Golden Gate University Environmental Law Journal

Volume 10 | Issue 1 Article 6

May 2018

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THE RIGHT TO FLOURISH, REGENERATE, AND EVOLVE: TOWARDS JURIDICAL PERSONHOOD FOR AN ECOSYSTEM

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I. INTRODUCTION: THE RIVER THAT OOZED RATHER THAN FLOWED

On June 22, 1969, the Cuyahoga River in Cleveland ignited into flames as a passing train spattered sparks into its water. When TIME magazine published photos of the Cuyahoga burning alongside a story that described the river as "so saturated with sewage and industrial waste that it 'oozes rather than flows,'" concern erupted across the country.[2] In retrospect a half-century later, TIME noted that "the flaming Cuyahoga became a figurehead for America's mounting environmental issues and sparked wide-ranging reforms, including the passage of the Clean Water Act and the creation of federal and state environmental protection agencies."[3]

Because of its public role as the symbol of a movement of environmental reform, the Cuyahoga received rehabilitating treatment and resources, and was ultimately declared "fireproof" on the twentieth anniversary of the blaze.[4] Once no longer flammable, even if it still was not sparkling clean, biologists found several species of insects, fish, and other organisms that had disappeared from the Cuyahoga had now returned and were "flourishing."[5]

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[2] Jennifer Latson, *The Burning River that Sparked a Revolution,* TIME MAG. (June 22, 2015) http://time.com/3921976/cuyahoga-fire/.

[3] *Id.*

[4] Doron P. Levin, *River Not Yet Clean, but It's Fireproof,* N.Y. TIMES (June 25, 1989) http://www.nytimes.com/1989/06/25/us/river-not-yet-clean-but-it-s-fireproof.html.

[5] *Id.*

But the Cuyahoga is exceptional: approximately forty percent of the rivers and lakes in the United States, as surveyed by the U.S. Environmental Protection Agency (EPA), are too polluted for swimming and fishing.[6] Water pollution has many causes, but most often results from fertilizer run-off and industrial wastewater discharges.[7] Meanwhile, in many places across America water supplies are straining to meet ever-increasing demands; diversions of water to support cities, agriculture, and industrial uses have significantly altered the natural character of many waterways and their surrounding habitats, jeopardizing the sustainability of rivers, lakes, and other crucial, interconnected ecosystems.[8]

Inevitably, the use of water for almost all human activities results in the deterioration of its quality and generally limits its further potential use.[9] For that reason, it is necessary to protect the nation's waterways from exploitative and destructive human practices. But half a century after the river that oozed and burned sparked a national movement giving rise to a host of environmental protection agencies and regulations, most rivers and lakes in the U.S. are still more polluted and over-tapped than ever. Because governments and the legal system have failed to safeguard America's waterways, a crucial evolution in legal consciousness is needed.

With that end in mind, this article will examine two at-risk American rivers through a comparison of the different legal approaches brought by the citizens and conservation groups fighting to protect them. Through analysis of the two lawsuits, this article will highlight the flaws of the traditional approach, and introduce a novel proposal for a shift in the lens under which nature is considered in American jurisprudence.

Part I will survey the Suwannee River and a citizen suit against a poultry-packing plant accused of illegally fouling its waters through repeated violations of an EPA-issued permit governing wastewater discharges. This suit represents the congressionally-created traditional avenue to protecting a natural object when government agencies are unable or unwilling to enforce environmental regulations.

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[6] *Why is Our Water in Trouble?*, THE NATURE CONSERVANCY, https://www.nature.org/ourinitiatives/habitats/riverslakes/threatsimpacts/ (last visited Jan. 14, 2018).

[7] *Id*; *see also* Environment America Research & Policy Center, *Corporate Agribusiness and the Fouling of America's Waterways,* ENV'T AMERICA, http://www.environmentamerica.org/reports/ame/corporate-agribusiness-and-fouling-americas-waterways?_ga=2.70661520.1050170889.1506310806-342562671.1506310806 (last visited Jan. 14, 2018).

[8] *Protect Ecosystems and Fisheries,* NAT. RESOURCES DEF. COUNS., https://www.nrdc.org/issues/protect-ecosystems-and-fisheries (last visited Jan. 14, 2018).

[9] *Water Quality Monitoring: Chapter 2 - Water Quality*, WORLD HEALTH ORG. 18 (Jamie Bartram and Richard Balance, eds.) http://www.who.int/water_sanitation_health/resourcesquality/wqmchap2.pdf.

Part II will present the Colorado River and a unique suit, which builds upon dusty law review pages and an old Supreme Court Justice's dissent in an attempt to establish juridical personhood for a river ecosystem. This case of first impression aims to establish a new legal doctrine that would significantly loosen the standing requirements for citizens seeking to sue for the protection of inanimate, natural objects—by allowing the suit to be brought in the name of the aggrieved ecosystem itself. The court's declaration of the ecosystem as a legal person is the necessary first step towards the recognition of the ecosystem's fundamental rights, and an ultimate remedy against the state and governor for the violation of those rights.

Part III will consummate the comparison of approaches brought by the two suits through argument positing why an evolution in the consciousness of American jurisprudence is necessary and desirable. Because the governments and laws of the United States have failed to protect the ecosystems within its jurisdiction, Nature needs a voice to litigate for its own preservation.

II. THE SUWANNEE

The headwaters of the Suwannee River descend from an elevation of approximately 120 feet above sea level.[10] In total, the Suwannee's course runs about 250 miles, all but thirty-five of which are within the State of Florida.[11] Although its flow churns at an average speed of four miles per hour, transitions in geography create noticeable differences, dividing the Suwannee into its Upper, Middle, and Lower sections.[12] The Upper Suwannee is lined with steep limestone banks that hasten its flow and create rare Florida "whitewater."[13] The Middle section's "sloping sand banks retain the footprints of turkey, deer and other animals that drink from the river."[14] About fifty miles downstream, near the city of Fanning Springs, the Lower Suwannee serves as a fish habitat and a home to other species, like bluegill, redear sunfish, channel catfish, and

[10] *The Suwannee River*, SAVE OUR SUWANNEE, http://www.saveoursuwannee.org/suwannee-region/ (last visited Jan. 14, 2018).

[11] *Suwannee River*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Suwannee-River (last visited Jan. 14, 2018).

[12] SAVE OUR SUWANNEE, *supra* note 10.

[13] *Id*.

[14] *Suwannee River*, GEORGIA RIVER NETWORK, https://garivers.org/other-georgia-rivers/suwannee-river.html (last visited Jan. 14, 2018).

both redbreast and spotted sunfish.[15] Many consider the Suwannee River to be one of Florida's most important waterways.[16]

Beyond the Suwannee River itself is its watershed, or basin, which covers almost ten thousand square miles.[17] The Suwannee Basin is a diverse ecosystem, and this diversity contributes to the importance of its ecology: the watershed is made up of three separate but interconnected hydrologic landscape units, each supporting an abundance of animal, plant, and human life.[18] The Suwannee River Basin is the largest free-flowing source of freshwater to the Gulf of Mexico.[19]

But the Basin faces supply-anxieties as more people, more wells, larger wells, and increasingly-intensive agriculture practices have resulted in persistently increasing withdrawals.[20] Additionally, the relative abundance of water resources in the Suwannee Basin makes it a target for nearby localities; particularly of concern is "the envious look northward from the water-exhausted Tampa Bay area."[21]

A. The Waters' Quality

Compared to most of the major rivers in the United States, the Suwannee's flow is "relatively unimpaired [in terms of] water quality."[22] It has been called "the only major waterway in the southeastern United States that is still unspoiled."[23] It is designated as one of twelve National Showcase Watersheds.[24] Significant portions of its basin are permanently protected under the ownership of federal and state governments.[25] In the

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[15] Save Our Suwannee, *supra* note 10.

[16] Plaintiff's Complaint at 3, Env't Am. v. Pilgrim's Pride Corp., (2017) (No. 3:17-cv-00272-TJC-JRK).

[17] *Suwannee River Watershed: Preserving the Georgia/Florida Connection*, U.S. Fish and Wildlife Service https://www.fws.gov/northflorida/Documents/NFL_Suwanee_factsheet.pdf (last visited Jan. 14, 2018).

[18] *The Suwannee River: A Coastal Plain Watershed in Transition* 3 (last visited Jan. 14, 2018), http://users.clas.ufl.edu/jbmartin/Prospectus.pdf; *see also The Suwannee River Basin Pilot Study: Issues for Watershed Management in Florida* https://pubs.usgs.gov/fs/FS-080-96/ (last visited Jan. 14, 2018).

[19] *Mary M. Davis and David W. Hicks* Water Resources of the Upper Suwannee River Watershed *70,* http://gwri.gatech.edu/sites/default/files/files/docs/2001/DavisM-01.pdf *(last visited Jan. 14, 2018).*

[20] Save Our Suwannee, *supra* note 10.

[21] Save Our Suwannee, *supra* note 10.

[22] *The Suwannee River: A Coastal Plain Watershed in Transition, supra* note 18, at 1.

[23] *The Suwannee River*, Exploring Florida, https://fcit.usf.edu/florida/lessons/suwannee/suwannee.htm (last visited Jan. 14, 2018).

[24] *The Suwannee River: A Coastal Plain Watershed in Transition, supra* note 18, at 1.

[25] *Suwannee River Watershed: Preserving the Georgia/Florida Connection* U.S. Fish and Wildlife Serv., https://www.fws.gov/northflorida/Documents/NFL_Suwanee_factsheet.pdf (last visited Jan. 14, 2018).

mid-1970's, the U.S. Department of the Interior recommended that the Suwannee be added to the National Wild and Scenic River System to protect the river from depletion and contamination.[26] Although there are several industrial plants that release effluent into the Suwannee's watershed, the United States Environmental Protection Agency (EPA) regulates industrial discharges by issuing permits through the National Pollutant Discharge Elimination System (NPDES).[27]

B. NPDES Protection

The Clean Water Act (CWA) prohibits the discharge of any pollutant by any person—except those discharges "in compliance with law."[28] To discharge a pollutant, or any combination of pollutants "lawfully," the EPA Administrator must issue an NPDES permit.[29] The Administrator may issue a permit "after opportunity" for public hearing,[30] and therein prescribe conditions on what can be discharged, as well as monitoring and reporting requirements, and other provisions "to ensure that the discharge does not hurt water quality or people's health."[31] According to the EPA, "[a]s long as the wastewater being discharged is covered by and in compliance with an NPDES permit, there are enough controls in place to make sure the discharge is safe and that humans and aquatic life are being protected."[32] There are several NPDES permit-holders along the Suwannee's route; one of which is a plant owned by a large corporation called Pilgrim's Pride.

C. Pilgrim's Pride

As part of JBS USA Holdings, Inc.,[33] Pilgrim's Pride Corporation is the second-largest chicken producer in the world.[34] Pilgrim's operates a processing plant in Live Oak, Florida, where chickens are born, raised,

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[26] Georgia River Network, *supra* note 14.

[27] NPDES Permit Basics, *National Pollutant Discharge Elimination System (NPDES)* United States Envtl. Protection Agency, https://www.epa.gov/npdes/npdes-permit-basics (last visited Jan. 14, 2018).

[28] 33 U.S.C. § 1311.

[29] *See generally* 33 U.S.C § 1342.

[30] 33 U.S.C § 1342(1).

[31] What is an NPDES permit?, U. S. Envtl. Protection Agency *supra* note 27; *see* 33 U.S.C. § 1342(2).

[32] *Is it legal to have. . .*, U.S. Envtl. Protection Agency, *supra* note 27.

[33] JBS USA is a wholly owned subsidiary of JBS S.A., a Brazilian company that is the world's largest processor of fresh beef and pork, with more than US $40 billion in annual sales as of 2012. *About JBS* JBS SA, https://jbssa.com/about/ (last visited Feb. 18, 2018).

[34] *About Us* Pilgrim's Pride, http://www.pilgrims.com/our-company/about-us.aspx (last visited Jan. 14, 2018).

"slaughtered, bled, scalded, de-feathered, eviscerated, cut up, deboned, and packed at the plant."[35] The Live Oak plant is less than one mile from Suwannee River State Park.[36] For more than five years, Pilgrim's has held an NPDES permit allowing it to discharge a limited amount of wastewater into the Suwannee.[37] That permit was issued by the Florida Department of Environmental Protection (FDEP), which was delegated authority to issue NPDES permits by the EPA.[38]

The FDEP has also designated the Suwannee River as "Special Waters" of the Outstanding Florida Waters.[39] Under Rule 62-302.700(1) of the Florida Administrative Code, the department's policy is "to afford the highest protection to Outstanding Florida Waters."[40] A state water will be given this designation after a finding that "the waters are of exceptional recreational or ecological significance and a finding that the environmental, social, and economic benefits of the designation outweigh the environmental, social, and economic costs."[41]

In April 2015, the FDEP found that the Pilgrim's plant in Live Oak had been violating the limits for toxicity set out in its NPDES permit from February 2013 to December 2014.[42] The FDEP released an order requiring Pilgrim's to take "corrective actions" in response to its "chronic toxicity violations."[43] Yet, in a memo dated February 3, 2017, an FDEP Wastewater Inspector wrote that there were "significant noncompliance issues" at the plant, and that Pilgrim's "is still having issues with meeting the permit limits."[44] Since its NPDES permit was issued, the Pilgrim's plant at Live Oak has discharged millions of gallons of wastewater into the Suwannee river.[45] Neither the federal government nor the State of Florida have effectively prevented Pilgrim's from violating the Clean Water Act (CWA or the Act).[46]

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[35] Andrew Caplan, *Pilgrim's Pride sued over wastewater in river*, GAINESVILLE SUN (Mar 9, 2017 6:42 PM) http://www.gainesville.com/news/20170309/pilgrims-pride-sued-over-waste-water-in-river; Pilgrim's Complaint, *supra* note 16, at 1.

[36] Caplan, *supra* note 35.

[37] Pilgrim's Complaint, *supra* note 16, at 2.

[38] *Id.*

[39] *Id.* at 40.

[40] Special Protection, Outstanding Florida Waters, Outstanding National Resource Waters, Fla. Admin. Code Ann. r. 62-302.700.

[41] FLA. ADMIN. CODE ANN. R. 62-302.700(5).

[42] Pilgrim's Complaint, *supra* note 16, at 20.

[43] *Id.* (quoting FDEP *2015 Consent Order* w/ Pilgrims, April 2015*)*

[44] *Id.* at 3.

[45] Caplan, *supra* note 35.

[46] Pilgrim's Complaint, *supra* note 16, at 3; 33 U.S.C. §1251 et seq. (1972).

D. Who Will Protect the River When the Government Has Failed To?

A citizen suit provision in the CWA allows citizens to sue any person who is alleged to have violated (a) an effluent standard or limitation, like those of an NPDES permit; or (b) an order issued by the Administrator or a state relating to such a standard or limitation.[47] This provision is designed to include citizens in the enforcement of environmental protection and to serve as a check on the government. The provision also permits any citizen to sue the agency alleging that the Administrator has failed to fulfill any duty under the Act "which is not discretionary."[48]

Consequently, a group of citizens and environmental groups filed suit against Pilgrim's in U.S. District Court for the Middle District of Florida.[49] The suit alleges that Pilgrim's has violated the CWA for 1,377 consecutive days (almost four years).[50] The plaintiffs claim to have noticed algal blooms—toxic to humans, animals and plant life—in the Suwannee downstream from the Pilgrim's plant.[51]

Algal blooms occur when nitrogen and phosphorous, most often coming from agricultural fertilizer runoff and wastewater, enter an aquatic environment.[52] Such deleterious effects are not unknown to the EPA: by its own report, "agriculture is the leading cause of pollution in more than 145,000 miles of rivers and streams; one million acres of lakes, reservoirs and ponds; and 3,000 square miles of bays and estuaries in the United States."[53] According to the EPA's Toxic Release Inventory, which tracks the management of certain toxic chemicals through industry self-reporting, "JBS facilities (including Pilgrim's) dumped more than 37.6 million pounds of toxic pollutants into American waterways from 2010 to 2014."[54] Although some of these reported discharges may have been self-reported "exceedances" of NPDES permit limits, most of these

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[47] 33 U.S.C. §§ 1365(a)(1), (f).

[48] 33 U.S.C. § 1365(a)(2).

[49] *See generally* Pilgrim's Complaint, *supra* note 16.

[50] Caplan, *supra* note 35.

[51] Pilgrim's Complaint, *supra* note 16, at 41; *see generally* Jane J. Lee, Pea Soup, Pictures: Extreme Algae Blooms Expanding Worldwide, National Geographic (April 24, 2013) https://news.nationalgeographic.com/news/2013/04/pictures/130423-extreme-algae-bloom-fertilizer-lake-erie-science/.

[52] Lee, *Plant Food*, *supra* note 51.

[53] Environment America Research & Policy Center, *Corporate Agribusiness and the Fouling of America's Waterways,* Env't America 7 (June 29, 2016), http://www.environmentamerica.org/reports/ame/corporate-agribusiness-and-fouling-americas-waterways?_ga=2.70661520.1050170889.1506310806-342562671.1506310806.

[54] Toxics Release Inventory (TRI) Program, U.S. Envtl. Protection Agency, https://www.epa.gov/toxics-release-inventory-tri-program/learn-about-toxics-release-inventory#What%20is%20the%20Toxics%20Release%20Inventory; Env't America, *supra* note 53, at 21.

pollutants, which were purposely released into natural waterways, are lawfully permitted by both federal and state governments.[55]

E. Remedies

In the suit against Pilgrim's for its Live Oak plant's alleged NPDES violations, the plaintiffs seek: (a) a declaration of Pilgrim's violations of the CWA and NPDES permit; (b) a determination of the number of days Pilgrim's has violated; (c) an order to comply with the CWA and NPDES permit, and to refrain from further violations; (d) an order to implement remedial, mitigation, or offset measures; (e) an assessment of civil penalties against Pilgrim for each day of violations; (f) an award for the costs of litigation; and (g) any other relief the Court deems necessary.[56] Much of the relief sought is declaratory and injunctive. The declaratory findings of parts (a) and (b) are prerequisite to any injunctive or civil relief that can be granted.

Under the CWA, if the Administrator finds that a violation has occurred, notice must be given to the violator in addition to the local state government. If neither violator nor state government respond sufficiently, the Administrator should issue a compliance order.[57] The Administrator *may* bring civil action against a violator "for appropriate relief, including a permanent or temporary injunction."[58]

The CWA also authorizes criminal penalties for negligent and reckless violations, in addition to false statements in reporting and tampering with monitoring equipment.[59] Civil penalties are also available, up to $25,000 per day for each violation.[60] When determining the amount of a civil penalty, a court will consider a variety of factors, including: (i) the seriousness of the violation; (ii) any economic benefit that resulted from the violation; (iii) any history of other violations; (iv) any good faith efforts to comply; (v) the economic impact of the penalty on the violator; and (vi) "such other matters as justice may require."[61]

As the statutory provisions demonstrate, the federal government has a variety of options to address violations of the CWA. However, the "vast majority" of the EPA's enforcement is executed through adminis-

[55] 33 U.S.C. § 1311.

[56] Pilgrim's Complaint, *supra* note 16, at 42.

[57] 33 U.S.C. § 1319(a).

[58] 33. U.S.C. § 1319(b).

[59] 33. U.S.C. § 1319(c).

[60] 33 U.S.C. § 1319(d).

[61] *Id.*

trative action.[62] In practice, when the government does bring civil action to enforce environmental protections, the strength of the penalties authorized by the CWA are often not employed effusively.

For example, in a 1999 case from the Fourth Circuit, defendant Smithfield Foods, Inc. owned and operated two slaughterhouses that discharged wastewater into Virginia's Pagan River.[63] Smithfield had been granted NPDES permits, but was accused of violating the wastewater limits imposed by the permits for a period of over five consecutive years.[64] Although the Virginia Department of Environmental Quality had evidence of "Smithfield's numerous CWA violations," the EPA eventually realized that the State of Virginia "did not intend to initiate legal action against Smithfield."[65]

When the EPA finally sued in the Eastern District of Virginia, "the district court found Smithfield liable for 6,982 days (19 years) of violations."[66] Under the civil penalties provision of the CWA, Smithfield's liability for the violations set a maximum penalty of $174.55 million.[67] Applying the § 1319(d) factors, the district court found that "the violations were serious, the company had a history of noncompliance, its financial status was healthy, and good-faith efforts to comply with the law were minimal."[68] The district court evaluated the economic benefit to Smithfield from its violations at $4.2 million, and imposed penalty of $12.6 million, only about seven percent of the statutory maximum.[69] The Court of Appeals reviewed "the highly discretionary calculations" of the district court under an abuse of discretion standard and remanded for a recalculation of the penalties.[70] Ultimately, the penalty was reduced to $12.4 million.[71] Despite further charges that the chief operator of Smithfield's wastewater treatment plant had falsified reports and destroyed records, no criminal penalties were ordered.[72]

While this case serves as an example of federal government enforcement of environmental protections through civil penalties, the EPA

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[62] Jennifer Cornejo and Jordan Rodriguez, *Clean Water Act Section 404 Enforcement* 2, https://www.velaw.com/UploadedFiles/VEsite/Presentations/CWASection404Enforcement.pdf (last visited Mar. 19, 2018).

[63] U.S. v. Smithfield Foods, Inc., 191 F.3d 516 (4th Cir. 1999).

[64] *Id*.

[65] *Id*. at 522.

[66] *Id*. at 523.

[67] *Id*. at 529.

[68] Cornejo et al., *supra* note 62, at 7.

[69] *Id.*

[70] *Smithfield,* 191 F.3d at 532.

[71] Cornejo et al., *supra* note 62, at 7.

[72] *Smithfield,* 191 F.3d at 523.

notably favors administrative rather than civil or criminal action.[73] The prerogative tends to be focused on bringing the violator into compliance rather than on punition, or restoration of the contaminated ecosystem. In the case of citizen suits, all civil penalties awarded by a court are paid to the government; citizen plaintiffs have no right to monetary damages under the CWA.[74]

F. Standing

Achieving an adequate civil remedy in an environmental protection suit can be difficult, as can collecting on a judgment. However, many environmental suits are never tried on their merits: such cases can run into problems of justiciability, particularly in terms of standing. Prior to the 1990s, environmental cases enjoyed a broader view of standing. But with the evolution of the injury-in-fact standard, particularly in terms of its application to environmental litigation, standing has become a significant hurdle for lawyers bringing legal action to protect the environment.[75]

Historically, *Lujan v. Defenders of Wildlife (Lujan II)*[76] marked a dramatic shift in standing jurisprudence. As an issue of first impression, the Court considered standing under a citizen suit provision.[77] Although many believed that citizen suits overrode the necessity of showing an injury-in-fact,[78] the Court in *Lujan II* affirmed otherwise on the basis that standing's constitutional grounding necessitated an injury-in-fact.[79] The majority opinion set in place a stricter standard than it had ever before applied to environmental plaintiffs; as a result of *Lujan II* "an individual standing witness must [now] demonstrate that the behavior of a defendant directly affects a tangible, personal interest. It is not enough to allege an attenuated interest more diffusely defined . . ."[80]

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[73] Nicholas J. Nastasi and Jennifer A. DeRose, *Federal Environmental Law: Criminal Enforcement,* Ass'n of Corp. Couns. (Feb. 1, 2012) http://m.acc.com/legalresources/quickcounsel/felce.cfm.

[74] Ohio Envtl. Council, Guide to Clean Water Acts Citizen Suits 10 (last visited Mar. 19, 2018), https://www.waterboards.ca.gov/water_issues/programs/swamp/docs/cwt/guidance/112a1.pdf.

[75] Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. Rev. 931, 938 (1998).

[76] 504 U.S. 555 (1992).

[77] *Cf.* Lujan v. Nat'l Wildlife Fed'n (Lujan I)*,* 497 U.S. 871 (1990); *See* 45 UCLA L. Rev. 931, n.90.

[78] Injury-in-fact is defined as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." Kerchner v. Obama, 669 F. Supp. 2d 477, 481 (D.N.J. 2009) (quoting *Lujan II,* 504 U.S. at 560).

[79] 504 U.S. 555.

[80] 45 UCLA L. Rev., at 950.

For the Pilgrim's case, the standing standard for citizen suits under the CWA is no different. A "citizen," for the purposes of a citizen suit under § 505(a) of the Act, is defined as "a person or persons having an interest which is or may be adversely affected."[81] This language can be read as codifying the injury-in-fact standard into the Act. The Court has held that "environmental plaintiffs adequately allege injury-in-fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."[82]

Thus, the complaint in the Pilgrim's suit takes pains to qualify the "members" of the plaintiffs' group. The named plaintiffs, Environment America, Inc. and the Sierra Club, are both national non-profit environmental conservation organizations. However, a plaintiff, as a national non-profit environmental organization, may not have standing alone. The Sierra Club certainly knows this fact, as it once attempted to establish that, as an organization, it had standing to sue as itself.[83] In *Sierra Club v. Morton,* the Sierra Club argued that its "longstanding concern with and expertise in [environmental] matters were sufficient to give it standing as a 'representative of the public,'" and "specifically declined to rely on its individualized interest as a basis for standing."[84] But that argument was unsuccessful.

Here, Environment America, Inc. a Colorado corporation, operates under the name "Environment Florida"; Sierra Club, a California organization, with an office in Fort White, Florida, in addition to the number of its Florida Chapter's members—some of which are from the Suwannee area.[85] To bolster the legitimacy of their standing, the plaintiffs assert that some of their members "live, own homes, or spend time near the [Live Oak] plant and/or the Suwannee River, and . . . participate in recreational activities in, on, or near the Suwannee River downstream of the plant."[86] The complaint further elaborates: "[plaintiffs' members] swim, canoe, kayak, dive, fish, view wildlife, take walks, conduct research, bicycle, boat, and engage in other activities on, in, and by the Suwannee

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[81] 33 U.S.C. §§ 1365(a), (g).

[82] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,120 S. Ct. 693, 705 (2000); Nat. Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 994 (9th Cir. 2000) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972).).

[83] Sierra Club v. Morton, 405 U.S. 727 (1972) (affirming the dismissal of the Sierra Club's suit to stop the Disney corporation from developing a secluded natural valley into a major ski resort.).

[84] *Id.* at 735 n.8.

[85] Plaintiff's Complaint at 4, Env't Am. v. Pilgrim's Pride Corp., (2017) (No. 3:17-cv-00272-TJC-JRK).

[86] *Id.* at 5.

River and its springs downstream of the plant."[87] This section of the complaint concludes by listing nine paragraphs of harm suffered by plaintiffs' members, from the lessening of enjoyment of recreation activities, to fears about eating fish caught in the River.[88] This description is necessary to establish standing under the CWA—not just any concerned citizen can enact a citizen suit.

G. Other Problems With Standing

Another obstacle for citizen suits is that plaintiffs must give sixty-days' notice to the EPA, the state, and the alleged violator before suing.[89] The Court's purpose in notifying the alleged violator "is to give it an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit."[90] Certainly, this notification requirement is not unreasonable; it is intended to minimize the burden on a crowded court system. But it often allows violators to strategically sweep the rug out from under citizens, so to speak. In general, regulated industries want to avoid CWA citizen suits, which can cost significantly more than enforcement actions by regulatory agencies.[91] If a violator suddenly ceases its "exceedances," or reports that it has, concerned citizens can be left powerless to address the damage of the past violations; they must rely on the government and trust in its "discretion."[92]

Thus, even when the government has created protections for the environment and built provisions to empower citizens to participate in their enforcement, pollution occurs and the environment degrades. Irrespective of designations like "Special Waters," and hyperbole about "ecological value" and "highest protections," the federal and state governments have repeatedly failed to adequately abate the problem of the industrial defiling of America's waters. Regulations like the CWA and NPDES permits fail to deter violator-industrialists from environmentally-destructive practices. Violations are met with notices and administrative orders that drag on, and citizen attempts to pick up the government's slack are met by many obstacles. As the current federal government seeks to re-

[87] *Id.* at 40.

[88] *Id.* at 41.

[89] 33 U.S.C. § 1365(b)(1)(A).

[90] Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60 (1987).

[91] Ohio Envtl. Council, Guide to Clean Water Acts Citizen Suits 6 (last visited Mar. 19, 2018), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwj2_PeRnIXXAhVIzGMKHXH5B34QFggtMAI&url=https%3A%2F%2Fwww.waterboards.ca.gov%2Fwater_issues%2Fprograms%2Fswamp%2Fdocs%2Fcwt%2Fguidance%2F112a1.pdf&usg=AOvVaw0r4RzHbsRy8q9Xv9dT0abt.

[92] 33 U.S.C. § 1365(a)(2).

peal environmental protections and deflate the EPA in favor of deregulation and big business, who will protect America's weary waterways?

III. The Colorado

From mountainous heights stream the source-waters of the Colorado River.[93] Delivered downward on the American southwest from the Continental Divide in Colorado's Rocky Mountains, the Colorado River cuts its way through seven American states toward the Gulf of California.[94] Its course carves 1,450 miles through canyons, buttes, mesas, and gorges, providing for the Colorado's epic, photogenic backcloths.[95] Before the construction of the many dams that modernly sap its course, the Colorado fed one of the largest desert estuaries on the planet.[96] Even now, the watershed spans eight percent of the continental United States.[97] Consequently, the traditional power and abundance of the Colorado's life-giving presence in the arid expanses of the southwest have made it the lifeline of the region.[98]

But the Colorado's moniker, "the hardest-working river in the west," understates the strain it endures: it bears the burden of "over-allocation, over-use, and more than a century of manipulation."[99] It is the most-litigated and most-regulated river in America, maybe even the world; while there are others more sizable, "no other river is more divided and overused."[100]

A. The Triumph of Politicians and Engineers

More water is diverted from the Colorado River Basin than from any other watershed in America—Los Angeles, San Diego, Phoenix, Tucson, Denver, Tijuana, Mexicali, and Las Vegas are all dependent on its waters.[101] To invoke the words of scholar Philip L. Fradkin: "The

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[93] *Colorado River Basin,* Desert USA, https://www.desertusa.com/colorado/coloriv/du_coloriv.html (last visited Mar. 14, 2018).

[94] April R. Summitt, Contested Waters: An Envtl. History of the Colo. River X, Boulder: University Press of Colorado (2013); *Colorado River* American Rivers, https://www.americanrivers.org/river/colorado-river/ (last visited Jan. 15, 2018).

[95] *Colorado River*, American Rivers, https://www.americanrivers.org/river/colorado-river/ (last visited Jan. 15, 2018).

[96] *Colorado River*, New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Colorado_River (last visited Jan. 15, 2018).

[97] American Rivers, *supra* note 95.

[98] Summitt, *supra* note 94, at 4.

[99] New World Encyclopedia, *supra* note 96.

[100] Summitt, *supra* note 94, at X.

[101] Philip L. Fradkin, A River No More: The Colo. River and the West 42 (1996); Summitt, *supra* note 94, at X.

complex of dams, reservoirs, tunnels, and canals spreading from the Colorado River system to embrace much of the West has become the most complicated plumbing system in the world."[102]

While seven major dams straddle its main channel, in addition to dozens more scattered astride the Colorado's tributaries, it is the Hoover Dam that stands most prominently and with the most renown.[103] It symbolizes both "the successful joining of federal power and individual ingenuity," and "the human ability to control nature, to harness a river."[104] At the time of its completion in 1936, the Hoover Dam was the largest concrete structure ever built, as well as the tallest and biggest dam on the planet.[105] Today, the Hoover Dam's gigantic turbines churn over four billion kilowatt-hours of electricity from the Colorado's waters each year to keep large sections of California, Nevada, and Arizona alight.[106]

The Morelos Dam, located about three hundred miles below the Hoover Dam, diverts flow to irrigate farms across the Mexican border.[107] This lower section of the Colorado, officially designated as the "Lower Colorado River" (Lower Colorado), begins upstream in Arizona; it is where the River is most "bottled up and sucked dry by agriculture and municipal demand."[108] The Colorado River is one of the world's few rivers that regularly dries up before reaching the salty seawaters of its natural destination.[109] The Lower Colorado currently holds the number one position on the America's Most-Endangered River Report for 2017.[110] This fact is greatly disconcerting considering that the "Lower Colorado River provides drinking water for one in ten Americans . . . and grows approximately 90 percent of the nation's winter vegetables."[111]

Part of the problem is that the Lower Colorado Basin consumes a yearly deficit, on average, of approximately 1.2 million more acre-feet of water than it receives from the Upper Basin, which is sucked unsustainably from water supplies accumulated when demand was lower.[112] Al-

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[102] FRADKIN, *supra* note 101, at 42.

[103] SUMMITT, *supra* note 94, at IX.

[104] *Id.*

[105] *Id.* at IX, 3.

[106] *Id.* at IX.

[107] *Id.*

[108] AMERICAN RIVERS, *supra* note 95.

[109] AMERICAN RIVERS, *supra* note 95; *but see* Sandra Postel, *A Sacred Reunion: The Colorado River Returns to the Sea*, NAT'L GEOGRAPHIC: WILDLIFE AND WILDPLACES (May 9, 2014), https://voices.nationalgeographic.org/2014/05/19/a-sacred-reunion-the-colorado-river-returns-to-the-sea/.

[110] America's Most Endangered River Report 2017, https://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2017/04/11121018/MER2017_FinalFullReport_04062017.pdf.

[111] *Id*. at 3.

[112] *Id.* at 3-4.

though recent attempts to address this issue have seen some success, the Most-Endangered Report has warned that the looming menace of drought endures and may intensify.[113]

B. The Law of the River

The close of 2017 brings the ninety-fifth anniversary of the signing of the Colorado River Compact.[114] This agreement, signed November 24, 1922, has become known as the "keystone" of the swollen body of law governing the Colorado River.[115] The Compact allocates waters for the River's seven basin states: Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California.[116]

By dividing these states into different groups, the Compact allocates a collective consumptive use of 7.5 million acre feet (MAF) of water per year to each group, which is then apportioned among its states.[117] The figures used to tabulate this allocation were based on hydrologic data from the federal Reclamation Bureau that indicated an annual average flow of 16.4 MAF. But the data varies over time because the Colorado's flow has never been consistent, ranging from 4.4 MAF to over 22 MAF per year; the average flow has actually been millions of acre feet less than the Compact's commissioners presumed.[118] Despite suggestions that it should be renegotiated after fifty years, the Compact's allocation was made in perpetuity; its figures continue to be the basis for consumption of the Colorado River's waters.[119]

But the negotiation of the Compact was only the beginning: battles over the Colorado have been fought within and without the houses of Congress, internationally, and all the way up to the Supreme Court. Notable developments include the "largest water settlement in U.S. history," when in 2004, the Gila River Indian Community finally gained confirmed water rights after a struggle lasting more than a century.[120] Also,

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[113] *See id.*

[114] Joe Gelt, *Sharing Colorado River Water: History, Public Policy, and the Colorado River Compact*, Water Resources Res. Ctr. (Aug. 1997), https://wrrc.arizona.edu/publications/arroyo-newsletter/sharing-colorado-river-water-history-public-policy-and-colorado-river.

[115] *Id.*

[116] Greg Hobbs, Jr. History of Colorado River Law, Development and Use: A Primer and a Look Forward *3 (2005)* http://scholar.law.colorado.edu/hard-times-on-colorado-river/?utm_source=scholar.law.colorado.edu%2Fhard-times-on-colorado-river%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages; Law of the River Colo. River Water Users Ass'n, https://www.crwua.org/colorado-river/uses/law-of-the-river *(last visited Jan. 15, 2018).*

[117] Colo. River Water Users Ass'n, *supra* note 116.

[118] Gelt, *supra* note 114.

[119] Hobbs, *supra* note 116, at 4; Col. River Compact Article III(a). https://www.usbr.gov/lc/region/pao/pdfiles/crcompct.pdf.

[120] Summitt, *supra* note 94, at 161.

in one of the longest U.S. Supreme Court cases in history, Arizona battled California over whether water from the Gila River (one of the Colorado's tributaries) would count as part of Arizona's annual allotment.[121]

This extensive legislative and litigative history demonstrates the centrality of the Colorado River to human livelihood—yet its epic legal chronicle also displays a consistent ignorance to the livelihood of the River itself. Generations of battling communities and governments have always posited the River as the *object* of the litigation. The Colorado itself—as a system, as an entity—has eternally stood outside the courtroom doors while its fate has been mulled and wrought without any consideration for its own wellbeing or survival. Now, with increasing concerns about the failure of the traditional legal system to address issues of environmental degradation, a new movement is swelling, pushing for a shift in legal consciousness to recognize the River itself as *plaintiff* of the litigation.

C. Colorado River Ecosystem Versus State and Governor

On September 25, 2017, a lawsuit was filed in federal district court in the name of the Colorado River Ecosystem.[122] The suit seeks declaratory and injunctive relief against the State and Governor of Colorado for: (1) the recognition of the Colorado River Ecosystem's constitutional personhood; (2) recognition of the Ecosystem's fundamental rights; (3) equal protection of those rights; and (4) the enjoining of the State from failing in its duty to recognize those rights, and thereby violating those rights.[123] In addition to the Ecosystem, the plaintiff party includes "next friends": an environmental group and local citizens with a strong connection to the ecosystem, whom the suit proposes to serve as the Ecosystem's legal voice.

The plaintiffs' group of this suit resembles that of the *Pilgrim's* citizen suit. Both suits have been brought by environmental groups, composed of citizen-members at both the national and local level, to protect the rivers from ruin. However, *River Ecosystem* posits a new legal perspective that it argues is necessary "to avert collapse" because "[t]he dominance of a culture that defines Nature as property enables its destruction."[124]

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[121] *Id.* at 156; *see* Arizona v. California, 373 U.S. 546 (1963).

[122] Col. River Ecosystem v. State, No. 1:17-cv-02316-NYW (D. Col. filed Sept. 25, 2017).

[123] *See* Plaintiff's Amended Complaint, Col. River Ecosystem v. State (filed Nov. 3, 2017) (No. 1:17-cv-02316-NYW), *throughout the discussion reference will be to the Amended Complaint rather than the Original Complaint.

[124] *Id.* at 19.

D. Plaintiff Colorado River Ecosystem

The idea of suing in the name of a natural system is foreign to the American Legal System. So, to meet the demands of legal exactitude and functionality, the complaint does not refer to "the River," but instead to "the Ecosystem." Because a river is only an artery of a greater watershed drainage system, this broader nomenclature is more appropriate and workable. The Ecosystem is the approximate 246,000 square mile area "bound by the high points and ridge lines where drop-by-drop and grain-by-grain, water, sediment, and dissolved materials ebb their way towards the Gulf of California."[125]

Although the idea of a lawsuit by a natural entity presumes fanciful hypotheticals wherein blades of grass sue gardeners, etc., the definition of the Ecosystem offered in the complaint is more legally-feasible than even its rational critics may imagine. An ecosystem may be indefinably expansive in its reaches, but that does not make it invisible. The major avenues and arteries of its passage are clear enough, and fundamental to the lives—animal, plant, and human—that exist within its province.

E. Next Friends and the Riverkeeper

The complaint proffers the human parties of the plaintiffs' group as "next friends," or guardians, of the Ecosystem. They represent "the human part . . . capable of speaking through words on behalf of the natural communities that comprise the Colorado River Ecosystem."[126] The term "next friend" is traditionally used in the legal context to refer to the person through whom an infant or juvenile maintains or defends a suit in the absence of a guardian. It has also been employed creatively in the contexts of elder law, habeas corpus, and military/terrorism prisoner cases as well.[127] The complaint describes the next friends, who were chosen "to facilitate the Ecosystem's appearance in court," in a manner akin to the description given of the plaintiffs' group in *Pilgrim's*.[128]

Like the plaintiffs in *Pilgrim's,* the members of Deep Green Resistance, the next friends, reside at various locations along the River or have some articulable connection to the Ecosystem. However, the next friends are not qualified in terms of their relationship to the Ecosystem in quite

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[125] *Id.* at 3.

[126] *Id.* at 10.

[127] *See* Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 Yale J. Health Pol'y L. & Ethics 147 (2016); Tracy Bateman Farrell, *Next-Friend Standing for Purposes of Bringing Federal Habeas Corpus Petition*, 5 A.L.R. Fed. 2d 427; Caroline Nasrallah Belk, *Note: Next Friend Standing and the War on Terror*, 53 Duke L.J. 1747 (2004).

[128] River Ecosystem Complaint, *supra* note 123, at 10.

the same detail as the plaintiffs in *Pilgrim's*; not as much effort is dedicated to establishing a direct harm (i.e. an injury-in-fact) to individual humans because the next friends concept proposes an evolution of the standing standard for environmental cases. Instead, the next friends are offered as guardians "bound to act in [the Ecosystem's] best interests and to advocate for [its] inherent and constitutionally-secured rights."[129] This role is held up as an application of the *guardian ad litem,* who serves as a legally-appointed protector of a child or a person who has a disability.

In *River Ecosystem*, the next friends concept offers a loosening of the standing standard to (a) give prominence to the injury of the environmental system itself, and (b) free plaintiffs' groups from the potentially-fatal burden of having to articulate a direct human harm. Rather than seeking plaintiffs with very specific facts to fit into the narrow field of what qualifies as proper to establish standing, the next friends guardianship allows for the election of agents who may have less of a qualifiable "injury," but who may nonetheless have a more qualified relationship with the environmental system to be represented. For example, in addition to the members of Deep Green Resistance, the next friends also include Owen Lammers and John Weisheit. Mr. Lammers is described as the Executive Director of Living Rivers, an advocacy group working "to realize social-ecological balance with the Colorado River Watershed."[130] The complaint states that Mr. Lammers has held this position for almost twenty years.[131]

D. John Weisheit is the 63-year-old "Riverkeeper" who "has enjoyed the Colorado and its tributaries since childhood . . . Mr. Weisheit began his training as a professional river guide in 1980 and continues to lead river trips that support scientific research and public education."[132] Mr. Weisheit has also published a long-researched book about canyonland rivers.[133]

The traditional injury-in-fact standard creates significant obstacles for plaintiffs in environmental suits. It also serves to reinforce the dangerous idea that Nature is property by blurring the judicial lens from the recognition that the interests and wellbeing of ecosystems are justiciable. Even the citizen suit provisions built in to environmental statutes like the CWA are hampered by this human-centered standing approach. But the next friend designation allows qualified individuals with specialized

[129] *Id.* at 11.
[130] River Ecosystem Complaint, *supra* note 123, at 16.
[131] *Id.*
[132] *Id.* at 16, 19.
[133] *Id.* at 16.

knowledge and skills tailored to the interests of the natural system to stand for its rights without having to allege a particularized injury.

This idea of overcoming the standing standard by placing Nature itself as a plaintiff in a lawsuit is not a new one. Despite the decision of the unconvinced majority, *Sierra Club v. Morton* did yield one notable upshot for environmentalists: in his dissent, Justice Douglas gave credence to the revolutionary notion that the resource itself should be granted standing.[134]

F. The Lone Justice Standing With the Trees

The notion rooted in Douglas' dissent had been presented in an article published just a few months before titled *Should Trees Have Standing?*[135] In that article, law professor Christopher Stone proposed that, as human evolution has gradually given to an expansion of those with rights under the law, a further expansion of the law is possible to convey rights to natural systems, like a river, or, as it was in *Sierra Club v. Morton,* a valley.[136]

In fact, the law already conveys rights to other inanimate entities, such as trusts, corporations, and municipalities.[137] Stone ventured that while the idea may sound absurd, at one time so did the idea of giving rights to women; the current legal notion of property looks to the natural world as "objects for man to conquer and use—in such the same way as the law once looked upon 'man's' relationship to African Negroes."[138] Stone's article proffered a glimpse into how such a system would function, claiming that in some ways the legal system has already begun to develop the necessary mechanisms (such as guardianship, and class actions for injuries diffused over a large group).[139] He declared that conceptually, such a legal sea-change is necessary to re-adjust awareness about humanity's relationship to the environment. This idea is at the foundation of "resource-centered" standing, and can be contrasted with the current and traditional human-centered approach.

Although Stone's article and Douglas' dissent were written almost a half-century ago, there has been little development of the "standing for nature" idea since then. Except for a few sporadic articles reviving the

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[134] *Sierra Club,* 405 U.S. 727 (1972), *see supra* note 83, at 741.

[135] Christopher D. Stone, Should Trees Have Standing?: and Other Essays on Law, Morals, and the Env't, (25th Anniversary Ed. 1996).

[136] *Id.*

[137] *Id.* at 3.

[138] *Id.* at 12.

[139] *Id.* at 7.

notion for the purpose of academic debate, the idea has remained outside American halls of justice—until now.

G. Standing, As It Stands Today

Modernly, scholars speak of globalist standing, as exemplified by the cases before the era of *Lujan II*, and localist standing, the current standard, which places an intensively individualistic focus on the plaintiff's injury-in-fact. In her article *Standing for the Environment,*[140] Ann Carlson makes an interesting argument that, while many enviro-litigators lament the change in *Lujan II*, the heightened standard can influence litigation strategies to focus more on the human implications of environmental degradation. Carlson describes it as "a chance to establish a stronger connection between humans and the natural environment and thus do more for long-lasting environmental protection than can be accomplished through any single legal victory."[141]

Scholars and lawyers like Stone, however, would argue that this human-centered perspective blinds the law to some of Nature's injuries that those human persons who do have standing cannot or will not adequately represent. In *Should Trees Have Standing*, Stone provides a number of examples: "even if a plaintiff riparian wins a water pollution suit for damages, no money goes to the stream itself to repair its damages . . . even if the jurisdiction issues an injunction . . . there is nothing to stop the plaintiffs from selling out the stream, i.e. agreeing to dissolve or not enforce the injunction at some price," as Judge Learned Hand might encourage them to do.[142] Stone argued that "a serious reconsideration of our consciousness towards the environment" is necessary, and it is through the Supreme Court and the legal system as a way to inculcate society.[143] Those are words of decades ago, and the legal system is only now at the outset of an opportunity to consider the Standing for Nature doctrine's merits.

H. The Legal Basis

River Ecosystem centers on a group of human representatives suing on behalf of the ecosystem composing the Colorado River. The suit alleges the state government has failed to recognize the Ecosystem's rights, and that it continues to create and pursue policy that contributes to

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[140] Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. Rev. 931 (1998).
[141] *Id.* at 1004.
[142] Stone, *supra* note 135, at 11.
[143] Stone, *supra* note 135, at 36.

the Ecosystem's demise. First, the suit asks the federal district court to declare the Ecosystem a legal person. Upon a determination of the Ecosystem's personhood, the suit seeks the recognition of the Ecosystem's rights, so that the court may then acknowledge the State's violation of those rights. Finally, the suit begs the court's protection from further governmental violation by compelling the State to recognize the Ecosystem's rights.

The plaintiff contends the court has the authority to grant this remedy through the function of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, which states that

> any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.[144]

This statute does not confer jurisdiction, so the lawsuit also invokes diversity of citizenship under 28 U.S.C. § 1332 (the Colorado's waters cannot be said to reside in only one state;), as well as federal question subject matter under § 1331, and original jurisdiction under § 1343, subsection (a)(3) of which is specifically used

> [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all *persons* within the jurisdiction of the United States.[145]

The use of this subsection is important because (1) of course, the State and Governor are the defendants, and (2) the very purpose of the suit is to establish the personhood and rights of the Colorado River Ecosystem under the U.S. Constitution. This statute establishes the jurisdiction of U.S. district courts over "any civil action authorized by law to be commenced by any person," to recover for the deprivation of any right, and this subsection is designed for instances where a government actor is the cause of that deprivation.[146]

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[144] 28 U.S.C. § 2201(a). Also notable is the statutory language qualifying that a party's rights may be declared "whether or not further relief is or could be sought." This feature reveals the design of the statute to operate commonly as a summary proceeding in cases of undisputed facts or solely questions of law. *See* Advisory Notes.

[145] 28 U.S.C. § 1343(a)(3) (emphasis added).

[146] 28 U.S.C. § 1343(a)(1).

For the court to be able to give declaratory relief under § 2201, there must be "a case of actual controversy."[147] The statute takes this language directly from the U.S. Constitution.[148] Courts, in the context of this statute, have interpreted those words to mean that the controversy must be "of a justiciable nature."[149] If the court finds that an actual controversy exists, "[t]he existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared."[150]

The complaint asserts that there is an actual case and controversy, and legal uncertainty, as to whether the Colorado River Ecosystem is a legal person and thereby has inherent rights protected by the Due Process Clause of the Fourteenth Amendment.[151] The complaint defines the Ecosystem's inherent rights as the "right to exist, the right to flourish, the right to regenerate, the right to be restored, and the right to naturally evolve."[152] In this way, the litigation strategy to protect the Colorado is radically different from the traditional citizen-suit model, like that being used in the attempted protection of the Suwannee.

Here, the Ecosystem becomes more than an object—it becomes an *actual party* to the suit and a legal actor speaking directly to the court for the recognition of its own standing and rights. In *River Ecosystem*, a win means the Ecosystem's entitlement to legal status, so that it may litigate for its own protection, whereas in *Pilgrim's*, a win means the government-set limits on toxic discharges will be enforced. The difference between both the legal posture and potential results of the two different suits is staggering, and reflects the gap in modern jurisprudence and social consciousness about the value of Nature—and its role in sustaining the human economy.

The complaint frames the issue as the need for the Ecosystem to protect itself, because "[t]hreats to the Colorado River Ecosystem are threats to life."[153] This stance is in stark contrast with the traditional legal notion that the Earth is property, or at best, that the environment is passive and must be protected from human encroachment by paternalistic legislation. The major problem with this latter approach has always been where to draw the line: the fine balance between limiting environmental degradation without hindering industry.

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[147] 28 U.S.C. § 2201.

[148] U.S. CONST. art. III.

[149] Ashwander v. TVA, 297 U.S. 288, 325 (1936).

[150] USCS Fed Rules Civ Proc R 57 Notes of Advisory Committee. *FRCP 57 governs the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201.

[151] River Ecosystem Complaint, *supra* note 123, at 27.

[152] *Id.*

[153] *Id.* at 25.

History has shown that governments and the law have failed to safeguard the environment upon which civilization depends. In a system that has so much hope, trust, and reliance on the mechanical wrenching of the adversarial push-and-pull to extract justice, perhaps it is only logical that Nature be given the power to advocate for itself—especially when its foremost historical enemies, governments and corporations, yield so much legal force.

I. The Amendments and Juridical Personhood

The Petition Clause of the First Amendment protects the right to petition a court for the redress of grievances. The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee that the government shall not deprive any person of "life, liberty, or property." Because a lack of legal recognition violates its due process and petition rights, the plaintiff contends that the Colorado River Ecosystem should be recognized as a "person" as the word is used in the Constitution.[154] This effort towards establishing juridical personhood for the Ecosystem is the first step towards having its rights legally acknowledged and enforced. This point is where the crux of the litigation lies: if the plaintiff is unable to persuade the court that the Ecosystem should be considered a legal person, the claims for the recognition of its rights will fail.

But while the idea of a non-human entity as a "person" may seem strange to the average American, lawyers and jurists (and boardroom executives) have long been familiar with the idea. In fact, modern law holds many examples of the attribution of constitutional rights to "non-natural" entities, just as it holds examples of the historical denial of the rights of some groups of natural persons (e.g. women, slaves, etc.). The most prominent example of a non-natural legal person is that ubiquitous actor, the hero and villain of modern times: the Corporation.

J. Corporations Are People Too

Corporate personhood stems from a rationale of economic efficiency, but has since germinated into a broader philosophy legitimizing the continued expansion of corporate rights under a theory of aggregation.[155] Under this modern theory, corporations derive their own separate

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[154] *Id.*

[155] *See* James G. Wright III, *A Step Too Far: Recent Trends in Corporate Personhood and the Overexpansion of Corporate Rights*, 49 J. Marshall L. Rev. 889, 890 (2016); Brendan F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go From Here?*, 58 S.D. L. Rev. 119, 140 (2013).

rights from the aggregation of the human individuals of which they are comprised.[156] Although the idea of corporations existing as legal entities with the ability to contract, to sue, and to own property is relatively ancient, our modern conception of the "corporate person" is distinct in that now corporations are afforded constitutional rights extending beyond the mere practicality of economic function.[157] Indeed, it has been observed that the modern "Court takes the notion of [corporate] 'personhood' quite literally, attempting to expand the rights of corporations to equal that of natural persons."[158]

K. The Grounds Upon Which the Corporate Person Stands

Corporate personhood is the notion that the U.S. Constitution "provides for equal identity between corporations and persons."[159] The evolution of corporate personhood in modern American jurisprudence has manifested expansions in unanticipated ways, leading scholars to observe that, "corporate personhood is quicksilver; it seems an endlessly adaptable concept."[160]

The increase in the legal clout of corporations has had the parallel effect of contributing to environmental degradation. Because the greatest polluters are industrial, the continuing expansion of the rights of corporate persons empowers these super-human aggregates, whose destructive activities are exponential in force. Lawsuits to protect natural areas are often against corporate defendants, brought by environmental groups and concerned citizens. But because the legal system has developed alongside economic expansion, business interests often trump those of concerned environmentalists, especially when it comes to standing requirements.

And so, behemoth industrialists like JBS not only have increased resources and capital, but they also enjoy a legal status that affords them

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[156] Wright III, *supra* note 155, at 890-91.

[157] Gwendolyn Gordon, *Environmental Personhood,* 15-16, SSRN (March 7, 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935007.

[158] Wright III, *supra* note 155, at 908. The contemporary Court's view seems in close concurrence with Mitt Romney's famous quip to hecklers during the 2011 presidential campaign: *see* Ashley Parker, *'Corporations Are People,' Romney Tells Iowa Hecklers Angry Over His Tax Policy* N.Y. Times (Aug. 11, 2011) http://www.nytimes.com/2011/08/12/us/politics/12romney.html.

[159] Nick J. Sciullo, *Reassessing Corporate Personhood in the Wake of Occupy Wall Street*, 22 Widener L.J. 611, 642-643 (2013).

[160] Gordon, *supra* note 157, at 2. And yet it the Court was never doubtful that a corporation could be considered a legal person: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." Santa Clara Cnty. v. S. P. R. Co., 118 U.S. 394, 397 (1886).

a variety of legal tools with which to lobby and litigate against environmental protections, and to wage their defense against suits to expose and prosecute their pollutive malfeasance. Governments, like that of the State of Colorado, often defer to the interests of big business on environmental matters, cooperating under the seduction of economic, infrastructure, and employment gains. American history has seen governments with varying degrees of alignment and deference to the corporate infringement of Nature's rights, some with less, some with more, but consistently and regardless of administrative policy, the laws and courts of the United States have failed to safeguard the natural ecosystems of America.

IV. The Necessary Evolution

The waters of the Suwannee are, by government acknowledgement, exceptionally pure and vital. The flow of the Colorado is undeniably epic and crucial: with it, millions of thirsts are quenched, crops irrigated, and the electricity of several metropolises fueled. The Suwannee is a target of neighboring water-scarce municipalities. The Colorado has been dammed and diverted so many times now that its waters rarely reach their oceanic destination. It is common to think of these victims as isolated bodies of a landscape, or azure veins on a map. But these units of water are actually pieces of elaborate ecosystems upon which the lives and the ultimate livelihood of American civilization depend.

The purpose of law is to promote and safeguard the health, welfare, and safety of a society. The role of government is to uphold and execute the law. But the government and the law have miscarried the value of natural ecosystems. Even with the legislated protection of agencies like the EPA, the degrative effect of regulated human activity on natural systems has been visibly profound. The EPA has shown itself to be insufficient, yet courts defer to its jurisdiction, presuming it will manage things appropriately. But the EPA tolerates exceedances and neglects to use the full strength of its power for punition and deterrence. As a federal agency, the EPA is subject to the ebbing policy whims of changing executives; the application of its powers and discretion have never been consistent.

The Colorado is a foremost example of the failure of law and government to sustain a natural system. The extensive century of law-making around the Colorado has focused almost exclusively on damming and divvying up its flow. The legal battles that have been waged, including the longest running U.S. Supreme Court case in history,[161] have been

[161] Arizona v. California, 373 U.S. 546 (1963).

singularly-centered; apportionment between competing human groups and needs is the unwavering, all-else-overshadowing concern.

But the short-sighted human needs of the past and present have neglected to appreciate the living quality of the resources that have been subjugated, sapped, and sullied in their service. Rivers are pieces of intricate ecosystems; ecosystems are living entities, and therefore can be killed and eradicated. Modern American civilization, through its laws and governments, has endorsed, supported, and upheld the despoilment of the natural ecosystems under its jurisdiction—without adequate consideration of their finite mortality. Therefore, those elements of American society endowed with the power and position to protect the environment, have been and continue to be complicit in its destruction.

A. When the Government Has Failed to Protect a River, The Ecosystem Must Be Able to Protect Itself

À la base, *Pilgrim's* and *River Ecosystem* are the same: they both seek judicial remedy to the problem of a river's ruin. Substantively, however, their legal approaches are vastly different. *Pilgrim's* follows the traditional model, as designed by Congress and enacted, for this context, as the citizen suit provision of the CWA.

At best, the *Pilgrim's* plaintiffs may win a court order forcing Pilgrim's to comply with the toxic discharge limits in its NPDES permit, and "to refrain from further violations."[162] A court could also issue an order obligating Pilgrim's to "remedy, mitigate, or offset the harm caused by [its] violations," and issue a civil penalty against the corporation for each day of its violations. Superficially, existing law does empower a court to address the threefold objectives of punishment, deterrence, and restoration. Nonetheless, past examples of (a) the EPA's regulation; (b) the historical pattern of court enforcement; in addition to (c) the alarmingly continuous increase in ecological degradation nationwide since the EPA's creation, have shown this avenue to be ineffectual.

Conversely, *River Ecosystem* proffers the opportunity for a legal paradigm shift. Even as the potency of the EPA deflates, and the current executive and lawmakers veer government policies far from environmental protection, a declaration of the Ecosystem's rights by the judicial branch could serve as a necessary check towards a balance of the type intended by the Constitution's framers. Such a declaration would not only force businesses and governments to reconsider their treatment of

[162] Plaintiff's Complaint at 42, Env't Am. v. Pilgrim's Pride Corp., (2017) (No. 3:17-cv-00272-TJC-JRK).

(and attitudes toward) ecological resources—and the effects thereupon of human (mainly economic) activities—but it would also set an important precedent with which to evolve America's legal consciousness. In a country where less than a fifth of the rivers are officially considered "good" and "healthy biological communities," while the rest "can't support healthy aquatic life," that such an evolution is necessary seems self-evident.[163]

Another difference between the *Pilgrim's* model and that of *River Ecosystem,* is the form of the human representatives standing for the respective rivers. In *Pilgrim's*, the conservationist groups leading the suit sought out select individuals with whom some articulable relationship to the river can be proved. This practice is widespread, and necessary, in environmental litigation because of the particularized injury-in-fact requirement of standing. As applied to citizen suits, a stringent injury-in-fact standard creates a needless procedural obstacle. Congress explicitly wrote citizen suit provisions into environmental regulations with the intention of loosening standing obstacles in the environmental context; it was the Court which tightened up the standard. Accordingly, the current standing requirements in front of environmental suits could be overcome by the Court's expansion of juridical personhood to include natural ecosystems.

A next friends-type designation would allow for more specialized and motivated representatives, such as John Weisheit, *River Ecosystem*'s designated "riverkeeper," and Owen Lammers, another named next friend in the suit. Respectively, these two represent (1) a hands-on, lifetime local inhabitant, with decades of experience navigating the waters, and over twelve years of dedication to scientific research in the area; and (2) an experienced organizer and activist focused on developing sustainable management policies within the region.

In contrast to the unique representatives conservation groups are often forced to seek out to overcome the hurdle of standing, the next friends concept opens courtroom doors to those holding great dedication and experience with the ecosystem who may otherwise have trouble showing a particularized injury. But this is not to say that just anyone could file a lawsuit on behalf of an ecosystem because that could lead

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[163] Dashiell Bennett, *Half of All U.S. Rivers Are Too Polluted for Our Health,* THE ATLANTIC (Mar. 27, 2013) https://www.theatlantic.com/national/archive/2013/03/half-all-us-rivers-are-too-polluted-our-health/316027/; *see* U.S. Environmental Protection Agency, *EPA Survey Finds More Than Half of the Nation's River and Stream Miles in Poor Condition*, WATER ONLINE (Mar. 26, 2013), https://www.wateronline.com/doc/epa-survey-finds-half-nations-river-stream-miles-poor-condition-0001.

parties who exploit or over-use natural resources to also file like-named lawsuits, with the furtive purpose of reducing protections.

The purpose of the next friends concept is not to eliminate the standing requirement for environmental suits. Rather its objective is to refine its adequacy: just as a *guardian ad litem,* in the family law context, is appointed to serve "the best interest of the child," so too would the next friend be evaluated in terms of an ability to represent the "best interests" of the Ecosystem, as adjudged by the court—through a lens wider than that of the particularized injury-in-fact standard. That way, more environmental cases could be heard and decided on their merits.

Moreover, because corporations are legal persons with expanded constitutional rights, and because the greatest polluters are industrial, the development of the legal system alongside economic expansion has granted those superhuman aggregates of resource, capital, and political influence a voice in the courts. When it comes to environmental laws, that voice is most often heard either pushing for less limitations or defending against allegations of causing harm.

V. Conclusion

On November 17, 2017, Pilgrim's settled the lawsuit against it by agreeing to pay $1.43 million in penalty fees. Some of that amount will go to the federal and Florida state governments, but the greater part will be paid to Stetson University to create a Sustainable Farming Fund, which will be administered by the Institute for Water and Environmental Resilience at the school.[164] On November 7, ten days before the announcement of that settlement, the net income attributable to Pilgrim's Pride for the third-quarter of 2017 had increased from $98.66 million to $232.68 million—a 230% increase.[165]

So, while the settlement contains provisions that appear to favor the river, along with steps toward evolving the future environmental impacts of agricultural practices, the result poses concerns about the prospect of the Suwannee's enduring purity. First, the allowance levels of the Pilgrim's plant's NPDES permit still remain legal limits: about 1.5 million

[164] Jamie Wachter, *Pilgrim's Pride Settles Water Pollution Lawsuit* The Suwannee Democrat (Nov. 16, 2017) http://www.suwanneedemocrat.com/news/pilgrim-s-pride-settles-water-pollution-lawsuit/article_9c18e536-ca49-11e7-b4e0-37646c7f0746.html.

[165] *Pilgrim's Pride Q3 Profit Rises,* NASDAQ (Nov. 7, 2017) www.nasdaq.com/article/pilgrims-pride-q3-profit-rises-20171107-02068.

gallons of wastewater from the processing plant are pumped into the Suwannee River daily.[166]

Second, Pilgrim's is exempted from its obligation to limit its plant's toxic discharges by purchasing new equipment and installations if the discharge of wastewater into the Suwannee has been *scheduled* to be eliminated through an alternative plan approved by the Florida Department of Environmental Protection, prior to the deadlines set for compliance.[167] The same exemption applies to the obligation to pay penalties from any future violation to the Farming Fund. Given the track record of the Florida EPA's leniency towards agri-business, this provision is not encouraging.

Third, the penalty fees, described as "historic for the state [of Florida]," represent a mere 0.6 percent of the company's net income for the year's 3rd quarter.[168] That number speaks volumes about the state government's attitude toward enforcement; in this case the state "had not taken any meaningful action in well over 1,000 days of violations over five years."[169] And so, while this settlement represents a victory for the citizens who stepped in because their "state officials were not doing enough to protect one of Florida's most important rivers,"[170] it also poses an echoing query about what would have happened had the particular facts of the case not so-easily supported the citizen-plaintiffs' standing.

Meanwhile, less than a month later, on December 4, 2017, Magistrate Judge Nina Y. Wang of the U.S. District Court for the District of Colorado issued an order dismissing plaintiff Colorado River Ecosystem's complaint with prejudice.[171] The court order thereby granted the plaintiff's motion to dismiss its amended complaint; denied as moot the defendant's motion to dismiss the amended complaint; and directed the Clerk of the Court to terminate the case.[172] Approximately three weeks earlier, on November 16, the Colorado Attorney General's office had sent a letter threatening that if the plaintiffs did not withdraw the case it would file sanctions against Jason Flores-Williams, the attorney repre-

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[166] Eileen Kelley, *Settlement proposed against Chicken-Processing Plant that Dumps into Suwannee*, NAT'L ENVTL. LAW CTR. (Nov. 15, 2017), https://www.nelconline.org/settlement-proposed-lawsuit-against-chicken-processing-plant-dumps-suwannee-river.

[167] Wachter, *supra* note 164 (emphasis added).

[168] Kelley, *supra* note 166.

[169] *Id.*

[170] *Id.*

[171] *See* Order 12/4/17, Col. River Ecosystem v. State (2017) (No. 1:17-cv-02316-NYW).

[172] *Id.*

senting the Colorado River Ecosystem and its next friends.[173] In the plaintiff's motion to dismiss its own complaint, Flores-Williams wrote:

> The Complaint represented a good faith attempt to introduce the Rights of Nature doctrine to our jurisprudence . . . The undersigned [counsel for plaintiff] continues to believe that the doctrine provides American courts with a pragmatic and workable tool for addressing environmental degradation and the current issues facing the Colorado River. That said, the expansion of rights is a difficult and legally complex matter. When engaged in an effort of first impression, the undersigned has a heightened ethical duty to continuously ensure that conditions are appropriate for our judicial institution to best consider the merits of a new canon. After respectful conferral with opposing counsel per D.C.COLO.LCivR 7.1(A), Plaintiff respectfully moves this Honorable Court to dismiss the Amended Complaint with prejudice.[174]

Following the court's order, Colorado Attorney General Cynthia Coffman issued a statement saying the "Colorado River Ecosystem asked for the dismissal after [her] office filed a motion to dismiss the amended complaint."[175] But Attorney General Coffman's statement did not mention the threatened sanctions. Instead, it declared that the case "unacceptably impugned the State's sovereign authority to administer natural resources for public use."[176] This argument, grounded in the Tenth Amendment, is a common response against uses of the federal courts for environmental protection.

However, the geographic and economic expanses of a single ecosystem interweave the interests and fates of different communities and cannot be said to fall, even in part, under the exclusive jurisdiction of one: the Colorado's watershed is domiciled in six different states, plus Mexico. By the very nature of ecological interconnectivity, the health of America's ecosystems should be understood and addressed as a national (i.e. federal) question. Nevertheless, because of the State's threatened sanctions against Flores-Williams, Attorney General Coffman's claim

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[173] Lindsay Fendt, *State Files Again to Dismiss Colorado River "Personhood" Suit, Threatens to Sanction Lawyer*, COYOTE GULCH (Dec. 4, 2017), https://coyotegulch.blog/2017/12/04/state-files-again-to-dismiss-colorado-river-personhood-lawsuit-threatens-to-sanction-lawyer/.

[174] Plaintiff's Motion to Dismiss, Col. River Ecosystem v. State (2017) (No. 1:17-cv-02316-NYW).

[175] Chris Walker, *Attorney to Withdraw Colorado River Lawsuit Under Threat of Sanctions*, WESTWORD (Dec. 4, 2017), http://www.westword.com/news/colorado-river-lawsuit-to-be-withdrawn-due-to-potential-sanctions-9746311.

[176] *Id.*

that the "case unacceptably impugned the State's sovereign authority" cannot be tested on its merits.

In her announcement, Attorney General Coffman observed that "[u]nder the terms of dismissal, the case cannot be brought again in federal court."[177] Though it may be true that the terms of the dismissal preclude the case from being brought again in federal court, this prejudice only applies to the case's plaintiffs; the dismissal does not prevent a different plaintiff from bringing a different suit to establish the same doctrine.

So, while the Colorado River Ecosystem may be left unrecognized, the merits of Ecosystem Personhood and the Rights for Nature doctrine remain untried by an American court. Flores-Williams wrote of the need for appropriate "conditions" when bringing a case of first impression. But environmental issues, particularly those related to water quality and scarcity in the U.S., show no signs of abatement.

In response, a shift in consciousness is needed; juridical personhood for the nation's environmental systems could be the way to open such a door. The administrative, economic, and legal systems of America are structured with an inherent, fatal blindness to the wellbeing of the natural systems that support them. Notions of property and apportionment, measured solely in terms of human benefits and injuries-in-fact, are not conducive to the health and protection of the ecosystems that underpin our civilization.

The legal recognition of ecosystem personhood not only widens the scope of the types of injuries a court can determine, as concerns environmental harm, but it also holds the potential to progress cultural attitudes and begin inculcating a new social consciousness of the human relationship with the environment. In the same way that the Court thrust a change upon the American social landscape with its decision in *Brown v. Board of Education*,[178] so can it overcome staunched, destructive notions again by recognizing the constitutional personhood, and inherent rights, of the ecosystems within its jurisdiction: "a society in which it is stated, however vaguely, that 'rivers have legal rights' would evolve a different legal system than one which did not employ that expression, even if the two of them had, at the start, the very same 'legal rules' in other respects."[179] Yesterday, today, and tomorrow America, and the world, stand at a turning point upon which the fate of the planet's life-blood—

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[177] *Id.*

[178] Brown v. Bd. of Ed*uc.*, 347 U.S. 483 (1954) (holding that racial segregation in public schools is unconstitutional).

[179] STONE, *supra* note 135, at 33.

and thereby the lives of its inhabitants and their economies—is dependent.

Despite great resistance and apathy against the expansiveness of the current environmental crises, the Court's recognition of the rights of Nature could re-orient the American legal system, and thereby American society, setting forth the evolution of the nation in a new direction. Just as *Brown v. Board* was followed by defiance, experimentation, success and failure, ultimately the first step undertaken by the Warren Court in recognizing the unconstitutionality of race-based school segregation led to a fundamental change in the way subsequent generations of Americans thought and behaved. Such a step is crucially needed now, because the right to flourish, regenerate, and evolve—although framed for an ecosystem—is really the right to flourish, regenerate, and evolve American civilization.