalrights.org/news/press-release-sauk-suiattle-tribe-vs-seattle-sees-the-rights-of-salmon-protected-in-new-tribal-court-case>.

133. *See* 1855 Treaty Authority, *supra* note 131.

134. *Id.*

135. Press Release, Center for Democratic and Environmental Rights, City of Seattle Settles “Rights of Nature” Case Filed by the Sauk-Suiattle Tribe—Agrees to Create Fish Passage Through Skagit River Dams (May 2, 2023), <https://www.centerforenvironmentalrights.org/news/press-release-city-of-seattle-settles-rights-of-nature-case-filed-by-the-sauk-suiattle-tribe-agrees-to-create-fish-passage-throughskagit-river-dams>.

136. *Kunming-Montreal Global Biodiversity Framework*, CONVENTION ON BIOLOGICAL DIVERSITY (June 9, 2023), <https://www.cbd.int/gbfi> [hereinafter *Kunming-Montreal*].

137. *See id.*

138. Convention on Biological Diversity Dec. 15/4, Kunming-Montreal Global Biodiversity Framework, U.N. Doc. CBD/COP/DEC/15/4, at 5 (Dec. 19, 2022), <https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>.

139. *See Kunming-Montreal, supra* note 136.

140. Que Establece la Conservación y Protección de las Tortugas Marinas y Sus Hábitats en la República de Panamá [Establishing the Conservation and Protection of Sea Turtles and Their Habitats in the Republic of Panama], Ley No. 371, Gaceta Oficial No. 29730-A (2023), https://www.gacetaoficial.gob.pa/pdfTemp/29730_A/GacetaNo_29730a_20230301.pdf.

141. Nicholas Fromherz & Erica Lyman, *Panamanian Law Extends Rights to Sea Turtles*, LEWIS & CLARK L. SCH. (Apr. 11, 2023), <https://law.lclark.edu/live/news/50804-panamanian-law-extends-rights-to-sea-turtles>.

142. *Id.*

143. *Aruba Leads Efforts to Introduce Rights of Nature in Constitution*, GLOB. ALL. FOR RTS. NATURE (Apr. 22, 2023), <https://www.garn.org/aruba-rights-of-nature>.

144. Aruba Gobierno, *The Rights of Nature to Be Added to the Constitution*, https://www.government.aw/news/news_47033/item/the-rights-of-nature-to-be-added-to-the-constitution_62223.html (last updated June 11, 2023).

145. Rights of Nature is a topic of discussion in the CBD, a binding multilateral agreement focused on prioritizing a global movement to live in harmony with nature. There was a push to reintroduce Rights of Nature-focused language by organizations spanning 200 countries, which is indicative of the resurgence of Rights of Nature as an emerging form of governance. *See* CBD RECOMMENDATION, *supra* note 75; *see* Press Release, Earth Law Center, *supra* note 9.

communities. This is a common issue in environmental law making—legislation may become a roadblock to positive change when it extends beyond what is necessary to protect natural resources. Skeptics of strict environmental protection movements, such as Rights of Nature, may point to dilemmas much like this to question the movement's ability to protect natural resources without gatekeeping them.

C. Impacts of Rights of Nature on Marginalized Peoples

Although the Rights of Nature movement promotes the synergy of equity and conservation to various communities, SIDS, IPLC, and coastal, island, and fishing communities are negatively impacted by conservation efforts. Impacted communities experience practices placed in competition with ecocentric measures stemming from Rights of Nature. Rights of Nature contributes to many positive aspects of communities, but also demonstrates that there are negative impacts where these rights are upheld. These efforts can include the designation of marine protected areas (MPAs)¹⁴⁶ and other area-based management tools (ABMTs) or the use of marine spatial planning (MSP).

As there is an international increase in the designation of sites of MPAs, there are several experiences that demonstrate the challenges IPLCs have faced relating to limiting their ability to access resources and lack of engagement in the decisionmaking processes. Though the experiences presented in this research highlight a lack of FPIC pertaining to mostly MPAs, similar circumstances have occurred in the implementation of MSP and other ABMTs.¹⁴⁷ These marginalized communities have faced hardships, including the lack of representation in governance processes and lack of enforceable legal protections.¹⁴⁸ For these communities, there is a struggle to balance the need for conservation measures and economic prosperity.

Fishing rights and tourism can be impacted by conservation measures, such as in experiences by local communities around the areas of the MPA of Taza National Park in Algeria, Nha Trang Bay MPA in Vietnam, and Fernando de Noronha Marine National Park in Brazil. In many of these cases, conservation measures utilized could be interfering with other community MPAs and ABMTs.

Although protected areas are not always a direct result of the implementation of Rights of Nature legal decisions, some categories of protected areas support a high level of conservation and protection. This focuses on a more ecocentric approach instead of an anthropocentric approach. Ecocentric approaches prioritize resource conservation because of the extractive ecosystem services provided, such as fishing.¹⁴⁹ MPAs can support the objective of Rights of Nature and, on occasion, this leads to tension between different sectors, such as recreational and commercial fishing, tourism, and industry development, when MPAs are subject to new regulations for protection.

Many additional types of protected areas exist in different national jurisdictions, but they do not all share a purely ecocentric approach. For example, in Scotland, there are several types of terrestrial and marine designations derived from European, national, and devolved laws. These include designations such as sites of special scientific interest, national nature reserves, and local landscape areas, each of which allows for different activities to occur within their boundaries. Designations also vary in their implementation, management, and relationship to land use planning and marine planning. Conflict occurs between sectors, such as fishing and conservation, given different approaches to conservation but more for the absence of consultation.

Designating and implementing one of the many types of protected areas outlined in the International Union for Conservation of Nature (IUCN) guidelines¹⁵⁰ can contribute to the conservation of nature and promote the rights of IPLC and coastal communities regarding access to land and resources, but this has not always been the experience of these groups. Some of these communities' experiences of conservation measures led to the prohibition of access to lands and resources that were traditionally utilized. Traditional territory owners have fought for their access to land and territories as they are marginalized by those who facilitate protected areas.

An example of nature conservation efforts colliding with the interests of Indigenous groups occurred in the Colorado River, which experienced extreme drought in late 2022. The drought caused the driest conditions in more than 1,200 years, with experts stating that its severity is exacerbated by climate change.¹⁵¹ Upon realizing the need to conserve and protect this environment, the U.S. Bureau of Reclamation, with input from some tribal leaders, created the Colorado River Basin Drought Contingency Plan, which was established to prescribe water cuts among the states the river serves and to come to an agreement with basin tribes on cuts they would make.¹⁵² The Bureau of

146. The International Union for Conservation of Nature (IUCN) created several categories for MPAs in their Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas in 2012. There are several categories of areas that vary in their primary objectives and restrictions. For additional information, see the *Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas*, IUCN (Sept. 24, 2012), <https://www.iucn.org/content/guidelines-applying-iucn-protected-area-management-categories-marine-protected-areas>.

147. Natalie C. Ban & Alejandro Frid, *Indigenous Peoples' Rights and Marine Protected Areas*, 87 MARINE POL'Y 180 (2018), available at <https://doi.org/10.1016/j.marpol.2017.10.020>; Rachel Zuercher et al., *Enabling Conditions for Effective Marine Spatial Planning*, 143 MARINE POL'Y 105141 (2022), available at <https://doi.org/10.1016/j.marpol.2022.105141>.

148. JON DAY ET AL., IUCN, BEST PRACTICE PROTECTED AREA GUIDELINES SERIES NO. 19, GUIDELINES FOR APPLYING THE IUCN PROTECTED AREA MANAGEMENT CATEGORIES TO MARINE PROTECTED AREAS: DEVELOPING CAPACITY FOR A PROTECTED PLANET (2d ed. 2019), <https://portals.iucn.org/library/sites/library/files/documents/PAG-019-2nd%20ed.-En.pdf>.

149. See International Labour Organization, *Indigenous and Tribal Peoples Convention*, June 27, 1989, No. 169 [hereinafter *Indigenous and Tribal Peoples Convention*].

150. See DAY ET AL., *supra* note 148.

151. Tim Vanderpool, *Colorado River Basin Tribes Address a Historic Drought—And Their Water Rights—Head-On*, NAT. RES. DEF. COUNCIL (Nov. 14, 2022), <https://www.nrdc.org/stories/colorado-basin-tribes-address-historic-drought-and-their-water-rights-head>.

152. See *id.*

Reclamation ordered that the states and tribes needed to come to another agreement before August 15, 2022, with the goal of conserving an additional four million acre-feet, but basin tribes stated they were largely not consulted with on this subsequent agreement, and therefore did not sign.¹⁵³

This experience highlights where environmental conservation and the rights of other IPLCs and coastal communities can cause conflict. This also illustrates some of the realities of FPIC when it is not upheld during the decision-making process. The Food and Agriculture Organization of the United Nations (FAO) defines “FPIC” under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁵⁴ The definition establishes:

“Free” = The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.

“Prior” = The consent is sought sufficiently in advance of any authorization or commencement of activities.

“Informed” = The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.

“Consent” = A collective decision made by the right holders and reached through a customary decision-making process of the communities.¹⁵⁵

The failure to uphold FPIC for IPLCs and coastal communities is a reoccurring concern in many experiences around the world, and is important to consider when implementing any conservation measures, including Rights of Nature.

1. International IPLCs and Coastal Communities

A significant challenge for many of these IPLCs and coastal communities is to first have their national jurisdictions acknowledge their autonomy through agreements, such as UNDRIP. Alternatively, nation-states can decide to acknowledge the definition of “Indigenous peoples” established by the United Nations in the Indigenous and Tribal Peoples Convention, 1989, created under the International Labour Organization (ILO), and can create laws and policies ensuring the rights of Indigenous communities.¹⁵⁶ It should be noted that when UNDRIP was voted on in 2007, Canada, Australia, New Zealand, and the United States voted against the agreement and 11 nation-states abstained, which included the Russian Federation and several African and Middle Eastern countries with

large Indigenous populations.¹⁵⁷ Canada, Australia, New Zealand, and the United States have since ratified the declaration, and have either implemented binding laws or stated that the declaration is merely aspirational and not legally binding.¹⁵⁸

In 2021, the United States was the last country in the world to become a signatory to the declaration. UNDRIP is significant for all of the aforementioned countries considering the many IPLCs and coastal communities who reside in their jurisdictions, but the delay in upholding and implementing its protections underscores the common experience of limited or slow-moving actions to protect these communities’ rights.¹⁵⁹

ILO’s work establishing Indigenous and tribal community rights inspired an increase in engagement in international forums, such as the United Nations Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples.¹⁶⁰ This benefited tribal and Indigenous peoples globally regarding better and more equitable enforcement of tenure and resource rights. Participation of Indigenous groups within governance measures implementing protected areas has only become more common in the past few years as more nations have adopted the process and principles of FPIC.¹⁶¹

Considering the challenges countries face in implementing and upholding Indigenous rights stemming from UNDRIP, it is likely States will also challenge the concept and terminology surrounding coastal communities and the rights they should hold due to their special relationship with the environment. The rights of coastal communities to access and extract natural resources within a State’s national marine territory could also be a significant hurdle to overcome.

Countries that ratified UNDRIP may not automatically uphold the rights of coastal communities. Article 1 of the

157. United Nations Department of Economic and Social Affairs, *United Nations Declaration on the Rights of Indigenous Peoples*, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> (last visited Sept. 16, 2023).

158. *See id.*; DEPARTMENT OF JUSTICE CANADA, UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT, <https://www.justice.gc.ca/eng/declaration/about-appropos.pdf>; AUSTRALIAN HUMAN RIGHTS COMMISSION, IMPLEMENTING UNDRIP (2021), https://humanrights.gov.au/sites/default/files/2020-10/implementing_undrip_-_australias_third_upr_2021.pdf; *Indigenous Peoples in Aotearoa*, INT’L WORK GRP. FOR INDIGENOUS AFFS. (Apr. 24, 2019), <https://www.iwgia.org/en/aotearoa-new-zealand/3413-iw2019-aotearoa.html>.

159. *See, e.g.*, Rep. of the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/51/49 (July 28, 2022); Rep. of the U.N. High Commissioner for Human Rights on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/51/18 (July 6, 2022).

160. *See* Rep. of the Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 159; *see also* Rep. of the U.N. High Commissioner for Human Rights on the Rights of Indigenous Peoples, *supra* note 159.

161. Karim Erzini, *Marine Protected Areas and Small-Scale Fisheries*, 5 AQUACULTURE & FISHERIES 211, 212 (2020), available at <https://doi.org/10.1016/j.aaf.2020.09.002>; Giovanna C. Barreto et al., *Human Dimensions of Marine Protected Areas and Small-Scale Fisheries Management: A Review of the Interpretations*, 119 MARINE POL’Y 104040 (2020), available at <https://doi.org/10.1016/j.marpol.2020.104040>; FAO, *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication*, <https://www.fao.org/voluntary-guidelines-small-scale-fisheries/en/> (last visited Sept. 16, 2023).

153. *See id.*

154. FAO, *Indigenous Peoples*, <https://www.fao.org/indigenous-peoples/our-pilars/fpic/en/> (last visited Sept. 16, 2023).

155. *See id.*

156. *See* Indigenous and Tribal Peoples Convention, *supra* note 149.

United Nations Indigenous and Tribal Peoples Convention, 1989 provides:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.¹⁶²

Though this definition leaves room to interpret the inclusion of coastal communities, it is likely to ultimately turn on the political will of any given country to uphold the rights of coastal communities alongside those of Indigenous communities. The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) has considered the experiences and cultural significance of land and resources to IPLCs and coastal communities in several assessments on topics pertaining to land degradation and sustainable use and assessments on regions, such as Asia and America.¹⁶³

Additionally, several United Nations entities published a joint report on the state of IPLCs' land and territories in 2021. The report highlights experiences where IPLCs and coastal communities significantly contribute to maintaining a healthy environmental status of their land and territory.¹⁶⁴ It recognizes that there is a lack of information and geospatial data to update the state of IPLCs' and coastal communities' involvement in the governance of many marine and some coastal areas.¹⁶⁵ These findings are consistent with the circumstances within areas like the United States and Scotland, where marine space is often not governed by either of these groups, but rather by public trust doctrines or other governmental mechanisms.

2. Indigenous Communities in the United States

Indigenous communities are some of the most outspoken advocates in acknowledging Rights of Nature. However, where Rights of Nature arguments have served as a means for progress on climate action for many tribes, there are also fears that it may serve as another obstacle to both culturally significant and necessary activities, as many other environmentally related laws have done in the past.¹⁶⁶

Playing a role in the Rights of Nature movement in the United States, the Yurok Tribe is the largest federally recognized Tribe in the state of California.¹⁶⁷ The governing body for the Yurok Tribe is the Tribal Council, responsible for policy issues, and the Yurok Tribal Court, responsible for deciding matters about the Yurok community.¹⁶⁸ People within the jurisdictional bounds of the Yurok lands are subject to the Yurok Tribal Code, which outlines topics such as local environmental ordinances and fishing rights.¹⁶⁹ Among many other attributes, the Yurok Tribe prides itself on the Tribe's strong fishermen, relying heavily on salmon, sturgeon, and candlefish, which are, economically and culturally, major resources for the Yurok people and are harvested from the nearby Klamath River. The Tribe explains that their "way was never to overharvest and to always ensure sustainability of [their] food supply for future generations."¹⁷⁰

The Yurok Reservation centers around the Klamath River and its resources in the Pacific Northwest.¹⁷¹ Originating in the Cascade Mountains of the California-Oregon border, the river provides resources to many Native American communities that reside along the riverbed, namely the Yurok Tribe itself.¹⁷² For many years, the Klamath River boasted the third-largest salmon runs in the nation, but the recent effects of climate change have led to lower-than-average flows and potential for diseases leading to a sharp decline in the salmon populations that once flourished.¹⁷³ In addition to coho and Chinook salmon, the Klamath River also supports steelhead and coastal cutthroat trout, green and white sturgeon, and Pacific lamprey.¹⁷⁴ However, their numbers have also begun to decrease in recent years, leading to several health issues for the Yurok Tribe and other communities who rely on fishing for sustenance and livelihood.¹⁷⁵

162. See Indigenous and Tribal Peoples Convention, *supra* note 149.

163. IPBES, THE REGIONAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES FOR ASIA AND THE PACIFIC (Madhav Karki et al. eds., 2018), https://zenodo.org/record/3237374#.Y_tOVR_P23A; IPBES, THE REGIONAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES FOR THE AMERICAS (Jake Rice et al. eds., 2018), https://zenodo.org/record/3236253#.Y_tObx_P23A; IPBES, THE ASSESSMENT REPORT ON LAND DEGRADATION AND RESTORATION (Luca Montanarella et al. eds., 2018), https://zenodo.org/record/3237393#.Y_tOfx_P23B.

164. WORLD WIDE FUND FOR NATURE ET AL., THE STATE OF INDIGENOUS PEOPLES' AND LOCAL COMMUNITIES' LANDS AND TERRITORIES (2021), https://wwfint.awsassets.panda.org/downloads/report_the_state_of_the_indigenous_peoples_and_local_communities_lands_and_territory.pdf.

165. See *id.*

166. See, e.g., *infra* Section II.C.2 (discussion of Makah Tribe).

167. Yurok Tribe, *Our History*, <https://www.yuroktribe.org/our-history> (last visited Sept. 16, 2023).

168. Yurok Tribe, *Tribal Court*, <https://www.yuroktribe.org/tribal-court> (last visited Sept. 16, 2023); Yurok Tribe, *Tribal Council*, <https://www.yuroktribe.org/tribal-council> (last visited Sept. 16, 2023).

169. YUROK TRIBAL CODE tit. 17, ch. 17.05.

170. See Yurok Tribe, *supra* note 167.

171. American Rivers, *Klamath River*, <https://www.americanrivers.org/river/klamath-river/> (last visited Sept. 16, 2023).

172. Emily Soloman, *Resilience of the Yurok Tribe in the Klamath River Basin*, HUNTER COLL. N.Y.C. FOOD POL'Y CTR. (Dec. 22, 2021), <https://www.nyc-foodpolicy.org/resilience-of-the-yurok-tribe-in-the-klamath-river-basin/>.

173. See Smith, *supra* note 110.

174. See American Rivers, *supra* note 171.

175. See Soloman, *supra* note 172.

In response, the Yurok Tribe successfully passed a 2019 resolution to recognize the rights of the Klamath River.¹⁷⁶ This resolution confers “legal personhood” to the river, similarly to how legal personhood is conferred to humans and many corporations.¹⁷⁷ Specifically, the Yurok resolution states: “That the Yurok Tribal Council will adopt an ordinance establishing Tribal law, which will grant the Klamath River, its ecosystem, and species the rights of personhood, thus granting standing in causes of action against entities inflicting harm in violation of the Klamath River, its ecosystems, and species rights.”¹⁷⁸ This casts a broad net, covering not just the river, but also the ecosystems relying on it.

While this resolution has not yet been challenged in court, the Yurok Tribe stated that the resolution would serve the river in a way similar to that in which the ESA or the Clean Water Act (CWA) might.¹⁷⁹ However, this method would follow a more “holistic” approach, allowing a claim to be brought in Yurok Tribal Court when the river is harmed.¹⁸⁰ Advocates for this resolution stated that by moving forward in recognizing Rights of Nature, there is a mindset shift from protecting the natural resource for human use to protecting the intrinsic value of the resource as a whole.¹⁸¹

Several tribes have begun to follow in the footsteps of the Yurok Nation in fighting for Rights of Nature to combat climate change. More recently, the Sauk-Suiattle Tribe filed suit against the city of Seattle on behalf of the salmon in the Skagit River.¹⁸² Roughly 40% of the Skagit River is currently in use or affected by hydroelectric dams, which the public utility company Seattle City Light plans to use for up to the next 50 years.¹⁸³ While hydroelectric energy is generally less expensive and carbon-neutral as compared to other energy alternatives, these dams place heavy burdens on local ecosystems such as the resident migratory salmon populations.¹⁸⁴ A 2020 study by the *Proceedings of the National Academy of Sciences* determined that even small dams in the United States have a large impact on the ability of salmon to reach their habitats during migration, limiting their ability to reproduce, and thus their predators’ ability to find food.¹⁸⁵

176. See Smith, *supra* note 110.

177. See *id.*

178. Resolution Establishing the Rights of the Klamath River, Resolution of the Yurok Tribal Council No. 19-40 (2019).

179. See Smith, *supra* note 110; 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

180. See Smith, *supra* note 110.

181. See *id.*

182. Sauk-Suiattle Indian Tribe v. City of Seattle, No. SAU-CIV-01/22/001 (Sauk-Suiattle Tribal Ct. Jan. 18, 2022), *civ. complaint for declaratory judgment filed*.

183. Isabella Breda, “Rights of Nature” Gains Steam in Pacific Northwest. Can It Help Species on the Brink?, SEATTLE TIMES (Feb. 23, 2011), <https://www.seattletimes.com/seattle-news/environment/rights-of-nature-movement-gains-steam-in-pacific-northwest-can-it-help-species-on-the-brink/>; Lorraine Loomis, *What Are the True Costs of the Skagit River Hydroelectric Dams?*, NW. TREATY TRIBES: BEING FRANK (May 3, 2021), <https://nwtreaty-tribes.org/what-are-the-true-costs-of-the-skagit-river-hydroelectric-dams/>.

184. See Breda, *supra* note 183.

185. Valerio Barbarossa et al., *Impacts of Current and Future Large Dams on the Geographic Range Connectivity of Freshwater Fish Worldwide*, 117 PNAS

In the complaint to the Sauk-Suiattle Tribal Court, the Tribe requested Rights of Nature be recognized, alleging that the rights of the salmon were violated by the construction of hydroelectric dams along the river.¹⁸⁶ The tribal court concluded that although the salmon were harmed by the public utilities, the court lacked jurisdiction to regulate the operation of the dams.¹⁸⁷

Although the Sauk-Suiattle Tribal Court dismissed the claims, it did acknowledge that there may be legitimate questions about the state’s harm to the salmon.¹⁸⁸ After this case was decided, it still garnered a significant amount of media attention and played a role in the recognition of the rights of endangered orcas in the area.¹⁸⁹ Additionally, the media attention that this case received from both public interest groups and the utilities created greater discussion of the ways Rights of Nature may apply to and be integrated into existing environmental solutions.¹⁹⁰

The Sauk-Suiattle Tribe is only one of many tribes bringing these issues to the forefront of the environmental legal field.¹⁹¹ The more the Rights of Nature movement becomes normalized in court systems, the more it may benefit the communities, such as the Yurok Tribe and the Sauk-Suiattle Tribe, who may serve as stewards of the land to promote a healthy ecosystem.

Some Native American communities, like the Yurok and Sauk-Suiattle Tribes, are major proponents of recognizing Rights of Nature. Other stakeholders criticize the approach because of its unintended consequences on small fishing communities. One of the ironies in implementation of stricter environmental protections is that some of the communities practicing sustainable use of natural resources are now at a greater disadvantage in utilizing them.

While the Rights of Nature claims are too new in the United States to illustrate this concern, several Indigenous communities in the United States face challenges under environmental laws, which were originally passed to protect natural resources from large-scale exploitative companies. The Makah Tribe is a community currently fighting for recognition of its treaty-granted whaling rights in the face of environmental protections that were set in place to control unsustainable fishing practices by major corporations.

The 1855 Treaty of Neah Bay originated as an agreement between the Makah Tribe and the then-territory of Washington.¹⁹² In this treaty, the Makah Tribe ceded a significant amount of land for a smaller reservation, upon which

3648 (2020), available at <https://doi.org/10.1073/pnas.1912776117>.

186. See *Sauk-Suiattle Indian Tribe*, No. SAU-CIV-01/22/001.

187. See *id.*

188. See *id.*

189. See Breda, *supra* note 183.

190. See *id.*; see also Susannah Frame, *After Years of Conflict, Seattle City Light Agrees to Tribal Demands on Skagit River*, KING5.COM (Apr. 28, 2023), <https://www.king5.com/article/news/investigations/skagit-river-dams/seattle-city-light-agrees-tribal-demands-skagit-river-dams-fish-passages/281-8a1f0590-6988-4c22-b26c-796f550b84f1> (reporting that, under terms of a new federal license, Seattle City Light committed to adding fish passage on its three hydroelectric dams on the Skagit River).

191. Ray Levy Uyeda, *Indigenous Activists Look to Rights of Nature Laws to Stop Fracking*, PRISM: CLIMATE & ENV’T (Oct. 20, 2022), <https://prismreports.org/2022/10/20/indigenous-rights-of-nature-stop-fracking/>.

192. Treaty of Neah Bay, Mar. 8, 1859, 12 Stat. 939.

white settlers could not encroach.¹⁹³ In return, the United States offered \$30,000 and the rights to hunt fish, seals, or whales “at usual and accustomed grounds and stations.”¹⁹⁴ The Makah tribal leaders left these treaty negotiations believing that while the Makah territory was reduced, their culturally significant whaling rights were protected.¹⁹⁵

Almost 100 years later, in 1946, the United States, along with many other States, signed onto the International Convention for the Regulation of Whaling (ICRW).¹⁹⁶ This agreement instituted catch limits and restrictions on where and when to hunt, and acknowledged the need for flexibility in such restrictions depending on the needs of the aboriginal subsistence hunters.¹⁹⁷ Based on the United States’ status as a State Party to this treaty, the ICRW plays a large role in the U.S. government’s granting and denying of waivers and hunting permits.¹⁹⁸

The Marine Mammal Protection Act (MMPA) was enacted in 1972.¹⁹⁹ Seeking to maintain the health and stability of marine mammal populations and their ecosystems, the MMPA prohibits the taking of marine mammals.²⁰⁰ “Take,” in this context, is intended to mean an action that would “harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal.”²⁰¹ Specifically to the case involving the Makah Tribe, this protects the gray whales that reside primarily in the northern Pacific Ocean.²⁰²

Of these whales, there are two distinct populations: the western North Pacific (WNP) gray whales and the eastern North Pacific (ENP) gray whales.²⁰³ Commercial fishing once rendered both populations endangered, at which time the Makah Tribe, with an interest in conservation, ceased hunting practices.²⁰⁴ In 1994, the ENP population regenerated to a level at which it was removed from the endangered species list, but the WNP population had not recovered and remained endangered under the ESA and depleted under the MMPA.²⁰⁵

Even with the MMPA in place, the Makah Tribe continued to hunt via its treaty-granted and ICRW-solidified rights. However, this changed in 2004 when the U.S.

Court of Appeals for the Ninth Circuit held that under the MMPA, the United States would require all tribes, excluding Native Alaskans, to acquire a waiver and complete an environmental impact assessment (EIA) if they wish to hunt whales.²⁰⁶ The Tribe has been undergoing this fairly costly process since 2005 in an effort to acquire a waiver from the National Oceanic and Atmospheric Administration (NOAA).²⁰⁷

After 15 years of researching and waiting, the National Marine Fisheries Service (NMFS, or NOAA Fisheries) made an initial decision to grant a waiver and proposed regulations by which the Makah would have to abide to secure a permit and conduct a hunt.²⁰⁸ Following this decision, the agency began a formal rulemaking, presided over by Administrative Law Judge George J. Jordan, and encouraged the submission of public comments, such as those by environmental interest groups.²⁰⁹

Following the November 14-21, 2019, hearing, Judge Jordan wrote a recommendation to NMFS supporting the issuance of the hunting waiver to the Makah Tribe.²¹⁰ In this recommendation, Judge Jordan described what would have a “negligible” effect on only the unendangered ENP gray whales’ migration and breeding habits.²¹¹ Additionally, beginning in July of odd-numbered years, the waiver would grant the Tribe four months to strike²¹² two whales. Beginning in December of even-numbered years, the waiver would grant six months to strike up to three gray whales over 10 years.²¹³

However, this is just a discussion of the waiver, and the administrative process is not an expeditious one. The public comment period closed on November 3, 2022, and the agency is still awaiting new information from the final environmental impact statement to make a final waiver decision.²¹⁴ The agency expected a final decision at some point during the summer of 2023, but a final decision has not yet been made.²¹⁵ This protracted process underscores

193. *Id.* art. 2.

194. *Id.* art. 4.

195. Makah Tribal Council, *The Makah Whaling Tradition*, <https://makah.com/makah-tribal-info/whaling/> (last visited Sept. 16, 2023).

196. ICRW, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

197. *Id.*

198. *Id.*

199. Marine Mammal Commission, *Marine Mammal Protection Act*, <https://www.mmc.gov/about-the-commission/our-mission/marine-mammal-protection-act/> (last visited Sept. 16, 2023); 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-410.

200. 16 U.S.C. §§1361 et seq.

201. *Id.* §1362.

202. National Oceanic and Atmospheric Administration (NOAA) Fisheries, *Species Directory: Gray Whale*, <https://www.fisheries.noaa.gov/species/gray-whale> (last visited Sept. 16, 2023) [hereinafter *Gray Whale*].

203. *Id.*

204. Hallie Golden, *Makah Tribe in US Hopes for Rights to Resume Sacred Tradition of Gray Whale Hunting*, GUARDIAN (Nov. 12, 2021), <https://www.theguardian.com/us-news/2021/nov/12/makah-tribe-us-sacred-tradition-hunting-gray-whales>.

205. Currently, there are an estimated 300 gray whales in the WNP stock based on data collected in the region. See *Gray Whale*, *supra* note 202.

206. *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

207. See Matthew Smith, *Makah Tribe Awaits Decision to Resume Hunting Gray Whales*, FOX13 SEATTLE (July 26, 2023), <https://www.fox13seattle.com/news/makah-tribe-awaits-decision-to-resume-hunting-gray-whales>.

208. NOAA Fisheries, *Makah Tribal Whale Hunt Frequently Asked Questions*, <https://www.fisheries.noaa.gov/west-coast/makah-tribal-whale-hunt-frequently-asked-questions> (last updated Aug. 16, 2022).

209. *Id.*

210. See Julian Mark, *A Tribe Has Not Hunted Whales in Decades. Now, It Might Have a Chance—And Animal Rights Groups Aren’t Happy*, WASH. POST (Sept. 29, 2021), <https://www.washingtonpost.com/nation/2021/09/29/makah-whaling-judge-recommendation/>.

211. *In re Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Gray Whales by the Makah Tribe*, ALJ Recommended Decision 155 (Sept. 23, 2021).

212. In his recommendation decision, Judge Jordan defines “strike” as “to cause a harpoon, darting gun, or other weapon, or a projectile from a rifle or other weapon, to penetrate a gray whale’s skin or an instance in which a gray whale’s skin is penetrated by such a weapon or projectile during hunting.” *Id.* at 144.

213. See Mark, *supra* note 210.

214. NOAA Fisheries, *Makah Tribal Whale Hunt*, <https://www.fisheries.noaa.gov/west-coast/marine-mammal-protection/makah-tribal-whale-hunt> (last updated Aug. 31, 2023).

215. Letter from Kimberly Damon-Randall, Director, NOAA Fisheries Office of Protected Resources, to Makah Indian Tribe (Feb. 6, 2023); Belamy Pailthorp, *Frustration Mounts as Makah Tribe Waits for Word on the*

how a Rights of Nature approach to ensuring the Makah's right to a limited take of gray whales would be more effective and respectful of their traditions.

3. Fishing

MPAs can interfere with fishing communities when these designated areas do not allow for any fishing activities to take place. This issue arose in the proposed Taza MPA in coastal Algeria.²¹⁶ Fishing communities near the proposed MPA, which include Boudis and Ziama Harbors, consist of many members who participate in recreational fishing or commercial small-scale fisheries. In the Algerian context, recreational fishing includes fishing that is conducted in a licensed recreational boat as a sport, leisure activity, or with noncommercial purposes.²¹⁷ Commercial small-scale fisheries are defined as traditional practices of fishing in the territorial sea on licensed professional boats, which hold a professional booklet. The controversy regarding the proposed MPA's implementation would disallow recreational fisheries and commercial small-scale fisheries from operating in the areas because the proposal seeks to establish a no-take zone.²¹⁸

One of the objectives of the proposed Taza MPA is to increase the regulations for the reporting of catches. Though small-scale commercial fisheries are required to report their catches, recreational fishers do not have to report, as their catches are only meant for leisure and non-commercial purposes. Nevertheless, the region suffers from holders of recreational boating licenses partaking in the illegal selling of their catches into the local market.²¹⁹ It was estimated at the Ziama Harbor that recreational fisheries were catching more than commercial small-scale fisheries during most months between May 2013 and April 2014.²²⁰

Research has found that professional and recreational fishers both do not comply with the minimum legal size for fishing nets and equipment, and 77% answered that they do not respect breeding seasons for the main target species.²²¹ All recreational fishers stated that they did not respect the breeding season of target species, with their main reasoning being opportunism. Professional fishers cited that they did not comply due to financial issues.²²² All fishers are concerned about the Taza MPA due to its impacts on the areas in which they will be able to fish. Regulation through this MPA will mean some fishers will

have to seek out new areas to fish. This leads to concerns regarding the equipment needed to fish in new areas.²²³

Fishers unanimously confirmed that current fishing quantities are much lower in comparison to 10 or 20 years ago, which is a cause for concern for many in the region.²²⁴ Fishers also agreed that the marine ecosystems were unhealthy, with 94% of interviewees stating marine protection should be a priority.²²⁵

Given these trends, the Taza MPA could be fairly beneficial to the region, but recognition of the concerns many fishers have regarding the locations they will be allowed to undertake their activities upon the implementation of the Taza MPA is a socioecological dimension that needs consideration.²²⁶ Despite these communities' traditional fishing practices, property rights for these communities are weak under the United Nations Convention on the Law of the Sea (UNCLOS),²²⁷ and compensation typically is not provided for loss of a fishing area.²²⁸ New opportunities for members of these communities could include involvement in the marine management processes within the region considering the vast local ecosystem knowledge of the area.

Another fishing case demonstrating a lack of proper implementation of FPIC for an MPA is seen in several water designations surrounding Malta.²²⁹ After issuing Legal Notice 311 on conservation of the Rđum Majjiesa to Ras ir-Raheb (RMRR) areas within the country and implementation of the European Union's Habitats Directive (which governs the creation of protected areas), Malta worked on developing a framework to support implementation of these measures.²³⁰

In Malta, there was a conflict between commercial and recreational vessels for fishing grounds before the proposed MPA in northwestern waters, as this economic activity is significant to coastal communities. Notwithstanding these conflicts, both communities agree that fishing is an important component of their livelihoods. Consequently, both fishing communities raised concerns over the implementation of an RMRR MPA due to the potential impacts on their ability to fish.²³¹ They expressed concerns over restrictions on types of fishing gear, reduction of areas to fish, and distance to new fishing areas increasing fuel costs.²³²

While consultation with these fishers was occurring, there were also several linguistic and communication barriers. Information given to the fishers by government and natural science experts in a meeting held in 2004 was not

Whale Hunt, KNKX PUB. RADIO (July 12, 2023), <https://www.knkx.org/environment/2023-07-12/frustration-makah-tribe-noaa-whale-hunt>.

216. Ibrahim Boubekri et al., *Social-Ecological Dimensions of Marine Protected Areas and Coastal Fishing: How Fishermen's Local Ecological Knowledge Can Inform Fisheries Management at the Future "Taza" MPA (Algeria, SW Mediterranean)*, 221 OCEAN & COASTAL MGMT. 1, 4 (2022), available at <https://doi.org/10.1016/j.ocecoaman.2022.106121>.

217. *See id.*

218. *See id.* at 3-6.

219. *See id.* at 5.

220. *See id.* at 9-15.

221. *See id.* at 7.

222. *See id.* at 6.

223. *See id.*

224. *See id.* at 10.

225. *Id.*

226. *Id.*

227. UNCLOS is a treaty that establishes a legal framework for all marine and maritime activities. UNCLOS, Dec. 10, 1982, 1833 U.N.T.S. 397.

228. Kjel Grip & Sven Blomqvist, *Marine Nature Conservation and Conflicts With Fisheries*, 49 AMBIO 1328 (2020), available at <https://doi.org/10.1007/s13280-019-01279-7>.

229. *See* Alicia Said et al., *Crossroads at Sea: Escalating Conflict in a Marine Protected Area in Malta*, 208 ESTUARINE COASTAL & SHELF SCI. 52 (2018), available at <https://doi.org/10.1016/j.ecss.2018.04.019>.

230. *See id.*

231. *See id.*

232. *Id.*

communicated in layman's terms, leading to disagreements. Artisanal fishers who attended stated that miscommunication at the meeting led to shouting as everyone attempted to get their points across.²³³ At a later stakeholder consultation meeting, representation seemed to be focused more on nongovernmental organizations (NGOs), the diving industry, and fishers' co-ops and associations. Small-scale fishers and artisanal fisheries do not feel that these organizations represented their concerns adequately.

The lack of representation during the consultation process led to small-scale and artisanal fishers feeling uninformed and marginalized within the process, due to a failure to uphold FPIC.²³⁴ Some fishers did not know the degree to which new regulations were supposed to conserve habitats and species or how the zoning scheme in the management plan would be controlled, leaving much ambiguity. Additionally, representation by fishers' co-ops and associations also failed many individual fishers, as the Gnejna Artisanal Fishers Association and the Federation for Amateur Fishers in Malta, who are supposed to represent around 170 fishers, openly supported the MPA. This was because many of the executive committee members of the Gnejna Artisanal Fishers Association were dominated by fishers with longlines and in competition with fishers using trammel netters. Designation of an MPA would marginalize fishers who use trammel netters more than those who do not because trammel netters are strictly regulated in an MPA in comparison to longlines.²³⁵

4. Tourism

Given the tensions between fishing communities and the implementation of MPAs, some scholars consider how tourism can support communities transitioning to new economic activities.²³⁶ In a study based in Vietnam relating to the Nha Trang Bay MPA, local people living in the MPA were surveyed to determine if the tourism industry within the MPA was as economically viable as fishing.²³⁷ Within the MPA, 70% of the population relied on fishing, 20% relied on aquaculture activities permitted in some areas of the MPA, and 10% relied on other sectors.²³⁸

The Nha Trang Bay MPA was designated in 2001, and since then many residents, including fishers, have benefited from jobs created by tourism such as cleaners, gardeners, and diving instructors.²³⁹ These opportunities are important for economic support of small-scale fishing communities. However, most of the tourism jobs are seasonal, which makes their income unstable throughout the year. The

study also found that low levels of participation in tourism seemed to be correlated with low levels of education and long distances to tourist attractions. It was also determined that aquaculture²⁴⁰ farmers and traditional fishers only received higher income while working simultaneously in their original jobs and tourism. Lower incomes resulted for those who chose between traditional fishing and aquaculture or tourism.²⁴¹

The shift from fishing to tourism has led to changes in land use patterns, which infringe on traditional livelihoods, with some villages being completely relocated.²⁴² Locals raise concerns over these relocations and the insufficient compensation schemes in place, which are deteriorating their future livelihoods.²⁴³ Climate change and emissions concerns were also identified in the region due to additional development along this coastal area.²⁴⁴ The Nha Trang region is known for providing a home to important blue carbon habitats, such as subtidal macrophyte, which when healthy sequester carbon and provide natural carbon storage.²⁴⁵ This is an important habitat to conserve given the world's ongoing goal to reduce carbon emission outputs.

The case of the Nha Trang Bay MPA illustrates some of the complexities and socioeconomic impacts on local communities when these conservation measures are established. Though Rights of Nature is not established in Vietnam, this case demonstrates tensions and conflicts between fishers and tourism that should be considered when designating such protected areas under future laws and regulations legislating Rights of Nature.

Where marine and coastal areas became designated for strict conservation measures, some studies have identified opportunities to mitigate harm to IPLCs. In Brazil, a study was conducted on the willingness of visitors to pay additional costs to enter and stay in the Fernando de Noronha MPA off the South Atlantic coast of Brazil.²⁴⁶ This area offers shark diving tourism and annually generates more than \$314 million in profits.²⁴⁷ Before this profitable tourism activity, the island predominantly was utilized for fishing to sustain local livelihood, culture, and food security. Between 1992 and 1997, shark fishing operated on the

233. *Id.*

234. *Id.*

235. *Id.*

236. Thuy Thi & Thanh Pham, *Tourism in Marine Protected Areas: Can It Be Considered as an Alternative Livelihood for Local Communities?*, 115 *MARINE POL'Y* 103892 (2020); Priscila F.M. Lopes & Sebastian Villasante, *Paying the Price to Solve Fisheries Conflicts in Brazil's Marine Protected Areas*, 93 *MARINE POL'Y* 1, 1-2 (2018).

237. See Thi & Pham, *supra* note 236, at 3-4.

238. See *id.* at 3.

239. See *id.*

240. Aquaculture is the cultivation of aquatic organisms in a controlled aquatic environment, such as farming for mussels, oysters, and clams. NOAA Fisheries, *What Is Aquaculture?*, <https://www.noaa.gov/stories/what-is-aquaculture> (last updated Aug. 9, 2016).

241. See Thi & Pham, *supra* note 236.

242. See *id.*

243. See *id.*

244. Ai Duc Nguyen et al., *Impact of Recent Coastal Development and Human Activities on Nha Trang Bay, Vietnam: Evidence From a Porites lutea Geochemical Record*, 32 *CORAL REEFS* 181 (2013), available at https://www.researchgate.net/publication/252322658_Impact_of_recent_coastal_development_and_human_activities_on_Nha_Trang_Bay_Vietnam_Evidence_from_a_Porites_lutea_geochemical_record.

245. Anna Fricke et al., *Subtidal Macrophyte Diversity and Potentials in Nha Trang Bay—Baseline Data for Monitoring a Rising Natural Resource*, 259 *ESTUARINE COASTAL & SHELF SCI.* 1, 2-3 (2021), available at <https://doi.org/10.1016/j.ecss.2021.107460>; Lukas Marx et al., *Marine Macrophytes as Carbon Sinks: Comparison Between Seagrasses and the Non-Native Alga Halimeda incrassata in the Western Mediterranean (Mallorca)*, 8 *FRONTIERS MARINE SCI.* 1, 7-8 (2021), available at <https://doi.org/10.3389/fmars.2021.746379>.

246. See Lopes & Villasante, *supra* note 236.

247. See *id.*

island, but now shark is no longer fished.²⁴⁸ In 2000, the MPA was established and banned all extraction in some areas. Thirty-five of the remaining 40 fishers within the MPA, who are allowed to fish in the pelagic fishery, were interviewed and asked about their estimated losses due to the MPA. They estimate that their catch decreased by 50%-59%.²⁴⁹

In this study, scholars estimated the annual amount of compensation these fishers should receive and then used this number to determine an island and park fee, which would allow these fishers to be compensated. They approached 579 tourists at the MPA randomly on beaches and at the airport to determine their willingness to pay for increased island and park fees to compensate the fishers. They found that most tourists interviewed (67%-71%) supported an increase in the park and island fees to support fishers. Unlike Vietnam, Brazil implemented Rights of Nature laws in the municipalities of Paudalho and Bonito.²⁵⁰

III. Water Rights

Much like Rights of Nature, the concept of Water Rights enhances water protection by reducing extinctions, safeguarding natural resources, ensuring job and recreation access, mitigating weather and climate impacts such as storms, floods, and fires, and initiating a future with clean rivers, wetlands, oceans, and seas with healthy habitats.²⁵¹ It commits to enhancing all aquatic systems and their well-being and food security needs while accommodating human interests in the decisionmaking procedure. Water Rights will result in fighting the harm caused by other entities and relying on law and policy to protect the importance of water.

A. Purpose of Water Rights

The purpose of Water Rights is to redefine waters and their ecosystems as legal entities. As a legal entity, water will be acknowledged as a living being with strong self-interest representation.²⁵² Under this ideology, water will be held in compliance with laws and regulations, rather than classified as property or dominion with subjugation and exploitation.²⁵³ Ocean Rights, Rights of Rivers, and Rights of Wetlands are branches of Water Rights that are advocated for as changes and enhancements in the sustainable management trajectory for humans' and earth's ecosystems, biodiversity, and climate regulation.

Fundamental rights are intended to ensure the health of water; water-based ecosystems are a primary resource

on which all livelihoods depend.²⁵⁴ Water is vital to many communities as it supports food sources, fertile soil, drinking water, sanitation, medicine, aquaculture, cultural uses, recreation, and more for billions of people.²⁵⁵

Water, in its various forms, is the most valuable resource for earth—it feeds, nourishes, and services all living beings, including humans and nonhuman nature.²⁵⁶ Human activities have a negative and inseparable impact on ecosystems, directly and indirectly.²⁵⁷ Activities change and degrade aquatic ecosystems everywhere; in fact, 75% of freshwater resources are devoted to crop or livestock production.²⁵⁸ About half of all salt water and freshwater wetlands in the contiguous 48 states have disappeared, and only 23% of the entire ocean is protected.²⁵⁹

Water ecosystems in various forms—salt water and freshwater wetlands, oceans, lakes, rivers, watersheds, river basins, and swamps—are believed to have fundamental rights related to entitlement for inheritance based on existence as members of earth and should possess legal standing in law.²⁶⁰ Fundamental rights ensure water exists, thrives, and evolves.²⁶¹ Such rights include:

- The right to flow,
- The right to perform essential functions within its ecosystem,
- The right to be free from pollution,
- The right to feed and be fed by sustainable aquifers,
- The right to native biodiversity, and
- The right to regeneration and restoration.²⁶²

Water Rights is a movement to identify salt water and freshwater ecosystems as living beings with inherent rights to life, health, and diversity, and to have representation.

Aquatic ecosystems can deal with produced waste and restore diminished habitats and their critical populations. The implementation of Water Rights will achieve much-needed restoration through more effective measures and at

248. *See id.*

249. *See id.*

250. Antonella Giordano, *Earth Law Working to Protect Oceans in Brazil*, EARTH L. CTR. (Jan. 23, 2019), <https://www.earthlawcenter.org/blog-entries/2019/1/earth-law-working-to-protect-oceans-in-brazil>.

251. *See Bergstein, supra* note 24.

252. *See id.*

253. *Id.*

254. *See* Universal Declaration of the Rights of Rivers, *supra* note 16, at 1.

255. *See id.*

256. *See* Wilson & Lee, *supra* note 22.

257. *See* Bender et al., *supra* note 2 (“For example, plastic materials are cheaper to produce than renewable or biodegradable materials largely because pollution is not considered in the cost.”).

258. *See* *Nature's Dangerous Decline*, *supra* note 17.

259. CENTER FOR AMERICAN PROGRESS ET AL., PROTECTING 30% OF AMERICA'S LANDS AND OCEAN BY 2030, at 1, https://static1.squarespace.com/static/60f1db7d96b30115e067b6f4/t/611d3fedd063a1417c0e4355/1629306864851/30x30Factsheet_Branded.pdf.

260. *See* Universal Declaration of the Rights of Rivers, *supra* note 16, at 3; Universal Declaration of the Rights of Wetlands, *Home Page*, <https://www.rightsofwetlands.org/> (last visited Sept. 16, 2023).

261. *See* Bender et al., *supra* note 2; Universal Declaration of the Rights of Rivers, *supra* note 16; LINDA SHEEHAN, EARTH LAW CENTER, A VISION FOR OCEAN HEALTH IN CALIFORNIA (2016), *available at* <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/57619c73b6aa602dea1224dc/1466014838226/A+Vision+for+Ocean+Health+in+CA.pdf>.

262. *See* Universal Declaration of the Rights of Rivers, *supra* note 16, at 3; *see also* Wilson & Lee, *supra* note 22.

an increased pace. Water governance has the potential to address the relationship between democracy, sustainability, and justice and equity for humans and ecosystems and help mitigate the harm caused to the value of water.²⁶³

1. Water Governance

As with most laws, regulations, and policies, the environment is protected for the primary benefit of human communities. Water governance through Water Rights focuses on holding people, governmental entities, intergovernmental organizations, communities, corporations, and recreationalists accountable. Local, regional, national, and international movements are organizing and planning acts to address water and environmental problems.²⁶⁴

The current laws and regulations²⁶⁵ implemented to safeguard water are not consistently upgraded to align with the increase in human-conducted activities, which result in water ecosystem harm.²⁶⁶ Even though the United States implements the issues of title, public trust, and control of the water between states and the federal government, there are still failures and setbacks unaccounted for.

There are legal and regulatory movements to address challenges and observed community impact, and science-supported research proves that the law is not finding long-term solutions and applying solutions to the harm caused. The enactment of Water Rights will enhance the protection of water.

B. Freshwater River Rights

Freshwater River Rights developed parallel to other established Water Rights movements. As such, the leading organizations in the Rights of Rivers movement overlap significantly with the Rights of Nature and Ocean Rights movements.²⁶⁷

The Universal Declaration of River Rights is a conservationist manifesto that later became a template for legislative drafting to establish Rights of Rivers and a direction for scientific understanding of healthy river systems.²⁶⁸ It acknowledges that rivers are “essential to all life by supporting a wondrous diversity of species and ecosystems,

feeding wetlands and other aquatic habitats with abundant water, delivering life-giving nutrients to coastal estuaries and the oceans, carrying sediments to river deltas teeming with life, and performing other essential ecological functions.”²⁶⁹ It further states that rivers “play a vital role in the function of Earth’s hydrologic cycle.”²⁷⁰

For example, International Rivers is an organization focused on protecting the Rights of Rivers and the communities that depend on them.²⁷¹ The organization dedicates a significant amount of research and resources to track the development of the Rights of Rivers movement.²⁷² International Rivers, alongside other organizations, such as the Earth Law Center (ELC), Save the Mekong, and Articulación en Defensa de los Ríos, collaborated on the Universal Declaration on the Rights of Rivers.²⁷³ This declaration argues that all rivers are (1) living entities, (2) entitled to fundamental rights, and (3) entitled to legal guardians.²⁷⁴ This declaration serves as a plea to governments and policymakers to recognize the importance of protecting rivers.²⁷⁵

1. History of Rights of Rivers

There are many victories recognizing Rights of Rivers that warrant specific discussions and could serve as the basis for an entire piece of scholarship on their own. Organizations and IPLCs promoting this movement are reaching leaders of world nations, and are making strides in protecting waterways and reporting major victories with other advocates, world leaders, and scholars.²⁷⁶

One such example occurred in 2016, when the Colombian Supreme Court found that the Atrato River, which historically faced environmental pressures from industry and drug-related deforestation and mining-related pollution, is now “subject to the rights that implicate its protection, conservation, maintenance and in this specific case, restoration.”²⁷⁷ One year later, in New Zealand, policymakers with support from the Whanganui Tribe granted legal status to the Whanganui River.²⁷⁸ Policies surrounding the Whanganui River had previously balanced on

263. See Bender et al., *supra* note 2 (“Adopting an Ocean-centered lens to address marine pollution requires a life cycle approach to shape patterns of production and consumption and address pollution at the source (whether it be plastic production, agricultural runoff, dumping of mine tailings, etc.)”).

264. NOAA, *Ocean Pollution and Marine Debris*, <https://www.noaa.gov/education/resource-collections/ocean-coasts/ocean-pollution> (last updated Apr. 1, 2020).

265. Current U.S. laws and regulations include the CWA, Safe Drinking Water Act (42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465), Marine Debris Act, MMPA, Coastal Zone Management Act of 1972 (16 U.S.C. §§1451-1466, ELR STAT. CZMA §§302-319), Magnuson-Stevens Fishery Conservation and Management Act, and National Environmental Policy Act (42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209).

266. See Wilson & Lee, *supra* note 22.

267. These include organizations such as the Earth Law Center (ELC), International Rivers, Save the Mekong, and Articulación en Defensa de los Ríos. Universal Declaration of the Rights of Rivers, *Endorsing Organizations*, <https://www.rightsofrivers.org/#endorse> (last visited Sept. 16, 2023).

268. ELC, *Universal Declaration of River Rights*, <https://www.earthlawcenter.org/river-rights> (last visited Sept. 16, 2023).

269. See Universal Declaration of the Rights of Rivers, *supra* note 16, at 1.

270. See *id.*

271. International Rivers, *About*, <https://www.internationalrivers.org/about/> (last visited Sept. 16, 2023).

272. INTERNATIONAL RIVERS ET AL., RIGHTS OF RIVERS: A GLOBAL SURVEY OF THE RAPIDLY DEVELOPING RIGHTS OF NATURE JURISPRUDENCE PERTAINING TO RIVERS (2020), <https://www.internationalrivers.org/wp-content/uploads/sites/86/2020/09/Right-of-Rivers-Report-V3-Digital-compressed.pdf>.

273. See Universal Declaration of the Rights of Rivers, *supra* note 16.

274. See *id.*

275. *Id.*

276. *Id.*

277. Bram Ebus, *Colombia’s Constitutional Court Grants Rights to the Atrato River and Orders the Government to Clean Up Its Waters*, MONGABAY (May 22, 2017), <https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/> (summarizing *Tierra Digna v. Colombia*, Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Expediente T-5.016.242).

278. Kate Evans, *New Zealand River That Became a Legal Person*, BBC TRAVEL (Mar. 20, 2020), <https://www.bbc.com/travel/article/20200319-the-new-zealand-river-that-became-a-legal-person>; see also *Te Awa Tupua Act 2017*, No. 7 (N.Z.).

the line between conservation by the government and gatekeeping of resources from the Indigenous communities dependent on it.²⁷⁹ As a designated national park, the river was off-limits to everyone, even to tribes with established fishing and hunting practices in and along the river for hundreds of years.²⁸⁰ The new legislation reframed this approach to conservation by taking into account the importance of the river as its own entity upon which many communities rely.²⁸¹

In July 2019, the highest Bangladeshi Supreme Court granted all rivers legal status; polluters may be prosecuted by the river's guardian, the National River Conservation Commission.²⁸² This blanket coverage of all the rivers that contribute to the Bay of Bengal is highly significant, as it protects not only the rivers and their ecosystems, but also the communities that live on the surrounding land.²⁸³ By emphasizing the importance of the rivers for all communities as a whole, the Rights of Rivers concept seeks to provide greater blanket protections for these waterways and those who rely upon them.

On a significantly smaller, albeit no less important, scale, there are also examples of towns and counties adopting resolutions to protect their local waterways.²⁸⁴ In 2020, the U.S. Snake River was granted rights after the Nez Perce General Council passed a resolution recognizing the river's rights under the revised constitution and bylaws adopted by the General Council of the Nez Perce Tribe.²⁸⁵ Additionally in 2020, the Wekiva River and Econlockhatchee River were granted rights through the Right to Clean Water Charter Amendment in Florida.²⁸⁶

Similarly, inspired by the Rights of Nature movement, the town council of Ridgeway, Colorado, approved a resolution recognizing the rights of the Uncompahgre River in 2021.²⁸⁷ Following this, the Ni'ž'i'dè (Salt Fork River) and Ni'skà (Arkansas River) of Oklahoma were granted rights in 2022. In the United States and on a global scale, the history of river advocacy by smaller communities has become a pattern by which these communities take steps to change

the public view of Rights of Nature and eventually effectuate greater changes.

2. Current Development of Rights of Rivers

The global recognition of Rights of Rivers is vital to the overall success of the Rights of Nature movement. Water faces challenges in the lack of effective political support for the well-being of the ecosystem. Asking whether the law is the most effective tool for addressing conflicts is a serious question to consider. Locations around the globe are presently considering granting specific regional Rights of Rivers.²⁸⁸

In the United Kingdom, the River Ouse may soon become England's first river to be granted rights.²⁸⁹ The Lewes District Council passed a motion in February 2023, which acknowledged the Rights of Nature approach to apply to establishing a charter on the river's rights.²⁹⁰ These actions were spearheaded by one of the district councilors, who was frustrated by the lack of movement to protect rivers in England from effluent and wastewater when sewage treatment plants cannot cope with heavy rains. The Rights of River Ouse Charter will be drafted between 2023 and 2025 to enshrine substantive rights and promote a sustainable river system.²⁹¹

In northwest Australia, an ongoing action by the Save Our Marine Life coalition is calling for the Martuwarra Fitzroy River to be protected by laws aligned with the values promoted by Rights of Rivers.²⁹² These rights are also sought to be applied to Murray River (of the Murray-Darling Basin) in southeast Australia through the water management concept of "cultural flows."²⁹³ This concept ensures that Indigenous communities are involved in management, and upholds the approach of FPIC.

In Asia, ongoing actions are promoting Rights of Rivers, including actions for the Ganges River and its second largest tributary, the Yamuna River, and for the Indus River of Pakistan.²⁹⁴ The movement for the Ganges River and Yamuna River was addressed in the courts of Uttarakhand, a northern state of India. The court found that these rivers should have legal personhood, as this "protects the recognition and faith of society."²⁹⁵ The Supreme Court of India rejected this decision later in 2017.²⁹⁶ Despite this

279. Deutsche Welle, *Should Nature Be Given Rights Enshrined in Law?*, EcoWATCH (Feb. 5, 2020), <https://www.ecowatch.com/rights-of-nature-2645043731.html> (describing how the river's status as a national park prohibited the Iwi Tribe from hunting or fishing, a practice that the Tribe had observed for hundreds of years).

280. *Id.*

281. See Evans, *supra* note 278.

282. See, e.g., Ashley Westerman, *Should Rivers Have Same Legal Rights as Humans? A Growing Number of Voices Say Yes*, NPR (Aug. 3, 2019), <https://www.npr.org/2019/08/03/740604142/should-rivers-have-same-legal-rights-as-humans-a-growing-number-of-voices-say-ye>.

283. *Id.*

284. Resolution of the Board of Trustees of Nederland, *supra* note 117; see also Booth, *supra* note 117.

285. Nez Perce Tribal General Council Resolution Recognizing Rights of Snake River (2020), https://ecojurisprudence.org/wp-content/uploads/2022/02/US_Nez-Perce_Snake-River-Resolution_203.pdf.

286. See *Rights of Rivers Global Map*, *supra* note 120; Orange County, Florida, Charter Amendments Approved by Voters on November 3, 2020, https://ecojurisprudence.org/wp-content/uploads/2022/02/US_Orange-County_Wekiva-and-Econlockhatchee-River-Bill-of-RightsRight-to-Clean-Water-Charter-Amendment_213.pdf.

287. See Booth, *supra* note 117.

288. See *Rights of Rivers Global Map*, *supra* note 120.

289. See Isabella Kaminski, *River Ouse May Become First in England to Gain Legal Rights*, GUARDIAN (Mar. 1, 2023), <https://www.theguardian.com/environment/2023/mar/01/sussex-river-ouse-first-in-england-legal-rights-aoe>.

290. *See id.*

291. *See id.*; see *The Rights of the River Ouse: Monica FERIA-TINTA to Advise on New Charter, a First for England*, TWENTY ESSEX (July 27, 2023), <https://www.twentyessex.com/the-rights-of-the-river-ouse-monica-feria-tinta-to-advise-on-new-charter-a-first-for-england/>.

292. Kimberley, *Petition to Protect the Martuwarra Fitzroy River*, https://www.likenowhereelse.org.au/protect_fitzyroy (last visited Sept. 16, 2023).

293. Environmental Justice Australia, *Cultural Flows at Margooya Lagoon*, <https://envirojustice.org.au/our-focus/first-nations-justice/cultural-flows/> (last visited Sept. 16, 2023).

294. See *Rights of Rivers Global Map*, *supra* note 120.

295. *See id.*

296. *See id.*

denied decision, in late 2022, the United Nations awarded the Indian government support to their restoration initiatives to restore the health of the Ganges River.²⁹⁷

Meanwhile, in Pakistan, the coalition called the Pakistan Fisherfolk Forum (PFF) partnered with the ELC and asserted that the Indus River needs rights in the Pakistani portion of the river.²⁹⁸ The coalition drafted the Indus Rivers Act in hopes this would help protect the river's biodiversity and flow.²⁹⁹ In summer 2022, the PFF rallied for the rights of the Pakistani part of the Indus River and proposed a joint action plan for the government to give personhood status to the river.³⁰⁰ As of this writing, there has been little progress in establishing this status.

The use of the water within the watercourse is identified as tension between Pakistan, India, and the World Bank, and there is a need for change and an update to the Indus River Treaty.³⁰¹ The Indus River Treaty was discussed in the Indian Parliament in summer 2021, with a recommendation that the treaty be renegotiated to include new pressing issues of climate change and EIAs.³⁰² Tensions continued to rise in January 2023, when India sent a notice to Pakistan stating its intention to modify provisions of the treaty; Pakistan has taken the issue to the Permanent Court of Arbitration.³⁰³

Given rising tensions and the need to update the Indus River Treaty to encapsulate increasing pressures on the watercourse due to climate change, there is potential for more stringent conservation measures. Neither India nor Pakistan signed the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, which helps other countries allocate water use and protect, preserve, and manage the environment.³⁰⁴ Consequently, a future update to the Indus River Treaty could provide the catalyst they need to consider other mechanisms that can support the sustainable use of water-

course resources, such as river rights and legal personhood for the river.

In Europe, there is progress in advancing Rights of Rivers for the Balkan-Serbian Rivers and the River Tavignanu in Italy.³⁰⁵ Earth Thrive, ELC, and International Rivers all worked together to establish fundamental rights for all the Balkan rivers. The goals include achieving the creation of a national law or constitutional amendment recognizing Rights of Rivers. In Italy, the Tavignanu Vivu coalition is fighting for protection over the Tavignanu River to establish a declaration to European decisionmakers that would lead to a local referendum and would change the status of the river.³⁰⁶

IV. Ocean Rights

The earth law framework includes Ocean Rights, an ocean-centered³⁰⁷ movement approach acknowledging and identifying the ocean as a living entity and recognizing the interconnection between human exploitation of the ocean and the ecological needs of the ocean's health and well-being.³⁰⁸ Earth law advocates, including governments and organizations, are advocating for the expansion and strengthening of conservation measures for salt water areas.

A. Purpose of Ocean Rights

The Ocean Rights purpose is to recognize the ocean as a source of life. Ocean Rights brings together changemakers to find solutions, reinforce human responsibilities, transform how human activities are valued and managed, and protect and restore the health of the ocean.³⁰⁹ This is a strategic approach for improving the environment.³¹⁰ Ocean Rights applies as a thoughtful balance between ecosystem conservation and human needs.³¹¹

Ocean Rights establishes standards and criteria for productive evolutions of principles; it aims to strengthen the ocean ecosystem's intrinsic value to exist through governance, decisionmaking, cost-benefit analyses, representation, and actions to preserve, restore, and protect biodiversity, ensure ecosystem resilience, and mitigate human usage.³¹² These initiatives will support successful

297. Press Release, United Nations Decade on Ecosystem Restoration 2021-2030, UN Recognizes Indian Government Initiative to Restore Ganges River With Special Award (Dec. 13, 2022), <https://www.decadeonrestoration.org/press-release/un-recognizes-indian-government-initiative-restore-ganges-river-special-award>.

298. See *Rights of Rivers Global Map*, *supra* note 120.

299. ELC, *Indus River*, <https://www.earthlawcenter.org/indus-river> (last visited Sept. 16, 2023).

300. PFF Rally Demands "Personhood" Status for River Indus, DAWN (June 1, 2022), <https://www.dawn.com/news/1692449>.

301. Siwat Varnakomola, *Will There Be a Water War Between India and Pakistan by 2025?*, KING'S COLL. LONDON (Aug. 15, 2022), <https://www.kcl.ac.uk/will-there-be-a-water-war-between-india-and-pakistan-by-2025>.

302. Vishwa Mohan, *Renegotiate Indus Treaty With Pakistan: Parliamentary Panel to Gov't*, TIMES INDIA (Aug. 6, 2021), <https://timesofindia.indiatimes.com/india/renegotiate-indus-treaty-with-pakistan-parliamentary-panel-to-govt/articleshow/85087026.cms>; Athar Parvaiz, *India, Pakistan Cross-Border Water Treaty Needs Climate Change Revision*, NATURE INDIA (Sept. 16, 2021), <https://www.nature.com/articles/d44151-021-00036-8>.

303. Snigdhendu Bhattacharya, *India Escalates Water Conflict With Pakistan*, DIPLOMAT (Jan. 30, 2023), <https://thediplomat.com/2023/01/india-escalates-water-conflict-with-pakistan/>; Daniel Haines, *India and Pakistan Are Playing a Dangerous Game in the Indus Basin*, U.S. INST. PEACE (Feb. 23, 2023), <https://www.usip.org/publications/2023/02/india-and-pakistan-are-playing-dangerous-game-indus-basin>.

304. Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 51 U.N.T.S. 49, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsq_no=XXVII-12&chapter=27&clang=_en.

305. See *Rights of Rivers Global Map*, *supra* note 120.

306. ANIMA MUNDI LAW INITIATIVE, RIGHTS OF NATURE CASE STUDY: FRANCE—RIVER TAVIGNANU (2022), <https://static1.squarespace.com/static/5d659024afafe900010c22d7/t/62c6ba9bccd2dc4cf4147740/1657191109422/Anima+Mundi+Law+Initiative+case+study++France++River+Tavignanu+%28June+2022%29.pdf>.

307. An ocean-centered approach centers the needs of the ocean in decisionmaking. See Bender et al., *supra* note 2.

308. See *id.*

309. See ELC, *Towards a Universal Declaration of Ocean Rights (UDOR)*, <https://www.earthlawcenter.org/ocean-rights> (last visited Sept. 16, 2023) [hereinafter *Towards a Universal Declaration of Ocean Rights*].

310. See *id.*

311. Michelle Bender, *An Introduction to Ocean Rights*, WORLD OCEAN F. (Oct. 22, 2018), <https://medium.com/world-ocean-forum/an-introduction-to-ocean-rights-2f82e05fbedf>.

312. NATIONAL OCEAN PROTECTION COALITION ET AL., CONSERVING THE OCEAN FOR OUR FUTURE, <https://static1.squarespace.com/static/60f1db7d96b30115e067b6f4/t/61045eb49f95b0c51ba5324/16276763>

environmental recoveries and protections³¹³ resulting in accepting the ocean as a respected and protected source of life for our planet.

Interest in protecting and managing the ocean moved forward in 1982 with the introduction of UNCLOS, one of the first binding, wide-scale treaties to guide protecting the marine environment and ocean biodiversity.³¹⁴ This treaty provides the international legal framework for the management of maritime navigation and resource extraction within different delineations of offshore territories. It has hundreds of articles setting rules and regulations and enforcing laws of navigation, fishing, shipping, conservation, and pollution.³¹⁵

UNCLOS divides the marine environment into established zones with various legal statuses.³¹⁶ The legal status of coastal zones and waterways commonly results in conflict between States and their federal governments.³¹⁷ Currently, governments identify the coastal zones by the mean high-water mark and the mean low-water mark, but due to dynamic areas, the marks are difficult to distinguish.³¹⁸ Although UNCLOS prioritized establishing national security and regulation of natural resource exploitation in these different areas of marine space, it has also worked alongside other conventions, such as the CBD and the United Nations Framework Convention on Climate Change (UNFCCC), to push forth environmental perspectives of resource extraction and sustainability.³¹⁹

Nationally, 168 Parties ratified UNCLOS. The United States is absent from the list of countries who ratified UNCLOS.³²⁰ The Ronald Reagan Administration feared economic repercussions of signing at the time of UNCLOS' creation, and the United States has continued to fail to prioritize the treaty.³²¹ However, the United States declared *most* UNCLOS provisions to be customary international law that would be binding international law.³²² Since the 1980s, UNCLOS remains one of the most significant treaties in setting the groundwork for international ocean protection.³²³

In 2002, the Committee on Economic, Social, and Cultural Rights adopted Comment No. 15 on the right to water, acknowledging that accessing water is essential to

human life.³²⁴ Building on this development in 2010, the United Nations General Assembly recognized that access to clean drinking water and sanitation are “essential to the realisation of all human rights.”³²⁵ The resolution requires nation-states and international organizations to assist developing countries in ensuring access to safe and clean water.³²⁶ In doing so, the United Nations highlighted the significance of ocean resources and laid the groundwork for movements meant to provide other means to protect the rights of water.

Five years later, in 2015, the Ocean Race, an organization dedicated to educating the public and advocating for ocean protection and governance,³²⁷ held its first summit to raise awareness of environmental issues relating to ocean resources and marine life.³²⁸ Since this summit, the Ocean Race has organized many other events that encourage governments and corporations to commit to reduce waste and engage in discussions regarding ocean life and the importance of protecting it.³²⁹ This includes an annual sporting event whereby sailors from around the world compete to finish one of the most difficult sailing routes around the world's major oceans and seas.³³⁰ Within their “Racing With Purpose” campaign, the Ocean Race conveys its support for the co-creation of the Universal Declaration of Ocean Rights (UDOR)³³¹ with ELC, Nature's Rights, and the municipality of Genova, enhancing global attention for this movement.³³²

The Ocean Race led to the initiation of formulating the Ocean Rights Alliance, with the goal to encourage businesses to become members and contribute to developing the key principles of Ocean Rights.³³³ The members are expected to contribute to the Genova Process,³³⁴ an application of an Ocean Rights lens to existing sustainability commitments, and to publish case studies on how Ocean Rights are implemented within their businesses.³³⁵ Summits were held in various locations around the world, including Newport, Rhode Island; Hong Kong; Cape Town; and, most recently, Seychelles.³³⁶ In late 2022, the ELC

44142/ConservingtheOceanFactsheet_Branded_Printer-Friendly.pdf; see also Bender, *supra* note 311.

313. *See id.*

314. United Nations, *Oceans and the Law of the Sea*, <https://www.un.org/en/global-issues/oceans-and-the-law-of-the-sea> (last visited Sept. 16, 2023) [hereinafter *Oceans and the Law of the Sea*].

315. *See* UNCLOS, *supra* note 227.

316. *See id.*

317. KAREN A. ALEXANDER, *CONFLICTS OVER MARINE AND COASTAL COMMON RESOURCES* (2019), <https://www.taylorfrancis.com/books/mono/10.4324/9781315206424/conflicts-marine-coastal-common-resources-karen-alexander>.

318. *See* UNCLOS, *supra* note 227, art. 7.

319. *See Oceans and the Law of the Sea*, *supra* note 314.

320. Office of the Staff Judge Advocate, U.S. Indo-Pacific Command, *The U.S. Position on the U.N. Convention on the Law of the Sea (UNCLOS)*, 97 INT'L L. STUD. 81, 82 (2021).

321. *Id.*

322. *Id.* at 83.

323. *See Oceans and the Law of the Sea*, *supra* note 314.

324. Committee on Economic, Social, and Cultural Rights, *General Comment No. 15: The Right to Water*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

325. G.A. Res. 64/292 (July 28, 2010).

326. *Id.*

327. Ocean Race, *Racing With Purpose*, <https://www.theoceanrace.com/en/racing-with-purpose/about> (last visited Sept. 16, 2023).

328. Ocean Race, *Summits & Policy*, <https://www.theoceanrace.com/en/racing-with-purpose/summits-and-policy> (last visited Sept. 16, 2023).

329. *See id.*

330. Ocean Race, *IMOCA Route*, <https://www.theoceanrace.com/en/route> (last visited Sept. 16, 2023).

331. UDOR's goal is to achieve a global voice and representation in governance by 2030. *See Towards a Universal Declaration of Ocean Rights*, *supra* note 309.

332. *See* Ocean Race, *supra* note 330; *UN Climate Conference (COP27): The Ocean Race Boosts Support for Ocean Rights*, IMOCA (Nov. 17, 2022), <https://www.imoca.org/en/news/news/un-climate-conference-cop27-the-ocean-race-boosts-support-for-ocean-rights>.

333. Ocean Rights Alliance, *Home Page*, <https://www.oceanrightsalliance.com/> (last visited Sept. 16, 2023).

334. The Genova Process involves the drafting of principles for Ocean Rights. Ocean Race, *Genova Process*, <https://www.theoceanrace.com/en/ocean-rights#GENOVA> (last visited Sept. 16, 2023).

335. *See* Ocean Rights Alliance, *supra* note 333.

336. *See id.*

promoted the establishment of UDOR along with several other organizations at a side event during the COP27 of the UNFCCC.³³⁷

Building on this progress and interest in advocating for marine resources, the ELC drafted an Ocean Rights Initiative. More than 70 organizations spanning more than 30 countries signed the initiative.³³⁸ The initiative encouraged the United Nations and individual governments to show support for ocean resources by using a rights-based management system and to incorporate such rights into their governing systems.³³⁹ While there is still a need for greater advocacy and initiative in recognizing Ocean Rights, the efforts of organizations, such as the ELC and the Ocean Race, have made a difference. There are many countries that formally or informally recognize Rights of Nature, or that have enacted laws and policies directed toward Ocean Rights and other Water Rights. Such countries include Ecuador,³⁴⁰ Belize,³⁴¹ Panama,³⁴² New Zealand,³⁴³ the Philippines,³⁴⁴ and the Cook Islands.³⁴⁵

B. Current Development of Ocean Rights

There could be an optimistic outcome for Ocean Rights, considering that international officials reached consensus on the text of the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction Treaty (BBNJ Treaty).³⁴⁶ The BBNJ

Treaty is an implementing agreement to UNCLOS that demonstrates more social and political support to change the status quo stagnating UNCLOS. This shift in focus could allow room for the development of Ocean Rights, where nation-states already have the political backing to do so. Laws and regulations could implement the BBNJ Treaty while applying ideas that stem from a UDOR.

The development of initiatives promoting Ocean Rights is on the rise thanks to the continued efforts of several organizations, including the ELC, Relay4Nature, International Rivers, and the Global Alliance for the Rights of Nature (GARN), promoting UDOR.³⁴⁷ These efforts encourage the United Nations to include more protections for ocean resources in governing principles and resolutions. Members of societies impacted by changes are included in the negotiations to ensure that participating State Parties understand the complexity of the decisionmaking. The 2023 omnibus resolution on oceans and the law of the sea works to push more of Ocean Rights into the upcoming agendas of the United Nations.³⁴⁸

1. High Seas Treaty

In addition to the increase in knowledge and dissemination of information on Ocean Rights, policymakers have made strides in finalizing the text of the BBNJ Treaty.³⁴⁹ After two decades of negotiations in fishing rights and benefit-sharing,³⁵⁰ the United Nations' international ocean BBNJ Treaty, also referred to as the High Seas Treaty, took the next step toward implementation as of June 2023. As soon as 60 countries sign and ratify the High Seas Treaty, it will become a legally binding international law resolution about conservation regulation and resource-sharing in the high seas.³⁵¹

Once the agreement becomes legally adopted by countries, it will promote stricter protections for marine life beyond national jurisdiction and a better means of marine conservation.³⁵² It still requires an abundant amount of

337. See OCEAN RACE, INVITATION TO OCEAN RACE EVENT IN LISBON, https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/62b60d5224b3c03223ce0e6a/1656098131190/23062022+Invitation+Side+EVENT-REMINDER_LISBON_compressed.pdf [hereinafter INVITATION].

338. Michelle Bender, *Earth Law Center Advances Ocean Rights*, ELC (Mar. 14, 2019), <https://www.earthlawcenter.org/blog-entries/2019/3/earth-law-center-advances-ocean-rights>.

339. ELC, ADOPTION OF HOLISTIC AND RIGHTS-BASED OCEAN GOVERNANCE, <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5ba7b7674785d39a15690c71/1538242428456/Ocean+Rights+Initiative+Sept+2018.pdf>; see INVITATION, *supra* note 337.

340. The Galapagos Marine Reserve, governed by Galapagos Special Law, puts protections in place for the ecosystems in the MPA. Decisionmaking regarding the area is, in part, granted to a Participatory Management Board, which comprises local stakeholders in sectors such as tourism, ecology, and fishing. Special Law on the Galapagos, Law No. 278 (1998) (Ecuador).

341. *Westerhaven Schiffahrts v. Attorney Gen. of Belize*, Civ. App. No. 19 of 2010 (Ct. App. 2011).

342. In 2022, Panamanian President Cortizo assisted in introducing legislation that would grant legal personhood status to natural entities, such as oceans and rivers. Lucy Jones, *Panama Is the Latest Country to Legally Recognise the Rights of Nature*, PLANET ARK (Mar. 7, 2022), <https://planetark.org/newsroom/news/panama-is-the-latest-country-to-legally-recognise-the-rights-of-nature>.

343. See Te Awa Tupua Act 2017, No. 7 (N.Z.).

344. In 2015, the Supreme Court of the Philippines ruled that while marine mammals and their habitats did not have legal standing, citizens could sue on behalf of the harmed entity. This later led to special prosecutors for environmental crimes. Ralf Rivas, *How Dolphins Shaped Environmental Laws, Protected Benham Rise*, RAPPLER (May 17, 2018), <https://amp.rappler.com/nation/202776-dolphins-shaped-environmental-laws-philippines-benham-rise>.

345. In 2017, the Marae Moana was designated as a protected area in the exclusive economic zone and would be managed by a council of nine appointed members, including the Cook Islands prime minister, representatives from the northern and southern islands, and other interested governmental, private, and religious parties. Marae Moana, *What Is Marae Moana?*, <https://www.maraemoana.gov.ck/about-marae-moana/what-is-marae-moana/> (last visited Sept. 16, 2023).

346. United Nations, *Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction*, <https://www.un.org/bbnj/> (last visited Sept.

16, 2023) [hereinafter *Intergovernmental Conference*].

347. See, e.g., ELC, *Home Page*, <https://www.earthlawcenter.org/> (last visited Sept. 16, 2023); see also *Relay4Nature: The Mission*, OCEAN RACE (May 7, 2021), https://www.theoceanrace.com/en/news/12690_Relay4Nature-the-Mission; International Rivers, *Home Page*, <https://www.internationalrivers.org/> (last visited Sept. 16, 2023); GARN, *Home Page*, <https://www.garn.org/> (last visited Sept. 16, 2023).

348. See *Towards a Universal Declaration of Ocean Rights*, *supra* note 309.

349. United Nations, *Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction—Fifth Substantive Session*, https://www.un.org/bbnj/fifth_substantive_session (last visited Sept. 16, 2023); Minna Epps, *Key Takeaways From Treaty Negotiations for Biodiversity Beyond National Jurisdiction (BBNJ)*, United Nations HQ New York, IUCN (Aug. 13, 2022), <https://www.iucn.org/blog/202208/key-takeaways-treaty-negotiations-biodiversity-beyond-national-jurisdiction-bbnj-united>.

350. UNCLOS of 1982 was the most recent international agreement on ocean protection of only 1.2% of high seas waters. See Stallard, *supra* note 86.

351. See *id.* The High Seas Treaty is referred to as the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, or BBNJ Treaty. *Intergovernmental Conference*, *supra* note 346.

352. See *Intergovernmental Conference*, *supra* note 346.

work, including the legislative approval of each country, before it is implemented.³⁵³

The ultimate goal of the High Seas Treaty is to close a gap in international law by offering a framework for governments to protect ocean health, climate resilience, and the socioeconomic well-being and food security of the world.³⁵⁴ The High Seas Treaty is a step toward protecting biodiversity and species under the threat of climate change, overfishing, and deep-sea and seabed mining.³⁵⁵ It will seek to implement strict environmental regulations and oversight to ensure ocean activities are sustainable and responsible.³⁵⁶ The activity limits will be applied to fishing, including the amount, routes of use, shipping lanes, and allowed bioprospecting for deep sea mining for minerals taken from a seabed 200 meters down or below the surface.³⁵⁷ A challenge will be to regulate how to disperse the use and benefits equally; how much the ocean resources are worth is unknown and difficult to identify and divide.³⁵⁸

The High Seas Alliance, among many other organizations globally, submitted stakeholder written inputs to the BBNJ Treaty process supporting better measures for intergenerational equity and benefit-sharing.³⁵⁹ The stakeholder engagement at the July 2022 United Nations Ocean Conference demonstrated the ways in which organizations are pushing Ocean Rights and the global goal of protecting and preserving 30% of the oceans through MPAs onto the international agenda by the year 2030 (known as 30x30).³⁶⁰ Several organizations, including the ELC and Stop Ecocide, submitted stakeholder engagement inputs, which propose that stronger actions be taken to support the aforementioned 30x30 goal and an ecocentric Rights of Nature approach.³⁶¹

For example, in Stop Ecocide's submission, it presented the work it conducted with legal experts involving a legal definition of "ecocide."³⁶² This submission included a list of countries considering recognizing the term within their borders.³⁶³ Though it does not explicitly mention Rights of Nature, Rights of Rivers, or Ocean Rights, Stop Ecocide's goals align with the overarching aims of these concepts to achieve environmental protection through an ecocentric approach. Though there are more than 50 submissions, most of these organizations discussed and emphasized the 30x30 goal rather than the proposed UDOR.³⁶⁴ Several of the submissions emphasized the need to complete the negotiations and text of the BBNJ Treaty.³⁶⁵

The BBNJ Treaty also strives to better define and articulate equitable sharing of marine genetic resources that cannot be regulated without the participation and cooperation with international patent law and intellectual property rights.³⁶⁶ Stronger and clearer regulation of activities pertaining to bioprospecting and development of these resources has led to more discussion over stronger EIAs for these developments and to fit into the BBNJ Treaty more generally. These interests led to activity discussions within the agreement's text and their importance in highlighting potential impacts on coastal communities and SIDS.

Although the BBNJ Treaty pertains to the high seas and areas outside of national jurisdiction, the treaty often overlooks the interconnection between species within

353. Catrin Einhorn, *Nearly Every Country Signs On to a Sweeping Deal to Protect Nature*, N.Y. TIMES (Dec. 20, 2022), <https://www.nytimes.com/2022/12/19/climate/biodiversity-cop15-montreal-30x30.html>.

354. *IUCN Statement on the High Seas Treaty*, IUCN (Mar. 5, 2023), <https://iucn.org/iucn-statement/202303/iucn-statement-high-seas-treaty>.

355. See Einhorn, *supra* note 353.

356. See Stallard, *supra* note 86.

357. *Id.*

358. *Id.*

359. High Seas Alliance, *Treaty Negotiations*, <https://www.highseasalliance.org/treaty-negotiations/> (last visited Sept. 16, 2023).

360. If leaders finalize the Post-2020 Global Biodiversity Framework (a movement to set measurable targets to conserve ecosystems), Targets 2 and 3 will commit to conserving 30% of earth's land and water by 2030. Many nations committed and signed on to this agreement at COP27 in 2022. In the United States, the Joseph Biden Administration committed to the 30x30 goal—not through the CBD—but through the nation's America the Beautiful initiative. Several of the targets state that "for the benefit of all people and nature." *Kunming-Montreal Global Biodiversity Framework*, *supra* note 4. Roughly 190 countries around the world have approved the United Nations agreement to protect 30% of the planet's land and oceans by 2030. The agreement acknowledges that millions of plants and animals are at risk of extinction within decades, as biodiversity is declining rapidly. Those who approved the agreement agree to take several measures against biodiversity loss and to work on overseeing jeopardies to the earth's food and water supply, as well as the existence of species. See Einhorn, *supra* note 353.

361. See, e.g., Statement from ELC for the 2022 United Nations Conference (June 30, 2022), https://sdgs.un.org/sites/default/files/2022-07/MichelleBender_OceanCampaignsDirector_Earth_Law_Center.pdf; see also Statement from Stop Ecocide International for the Second United Nations Ocean Conference (June/July 2022), https://sdgs.un.org/sites/default/files/2022-06/JojoMehta_Co-Founder_and_ExecutiveDirector_Stop_Ecocide_International.pdf.

362. See Statement from Stop Ecocide International for the Second United Nations Ocean Conference, *supra* note 361.

363. See *id.*

364. See, e.g., United Nations Ocean Conference, *Stakeholder Engagement in Numbers*, <https://www.un.org/en/conferences/ocean2022/preparation/stakeholders> (last visited Sept. 16, 2023); see Statement from Eco Foundation Global for World Coastal Forum (July 2022), https://sdgs.un.org/sites/default/files/2022-07/ZhangHai_SecretaryGeneral_Eco_Foundation_Global.pdf; Statement from EarthEcho International, https://sdgs.un.org/sites/default/files/inline-images/SeanRussel_Associate_Director_of_Youth_Engagement_%26_Partnerships-EarthEcho_International.pdf; Statement from Fauna & Flora International to the United Nations Ocean Conference 2022 (June 2022), https://sdgs.un.org/sites/default/files/inline-images/SophieBenbow_HeadofMarine_Flora%26FaunaInternational.pdf; Statement from High Seas Alliance to the United Nations Ocean Conference (July 1, 2022), https://sdgs.un.org/sites/default/files/2022-07/PeggyKalas_Director_HighSeasAlliance.pdf; Statement from Marine Conservation Institute to the United Nations Ocean Conference, https://sdgs.un.org/sites/default/files/inline-images/SarahHameed_BlueParksDirector%26SeniorScientist_Marine_Conservation_Institute.pdf; Statement from Monmouth University Urban Coast Institute to the United Nations Ocean Conference (July 2022), https://sdgs.un.org/sites/default/files/2022-07/DanielleShaw_ChiefCouncillor_Monmouth_University.pdf; Statement from One Ocean Hub to the United Nations Ocean Conference (2022), https://sdgs.un.org/sites/default/files/inline-images/ElisaMorgera_Professor_OneOceanHub.pdf; Statement from the PEW Charitable Trusts to United Nations Ocean Conference (2022), https://sdgs.un.org/sites/default/files/inline-images/Megan_Jungwiwattanaporn_EnvironmentOfficer_PewCharitableTrusts.pdf; Statement from Save the Waves Coalition to the United Nations Ocean Conference (July 2022), https://sdgs.un.org/sites/default/files/2022-07/MaraArroyo_SurfProtectedAreasNetworkManager_Save_The_Waves_Coalition.pdf; Statement from Stop Ecocide International for the Second United Nations Ocean Conference, *supra* note 361.

365. See Statement from High Seas Alliance to the United Nations Ocean Conference, *supra* note 364.

366. SIVA THAMBISETTY, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, POLICY BRIEF NO. 48, INTELLECTUAL PROPERTY AND MARINE GENETIC RESOURCES: NAVIGATING ARTICLES 10-13 IN THE BBNJ DRAFT TREATY (2022), <https://ssrn.com/abstract=4054874>.

and outside national jurisdictions. A research study has observed this demonstrated conduct and its importance on side events during the BBNJ process.³⁶⁷ Organizations were promoting the concept of ecological connectivity and the need for stronger language in the BBNJ Treaty to reflect this reality.³⁶⁸ During the discussion on this concept with participants, several States did not understand how there could be a connection between ecosystems in the high seas and coastal communities until there was a thorough explanation of these ecosystems interactions.³⁶⁹ This research highlights the need to have organizations, coastal community groups, and SIDS at the negotiation table, as they can often speak to experiences that lawmakers and policymakers do not have.

The text of the BBNJ agreement does not include Ocean Rights, but a few negotiable aspects of the treaty are relevant to the conservation of the marine environment. These include benefit-sharing in conjunction with the common heritage of humankind principle, additional EIA guidance, and capacity-building. The BBNJ Treaty's finalized text contains increasing support from organizations and countries that insist stronger language is needed to ensure intergenerational equity when Members implement these measures. In addition, though the text of the BBNJ Treaty is finalized, there remains increasing ratified support from organizations and countries who insist that stronger language is needed to ensure intergenerational equity when these measures are implemented.³⁷⁰

Despite this momentum, concerns remain regarding equity and public participation during negotiations due to the limited opportunity of non-nation-state actors and observers to participate in in-person meetings due to COVID-19.³⁷¹ The lack of meaningful public participation from a variety of groups was troubling, considering that the topic discussed in these negotiations was concerning benefit-sharing and intergenerational equity. In this sense, the process seemed to have illogically permitted parts of the negotiations to continue without several key voices being heard that were directly impacted by the decisions made.

A significant amount of time during the BBNJ negotiations focused on benefit-sharing in the high seas and in "the Area." The high seas constitute the water column outside of national jurisdiction while "the Area" encompasses the seafloor outside of national jurisdiction. UNCLOS

regulates differently the resources that exist in these two locations. The convention defines rules and lays out regulations for the utilization of high seas resources, while the International Seabed Authority regulates resource development and bioprospecting of resources in "the Area," such as the Mining Code.³⁷²

While fishing on the high seas is permitted under UNCLOS, insofar as Parties meet their treaty obligations, resources found in "the Area" are subject to Article 136, the Common Heritage of Mankind.³⁷³ This stipulates that these resources should be for the benefit of "mankind," and legal scholars have interpreted this to mean that their benefits must be shared equitably. BBNJ negotiations are considering how to share these benefits, as nation-states are starting to reach the scientific, technological, and economic means to bioprospect and develop these resources.

"The Area" contains many important gaseous, liquid, and mineral resources, which States are interested in acquiring due to their economic value. Many organizations speak out against the resource developments, given the many unknowns about these deep sea environments and the risks of trying to access and consume them. Due to this lack of knowledge, negotiations have considered the stronger measures needed within EIAs. One of the most well-known locations identified for seabed mining development potential is the Clarion-Clipperton Zone between Hawaii and Mexico.³⁷⁴ Although this area would be promising for the extraction of resources, one-third of the area within the Clarion-Clipperton Zone will be protected from extractive activities, considering the many unknowns regarding the impacts of development that scientists admit to in areas such as the Clarion-Clipperton Zone.³⁷⁵

Although these ocean areas are far offshore, the development decisions may have broader impacts across the regime. The common heritage of mankind and the precautionary principle are necessary areas that IPLCs and coastal communities are managing or could manage because of the implications these people face if these resources are not effectively managed or shared. Sometimes, offshore activities are understood as far removed from being able to influence ecosystems closer to coastal shores that impact inland communities. Yet, many species in offshore regions interact with coastal ones. Consequently, a strong holistic, integrated, and interconnected approach needs to be adopted to preserve water environments (i.e., water quality) and marine species populations (i.e., fish stocks). Recognizing Ocean Rights and ensuring that application measures take a holistic approach, such as through monitoring in MPAs, demonstrates how a holistic method of implementation would positively impact the marine environment and increase managerial opportunities for IPLC groups.

367. See Ina Tessnow-von Wysocki & Alice B.M. Vadrot, *Governing a Divided Ocean: The Transformative Power of Ecological Connectivity in the BBNJ Negotiations*, 10 POL. & GOVERNANCE 1, 14-28 (2022), available at <https://doi.org/10.17645/pol.v10i3.5428>.

368. See *id.*

369. See *id.*

370. See *id.* Intergenerational equity in this context involves upholding the rights of children and future generations to a healthy environment. See MICHAEL SWEENEY & ELISA MORGERA, ONE OCEAN HUB, DON'T FORGET A HEALTHY OCEAN AS PART OF CHILDREN'S RIGHT TO A HEALTHY ENVIRONMENT (2021), <https://oneoceanhub.org/wp-content/uploads/2021/09/Policy-Brief.pdf>.

371. See *Exploring Ocean's Rights at Ocean Race Summit*, ONE OCEAN HUB (June 29, 2021), <https://oneoceanhub.org/exploring-oceans-rights-at-ocean-race-summit/>.

372. ISA, *The Mining Code*, <https://www.isa.org.jm/the-mining-code/official-documents/> (last visited Sept. 16, 2023).

373. See UNCLOS, *supra* note 227, art. 136.

374. PEW CHARITABLE TRUSTS, *THE CLARION-CLIPPERTON ZONE* (2017), https://www.pewtrusts.org/-/media/assets/2017/12/sea_the_clarion_clipperton_zone.pdf.

375. See *id.*

The Ocean Rights and 30x30 global goals are highly ambitious. Scholars are skeptical regarding what each system will be able to achieve. Organizations have investigated the extent to which MPAs have become “paper parks”³⁷⁶ in different jurisdictions. For example, Oceana published a report in 2020 highlighting the number of MPAs poorly managed and leading to continued damage to ecosystems.³⁷⁷ Oceana found that 80% of European MPA management plans failed to lay out a solid management basis,³⁷⁸ and 86% of MPAs claiming to protect the seabed allowed area exposure to high-risk fishing gear.³⁷⁹

Considering the growing literature on the inefficiencies of some MPAs, it is hard to envision regulations and laws passed to support strong Ocean Rights. MPAs are a measure used to ensure the protection of an area for anthropocentric or ecocentric objectives. Regardless of the purposes for MPA implementation, it must conserve the marine environment. Although Ocean Rights provides a new lens through which regulations could be adopted, this approach will likely be contested.³⁸⁰ In comparison to identified, designated, and managed MPAs, Ocean Rights would potentially clash with preexisting norms established in UNCLOS on the rights of nation-states.

The BBNJ Treaty has not completely changed key perspectives of UNCLOS. The amount of time spent negotiating the sharing of benefits for marine genetic resources demonstrates that there remains an underlying understanding that the ocean is a resource to be exploited by humankind. As such, there are difficulties in balancing this sentiment with the objectives of a UDOR.

Only Parties to the treaty and select organizations are accredited to negotiate at United Nations conferences. In this context, States usually have the sole right to regulate the waters within their national jurisdiction and their exclusive economic zone stemming from Article 194 of UNCLOS, leaving IPLC and coastal community rights to utilize and manage these resources as permitted by their governing State.³⁸¹ Even where States allow for IPLCs to utilize and manage coastal space, liability still falls on the State Party of UNCLOS.³⁸² There are few occasions in the marine shipping regime where Indigenous groups are granted full access rights to ocean spaces that are considered particu-

larly sensitive sea areas, another type of designated area under the International Maritime Organization.³⁸³

Considering the limitations of UNCLOS, international human rights laws are utilized to establish precedents expecting States to maintain their human rights obligations while implementing measures within UNCLOS. For example, Article 3 of UNDRIP provides that Indigenous peoples have the right to self-determination, which the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social, and Cultural Rights also establish.³⁸⁴ In the latter two, “all peoples may, for their ends, freely dispose of their natural wealth and resources [and] . . . in no case may a people be deprived of its own means of subsistence,” and “[t]he state parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”³⁸⁵ As these rights relate to marine resources, these provisions can be understood to confer to Indigenous peoples a right to participate in marine governance by allowing them to be in control of the development of their land, resources, and territory.³⁸⁶

There is skepticism regarding meaningful MPA implementation to achieve 30x30. Unsurprisingly, a similar sentiment exists with Ocean Rights. Strong guidance is necessary to support its jurisdictional implementation. Conflicts may occur due to the negotiation challenges with preexisting text and regulations from UNCLOS. The text of UNCLOS establishes specific State rights to manage ocean resources within national territories. Beyond this, the State decides to determine who, within its borders, is granted private rights to that territory or if these areas are governed by standards, like the U.S. public trust doctrine. Given that UNCLOS and nations globally vary in how they govern ocean resources within their jurisdictions, it would seem inevitable that applying Ocean Rights around the world would be challenging.

Though few organizations explicitly wrote about UDOR, many organizations expressed interest in the equitable application of measures enforcing the 30x30 international goal.³⁸⁷ MPAs can and should be managed by and with input from IPLCs and coastal communities because gaps would remain without the benefit of traditional knowledge.³⁸⁸ Several organizations have voiced their concerns regarding lack of public participation due to the

376. “Paper parks” refer to MPA designations of areas that have not been managed properly and fail to protect the area from degradation. They amount to nothing more than protections on paper.

377. See ALLISON L. PERRY ET AL., OCEANA, UNMANAGED = UNPROTECTED: EUROPE’S MARINE PAPER PARKS (2020), https://europe.oceana.org/wp-content/uploads/sites/26/oceana_2020_unmanaged_equals_unprotected_marine_paper_parks.pdf.

378. *See id.*

379. *See id.*

380. Wesley J. Smith, *Science Journal Claim: “Ocean” Is a “Living Entity” With Inherent Rights*, NAT’L REV. (Oct. 19, 2022), <https://www.nationalreview.com/corner/science-journal-claim-ocean-is-a-living-entity-with-inherent-rights/>.

381. *See* UNCLOS, *supra* note 227, art. 194.

382. Endalev Lijalen Enyew & Nigel Bankes, *Interaction Between the Law of the Sea and the Rights of Indigenous Peoples*, in THE LAW OF THE SEA: NORMATIVE CONTEXT AND INTERACTIONS WITH OTHER LEGAL REGIMES 151, 155-63 (Nele Matz-Lück et al. eds., Routledge 2023).

383. International Maritime Organization, *Particularly Sensitive Sea Areas*, <https://www.imo.org/en/ourwork/environment/pages/pssas.aspx> (last visited Sept. 16, 2023).

384. Amiel Ian Valdez, *Balancing the Indigenous Peoples’ Ancestral Sea Rights, and the State’s Obligation to Protect and Preserve the Marine Environment: A Comparative Study of the Philippine and Australian Approaches*, 23 ASIA PAC. J. HUM. RTS. & L. 47, 58-62 (2021).

385. *See id.*

386. *See id.*

387. Gov.UK, *Global Ocean Alliance: 30by30 Initiative*, <https://www.gov.uk/government/topical-events/global-ocean-alliance-30by30-initiative/about> (last visit Sept. 16, 2023).

388. *Reaction: COP15 Outcome Recognises the Importance of Blue Nature*, HIGH SEAS ALL. (Dec. 19, 2022), <https://www.highseasalliance.org/2022/12/19/reaction-cop15-outcome-recognises-the-importance-of-blue-nature/>.

challenge of COVID-19. Several other organizations wrote and submitted papers on the BBNJ process and its success in providing meaningful opportunities for public participation.³⁸⁹ Not only do organizations voice opinions on the general lack of participation allowed during the process, but many also explicitly speak of the need for coastal and fishing communities to be further involved in these discussions due to impacts to their livelihood.

2. Lack of International Regime Interaction

Climate change, biodiversity, and ocean regimes need to work together in law and policy creation and implementation to mitigate the harsh impacts incurred by IPLCs and coastal communities. Political will is growing to ensure that governance of climate change, biodiversity, and sustainability objectives no longer operate in silos as in the past. International regimes such as the UNFCCC, CBD, UNCLOS, and others have made strides in respective areas to regulate different aspects of the environment. Those strides must continue to ensure that a holistic approach is applied to the governance of coastal and marine environments, and to have these regimes work collaboratively instead of in conflict.

The climate change regime under the UNFCCC framework should work with UNCLOS to promote a healthy environment. Unfortunately, the text of the convention and the implementing Paris Agreement only reference the ocean in the preamble.³⁹⁰ Many scholars have criticized this shortcoming, as there remains a need to take a holistic approach to tackling climate change challenges because it has significant impacts on marine environments.³⁹¹

The CBD sustains more interaction with UNCLOS than the UNFCCC, and both conventions promote and establish goals about the conservation of the marine environment. As of March 2023, there are three potential and existing implementing agreements with UNCLOS. There is an open-ended working group that is in the process of ensuring uniformity between the text in the six official United Nations languages. The fifth session of the conference resumed on June 19, 2023. The agreement was adopted by consensus.³⁹² Other existing implementing agreements

include the sustainable utilization of fish stocks (known as the Fish Stocks Agreement) and an agreement relating to the implementation of Part XI of UNCLOS on provisions for international guidelines for deep seabed mining.³⁹³

Provisions within these three agreements are aligned with the objectives of the CBD, and thus should continue to work together to protect biodiversity. While it is necessary to ensure regimes work together to support the Rights of Nature movements, there could be ramifications to IPLCs and coastal communities regarding the implementation of conservation measures. Such ramifications stem from these coordinated regime actions if measures are not in place to ensure these groups are provided with sufficient FPIC.

3. UDOR

Although there are currently laws and policies across the world working to protect and respect marine ecosystems, there is a lack of recognition of the urgent actions needed against critical life threats of cumulative impacts from pollution and habitat destruction to overfishing and climate change.³⁹⁴ The UDOR's mission, outlined by the fundamental issues of the Universal Declaration of Human Rights, works to provide values and principles to develop stronger ecocentric ethics and regulation applications.³⁹⁵

For several years, the Government of Cabo Verde and other partners, including global law and policy experts, Indigenous peoples, NGOs, local communities, scientists, business leaders, stakeholders, developers, and others had the aim to grow support to implement Ocean Rights.³⁹⁶ On September 18, 2023, The Ocean Summit—Presenting Ocean Rights event, held during the 78th session of the United Nations General Assembly (UNGA 78), the UDOR was introduced.³⁹⁷ The goal is to identify the oceanic living ecosystems as integral parts of the environment and to coordinate with humans equally, rather than regulate with human hierarchy.³⁹⁸ It serves as a powerful tool for protecting the ocean and embedding human rights principles—international law and policy and treaties, national

389. Elisa Morgera et al., *Participation at BBNJ Negotiations Matters*, ONE OCEAN HUB (Apr. 11, 2022), <https://oneoceanhub.org/participation-at-bbnj-negotiations-matters/>.

390. See Bender et al., *supra* note 2; Tanya Brodie Rudolph et al., *A Transition to Sustainable Ocean Governance*, 11 NATURE COMM'NS 3600 (2020), available at <https://www.nature.com/articles/s41467-020-17410-2>.

391. Paris Agreement to the UNFCCC, Dec. 12, 2015, T.I.A.S. No. 16-1104; see UNCLOS, *supra* note 227.

392. U.N. General Assembly, *Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, U.N. Doc. A/CONF.232/2023/4 (June 19, 2023), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/177/28/PDF/N2317728.pdf?OpenElement>; U.N. General Assembly, *Singapore: Draft Resolution—Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, U.N. Doc. No. A/77/L.82 (July 10, 2023), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/201/67/PDF/N2320167.pdf?OpenElement>.

393. U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, U.N. Doc. A/CONF.164/37 (Sept. 8, 1995), https://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm; see UNCLOS, *supra* note 227.

394. Michelle Bender et al., *Universal Declaration for Ocean Rights and Ocean for Ecocide Law: The Paradigm Shift for a Healthy Connection of People With the Ocean in This UN Ocean Decade*, OCEAN VISION LEGAL (Sept. 15, 2023), <https://www.oceanvisionlegal.com/post/ocean-rights-and-ecocide>; UN General Assembly, *The Ocean Race and Global Partners' Call for the Recognition of the Inherent Rights of the Ocean*, OCEAN RACE (Sept. 19, 2023), https://www.theoceanrace.com/en/rwp/news/14637_UN-General-Assembly-The-Ocean-Race-and-global-partners-call-for-the-recognition-of-the-inherent-rights-of-the-ocean. A petition for UDOR was signed by over 32,000 people from 178 countries. One Blue Voice, *Home Page*, <https://www.onebluevoice.net/> (last visited Oct. 5, 2023).

395. Bender et al., *supra* note 394.

396. See *Towards a Universal Declaration of Ocean Rights*, *supra* note 309.

397. UN General Assembly, *supra* note 394; One Blue Voice, *supra* note 394.

398. See Wilson & Lee, *supra* note 22.

constitutions, and legal codes around the world. To accomplish this, the short-term goal is set to serve as a foundation in supporting the inclusion of Ocean Rights in the 2023 United Nations Omnibus Resolution on “Oceans and Law of the Seas.”³⁹⁹

Over the past several years, leaders developed principles for the long-term UDOR proposal, and are advocating for United Nations Member States to secure the UDOR by 2023.⁴⁰⁰ These principles, titled “We are the Ocean and the Ocean is us—Establishing a new relationship between humankind and the Ocean: Principles underpinning Ocean Rights” propose:

- i. **Inter- and intragenerational stewardship** (care for and ensure responsible use of the ocean, and strengthen and enforce the obligations set out in the United Nations Convention of the Law of the Sea, United Nations Framework Convention on Climate Change, Convention on Biological Diversity, and other instruments, frameworks, and bodies);
- ii. **Respect for diverse value systems, including the intrinsic value of the ocean** (inclusion of and respect for diverse values, knowledge, and practices to advance equity, justice, and sustainability in the blue and green economy, preserving the health of the ocean and human health, and ensuring full protection and respect for the rights and cultures of Indigenous, coastal, and marginalized communities);
- iii. **Representation of all stakeholder interests, including the ocean** (the right and responsibility to ensure the ocean’s interests and needs, representation in decisions and disputes affecting the ocean’s health, honoring the creation and enforcement of a network of marine protected areas and where human activity is effectively managed, within sustainable management of the ocean ecosystem);
- iv. **Adhering to and promoting best available science and ecologically based criteria, including Traditional knowledge** (informed by the best available data, information, knowledge, and science, including the worldviews, values, knowledge and practices of Indigenous peoples, and holistic approaches, including planetary boundaries, whole-of-government (and-society), and an integrated ecosystem approach);
- v. **Full and effective participation** (mechanisms that ensure equitable and inclusive representation and participation in multinational decisionmaking);
- vi. **Transparency and knowledge sharing** (equitable and fair sharing of information, Traditional knowledge, innovations, practices, and technologies of Indigenous peoples and local communities should

only be accessed with their free, prior, and informed consent, in accordance with national legislation);

- vii. **Precaution and prevention** (restrict elements that may cause serious and irreversible damage (i.e., extinction of species, destruction of ecosystems, or permanent alteration of natural cycles);
- viii. **In dubio, in favorem Oceani** (“in dubio, in favorem Oceani” or “when in doubt err on the side of the Ocean,” to be used in cases of uncertain or contrasting impact assessment for any anthropogenic activities).⁴⁰¹

These UDOR principles are set as a governing mechanism to best ensure that the ocean ecosystem is properly protected, restored, and respected for the health and well-being of current and future generations. The goal of UDOR by 2023 is to ensure the ocean’s rights, interests, and needs are implemented effectively on all international and local governance levels.⁴⁰²

V. Recommendations to Leverage Rights of Nature to Protect Ocean Rights

There are many paths that the Rights of Nature, Rights of Rivers, and Ocean Rights movements may follow. There are also uncertainties regarding which path will best promote the movements without undercutting IPLCs’ and coastal communities’ access to resources. Specifically, there is uncertainty surrounding how small-scale fishing communities may continue to survive and flourish in the context of an Ocean Rights-centered regime. To best understand where the future of the movements lies, existing models and infrastructure that protect both natural resources and the surrounding communities who depend on them must be examined.

The first, and potentially most effective, approach is through legislation on the federal, state, and local levels. We may also rely upon domestic and international court decisions as another instrument for the Rights of Nature, Rights of Rivers, and Ocean Rights movements. Finally, movements on the private and grassroots levels may have smaller results-based impacts, but are likely to promote the movements in ways that are accessible to all relevant communities. There is not a “one-size-fits-all” solution that nation-states, local communities, and organizations should follow, but rather strengths and weaknesses in the analysis of the various paths that the Rights of Nature, Rights of Rivers, and Ocean Rights movements may take.

A. Governance Implementation

Promoting Rights of Nature, Rights of Rivers, and Ocean Rights through legislative means is likely the most expedient method. On a federal level, however, law making is

399. *UN General Assembly*, *supra* note 394.

400. *Id.*

401. *Id.*

402. Bender et al., *supra* note 394.

often too broad-based to effectuate sustainable change. As this study has illustrated, federal statutes, such as the MMPA, create roadblocks for the IPLCs and coastal communities, which rely on the natural resources that the statutes protect.⁴⁰³ Similarly, MPAs, such as the Taza MPA in Algeria, aim to protect the local ecology, but have potential to strip the small fishing community surrounding the area of its rights to seek livelihood.⁴⁰⁴ Blanket protections are important stepping stones in promoting earth law movements, but they are enacted with the caveat that they often extend too far and result in gatekeeping important resources from communities who are not at the forefront of federal legislation.

State-level legislation may be implemented to protect communities while continuing to protect Rights of Nature, Rights of Rivers, and Ocean Rights themselves. One example of this is located in Mexico, where multiple state governments have recognized Rights of Nature and have drafted a form of these rights in their state constitutions.⁴⁰⁵ However, while this serves as progress in the movement, these provisions often fail to create strict change due to the broad nature of their terms and the lack of community input in drafting the laws, creating greater mistrust in the entities ultimately enacting the legislation.⁴⁰⁶ Much like the legislation enacted on the federal level, states that span broadly on a geographic and demographic level are unlikely to be successful in supporting small-scale sustainable fishing or hunting communities without consulting those communities while drafting this legislation.

Finally, legislation is well-suited in the hands of the communities with the best understanding of how to utilize and protect nature long before national governments considered these issues. Rights of Nature began with the relationship between nature and the Indigenous communities who lived in harmony with nature and were able to make decisions on the local level. This model places the ability to protect natural resources back into the hands of small-scale communities. In looking at the Yurok Tribe's 2019 resolution to protect the Klamath River by granting it standing to protect the river from serious environmental harms in tribal court, we may note that progress at this level is limited but placed in the hands of those in the best

position to handle these issues.⁴⁰⁷ This level of structured local governance is a recent development in the greater Rights of Nature movement, and will be an important one to follow as more guardianship responsibility is placed in the hands of local communities via local ordinances, or tribal codes.

B. Recognition of the Court System

The progress of the Rights of Nature and Rights of Rivers movements in the court systems is incredibly like the progress made in legislative governance. Looking back to examples such as *Sierra Club v. Morton*, outside of scholarship, the courts were some of the first to recognize the importance of acknowledging nature as a legal entity. However, this is an uphill fight, as court decisions are not always implemented and enforced as they are meant to be. Some scholars have criticized Ecuador's court decisions as being "arbitrary" for the lack of enforcement in protecting natural resources in the court system.⁴⁰⁸

While there are some notable successes, such as the recognition of the protections over the Whanganui River in New Zealand,⁴⁰⁹ and the Colorado River in the southwestern United States,⁴¹⁰ there is still potential for the exploitation of resources and local communities in the lack of enforcement of these court mandates. For example, in the Colorado River Basin, there are options for some tribes to sell their own water rights to support modern infrastructure that would support their communities in other ways.⁴¹¹ Here, the lack of solid infrastructure for certain communities has rendered treaty-granted and court-acknowledged water rights moot in the face of necessity. While reliance on the court system for change in the perception of the Rights of Nature and Rights of Rivers arguments may be a more accessible approach for some communities, this approach often lacks "teeth," and therefore allows only for small-scale and potentially short-lived momentum.

C. Grassroots Movements

Grassroots movements are less likely to have direct results in protecting Rights of Nature, but they do have the advantage of being a more accessible form of taking part in and educating the public about Rights of Nature and the subsequent movements, such as the Water Rights-based movements discussed herein. This may be seen in the Universal Declaration of the Rights of Rivers, which is currently endorsed by 100 organizations across 20 countries,⁴¹² or UDOR, encouraging a rights-based management system

403. See *supra* Section II.C.2 (discussion of Makah Tribe).

404. See Boubekri et al., *supra* note 216.

405. See Earth Law Center, *supra* note 115; Elizabeth MacPherson, *The (Human) Rights of Nature: A Comparative Study of Emerging Legal Rights for Rivers and Lakes in the United States of America and Mexico*, 31 DUKE ENV'T L. & POL'Y F. 327, 365-72 (2021).

406. As stated by Community Rights US Board Secretary Forest Jahnke:

Many of these communities and organizations have felt like their inclusion in this process has been nominal, at best, and that there has not been real participation. There is a gap of trust that must be overcome, as people are tired of seeing one well-intentioned program after another half-implemented, used for publicity, and left to rot in their communities. Meanwhile, well-intentioned government officials and larger organizations spearheading this effort suspect corruption on the ground. In both cases, these suspicions are understandable and often well-founded, but *must* be overcome if we really want to protect the rights of nature.

Victory: Rights of Nature in the State of Oaxaca, CMTY. RIGHTS US (Apr. 20, 2021), <https://communityrights.us/2021/04/20/rights-of-nature-victory-in-mexico/>.

407. See *supra* Section II.C.2 (discussion of Yurok Tribe).

408. Mauricio Guim & Michael A. Livermore, *Where Nature's Rights Go Wrong*, 107 VA. L. REV. 1347 (2021).

409. See Te Awa Tupua Act 2017, No. 7 (N.Z.).

410. See Vanderpool, *supra* note 151.

411. Hannah White, *Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States*, 43 AM. INDIAN L. REV. 129 (2018).

412. See Universal Declaration of the Rights of Rivers, *supra* note 16.

for ocean resources.⁴¹³ The work from advocating organizations encourage the United Nation's BBNJ Treaty impacts, which may someday serve as the foundation for more effective regulations than those currently in place under UNCLOS.⁴¹⁴ This is especially important in the context of the small-scale fishing communities that may be among the most affected by Ocean Rights-focused governance.

Organizational movements are also often inspired and led by the small subsistence-based groups that are best-suited to secure and protect Rights of Nature, whether that be in an advocacy role, like the Sierra Club in the United States,⁴¹⁵ or in a guardianship role, like the New Zealand Whanganui Tribe for the Whanganui River.⁴¹⁶ These organizations effectuate change through the inspired movements, and place an emphasis on living in harmony with nature's rhythm. As applied to small fishing communities, such groups may both benefit from and protect ocean resources. In looking at these patterns of changemaking, while organizational movements may not have the direct impact of legislation or judicial rulings, they are indicative of where the greater Rights of Nature movement may lead in the future, and how the effects of this movement may be balanced with the needs of local communities.

VI. Conclusion

This Article provides an overview of the implementation of earth law's Rights of Nature, Ocean Rights, and Rights of Rivers movements around the globe. While doing so, this research highlights the developments on the horizon for these respective movements and what the potential is to impact IPLCs, SIDS, and coastal and marginalized communities. Experiences from around the world demonstrate that there are increases in the attention to and establishment of these movement practices.

The recent developments of establishing rights are of increasing importance due to the significance of nature, ocean, rivers, and estuaries for the ecosystem services provided for IPLCs and coastal and marginalized communi-

ties. There are cases in national courts in the United States, New Zealand, Australia, Mexico, India, and Ecuador with varying levels of success.⁴¹⁷ Within the United States, there were several cases to establish Rights of Nature and Rights of Rivers. This Article highlights the actions taken recently to promote Ocean Rights, with a resolution to be presented at the United Nations General Assembly of 2023.

While identifying recent developments establishing these rights, governance measures are examined and utilized to conserve nature aligning with the ideals of these rights. This includes the identification and implementation of the High Seas Treaty, MPAs, and BBNJ negotiations. Experiences implementing MPAs, like in Vietnam and Malta, illustrate repercussions communities face when MPAs are implemented due to the restrictions sustained pertaining to fishing and maximum catch. Also addressed are the potential solutions to balance the needs of IPLCs, coastal and marginalized communities, and nature conservation through increasing economic opportunities in areas such as fishing and tourism.

The BBNJ negotiations influence regulations and conservation within many jurisdictions and have impacts on Ocean Rights. In comparison to many conservation measures for rivers and nature within national jurisdictions, the BBNJ Treaty works to provide better frameworks and guidance for resource conservation that fall under the common human heritage. Discussions have focused on governance about the conservation and development of natural resources while considering intergenerational equity and the sharing of benefits that arise from these resources.

This review suggests that there continues to be an increase in the Rights of Nature, Ocean Rights, and Rights of Rivers movements due to the ever-growing support of grassroots and larger organizations supporting developments taken to courts in jurisdictions around the world. The experiences in several jurisdictions were reviewed demonstrating the challenges SIDS, IPLCs, and coastal communities face when conservation measures are implemented without substantive FPIC or public participation.

413. ELC, *supra* note 339.

414. See *Intergovernmental Conference*, *supra* note 346.

415. See *Sierra Club v. Morton*, 405 U.S. 727, 2 ELR 20192 (1972).

416. See also *Te Awa Tupua Act 2017*, No. 7 (N.Z.).

417. Randall S. Abate et al., *Litigation to Protect the Marine Environment: Parallels and Synergies With Climate Litigation*, 47 WM. & MARY ENV'T L. & POL'Y REV. 595 (2023).