

THE RIGHTS OF NATURE MOVEMENT IN THE UNITED STATES: COMMUNITY ORGANIZING, LOCAL LEGISLATION, COURT CHALLENGES, POSSIBLE LESSONS AND PATHWAYS

*Marsha Jones Moutrie**

INTRODUCTION

In 2000, representatives from around the world adopted the Earth Charter. It declares: “[w]e are one human family and one Earth community with a common destiny. We must join together to bring forth a sustainable global society founded on respect for nature, universal human rights, economic justice, and a culture of peace.”¹ Since then, political leaders, theologians, academics, environmentalists, scientists, lawyers, and others have worked to achieve the goal of a sustainable society founded on respect for Nature. Many have been guided by the teachings of Father Thomas Berry, whose “Ten Principles of Jurisprudence” included: “[t]he universe is composed of subjects to be communed with, not objects to be used. As a subject, each component of the universe is capable of having rights.”² Environmental attorney,

* Marsha Jones Moutrie is a California attorney (UCLA School of Law, 1975), who served as City Attorney of Santa Monica, California from 1994 through 2016. During that time, she wrote, co-wrote, or approved as to form the city’s environmental laws, including its Sustainability Rights Ordinance. She also directed the city’s litigation, including the successful litigation against global corporations whose gasoline additive had polluted the city’s water wells. Since retiring from municipal service, she has practiced law primarily as an Earth Law Center volunteer.

¹ Earth Charter Initiative, *Charter of the Commonwealth of Independent States (CIS)*, International Law& World Order: Weston’s & Carlson’s Basic Documents (2001). <https://earthcharter.org>virtual-library2>the-earth-charter>text> [<https://perma.cc/46X4-TMED>] (last visited Sep. 6, 2020).

² Thomas Berry’s Ten Principles of Jurisprudence, GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE, <https://therightsofnature.org/thomas-berrys-ten-principles-of-jurisprudence/> [<https://perma.cc/BV4P-VY9R>] (last visited Sep. 6, 2020).

Cormac Cullinan elaborated on Father Berry's vision, calling for legal recognition of the fundamental rights of all beings to exist, to have a habitat, and to evolve.³ Around the world, people began working to incorporate recognition of Nature's rights into their legal systems.⁴

Some countries incorporated broad principles of Earth jurisprudence into their constitutions or other national laws.⁵ In the United States, recognition of Nature's rights has occurred at the local government level. Over the last fifteen years, communities have mobilized, non-profit organizations have provided education and assistance,⁶ city and county legislative bodies have adopted laws and resolutions recognizing Nature's substantive and procedural rights,⁷ the people have passed laws through the initiative process, the courts have provided judicial feedback, and state governments and officials have responded. This article describes that body of work, highlights the successes and the challenges, and suggests possible lessons learned and pathways forward.

**I. RECOGNITION OF NATURE'S LEGAL RIGHTS IN THE
UNITED STATES BEGAN WHEN THE COMMUNITY RIGHTS
MOVEMENT INCORPORATED NATURE'S RIGHTS
LANGUAGE INTO LOCAL CONTROL ORDINANCES
INTENDED TO DIMINISH CORPORATE POWER AND STATE
AND FEDERAL AUTHORITY**

Legal recognition of Nature's rights is generally described as beginning in 2006 in the mountainous woodlands of Pennsylvania's

³ CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* (2002).

⁴ In 2009, the United Nations Harmony with Nature Programme was founded as was the Global Alliance for Rights of Nature, Organizer Team. *THE RIGHTS OF NATURE* (2020), <https://therightsofnature.org/> [<https://perma.cc/JAL4-8A2T>] (last visited Sep. 6, 2020).

⁵ See Constitution of the Republic of Ecuador, Chapter 7, 71-74; Law on the Rights of Mother Earth, Bolivia (2010); see also DAVID R. BOYD, *THE RIGHTS OF NATURE: A LEGAL RESOLUTION THAT COULD SAVE THE WORLD* 165-201 (2017) (Describing the adoption of these national enactments).

⁶ Nonprofit groups working to advance Nature's rights in the U.S. include, but are not limited to, The Global Alliance for the Rights of Nature (GARN), Movement Rights, Indigenous Peoples Network, Honor Earth, CELDF, and the Earth Law Center.

⁷ See Craig M. Kauffman and Pamela L. Martin, *Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand*, 18 *GLOBAL ENVIRONMENTAL POLITICS* 4 (2018) p. 43-62.

Southern Coal Region, in Tamaqua, a community of about 7,000 residents.⁸ Raw sewage, being dumped into an abandoned open-pit mine within the borough's limits, threatened the drinking water supply.⁹ State law prohibited dumping untreated sewage into the ground, but the state was not enforcing the prohibition.¹⁰ Faced with this threat and assisted by the nonprofit Community Environmental Legal Defense Fund (CELDF), residents persuaded the Tamaqua Borough Council to adopt a community rights ordinance.¹¹ It incorporated into local law the state's prohibition against dumping sludge, thereby laying the foundation for local enforcement.¹² The ordinance also provided that corporate violators would lose their rights secured by state law and by the Contracts and Commerce Clauses of the U.S. Constitution.¹³

In 2006, when Tamaqua adopted its ordinance, the community rights model of local legislation was already well established in Pennsylvania; more than a dozen towns had adopted laws intended to enhance local control, though none of those laws mentioned rights of the natural world.¹⁴ Thus, the focus and foundation of the Tamaqua law—securing

⁸ Bobby O'Gurek, TAMAQUA BOROUGH - TAMAQUA, PENNSYLVANIA: HOME TAMAQUA BOROUGH - TAMAQUA, PENNSYLVANIA: HOME (2019), <https://www.tamaquaborough.com/> [<https://perma.cc/WMW9-LRDB>].

⁹ Kent Jackson, *1.8 Million Gallons of Sewage Leaks into River in Tamaqua*, REPUBLICAN HERALD (Apr. 27, 2012), https://m.republicanherald.com/news/1-8-million-gallons-of-sewage-leaks-into-river-in-tamaqua/article_6973f5b0-85dc-51c4-9566-55fd41574273.html [<https://perma.cc/8VWS-5ADB>].

¹⁰ Solid Waste Management Act, 35 P.S. Section 6018.101 *et seq.*

¹¹ Tamaqua Borough Sewage Sludge Ordinance, No. 612, Tamaqua Borough Mun.Code, Art. VI, Section 260.

¹² *Id.*

¹³ *Id.* Section 260-61 E. In 2007, Tamaqua adopted Ordinance 620, the Corporate Waste and Local Control Ordinance, which expanded the category of regulated waste and focused on the conflict between local and corporate rights by stating, “corporations engaged in certain types of waste storage, ‘beneficial use’ and/or waste disposal (...) constitute a threat to the health, safety, welfare, and rights of the residents (...).”

¹⁴ The website of Community Rights US, whose mission statement is “To protect the rights of we the People and the natural World by dismantling corporate rule (from the local up!)” maintains a database of community rights laws in the U.S. It lists 34 community rights laws adopted in Pennsylvania between 2003 and 2010. What is the Community Rights Movement?, COMMUNITY RIGHTS US (2019), <http://communityrights.us/what-is-thecommunity-rights-movement/> [<https://perma.cc/UWF7-AR5N>].

local control and diminishing corporate powers—was not new. Tamaqua’s law was hailed as ground-breaking because it engrafted, into the existing community rights model, language recognizing the legal rights of both humans and Nature: “borough residents, natural communities, and ecosystems shall be considered to be ‘persons’ for purposes of enforcement of the civil rights of those residents, natural communities and ecosystems.”¹⁵ Tamaqua’s ordinance was the world’s first law to recognize Nature’s rights.¹⁶

Four years later, the Pittsburgh city council unanimously adopted a community bill of rights law banning gas drilling, including hydraulic fracturing (“fracking”), to protect the city’s water supply. The ordinance stripped corporate violators of their legal status as “persons” protected by law; and it recognized rights of the natural world, stating, “[n]atural communities and ecosystems, including, but not limited to wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within the city of Pittsburgh.”¹⁷ The inclusion of this language made Pittsburgh the world’s first large city to adopt a law recognizing Nature’s rights.¹⁸

These laws were effectively publicized and received extensive press coverage.¹⁹ This attracted other communities’ interest, and dozens of other local governments in Pennsylvania adopted community rights laws that followed the basic model of recognizing both community rights and Nature’s rights.²⁰ Though the many iterations of the model vary in their provisions and language, most contain some version of basic provisions that:

¹⁵ Tamaqua Borough Mun. Code, §§ 260-66B.

¹⁶ Kaufman & Martin, *Constructing Rights of Nature Norms in the US, Ecuador and New Zealand, Global Environmental Politics*, 18.4, Nov.2018, 54.

¹⁷ Pittsburgh Mun. Code, § 618.03(b).

¹⁸ GARN GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE, *Timeline*, <https://therightsofnature.org/timeline/> [<https://perma.cc/WA7R-4T3R>] (last visited Sep. 6, 2020).

¹⁹ CELDF Community Environmental Legal Defense Fund, <https://celdf.org/> [<https://perma.cc/YP6C-S8TG>] (last visited Sep. 6, 2020).

²⁰ Community Rights US Community Rights Ordinances Across the US, COMMUNITY RIGHTS US (2019), <http://communityrights.us/community-rights-ordinance-campaigns-across-the-us/> [<https://perma.cc/PMH7-U2PC>] (last visited Sep. 6, 2020).

Recognize the peoples' right to local, self- government,

Prohibit or target corporate activities that threaten the local environment,

Diminish or nullify legal rights of corporate violators,

Elevate local authority to control use of the local environment over state and federal authority,

Recognize that natural communities and ecosystems have legal rights to, e.g., exist, flourish, and naturally evolve, and

Confer legal "personhood" (and thus the ability to sue) upon elements of Nature.

This basic model appealed to diverse communities facing environmental threats posed by corporate activities.²¹ Community Rights US reports that 200 local governments in twelve states eventually adopted laws recognizing Nature's legal rights using its community rights model.²²

II. COMMUNITY RIGHTS LAWS, RECOGNIZING RIGHTS OF NATURE, WERE WIDELY ADOPTED IN THE UNITED STATES, OFTEN AS INITIATIVE MEASURES, WHEN LOCAL GOVERNING BODIES RESISTED ADOPTION OF THE LAWS BASED ON CONCERNS ABOUT THEIR LEGALITY

This section describes the experience of five communities in adopting community rights ordinances that also recognize the rights of Nature.

²¹ *Id.*

²² *Id.* The emphasis on elevating community rights over corporate rights reflects CELDF's organizational belief that our federalist form of government is an underlying cause of the environmental catastrophe, which is best addressed by expanding local authority and reducing federal and state authority. *See* Richard Valdmanis, GREEN GROUP'S UNCONVENTIONAL FIGHT AGAINST FRACKING REUTERS (2015), <https://www.reuters.com/article/us-usa-fracking-lawsuits-insight/green-groups-unconventional-fight-against-fracking-idUSKCN0P90E320150629> [<https://perma.cc/4CBP-HGYF>] (last visited Sep. 6, 2020).

A. PENNSYLVANIA TOWNS ADOPTED COMMUNITY RIGHTS LAWS,
INCLUDING NATURE’S RIGHTS PROVISIONS, TO PROTECT WATER SUPPLIES
AGAINST DANGERS POSED BY FRACKING ACTIVITIES

*1. In Grant Township, Which Has No Public Water Supply, Residents
Proposed a Community Rights Law to Protect Their Water Wells and
Property Values*

Grant Township is a small community of 741 residents nestled in the rolling hills of central-western Pennsylvania, about 80 miles northeast of Pittsburgh, in an area known for its wooded hiking trails, lakes, streams, and Christmas tree farms.²³ A creek meanders through the woods, providing fly fishing opportunities for residents and a home for the rare hellbender salamander.²⁴ Grant Township has no public water supply, so residents must depend upon private wells.²⁵ In 2013, the well waters were threatened when Pennsylvania General Energy Company (PGE), a private corporation, obtained an initial permit from the U.S. Environmental Protection Agency (EPA) to inject runoff from a fracking operation into an abandoned well within the township.²⁶

Fearing that fracking waste would pollute their drinking water, residents united, forming the East Run Hellbenders organization and obtaining support from CELDF.²⁷ It provided “Democracy School” training,²⁸ assisted the community in organizing, and helped prepare a

²³ Justin Nobel, HOW A SMALL TOWN IS STANDING UP TO FRACKING ROLLING STONE (2018), <https://www.rollingstone.com/politics/politics-news/how-a-small-town-is-standing-up-to-fracking-117307/> [<https://perma.cc/P4L5-3DP6>] (last visited Sep. 6, 2020).

²⁴ Aaron Skirboll, *Nevertheless, They Persisted*, SIERRA CLUB MAGAZINE, Dec. 17, 2019, at 5, <https://www.sierraclub.org/sierra/2020-1-january-february/feature/nevertheless-they-persisted-grant-township-pennsylvania-fracking> [<https://perma.cc/6KHG-HUC8>].

²⁵ DAVID R. BOYD, THE RIGHTS OF NATURE A LEGAL REVOLUTION THAT COULD SAVE THE WORLD 115 (2017).

²⁶ Pa. Gen. Energy Co. v. Grant Twp. C.A.No.14-209, Memorandum Opinion, March 3, 2017, at 6.

²⁷ Skirboll, *supra* note 24, at 8.

²⁸ Democracy School: Learn More about Community Rights CELDF, CELDF COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND (2019), <https://celdf.org/celdf-services/education/democracy-school/> [<https://perma.cc/FE39-HWYA>].

proposed community rights ordinance.²⁹ The township's three-member board of supervisors considered the proposed ordinance at a meeting attended by PGE attorneys; they warned that, if the ordinance was adopted, the corporation would file suit against the township to invalidate the ordinance and would prevail.³⁰ They also warned that, as the prevailing party, PGE would be entitled to payment of its attorney fees by the town.³¹ Residents testified in favor of the ordinance, expressing their fears that the injection well would leak, destroy their private wells, greatly reduce property values and even force them to leave their homes.³² The supervisors adopted the ordinance.³³

The ordinance's findings express its rationale and purpose:

Whereas, this community finds that the depositing of waste from oil and gas extraction is economically and environmentally unsustainable, in that it damages property values and the natural environment, and places the health of residents at risk, while failing to provide real benefits to the people of this community; and

Whereas, this community finds that the depositing of waste from oil and gas extraction violates the rights of Grant Township residents, including our right to make decisions about what happens to the places where we live; and

Private corporations benefiting from the waste deposits of gas extractions are wrongly recognized by the federal and state governments as having more rights than residents, in violation of their inherent rights to local self-government and the state constitution's recognition that 'all power is inherent in the people.'³⁴

²⁹ See Grant Township, PA: A Stand to Protect Their Water & Their Community, CELDF COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND, <https://celdf.org/support/grant-township-pa-stand-protect-water-community/> [<https://perma.cc/VN6E-ZU97>] (last visited Sep. 6, 2020).

³⁰ See Skirboll, *supra*, note 24, at 2-4 (Providing a detailed account of the meeting and the township's subsequent, lengthy battle against fracking).

³¹ *Id.* at 4; 42 U.S.C. Section 1988 (authorizing fee awards to prevailing plaintiffs in Civil Rights actions).

³² *Id.* at 3.

³³ Pa. Gen. Energy Co. v. Grant Twp., C.A.No. 14-209 (W.D.Pa.) Memorandum Opinion, March 3, 2017, at 6.

³⁴ Community Bill of Rights Ordinance adopted June 1, 2014, Grant Twp., Indiana Cnty. Pa., Findings, <http://s3.documentcloud.org>documents/1370022/grant-township-community-bill-of-rights-ordinance.pdf>.

The ordinance's findings also assert that the right to local self-government is secured by the Declaration of Independence, the United States Constitution, and Pennsylvania's state constitution.³⁵ The findings do not mention the rights of the natural world; the findings' sole reference to the environment appears in the first above-quoted paragraph.³⁶

The substantive provisions of the ordinance focus on community rights and controlling corporate activity. The core prohibition provides, "[i]t shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction."³⁷ Other key provisions restrict corporate rights by declaring that any permit authorizing fracking within the township is invalid,³⁸ that corporations have no legal rights that would interfere with the rights enumerated in the ordinance,³⁹ and that corporate violators shall forfeit their legal "personhood", as well as their rights to assert preemption defenses and to challenge the township's legal authority to adopt the ordinance.⁴⁰ The ordinance affords both civil and criminal remedies.⁴¹

As to Nature's rights, the ordinance includes a one-sentence paragraph recognizing the rights of natural communities and ecosystems, which states, "[n]atural communities and ecosystems within Grant Township, including but not limited to, rivers, streams, and aquifers possess the right to exist flourish and naturally evolve," and another sentence recognizing that residents, natural communities, and ecosystems all have the right to clean air, water and soil.⁴² The ordinance also provides that actions brought to protect natural communities or ecosystems must be brought in their names.⁴³ Thus, viewed in its entirety, the ordinance prohibits depositing fracking waste, asserts a right of local

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* Section 3(a).

³⁸ *Id.* Community Bill of Rights Ordinance, *supra* note 33, Section 3(b).

³⁹ *Id.* Section 5(a).

⁴⁰ *Id.*

⁴¹ *Id.* Sections 4(a) & (b).

⁴² *Id.* Section 2(b).

⁴³ Community Bill of Rights Ordinance adopted June 1, 2014, Grant Twp., Indiana Cnty., Pa., Section 4(c), <http://s3.documentcloud.org/documents/1370022/grant-township-community-bill-of-rights-ordinance.pdf>.

self-government superior to corporate legal rights, nullifies the legal rights of corporations that violate the ordinance, and briefly recognizes substantive and procedural rights of natural communities and ecosystems.

The crowd of residents who attended the meeting filled the township's meeting hall; the supervisors considered both their pleas that possible destruction of the water supply would ruin the community and the PGE attorneys' warning about financial liability.⁴⁴ The supervisors' vote to approve the ordinance was unanimous.⁴⁵

Later, Grant Township's voters took another major step to maximize local control; they adopted a home rule charter, which is akin to a local constitution.⁴⁶ The charter incorporates much of the language of the community rights ordinance.⁴⁷

2. In Highland Township, Supervisors Adopted a Community Rights Law Prohibiting Injection Wells, But Later Withdrew Support Based on Legal Concerns

The small community of Highland Township is located in the riparian forestlands of central west Pennsylvania, an area known for its wildlife, rivers, and scenic hiking trails.⁴⁸ The county seal emphasizes Nature, depicting an elk, evergreen trees, and a fisherman beside a cascading stream in the foreground, and a much smaller factory building to the side and in the background.⁴⁹

In 2013, after a private utility company, Seneca Resources received a permit from the EPA to convert an existing natural gas well into an injection well, town residents organized in opposition and obtained

⁴⁴ Skirboll, *supra* note 24.

⁴⁵ *Id.*

⁴⁶ See Pennsylvania Home Rule Charter and Optional Plans Law, 53 Pa.C.S. 2901-3171; Pa.GE v. Grant Twp., CA No.1409, Opinion and Order, Jan.5,2018, at 4.

⁴⁷ *Id.* Opinion and Order, at 4.

⁴⁸ The 2010 census reports the population of Highland Twp. 492, Discover Elk County, PENNSYLVANIA GREAT OUTDOORS VISITORS BUREAU, <https://visitpago.com/counties/elk-county/> [<https://perma.cc/VV2D-QNU4>] (last visited Sep. 6, 2020).

⁴⁹ Elk County Official Website, ELK COUNTY, <http://www.co.elk.pa.us/> [<https://perma.cc/HLT2-XBT5>] (last visited Sep. 6, 2020).

assistance from CELDF in preparing a proposed community rights ordinance prohibiting injection wells in Highland.⁵⁰ The Highland Township board adopted the ordinance, which includes findings explaining its purpose:

[T]his ordinance removes legal powers and authority from corporations involved in the disposal, storage, surface or subsurface injection or ‘treatment’ of waste products produced by shale gas extraction activities within the Township, in recognition that those legal powers are illegitimate and unjust, in that they place the rights of a corporate minority over the rights and political authority of a majority of Highland Township residents.⁵¹

The ordinance provides that residents have the right to water from natural water cycles, clean air, a sustainable energy future, and local self-government and sovereignty.⁵² It also recognizes that natural communities and within the township possess “inalienable and fundamental rights to exist and flourish.”⁵³

The Highland Township ordinance follows the community rights model by stripping away corporations’ constitutional rights, including rights to challenge the ordinance’s validity in court, and corporations’ rights under federal and state permits authorizing activities prohibited by the ordinance.⁵⁴ The ordinance also contains a provision entitled “Calling for Constitutional Change,” which urges the adoption of an amendment to the state constitution that would enhance local power to “protect the health, safety and welfare of the community [and] assert or expand the rights of human and natural communities.”⁵⁵ The Board of Supervisors adopted the ordinance in 2013 and strengthened it in 2015, but later

⁵⁰ Katie Colaneri, *Elk County Township Prepares for Battle Against Deep Injection Well*, NPR (Mar. 14, 2014, 3:08 P.M.), <https://stateimpact.npr.org/pennsylvania/2014/03/14/elk-county-township-prepares-for-battle-against-deep-injection-well/> [<https://perma.cc/MRB6-PJGG>].

⁵¹ Community Rights and Protection from Injection Wells Ordinance, Ord. No.1-9 of 2013, Highland Township Community Rights & Protection from Injection Wells Ordinance, COMMUNITY RIGHTS US, <http://communityrights.us/community-rights-ordinances/highland-township-pennsylvanias-community-rights-and-protection-from-injection-wells-ordinance/> [<https://perma.cc/PC32-K6K3>] (last visited Sep. 6, 2020).

⁵² *Id.* Sections 3(a), 3(b), 3(d) and 3(e).

⁵³ *Id.* Section 3(c).

⁵⁴ *Id.* Section 4.

⁵⁵ *Id.* Section 8.

withdrew its support based on legal concerns.⁵⁶ In 2016, the residents of Highland Township, like the residents of Grant Township, maximized their local control by adopting a home rule charter, which incorporated the provisions of their community rights ordinance.⁵⁷

B. MORA COUNTY, NEW MEXICO BANNED FRACKING IN A COMMUNITY RIGHTS LAW DESCRIBING THE COMMUNITY’S LOVE OF THE LAND AND RESPONSIBILITY TO PROTECT THE WATER SUPPLY

Mora County, New Mexico encompasses 1,938 square miles of the western landscape described as New Mexico’s “prettiest place:” snow-capped mountains, high plains, and evergreen forests.⁵⁸ The county is rural and very sparsely populated, with only 2.35 residents per square mile.⁵⁹ There are no incorporated cities or towns in the county; the county seat is a “census-designated place.”⁶⁰ The residents depend upon the land, with ranching, lumbering, and outdoor recreation being the primary economic activities.⁶¹ As is typical of the Southwest, Mora County is racially and culturally diverse.⁶²

In 2013, corporate oil and gas operations acquired drilling rights from the state, and residents feared that extraction activities would

⁵⁶ Seneca Resources Corp. v. Highland Twp., 863 F.3d 245, 249-250 (2017).

⁵⁷ See Katie Weidenboerner, *Highland Township Votes in Home Rule Charter*, THE COURIER EXPRESS (Nov. 9, 2016), <http://www.thecourierexpress.com/news/highland-township-votes-in-home-rule-charter> [<https://perma.cc/3UQT-DE5C>]; see also Pennsylvania Home Rule Charter and Optional Plans Law, 53 Pa.C.S., Sections 2901-3171.

⁵⁸ New Mexico Counties, *Mora County*, <https://www.nmcounties.org/counties/mora-county/> [<https://perma.cc/3UGX-W4KZ>] (last visited Sep. 6, 2020).

⁵⁹ United States Census Bureau, *Mora County New Mexico*, <https://www.census.gov/quickfacts/fact/table/moracountynewmexico,US/PST045219> [<https://perma.cc/DAQ8-QMEZ>] (last visited Sep. 6, 2020).

⁶⁰ Wikipedia, *Mora County, New Mexico*, https://en.wikipedia.org/wiki/Mora_County,_New_Mexico [<https://perma.cc/Q663-NU3R>] (last visited Sep. 6, 2020).

⁶¹ Mora County, *About Us*, (2020) <https://countyofmora.com/about/> [<https://perma.cc/R5F7-P982>] (last visited Sep. 6, 2020).

⁶² United States Census Bureau, *supra* note 61.

degrade the natural environment and their quality of life.⁶³ Community members formed an organization and met with various government and non-profit representatives.⁶⁴ Ultimately, they worked with CELDF and prepared and proposed the Mora County Community Water Rights and Local Self-Government Ordinance (Ordinance 2013-01), which was substantively similar to the Grant and Highland Township ordinances.⁶⁵ The county's three-member Board of Commissioners adopted the ordinance by a vote of two to one.⁶⁶ The dissenting commissioner expressed concerns about the measure's legality, the financial risks attendant upon litigation, and the possibility that many community members did not understand that the law would probably neither withstand a legal challenge nor prevent fracking.⁶⁷

The Mora County ordinance differs from the Pennsylvania townships' laws in its expression of the community's strong emotional bond with Nature and recognition of human responsibilities to Nature:

WHEREAS, We, the residents in Mora County, are a multicultural community with indigenous roots of Many; and

WHEREAS, We recognize the Earth, water, and air as a source of life for all living in Mora County; and

WHEREAS, We are convinced that the quality of life for residents in Mora County, for both the present and the future, will be destroyed if

⁶³ Stacy Matlock, *Federal Judge Overturns Mora County's Drilling Ordinance*, SANTA FE NEW MEXICAN (Jan. 22, 2015), https://www.santafenewmexican.com/news/local_news/federal-judge-overturns-mora-county-s-drilling-ordinance/article_dddd444a-6ae8-56ea-b8a7-999c562a77b8.html [https://perma.cc/R8Q3-XSLG].

⁶⁴ Nina Bunker Ruiz, *How Residents of a Rural New Mexico County Fought the Fracking Barons and Won-For Now*, YES MAGAZINE (Sept. 16, 2014), <https://www.yesmagazine.org/issue/poverty/2014/09/16/how-residents-of-a-rural-new-mexico-county-fought-the-fracking-barons-and-won-for-now> [https://perma.cc/U9M8-N5XE].

⁶⁵ *Id.*

⁶⁶ Matlock, *supra* note 65.

⁶⁷ See Paula Garcia, *A Retrospective on the Mora County Fracking Ban*, LA JICARITA (Feb. 7, 2018), <https://lajicarita.wordpress.com/2018/02/07/a-retrospective-on-the-mora-county-fracking-ban/> [https://perma.cc/W6MY-QHMH]; see also Paula Garcia, *Protecting Mora County from fracking*, SANTA FE NEW MEXICAN-MY VIEW (May 17, 2008), https://www.santafenewmexican.com/opinion/my_view/protecting-mora-county-from-fracking/article_64d3968b-f968-5060-8e61-5220fab53464.html [https://perma.cc/ZN4R-PXH3].

we allow at-risk exploitation and pollution of the Earth, water, and air; and

WHEREAS, We the People of the County of Mora declare that we have the duty to safeguard the water both on and beneath the Earth's surface, and in the process, safeguard the rights of people within the county of Mora and the rights of the ecosystems of which Mora County is a part; and

WHEREAS, We (...) declare that all of our water is held in the public trust as a common resource to be used for the benefit of Mora residents and of the natural ecosystems of which they are apart. We believe that industrial use of water supplies in this county placing the control of water in the hands of a corporate few, rather than the county would constitute abuse and usurpation; and that we are therefore duty bound to oppose such abuse and usurpation. That same duty requires us to recognize that two centuries' worth of governmental conferral of constitutional powers upon corporations has deprived people of the authority to govern their own communities and requires us to take affirmative steps to remedy that usurpation of governing power (...).⁶⁸

Substantively, Mora County's ordinance prohibits fracking activities, declares federal or state drilling permits invalid, nullifies corporate violators' status as legal "persons," and restricts violators' access to the courts.⁶⁹ Mora County's law also recognizes rights of the natural world, stating: "[n]atural communities and ecosystems, including, but not limited to wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within Mora County against oil and gas extraction."⁷⁰

Two other noteworthy provisions of the law differentiate it from the Pennsylvania township ordinances: the body of Mora County's ordinance incorporates indigenous community members' understanding of humans' relationship to Earth. Section 4.7 provides:

Rights of La Querencia de la Tierra: The farm-based indigenous/mestizo (mixed blood) people who created the original Mora County culture considered the Earth to be living and holy; thus they referred to their homeland as 'La Querencia de la Tierra,' Love

⁶⁸ Mora Cnty. Cmty. Water Rights and Local Self Govt. Ordinance, No. 2013-01. Adopted April 29, 2013. Preamble.

⁶⁹ *Id.* at § 5.

⁷⁰ *Id.* at § 4.3.

of the Land. This sacredness connotes an intrinsic right of the land to exist without defilement.⁷¹

Additionally, Section 11 of Mora County’s law provides that attempts to overturn the law shall require the county to hold meetings to consider “other measures that expand local control (...) [s]uch consideration may include actions to separate the County from the other levels of government (...)”⁷²

C. WHEN OTHER COLORADO CITIES ADOPTED TRADITIONAL ZONING LAWS REGULATING OIL AND GAS EXTRACTION, VOTERS IN LAFAYETTE OPTED FOR A COMMUNITY RIGHTS CHARTER AMENDMENT

The communities in the Front Range area of Colorado, near Denver, enjoy stunning views of the Flatirons and the Rocky Mountains, proximity of urban convenience to wildlands, and an array of year-round outdoor recreational opportunities.⁷³ However, enormous change has occurred in recent years, fueling a political backlash.⁷⁴ Economic boom conditions, resulting from the rapid expansion of oil and gas extraction activities, yielded rapid population growth, sprawling housing development, significant increases in vehicular traffic, and severe air pollution problems.⁷⁵

⁷¹ *Id.* § 4.7.

⁷² Garcia, *supra* note, 69 (The commissioner who voted against the ordinance later described this as the “secession clause.”)

⁷³ See City of Denver, *Air Quality Program*: “Spectacular views and closeness to nature are just a couple of reasons why people choose to live in Denver. However, Denver’s location at the foot of the Rocky Mountains makes it prone to temperature inversions in which warm air traps cooler air near the ground, preventing pollutants from rising into the atmosphere.” Denver the Mile High City, *Air Quality Program*, <https://www.denvergov.org/content/denvergov/en/environmental-health/our-divisions/environmental-quality/air-quality.html> [<https://perma.cc/E8B7-5ALH>] (last visited Sep. 6, 2020).

⁷⁴ Sophie Quinton, *The West’s Population Boom Leads to Development Backlash*, STATELINE (Nov. 25, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/11/25/the-wests-population-boom-leads-to-development-backlash> [<https://perma.cc/2B9L-CLLX>].

⁷⁵ Michael Roberts, *Metro Denver’s Population is Up More than 388,000 in Eight Years*, WESTWORD (Apr. 19, 2019, 6:32 AM) <https://www.westword.com/news/denver-metros-population-is-up-more-than-388000-in-eight-years-11316402> [<https://perma.cc/2XLK-KN3D>].

In 2012 and 2013, concerned about environmental threats, cities along the base of the Front Range adopted measures prohibiting or suspending fracking.⁷⁶ Proponents urged that the measures were necessary to protect residents' health and quality of life because the oil and gas boom had contributed to an untenable increase in ozone and greenhouse gas emissions.⁷⁷ Most of the cities adopted standard zoning laws, either prohibiting fracking as dangerous land use or imposing moratoria on fracking so that its impacts could be studied; these zoning laws did not challenge corporate power.⁷⁸

The City of Lafayette, alone, chose the community rights approach.⁷⁹ Lafayette is a suburban community, adjacent to Boulder and north of Denver, which offers its residents a combination of small-town charm, easy access to urban amenities and cultural opportunities, a lakeside park, green belts, bikeways, and proximity to the mountain recreational areas and wildlands.⁸⁰ In 2010, Lafayette's population was about 24,500; in 2018 it was estimated to exceed 29,900.⁸¹

Seeking to preserve their community's health and quality of life, residents of Lafayette turned to CELDF for assistance; and the organization helped them prepare a community rights amendment to the city charter.⁸² The proposed charter amendment established the rights of

⁷⁶ Ballotpedia, *City of Lafayette "Community Rights Act" Fracking Ban Amendment, Question 300*, (Nov., 2013), [https://ballotpedia.org/City_of_Lafayette_%22Community_Rights_Act%22_Fracking_Ban_Amendment,_Question_300_\(November_2013\)](https://ballotpedia.org/City_of_Lafayette_%22Community_Rights_Act%22_Fracking_Ban_Amendment,_Question_300_(November_2013)) [https://perma.cc/6BZ4-RJMG].

⁷⁷ Michael Wines, *Colorado Cities' Rejection of Fracking Poses Political Test for Natural Gas Industry*, N.Y. TIMES (Nov. 7, 2013), <https://www.nytimes.com/2013/11/08/us/colorado-cities-rejection-of-fracking-poses-political-test-for-natural-gas-industry.html> [https://perma.cc/Z952-CBHK].

⁷⁸ Ballotpedia, *Fracking Ballot Measures*, https://ballotpedia.org/Fracking_ballot_measures [https://perma.cc/LD88-Q2ML] (last visited Sep. 6, 2020).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ United States Census Bureau, *Quick Facts, Lafayette City, Colorado*, <https://www.census.gov/quickfacts/lafayettecitycolorado> [https://perma.cc/4M4A-NNEY] (last visited Sep. 6, 2020).

⁸² Community Environmental Legal Defense Fund, *Lafayette City*, <https://celdf.org/community/lafayette/> [https://perma.cc/Y5TK-XKZX] (last visited Sep. 6, 2020).

residents to self-government, local sovereignty, peaceful enjoyment of their homes, and a sustainable energy future; it would also establish the rights of residents and ecosystems to clean water, clean air, and freedom from chemical trespass.⁸³ The prohibitions against corporate activity were more detailed than those in the Pennsylvania townships' and Mora County's laws: Lafayette's charter amendment prohibited corporations, not only from extracting gas and oil but also from storing or transporting the fracking waste, creating fossil fuel or other non-sustainable energy production, delivering infrastructure for uses related to fracking, extracting water for use in the extraction of gas.⁸⁴ Like other community rights laws, Lafayette's proposed charter amendment stripped away corporate violators' legal rights, including, but not limited to, rights under permits and rights to challenge the ordinance.⁸⁵ As to Nature, in addition to the rights shared with residents, the measure declared that ecosystems "possess inalienable and fundamental rights to exist and flourish."⁸⁶

Lafayette council members opposed fracking, but they refused to support the Community Rights Charter Amendment based on their concern that, if adopted by the voters, it would likely be challenged and invalidated in court at significant expense to the city.⁸⁷ One councilmember characterized the measure as an attempt to "separate Lafayette from the United States Constitution and the Colorado Constitution (...) at the expense of Lafayette."⁸⁸ Nonetheless, the voters adopted the measure, which passed with 60% voter support.⁸⁹

D. THE VOTERS OF TOLEDO, OHIO ADOPTED THE LAKE ERIE BILL OF RIGHTS BECAUSE INDUSTRIAL FARM RUNOFF SO POLLUTED THE LAKE THAT TOLEDO'S WATER SERVICE WAS CUT OFF FOR THREE DAYS

Lake Erie, one of the world's largest lakes, is the source of drinking water for 11 million people, but it has been polluted, for decades, by

⁸³ Ballotpedia, *supra* note 78.

⁸⁴ *Id.* at § 1-4.

⁸⁵ *Id.* at § 6-8.

⁸⁶ *Id.* at 2.3.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Ballotpedia, *supra* note 78.

industrial waste.⁹⁰ One of its tributaries, the Cuyahoga River, was so polluted that it caught fire a dozen times until, finally, the 1969 fire sparked the national environmental movement.⁹¹ The following year, the lake was described as “dying.”⁹² The United States, Canada, and their respective states and provinces that line the lake’s shore acted to address the disaster. Life returned to the lake, partially; but it continues to be heavily burdened by pollution from the runoff of manufacturing operations and industrial farming.⁹³

In 2014, a severe algae bloom in Lake Erie forced the complete shutoff of drinking water to the more than 287,100 people who live on the lake’s western bank in the City of Toledo.⁹⁴ The shutoff lasted for three days.⁹⁵ Phosphorus accumulations in the lake water, resulting from fertilizer runoff, were determined to be the cause of the disaster.⁹⁶ Public outrage galvanized community action: with assistance from CELDF, residents banded together and prepared the Lake Erie Bill of Rights (LEBOR).⁹⁷

⁹⁰ Michael Wines, *Behind Toledo’s Water Crisis, a Long-Troubled Lake Erie*, NEW YORK TIMES, (Aug. 8, 2005), <https://www.nytimes.com/2014/08/05/us/lifting-ban-toledo-says-its-water-is-safe-to-drink-again.html> [<https://perma.cc/2W7R-Z3BZ>].

⁹¹ Lorraine Boissoneutt, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAGAZINE, (June 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/> [<https://perma.cc/RZP6-982P>].

⁹² US EPA, *Facts and Figures about the Great lakes* (Apr. 4, 2019), <http://www.epa.gov/greatlakes/facts-and-figures-about-great-lakes> [<https://perma.cc/L7TM-6MEJ>].

⁹³ Jane J. Lee, *Driven by Climate Change, Algae Blooms Behind Ohio Water Scare Are New Normal*, NATIONAL GEOGRAPHIC (Aug. 6, 2014), <https://www.nationalgeographic.com/news/2014/8/140804-harmful-algal-bloom-lake-erie-climate-change-science/> [<https://perma.cc/S33E-KM47>].

⁹⁴ Mary Beth Griggs, *1970’s Redux: Lake Erie is so Polluted Toledo’s Drinking Water is Cutoff*, SMITHSONIAN MAGAZINE (Aug. 4, 2014), <https://www.smithsonianmag.com/smart-news/toledos-water-supply-was-contaminated-toxins-algae-180952242/> [<https://perma.cc/6D3N-4AAS>].

⁹⁵ Lee, *supra* note 95.

⁹⁶ *Id.*

⁹⁷ Community Environmental Legal Defense Fund, *Rights of Lake Erie Recognized in Historic Vote* (Feb. 27, 2019), <https://celdf.org/2019/02/rights-of-lake-erie/> [<https://perma.cc/8GBE-WLHW>].

Unlike many other community rights laws, LEBOR does not prohibit a specific activity that is harmful to the environment.⁹⁸ Instead, it establishes basic rights of the people of Toledo and of Lake Erie and its watershed by providing:

Rights of the Lake Erie Ecosystem. Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve. The Lake Erie Ecosystem shall include all-natural water features, communities of organisms, soil as well as terrestrial and aquatic sub ecosystems that are part of Lake Erie and its watershed.

Right to a Clean and Healthy Environment. The people of the City of Toledo possess the right to a clean and healthy environment, which shall include the right to a clean and healthy Lake Erie and Lake Erie ecosystem.

Right of Local Community Self-Government. The people of the City of Toledo possess both a collective and individual right to self-government in their local community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights.⁹⁹

After setting forth these general rights, LEBOR simply prohibits violating them, providing, “[i]t shall be unlawful for any corporation or government to violate the rights recognized and secured by this law.”¹⁰⁰

Other provisions of LEBOR, which strip corporate violators of their rights, are like other community rights laws. Thus, LEBOR invalidates any permit or other type of approval, issued to a corporation, that would authorize conduct prohibited by the ordinance;¹⁰¹ and it provides that:

Corporations that violate this law, or that seek to violate this law, shall not be deemed to be ‘persons’ to the extent that such treatment would interfere with the rights or prohibitions enumerated by this law, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by this law, including the power to assert state or federal preemptive laws in an attempt to overturn this law, or

⁹⁸ Charter of the City of Toledo, Ohio, Chapter XVII, Lake Erie Bill of Rights, [http://library.amlegal.com/nxt/gateway.dll/Ohio/toledo/charterofthecityoftoledoohio?f=tEMPLATES\\$fn=default.htm\\$3.0\\$vid=amlegal:toledo_oh](http://library.amlegal.com/nxt/gateway.dll/Ohio/toledo/charterofthecityoftoledoohio?f=tEMPLATES$fn=default.htm$3.0$vid=amlegal:toledo_oh) [https://perma.cc/EHW9-Q7XR].

⁹⁹ *Id.* at § 254.

¹⁰⁰ *Id.* at § 255(a). (This approach may have been chosen to minimize risks of preemption by federal and state laws regulating industrial farming techniques).

¹⁰¹ *Id.* at § 255(b).

the power to assert that the people of the City of Toledo lack the authority to adopt this law.¹⁰²

LEBOR carries criminal sanctions, providing that corporate or government violators “shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine” and that each day of violation is a separate offense.¹⁰³

Proponents of LEBOR faced and overcame significant obstacles to attain its passage.¹⁰⁴ After 6,000 signatures were gathered supporting LEBOR as an initiative ordinance and requesting its placement on the ballot, the county elections board voted to keep the measure off the ballot based on concerns that it unlawfully exceeded the city’s authority.¹⁰⁵ Proponents appealed, and the board’s decision was affirmed.¹⁰⁶ The measure was proposed again, this time as an amendment to the City Charter of Toledo to be approved by the voters; and the council voted to forward it to the elections board, despite two members’ public statements that the charter amendment would not withstand a legal challenge.¹⁰⁷ When the measure was returned to them as a charter amendment approved by the city council, the four-member elections board voted to place it on the ballot; however, two board members commented, publicly, that the measure was politically understandable but unlawful.¹⁰⁸ With 9% of the city’s voters participating, the measure passed at a special election in February of 2019 by 61%.¹⁰⁹

¹⁰² *Id.* at § 257(a).

¹⁰³ *Id.* at §256(a).

¹⁰⁴ Ballotpedia, *Lake Erie Bill of Rights, Path to the Ballot*, [https://ballotpedia.org/Toledo,_Ohio,_Question_2,_%22Lake_Erie_Bill_of_Rights%22_Initiative_\(February_2019\)](https://ballotpedia.org/Toledo,_Ohio,_Question_2,_%22Lake_Erie_Bill_of_Rights%22_Initiative_(February_2019)) [<https://perma.cc/QA73-YHTS>] (last visited Sep. 6, 2020).

¹⁰⁵ State ex rel. Maxcy v. Saferin, 155 Ohio St.3d 496. 2018-Ohio-4035, para. 5.

¹⁰⁶ *Id.*

¹⁰⁷ State ex rel. Abernathy v. Lucas Cnty. Bd. Of Elections, 156 Ohio St.3d238, 2019-Ohio-201, para.3.

¹⁰⁸ *Id.* paras. 8-9. (The Board’s second decision, like its first, was challenged in court and was upheld because state law established that the elections Board had no discretion to keep the measure off the ballot once the city council had voted to send the measure to the voters).

¹⁰⁹ See Ballotpedia, *supra* note 106.

The adoption of laws in these five communities, despite opposition and legal doubts, reflects the enthusiasm with which diverse communities have embraced the possibility of local environmental control.

III. CORPORATIONS SUED TO INVALIDATE COMMUNITY RIGHTS LAWS, ASSERTING FEDERAL SUPREMACY, PREEMPTION CLAIMS, AND CORPORATE CIVIL RIGHTS; AND THEY PREVAILED

A small percentage of the U.S. community rights laws were challenged in court, including the five described above; and all five were invalidated. This section describes those legal challenges and the results because the judicial response to the laws may be useful in formulating future Earth laws and assessing alternatives for recognizing and effectuating Nature's rights.

As described in this section, the legal claims asserted against the five communities described above vary with factual circumstances and each law's specific language. Generally, the challenges have been based on preemption doctrine, other limitations on the local authority, and federal civil rights, which protect humans and corporations and are guaranteed by:

The First Amendment protection of, among other things, the right to petition the government for redress, including in court;¹¹⁰

The Fifth and Fourteenth Amendment rights to equal protection of the laws, which guarantee that those similarly situated shall be treated similarly and prohibit irrational distinctions between those protected;¹¹¹

The Fifth Amendment right to Procedural Due Process, which requires notice and the opportunity to be heard before a governmental deprivation of property or liberty and includes protection against laws which are so vague that they do not give fair notice of what conduct is prohibited and increase risks of arbitrary or biased enforcement;¹¹²

¹¹⁰ See *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 342 (2010).

¹¹¹ See *Railway Exp. Agency v. New York*, 336 U.S. 106, 110 (1949).

¹¹² See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Procedural Bd. Of Rights v. Roth*, 408 U.S. 564 (1972).

The right to Substantive Due Process which safeguards the governed against arbitrary or irrational governmental action.¹¹³

As described below, the litigation testing the validity of these community rights ordinances was instituted by corporations against the cities and county. The community groups which had proposed and supported the measures were not parties. The Colorado cases were filed in state court; the other cases were filed in federal court. The legal controversies varied in their complexity, intensity, and duration in part because nonparties sought to intervene in some cases and additional cases were filed.¹¹⁴

A. A FEDERAL COURT DETERMINED THAT BOTH GRANT AND HIGHLAND TOWNSHIP'S COMMUNITY RIGHTS LAWS WERE INVALID BECAUSE THEY VIOLATED CORPORATE CONSTITUTIONAL RIGHTS

1. The Grant Township Litigation Involved Multiple Claims, Multiple Parties and Was Extremely Contentious; but the Township and Residents Persisted

PGE filed suit against Grant Township in 2014, alleging that the township's Community Bill of Rights Ordinance violated the private utility's federal civil rights and was preempted by state law.¹¹⁵ The township, represented by CELDF attorneys, filed a counterclaim alleging violations of the township's rights under federal and state law and the ordinance; and both parties moved for judgment on the pleading as to the claims involving no disputed facts.¹¹⁶ The court denied the township's motion and granted PGE's, holding that several provisions of the

¹¹³ See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

¹¹⁴ F.R.C.P. 24 allows intervention as of right if the proposed intervenor has an interest that would be impacted by the outcome of the case that is not adequately represented by the parties. The rule allows permissive intervention, at the court's discretion, if the proposed intervenor has a claim or defense that presents a common question of law or fact with a question being litigated.

¹¹⁵ *Pa. Gen. Energy Co. v. Grant Twp.*, Case No. 14-209; W.D.Pa., Complaint filed Aug. 8, 2014.

¹¹⁶ *Pa. Gen. Energy Co. v. Grant Twp.*, 139 F.Supp.3d 706, 743-744 (W.D.Pa.2017).

ordinance were preempted by state laws that established limits on the authority of second-class townships.¹¹⁷ In response, residents adopted a home rule charter, which expanded Grant Township's authority under Pennsylvania law.¹¹⁸ That change in the township's legal status obviated certain limitations imposed by state preemption, but it did not affect the constraints imposed by the U.S. Constitution.

Both parties moved for summary judgment.¹¹⁹ The court granted PGE's First Amendment claims, brought under the Petition Clause, because the ordinance purported to prohibit PGE from seeking judicial redress for violation of its federal civil rights and to deprive PGE of its right to assert that the township's charter provision was preempted by state law.¹²⁰

The court also granted PGE's Substantive Due Process claim, explaining that Due Process guarantees protect against arbitrary or irrational legislation.¹²¹ To determine whether Grant Township's Ordinance was irrational and arbitrary, the court looked, not only to the language of the Ordinance but also to statements in the record made by the township or its representatives.¹²² These statements included the assertion, made by one of the township's attorneys, that a community bill of rights "takes nothing for granted except the supremacy of inalienable rights over other laws, and [the need for] constitutional change at the state and national level that will recognize and enforce the right to community local self-government, free from state preemption and corporate interference(...)"¹²³ The court observed, "These record facts, among others, demonstrate irrational and arbitrary behavior (...) contrary to existing law (...) [taking] the purpose outside of the original point of the Ordinance."¹²⁴

117 *Id.*

118 Skirboll, *supra* note 24.

119 Pa. Gen. Energy Co. v. Grant Twp, *supra* note 112, (Memorandum Opinion on Motions for Summary Judgment (filed March 3, 2017)).

120 *Id.* at 25-27.

121 *Id.* at 20.

122 *Id.* at 29-31.

123 *Id.* at 31.

124 Pa. Gen. Energy Co. v. Grant Twp., C.A. No. 14-208, (W.D.Pa.). (Memorandum Opinion, p.31 (filed March 3, 2017)).

In response to the township's argument that the law was not arbitrary because it was based on legitimate concerns about the health of the environment, the judge stated:

[T]hat Grant Township had legitimate reasons to pass an ordinance is beside the point. The substantive due process review tests the arbitrariness and irrationality of the result and the efforts of the Ordinance beyond any alleged legitimate reason. Here a starting point of seeking a clean environment spun out of control into an Ordinance that does much more, including stripping corporations of their federal constitutional rights. [Emphasis in original.]¹²⁵

Following this decision, the case was scheduled for trial on the remaining claims; however, PGE and Grant Township settled their dispute before trial, filing a Joint Stipulation agreeing that PGE would dismiss with prejudice its remaining claims and request for damages in exchange for the township's token payment of \$1.00 in damages on the constitutional claims, which had been decided in PGE's favor on summary judgment.¹²⁶

This resolution of the legal claims did not end the litigation between PGE and Grant Township. PGE renewed a previously filed motion for sanctions,¹²⁷ seeking to recover \$500,000 in attorneys' fees and costs, which it claimed were incurred because the defendant pursued frivolous

¹²⁵ *Id.* at 32. (The court rejected PGE's other claims. The Supremacy Clause claim was rejected because that clause had recently been held not to create a cause of action but, instead, "instructs court what to do when state and federal law clash" *Id.* at p.19 , quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S.320, 325 (2015). The Procedural Due Process and Contract Clause claims were rejected because PGE had not submitted the exhibits necessary to support those claims. *Id.* at p. 32-35. The court analyzed Grant Township's claim that PGE had violated the peoples' right to local community self-government as a civil rights claim under 42 U.S.C. § 1983 and denied it because PGE, as a private corporation, is not a "state actor" and is therefore not subject to § 1983 liability). *Id.* at 7-12.

¹²⁶ *Pa. Gen. Energy Co. v. Grant Twp*, C.A. No. 1:14-cv-209, Memorandum Opinion, filed March 31, 2019, at 3. (The token payment of \$1.00 was probably demanded in settlement to protect PGE's ability to later claim attorney's fees pursuant to 42 U.S.C. § 1988(b) as the prevailing party in a civil rights lawsuit brought under 42 U.S.C. § 1983).

¹²⁷ 28 U.S.C. § 1927 and F.R.C.P.11. (Authorize the imposition of sanctions pursuant to specified standards).

unfounded claims.¹²⁸ In January of 2018, the District Court Judge awarded \$52,000 in sanctions against two CELDF attorneys and referred the matter to the state's disciplinary board to determine whether disciplinary measures should be undertaken against the township's attorneys.¹²⁹ The judge based her sanctions order on her conclusion that "[t]he continued pursuit of frivolous claims and defenses, despite [the lead attorney's] first-hand knowledge of their insufficiency (...) substantially and inappropriately prolonged this litigation, and required the Court and PGE to expend significant time and resources eliminating these baseless claims."¹³⁰

PGE next filed a motion for attorneys' fees based on its status as the prevailing party in a federal civil rights action.¹³¹ PGE produced detailed attorney billing records supporting its claim for over \$600,000 in fees, but the corporation expressed willingness to accept \$100,000 in fees to avoid bankrupting Grant Township.¹³² The court granted the motion in that amount, plus costs.¹³³ Later, PGE and the township successfully negotiated a settlement of the fee award; and it is reported that CELDF made the payment to PGE for the township.¹³⁴

The controversy also continued after the PGE settlement because the community group, the East Run Hellbenders Society, continued its efforts to participate on its own behalf and on behalf of the Little Mahoning Watershed after the trial court denied their intervention motion based on the ground that the interests the Hellbenders represented were adequately represented by the parties.¹³⁵ The Hellbenders appealed; and the order

¹²⁸ Pa. Gen. Energy Co. v. Grant Twp., C.A. No. 14-209 (W.D.Pa.) (Opinion and Order, filed Jan. 5, 2018. FRCP 1a. and 28 U.S.C. §1927 authorize the court to impose sanctions against attorneys or parties under specified circumstances, including improperly asserted claims or defenses unwarranted by existing law or by a nonfrivolous argument for changing existing law. F.R.C.P. 11).

¹²⁹ *Id.* at 24-25.

¹³⁰ *Id.* at 25.

¹³¹ See 42 U.S.C. § 1988.

¹³² Pa. Gen. Energy Co. v. Grant Twp., *supra*, note 127, at 1.

¹³³ *Id.* at 9.

¹³⁴ Josh Cotton, *PGE v. Grant Twp. Seemingly Settled*, TIMES OBSERVER (Nov. 20, 2019), <https://www.timesobserver.com/news/local-news/2019/11/pge-vs-grant-twp-seemingly-settled/> [<https://perma.cc/S5AQ-NY7Y>].

¹³⁵ Pa. Gen. Energy Co. v. Grant Twp., C.A.No.14-209 (W.D.Pa) (Memorandum Opinion, filed Oct.14, 2015, p.6-9).

denying intervention was affirmed based upon the appellate panel's conclusion that the township's and Hellbender's interests were "nearly identical" and that the community group's interests were therefore adequately represented by the township.¹³⁶ In a footnote to its opinion, the appellate panel expressed doubt about the watershed being a proper party under the Federal Rules of Civil Procedure.¹³⁷

2. When Seneca Resources Corporation Sued Highland Township, the Board of Supervisors Opted to Settle the Litigation; Residents Attempted to Continue the Case, But Could Not

Seneca Resources Corporation sued Highland Township to challenge its ban against disposal injection wells and its assertion of community authority.¹³⁸ However, with a change in the composition of the Board of Supervisors, the board's support for the ordinance eroded; and the township entered into a consent decree providing that the ordinance was unconstitutional, unenforceable, and adopted in excess of the town's authority, and the district court entered judgment for Seneca.¹³⁹ Town residents were undeterred; three months later, they adopted a Home Rule Charter, which included the community rights provisions of the former ordinance.¹⁴⁰

Seneca responded by filing a second lawsuit against the town, alleging, among other things, that the community rights charter provisions violated the First, Fifth, and Fourteenth Amendments and that the ban on injection wells was preempted by the federal Safe Drinking Water Act

¹³⁶ Pa. Gen. Energy Co. v. Grant Twp., 658 F. App'x 37, 40 (3rd Cir.2016).

¹³⁷ *Id.* at 41. (As to the watershed participating as a party, the appellate panel said, "We will refer to the Appellants in the plural throughout this opinion, but we are, at best, dubitante [*stet*], because we are not convinced that the Little Mahonig Watershed is a proper party (...) The plain language of Rule 17 does not permit an ecosystem (...) to sue anyone or be sued by anyone, and for that reason alone we have misgivings with the Watershed being listed as a party in this litigation. But (...) we make no specific holding on the question.")

¹³⁸ See Seneca Resources Corp. V. Highland Twp., 863 F.3d 245, 249-252 (2017) (describing the litigation's convoluted history).

¹³⁹ *Id.* at 251.

¹⁴⁰ Highland Twp. Charter, Art. VIII § 301 *et seq.*; Weidenboerner, *supra* note 59.

and state law.¹⁴¹ After the township filed a response admitting that the challenged provisions were invalid but asking that other charter provisions be allowed to stand, Seneca moved for judgment on the pleadings; and the district court judge granted the motion in part, finding that the charter provision prohibiting the injection of fracking waste was preempted by the federal Safe Drinking Water Act and by state law.¹⁴² The judge also found that community rights provisions violated Seneca's First Amendment right to seek redress in courts, as well as principles of Substantive Due Process, which protected Seneca against arbitrary government action.¹⁴³ The case settled, ending the legal proceedings between Seneca and the township.

Nonetheless, the controversy continued because the community group, Citizens Advocating a Clean and Healthy Environment (CACHE), continued its effort to intervene and thereby participate as a party, along with the Crystal Spring ecosystem.¹⁴⁴ CACHE wanted the opportunity to aggressively defend the community rights law because the township, believing the law to be invalid, did not.¹⁴⁵ The intervention was denied on grounds that the town and the board could adequately represent the proposed intervenors' interests and that the proposed intervenors lacked standing.¹⁴⁶ CACHE appealed the trial court's denial of intervention and also attempted to appeal the judgment entered pursuant to the consent decree.¹⁴⁷

The Third Circuit affirmed the trial court rulings.¹⁴⁸ As to intervention to defend the ordinance, the appellate court denied the appeal as moot because the ordinance had been repealed and therefore no longer existed.¹⁴⁹ As to challenging the consent decree and judgment and

¹⁴¹ Seneca Resources Corp. v. Highland Twp., No. 16-289 (W.D.pa.) (complaint filed Nov.30, 2016).

¹⁴² *Id.* Seneca Resources Corp. v. Highland Twp., 2017 WL4354710 (W.D.Pa. Sept. 29, 2017).

¹⁴³ *Id.*

¹⁴⁴ *Id.* (Memorandum Opinion – Motion to intervene by Cache and Crystal Spring Ecosystem, Sept. 20, 2017).

¹⁴⁵ *Id.* at 2-3.

¹⁴⁶ *Id.* at 3-6.

¹⁴⁷ Seneca Resources Corp v. Highland Twp., 863 F.3d 245 (2017).

¹⁴⁸ *Id.* at 254-256.

¹⁴⁹ *Id.*

defending the charter, the appellate court explained that because appellants had not become parties in intervention in the trial court and because they failed to show that they had suffered or would suffer injury sufficient to confer standing.¹⁵⁰ The appellate panel declined to consider whether an ecosystem could have standing.¹⁵¹

3. The Legal Controversy About the Townships' Community Rights Laws Continued Even After the Corporations' Lawsuits Settled Because the State Instituted Litigation, Asserting Preemption Claims Against the Townships; Grant Township Defended, Aided by a Change in State Law

The Pennsylvania conflicts continued: in March of 2017, the Pennsylvania Department of Energy and Power (DEP) filed suit against both Grant and Highland Townships, asserting that their local enactments were preempted by state law.¹⁵² The Highland Township board settled with the state, acknowledging that the ban on disposal wells was invalid; the state then issued an injection permit to Seneca Resources for the operation of an injection well in Highland Township.¹⁵³

Grant Township opted to litigate against the state, and the township's legal position was strengthened by a decision of the Pennsylvania Supreme Court construing the state Constitution's Environmental Rights Amendment.¹⁵⁴ The court determined that the amendment imposed a constitutional obligation upon the state to prohibit the degradation, diminution, and depletion of public natural resources, whether those harms might result from state action or the action of private parties, and also to act affirmatively, through the adoption of legislation, to protect the environment.¹⁵⁵ This judicial reinvigoration of the state Constitution's environmental protection provision bolstered Grant Township's arguments that state law did not preempt its charter provisions. When the

¹⁵⁰ *Id.* at 256-258.

¹⁵¹ *Id.* note 4.

¹⁵² Pa. Dept. of Env'tl. Prot. v. Grant Twp., No. 126 M.D.2017, (Pa. Cmwlth, Mar.2, 2020) (not reported).

¹⁵³ Skirboll, *supra* note 24.

¹⁵⁴ Const. of the Cmwlth of Pa., Art.1, § 27, P.L. 769, (adopted May 18, 1971).

¹⁵⁵ Pa. Env'tl. Defense Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).

DEP petitioned for summary relief on its state preemption claims, the township asserted that the state law limitations were unconstitutional as conflicting with the Environmental Rights Amendment.¹⁵⁶

In October of 2019, a three-judge appellate panel heard arguments about the extent of the town's and state's authority to regulate fracking operations under the state constitution, state oil and gas legislation, and the township's charter.¹⁵⁷ Press reports indicate that many members of the Hellbenders community group attended, expressing their determination to continue fighting for local control.¹⁵⁸ In March of 2020, the appellate panel issued its decision, denying the DEP's application for summary relief and allowing the township to pursue its claims that the charter provisions are protected by the Environmental Rights Amendment.¹⁵⁹ The court said:

In sum, the Township seeks to prove that hydrofracking and disposal of its waste are so dangerous to the environment as to be in violation of the [Environmental Rights Amendment], and thus that the statutes upon which DEP bases its preemption claims are constitutionally invalid. While the Township may or may not be able to prevail on its constitutional claims (...) it may attempt to do so in defense of DEP's lawsuit (...).¹⁶⁰

As of this writing, the struggle to attain local control of the environment continues, reinvigorated, in Pennsylvania.

B. MORA COUNTY'S LAW WAS INVALIDATED BECAUSE IT NULLIFIED CORPORATIONS' FIRST AMENDMENT RIGHT TO PETITION THE COURTS FOR RELIEF AND WAS PREEMPTED BY FEDERAL AND STATE LAW; HOWEVER, THE COURT FOUND THAT ADOPTION OF THE LAW WAS A RATIONAL

¹⁵⁶ Chauncey Ross, *Hellbenders have their day in court*, INDIANA GAZETTE (Oct. 5, 2019), https://www.indianagazette.com/news/hellbenders-have-their-day-in-court/article_a3381998-edaf-5743-8277-e2ac71ee60e6.html [https://perma.cc/4LG8-3DEK].

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Pa. Dept. of Env'tl. Prot. v. Grant Twp., No. 126 M.D. 2017, (Pa. Cmw'lth. March 2, 2020) at 5-9.

¹⁶⁰ *Id.* at 9.

RESPONSE TO THE FRACKING THREAT

Mora County's law was challenged in federal court by SWEPI, a Shell Oil Corporation, which had acquired a permit from the State of New Mexico to drill for oil and gas in Mora County.¹⁶¹ SWEPI filed suit against the county and its three commissioners, asserting numerous constitutional and state claims; and later moved for judgment on the pleadings.¹⁶² As to its constitutional claims, which were asserted under the federal Civil Rights Act,¹⁶³ SWEPI argued, among other things, that Ordinance 2013-01 violated the Supremacy Clause, SWEPI's Substantive Due Process rights, and its rights under the Equal Protection Clause and the First Amendment.¹⁶⁴ Mora County argued, among other things, that its law was rationally based and necessary to protect health and safety and that the Declaration of Independence and Treaty of Guadalupe Hidalgo gave the people of the county the right to self-government, which included the right to adopt the ordinance.¹⁶⁵

In an unusually lengthy opinion of 184 pages, the federal district court judge concluded that the ordinance violated SWEPI's civil rights because it conflicted with the Supremacy Clause and First Amendment guarantees.¹⁶⁶ As to the conflict between Mora's law and federal law, the court stated:

The Supreme Court has established that corporations are 'persons' within the meaning of the Equal Protection Clause and are entitled to its protections (...) The Supreme court has also established that corporations have First Amendment rights (...) The Ordinance, in

¹⁶¹ See SWEPI v. Mora Cnty., 81 F.Supp.3d 1075, 1088 (D.N.M.).

¹⁶² SWEPI v. Mora Cnty., CIV 14-0035 (D. New Mexico).

¹⁶³ 42 U.S.C. § 1983.

¹⁶⁴ SWEPI v. Mora Cnty, *supra* note 157, 81 F.Supp.3d.at 1096-1097.

¹⁶⁵ *Id.* at 1103-1108.

¹⁶⁶ The decision is particularly significant because it was the first federal court opinion on a local drilling ban and the first judicial interpretation of the preemptive power of the New Mexico Oil and Gas Act. See also Ellen M. Milmer and Mike Lee, *Scrapped drilling ban leaves open window for local rules*, E&E NEWS (Jan. 22, 2015) <https://www.eenews.net/stories/1060012063> [<https://perma.cc/TXQ7-STG3>]. (As noted in the decision, the New Mexico Attorney General had previously opined that state law preempted all local regulation, but the court decided otherwise). SWEPI V. Mora Cnty., 81 F.Supp.3d 1075, 1193-1194 (D.NM. 2015).

contradiction to the Constitution and Supreme Court precedent, states that corporations that violate, or that seek to violate, the Ordinance have no First or Fifth Amendment rights (...) Mora county lacks the authority to nullify constitutional rights.

The Defendants argue that Mora county residents' right to self-government provides them with the right to pass the Ordinance, including the provisions stripping corporations of their constitutional rights (...) They argue that the Declaration of Independence and the Treaty of Guadalupe Hidalgo provide, or at least recognize, these rights (...) The Defendants are, however, mistaken.¹⁶⁷

In addition to invalidating the ordinance provisions that purported to strip away SWEPI's First Amendment rights, the court invalidated the prohibitions against oil and gas extraction as preempted by state law.¹⁶⁸ Because these provisions were the heart and substance of the ordinance, the court refused to sever the invalid provisions from the remaining provisions and therefore invalidated the entire ordinance.¹⁶⁹

Nonetheless, the court did not reject all of Mora County's arguments and left an open question as to the extent of the local authority to regulate oil and gas extraction in New Mexico.¹⁷⁰ The court explained that New Mexico state law did not preempt the entire field of oil and gas extraction and, instead, left "room for concurrent regulation by Mora County."¹⁷¹ As to the constitutional claims, the court concluded that Mora County's law did not violate either Equal Protection or Substantive Due Process guarantees because it related to a legitimate state interest in residents' health and safety and was rationally based.¹⁷² As to the fact that the law's prohibitions applied only to corporations, and not to natural persons, the court explained that this distinction was not invalid as arbitrary because the county could have reasonably concluded that corporations were more

¹⁶⁷ *Id.* at 1172-1173 (internal citations omitted).

¹⁶⁸ *Id.* at 1189-1203.

¹⁶⁹ *Id.* at 1203-1212. (It is noteworthy that the court was not averse to local control of extraction activities. The court denied SWEPI's Equal protection claims based on its conclusion that the ordinance was rationally based. This aspect of the decision differs from the Pennsylvania district court's in *PGE v. Grant Twp*).

¹⁷⁰ Ellen M. Gilmer and Mike Lee, *Scrapped drilling ban leaves open window for local rules*, E&E NEWS (Jan. 22, 2015), <https://www.eenews.net/stories/1060012063> [<https://perma.cc/TXQ7-STG3>].

¹⁷¹ *SWEPI v. Mora Cnty.*, *supra*, note 162, 1195.

¹⁷² *Id.* at 1178.

likely than individuals or other business entities to undertake fracking activities.¹⁷³

The county supervisors considered an appeal but opted to settle because the loss on constitutional claims exposed the county to the risk of being ordered to pay increased legal fees if the county again lost on appeal.¹⁷⁴ However, the county and its people did not abandon their opposition to fracking. The county's attorney announced that all legal options for regulating fracking activities would be considered.¹⁷⁵ Moreover, in her subsequent written description of the controversy, the supervisor who had originally opposed the adoption of the ordinance expressed her ongoing commitment to protecting the environment.¹⁷⁶ She advocates resisting state preemption, enacting strict local land use laws, strengthening state environmental laws and supporting stiff enforcement, lobbying for additional limitations on oil and gas drilling to the Clean Drinking Water Act, and accelerating the transition to clean energy with incentives and by training workers for the solar and wind energy industries.¹⁷⁷

C. IN COLORADO, LAFAYETTE'S AND OTHER LOCAL LAWS WERE INVALIDATED AS PREEMPTED BY STATE LAW; LAFAYETTE PERSISTED, AMENDING ITS CHARTER AND TAKING OTHER ACTIONS TO CURTAIL FRACKING; AND THE COLORADO LEGISLATURE ULTIMATELY EXPANDED

¹⁷³ *Id.* at 1180.

¹⁷⁴ Paula Garcia, *Protecting Mora County from Fracking*, SANTA FE NEW MEXICAN (May 17, 2018), https://www.santafenewmexican.com/opinion/my_view/protecting-mora-county-from-fracking/article_64d3968b-f968-5060-8e61-5220fab53464.html [<https://perma.cc/ZN4R-PXH3>].

¹⁷⁵ Staci Matlock, *Mora settles pair of fracking ban lawsuits*, SANTA FE NEW MEXICAN (Apr. 28, 2015), [<https://perma.cc/Y26B-Y5FB>].

¹⁷⁶ Paula Garcia, *A Retrospective on the Mora County Fracking Ban*, LA JACARITA (Feb. 7, 2018), <https://lajacarita.wordpress.com/2018/02/07/a-retrospective-on-the-mora-county-fracking-ban/> [<https://perma.cc/W6MY-QHMH>].

¹⁷⁷ *Id.*

LOCAL CONTROL OVER OIL AND GAS OPERATIONS

Like other Colorado cities' laws banning fracking activities, Lafayette's was challenged as preempted by state law and invalidated.¹⁷⁸ The court explained in its ruling against Lafayette that the Colorado Oil & Gas Conservation Act¹⁷⁹ included the legislative declaration that it is in the public interest to, among other things "foster the responsible, balanced development, production and utilization of natural resources of Oil and gas in a manner that prevents waste" and that the act defines "waste" as operating a well in a manner that causes a reduction in the quantity of oil and gas ultimately recoverable.¹⁸⁰ Thus, the court concluded that Lafayette's community rights law banning oil and gas extraction conflicted with, and was preempted by state law."¹⁸¹

The community did not give up. Three years later, in 2017, the city council of Lafayette adopted the "Lafayette Climate Bill of Rights."¹⁸² The ordinance is based on legislative findings that global environmental destruction "constitutes an emergency that threatens our very survival", that "systematic poisoning of our water, air, and soil (...) affect the health and safety of all residents," and that "extraction of coal, oil and gas, and disposal of drilling waste within the City would significantly contribute to environmental destruction, and life-endangering health risks."¹⁸³ The substantive provisions of the ordinance recognize residents' and ecosystems' general rights to a healthy environment and freedom from activities that interfere with those rights, including extractive and other activities that threaten human health:

[A]ll residents and ecosystems in the City of Lafayette possess a right to a healthy climate and life-sustaining resources, which shall include the right to be free from all activities that interfere with that right, including the extraction of coal, oil, or gas, disposal of drilling waste,

¹⁷⁸ Colorado Oil & Gas Assoc. v. City of Lafayette, (U.S.D.C. Den.) Case No. 13CV31746 (Order Granting COGA's Motion for Summary Judgment, filed Aug. 27, 2014).

¹⁷⁹ Colo. Rev. Stat. § 34-60-100 et seq.

¹⁸⁰ *Id.* at 11-12.

¹⁸¹ *Id.* at 12.

¹⁸² Ordinance No. 02, Series 2017; Mun. Code Art., § 43-51 et seq.

¹⁸³ *Id.*

contaminated drinking water ...and other byproducts of industrial activity which threaten human physical and neurological systems.¹⁸⁴

The Climate Bill of Rights appears to do, indirectly, what its predecessor the Community Rights Act, did directly: prohibit fracking. Also, like its predecessor, the Climate Bill of Rights purports to deprive violators of their legal rights, providing that of “entities which violate the people’s right to a healthy climate and sustainable ecosystem shall not be deemed to be ‘persons,’ nor possess any other legal rights, privileges, powers, or protections which would interfere with the enforcement of that right;”¹⁸⁵ however, the deprivation appears to be narrower and less specific. Finally, the new law contains an anti-preemption provision which asserts that “the doctrines of ceiling preemption, municipal subordinate to the state government, or corporate ‘rights’ unconstitutionally violate the right of the residents of the city of Lafayette to local, community self-government.”¹⁸⁶

As of this writing, the legal viability of Lafayette’s Climate Bill of Rights is difficult to assess, partly due to changes in Colorado state law. Having lost the fight for local control in the courts, Coloradans circulated an initiative petition to expand local control of oil and gas extraction activities.¹⁸⁷ It qualified for the statewide ballot in 2018 and was defeated with approximately 55 percent of the voters opposed.¹⁸⁸ However, following that political uprising, the state legislature enacted SB 19-181, which loosened state control of oil and gas extraction.¹⁸⁹ The new state legislation revised state law and policy on oil and gas extraction by

¹⁸⁴ Climate Bill of Rights, § 1(a); Mun. Code §43-51(a).

¹⁸⁵ *Id.* §1(c) and 43-51(c).

¹⁸⁶ *Id.* § 1(d) and 43-51(d).

¹⁸⁷ Ballotpedia, *Colorado Proposition 112, Minimum Distance Requirements for New Oil, Gas, and Fracking Projects Initiative (2018)*, (Proposition 112 would have mandated a significantly increased “setback” distance between fracking operations and other land uses, such as schools, homes, and water sources) [https://ballotpedia.org/Colorado_Proposition_112,_Minimum_Distance_Requirements_for_New_Oil,_Gas,_and_Fracking_Projects_Initiative_\(2018\)](https://ballotpedia.org/Colorado_Proposition_112,_Minimum_Distance_Requirements_for_New_Oil,_Gas,_and_Fracking_Projects_Initiative_(2018)) [<https://perma.cc/F789-BX72>].

¹⁸⁸ *Id.*

¹⁸⁹ Colorado Legislation, *Senate Bill 19-181*, https://leg.colorado.gov/sites/default/files/2019a_181_signed.pdf.

prioritizing public health in making determinations on extraction permits and eliminating a particular state restriction on local authority over oil and gas extraction.¹⁹⁰ Since then, at least one request has been made to reopen a case involving a local Colorado fracking ban based on SB 19-181.¹⁹¹ Thus, for now, the extent of the authority transferred to local governments remains unclear.

Meanwhile, Lafayette has taken other steps to ward off the risks of fracking; the city has hired private oil and gas counsel to assist them in identifying and assessing their legal options and has adopted and extended a moratorium on drilling operations to remain in place during the assessment period.¹⁹² Additionally, the city's website states that, "as a matter of policy" the city does not provide water service to fracking operations and that there are no fracking operations in Lafayette at present.¹⁹³

D. LEBOR WAS CHALLENGED BY A FARMING CORPORATION ON
CONSTITUTIONAL AND PREEMPTION GROUNDS AND WAS INVALIDATED
BECAUSE THE RIGHT TO "EXIST, FLOURISH AND EVOLVE" WAS TOO
VAGUE TO MEET CONSTITUTIONAL STANDARDS

The day after the Lake Erie Bill of Rights was adopted, the Drewes Farms Partnership filed suit in federal court, challenging the initiative's constitutionality and Toledo's authority to adopt it.¹⁹⁴ The complaint alleges that Drewes Farms is operated by a fifth-generation farming family, that crop fertilization is essential to their business, and that its farming operation comports with all applicable legal standards, industry

¹⁹⁰ *Id.*

¹⁹¹ Rico Moore, *Colorado Rising files motion to reopen Longmont fracking ban case*, BOULDER WEEKLY (Aug. 22, 2019), <https://www.boulderweekly.com/news/colorado-rising-files-motion-to-reopen-longmont-fracking-ban-case/> [<https://perma.cc/F7QV-79EV>].

¹⁹² City of Lafayette, *Oil and Gas Information and Resources*, <https://cityoflafayette.com/753/Oil-and-Gas> [<https://perma.cc/9EW2-JRZ6>].

¹⁹³ *Id.*

¹⁹⁴ *Drewes Farm P'ship v. City of Toledo*, Case No. 3:19-cv-00434-JZ Doc#1, filed 2/27/19. Northern Dist. Of Ohio, Western Division. (The City of Toledo stipulated to the issuance of a preliminary injunction that preserves the status quo during trial court proceedings; so, though approved by the voters, LEBO did not go into effect. Preliminary Injunction Order).

best practices, and scientific recommendations for minimizing runoff.¹⁹⁵ The complaint includes five constitutional claims of civil rights violations under the First, Fifth, and Fourteenth Amendments.¹⁹⁶ The complaint also includes numerous preemption claims, among them that Lake Erie is regulated by two countries and five U.S. states and may not be regulated by local law.¹⁹⁷

Although Drewes Farms' complaint includes constitutional claims similar to those made against Mora County and Grant Township, it differs in one very significant respect: it alleges a violation of the Fifth and Fourteenth Amendment prohibition against laws so vague that they do not provide fair notice of what conduct is punishable or they invite arbitrary or discriminatory enforcement:

The Fifth Amendment prohibits the enforcement of criminal laws so vague that they fail to give ordinary people fair notice of the conduct they seek to punish, or so standardless that they invite arbitrary enforcement.

LEBOR is unconstitutionally vague in that it does not specify what conduct would interfere with the purported right of Lake Erie and the Lake Erie watershed to 'exist, flourish, and naturally evolve.'¹⁹⁸

These allegations are the first direct challenge to a U.S. ordinance provision recognizing Nature's substantive rights.¹⁹⁹

In January of 2020, the district court heard argument on plaintiff Drewes' Farm's motion for judgment on the pleadings.²⁰⁰ News reports indicate that community members filled the courtroom and demonstrated

¹⁹⁵ *Id.* (Complaint, Para.4).

¹⁹⁶ *Id.* paras. 6-7.

¹⁹⁷ *Id.* paras. 91-132.

¹⁹⁸ *Id.* paras.68, 71-72. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983).

¹⁹⁹ In the other cases, as described above, plaintiffs' complaints focused on preemption and the constitutionality of "community rights" provisions purporting to invalidate corporations' constitutional rights. The courts in those cases denied severance and thus invalidated the entire ordinances, including the provisions recognizing Nature's substantive rights; but, as described above in sections II.A. through III.C., the courts did not consider the legal validity of the sections recognizing Nature's substantive rights.

²⁰⁰ *See* F.R.C. P. 12(c).

outside the courthouse.²⁰¹ Afterward, CELDF commented that, whatever the outcome, the people of Toledo had already won because they had organized, passed a ground-breaking law, and ensured that meaningful arguments were made in court about the lake's rights and the people's right to govern locally to protect nature and their health.²⁰²

On March 3, 2020, the federal district court issued its "Order Invalidating Lake Erie Bill of Rights."²⁰³ The order explains:

The Fourteenth Amendment to the United States Constitution protects the right of due process. An 'essential' element of due process is the clarity of the laws. *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (...). If a law is so vague that 'persons of common intelligence must necessarily guess at its meaning,' it is unconstitutional. *Id.* (...). Vague laws are unconstitutional for at least two reasons: they 'may trap the innocent by not providing a fair warning,' and they invite arbitrary enforcement by prosecutors, judges, and juries. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The clarity requirement also 'ensures that [governmental] power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values.' *Roberts*, 468 U.S. at 629. (...) Under even the most forgiving standard, the environmental rights identified in LEBOR are void for vagueness.²⁰⁴

However, though the federal trial court invalidated LEBOR, the voter uprising against the pollution of Lake Erie succeeded in attracting the attention of state legislators. The State of Ohio announced the beginning of a process for developing daily "load limits" for phosphorous pollution of Lake Erie; and environmentalists have countered that such

²⁰¹ Tom Henry, *Lake Erie Bill of Rights Hearing Fills Federal Courtroom as Judge Deliberates its fate*, THE TOLEDO BLADE (Jan.28, 2020), <https://www.toledoblade.com/local/environment/2020/01/28/lake-erie-bill-of-rights-hearing-fills-federal-courtroom-as-judge-deliberates-its-fate/stories/20200128119> [<https://perma.cc/BU23-MQ6V>].

²⁰² Community Environmental Legal Defense Fund, *Lake Erie Bill of Rights Court Update*, CELDF (Feb. 3, 2020), <https://www.celdf.org/2020/02/lake-erie-bill-of-rights-court-update> [<https://perma.cc/RHV4-KQCH>].

²⁰³ *Drewes Farm P'ship v. City of Toledo*, Case: 3:19-cv-00434-JZ Doc#63 Filed: 2/27/20.

²⁰⁴ *Id.* (The order also states, "The right of Toledoans to 'self-government in their local community' is impermissibly vague as well.") *Id.* at p.6; see also Jeff D. Gorman, *Judge Shoots Down Lake Erie Bill of Rights*, COURT HOUSE NEWS SERVICE (Feb. 28, 2020), <https://www.courthousenews.com/judge-shoots-down-lake-erie-bill-of-rights/> [<https://perma.cc/V7YY-2Y2P>].

limits would be ineffective unless the state also regulated farmers' use of fertilizers and disposal of manure.²⁰⁵

In summary, though only a relatively small percentage of the community rights laws recognizing Nature's rights have been challenged, those that have been challenged were invalidated, including those discussed in this article and noted elsewhere.²⁰⁶ *Drewes Farm v. City of Toledo* is the only known case in which constitutional infirmity of Nature's rights provision was a basis for invalidation.

IV. OTHER LEGISLATIVE APPROACHES EMPHASIZE NATURE'S RIGHTS AND HUMANS' BOND WITH NATURE, RATHER THAN MAXIMIZING LOCAL AUTHORITY OR DIMINISHING CORPORATIONS' LEGAL RIGHTS

The community rights ordinances described in Section II of this article proclaim local sovereignty as against corporate threats, federalism, and state preemption and, therefore, might be characterized as "ethnocentric" in their emphasis upon human authority; Nature and rights of ecosystems are mentioned and included but they are not the focus.²⁰⁷ However, as described in this section some local enactments are significantly more eco-centric.

A. NATIVE AMERICAN ENACTMENTS EMPHASIZE HUMANS' BOND TO

²⁰⁵ John Seewer, *Ohio plans to tighten runoff to help Lake Erie*, COLUMBUS DISPATCH (Feb.14, 2020), <https://www.dispatch.com/news/20200214/ohio-plans-tighter-runoff-rules-to-help-lake-erie> [<https://perma.cc/TFR3-2CJ7>].

²⁰⁶ See Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. (2015) 675, 724, https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1020&context=faculty_scholarship [<https://perma.cc/C4JX-RXTG>]; see also Peggy Kirk Hall, Ellen Essman, and Evin Bachelor, *The Lake Erie Bill of rights Ballot Initiative*, IN THE WEEDS, OSU Extension Agricultural & Resource Law Program (Feb. 8, 2018). Pa. v. Grant Twp., C.A. No. 14-209 Opinion and Order, Jan. 5, 2018, p.19, (listing other cases in which courts rejected CELDF's arguments that local enactments could deprive corporations of constitutional rights).

²⁰⁷ Mora County's law differs from most community rights laws adopted by U.S. cities in that reflects the Native American understanding that humans are of Nature and not its masters; however, the substantive provisions of Mora County's law are similar to the other community rights enactments. See § II B, describing Mora's ordinance.

NATURE AND RESPONSIBILITY FOR NATURE'S WELFARE.

Native Americans have been leaders on this pathway, a status reflecting a cosmology in which humans are part of Nature, rather than its proprietors. Thus, in 2003, years before Tamaqua adopted what is generally recognized as the first rights of Nature law, the Navajo Tribal Council amended its nation's code to recognize Nature's rights.²⁰⁸ Title I of the Navajo code declares "all creation, from Mother Earth and Father Sky to the animals, those who live in the water, those who fly and plant life have their own laws, and rights and freedom to exist."²⁰⁹ Other Native American nations, tribes, and bands have also recognized the rights of Nature through formal enactments: the Ponca Nation being among the first.²¹⁰ Plagued with rising cancer and asthma rates resulting from the toxic impacts of fracking activities concentrated in Oklahoma, the Ponca Nation adopted an anti-fracking measure in 2017.²¹¹ Other tribes have acted to protect the waters that are the center of their lives and cultures, and two of their stories follow.

1. The Chippewa Acted to Recognize Rights of Manoomin (Wild Rice)

The reservation of the White Earth Band of the Chippewa Nation encompasses 47 lakes and 500 other bodies of water.²¹² This region of abundant water has been home to the Ojibwe or Anishinaabeg people for 1,000 years since they were first drawn there by the "food that grows on water", wild rice or Manoomin, which is the spiritual and economic

²⁰⁸ BOYD, *supra* note 25.

²⁰⁹ *Id.*

²¹⁰ Alex Brown, *Cities, Tribes Try a New Environmental Approach: Give Nature Rights*, THE PEW CHARITABLE TRUSTS: STATELINE (Oct. 30, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/30/cities-tribes-try-a-new-environmental-approach-give-nature-rights> [<https://perma.cc/MF6B-M9WC>].

²¹¹ *Id.* (Tribal leader Casey Horner and the Ponca people have received support from Movement Rights).

²¹² Winona LaDuke, *The Long and Honorable Battle of the Ojibwe to Keep Their Wild Rice Wild*, INDIAN COUNTRY TODAY (Nov. 2, 2011), https://indiancountrytoday.com/archive/the-long-and-honorable-battle-of-the-ojibwe-to-keep-their-wild-rice-wild-_dXm7kHqx0-l82Fu2arYlg [<https://perma.cc/RE9S-H7BM>].

mainstay of their culture.²¹³ They harvest it, annually, using an ancient method that safeguards Manoomin’s continued existence.²¹⁴ Harvesters in canoes beat the rice with flailing sticks; the grain releases, flying into the air and falling into the canoes for use as food or back into the water, where it reseeds.²¹⁵

Today, the aquatic ecosystem is threatened;²¹⁶ mining is increasing levels of sulfates.²¹⁷ In response to this threat and others, the leadership of the White Earth Band and the 1855 Treaty Authority voted to adopt resolutions recognizing the rights of Manoomin.²¹⁸ These resolutions are modeled on enactments of other Native American peoples and laws adopted in Ecuador, Bolivia, and New Zealand.²¹⁹

The resolutions describe Manoomin as a “gift” to the people from the “Creator” and a “central element of the culture, heritage, and history of the Anishinaabeg people.”²²⁰ The resolution of the 1855 Treaty Authority also recognizes Manoomin’s rights to “exist, flourish, regenerate, and evolve;” its right to restoration, recovery, and preservation; and its rights to clean water and freshwater habitat, a natural environment free from industrial pollution, a healthy, stable climate free from human-caused climate change impacts, and freedom from patenting and contamination by genetically engineered organisms.²²¹ Finally, that

²¹³ *Id.*

²¹⁴ Heide Brandes, *Like Gold to Us: Native American Nations Struggle to Protect Wild Rice*, SIERRA CLUB MAGAZINE (Aug. 26, 2019), <https://www.sierraclub.org/sierra/gold-us-native-american-nations-struggle-protect-wild-rice> [<https://perma.cc/QHH7-APJB>].

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ LaDuke, *supra* note 214.

²¹⁸ 1855 Treaty Authority Resolution Establish Rights of Manoomin, Resolution No. 2018-05, adopted Dec. 5, 2018; White Earth Reservation Business Committee Resolution No. 001-19-009, adopted Dec. 31, 2018.

²¹⁹ Winona LaDuke, *The White Earth Band of Ojibwe Legally Recognized the Rights of Wild Rice. Here’s Why*, YES MAGAZINE (Feb. 1, 2019), [https://www.yesmagazine.org/environment/2019/02/01/the-white-earth-band-of-
ojibwe-legally-recognized-the-rights-of-wild-rice-heres-
why/#:~:text=According%20to%20a%20resolution%2C%20these,treaty%20foods%20of
or%20future%20generations.%E2%80%9D](https://www.yesmagazine.org/environment/2019/02/01/the-white-earth-band-of-ojibwe-legally-recognized-the-rights-of-wild-rice-heres-why/#:~:text=According%20to%20a%20resolution%2C%20these,treaty%20foods%20of%20future%20generations.%E2%80%9D) [<https://perma.cc/NT7U-T4F4>].

²²⁰ 1855 Treaty, *supra* note 220.

²²¹ *Id.*

resolution recognizes the right of the Chippewa people to harvest and protect Manoomin, including by undertaking enforcement pursuant to mechanisms established by the federal Clean Water Act, Sections 401, 404.²²²

2. *The Yurok Acted to Recognize Rights of the Klamath River (Weroy)*

The Klamath River originates in Oregon farmlands, flows through the Cascade Mountains, and into California, where it flows through the Trinity and the Coastal Mountains and then into the sea in Del Norte County, about 20 miles south of the isolated town of Crescent City.²²³ The river's ecosystem occupies one of the least known, least populated, wildest, and most remarkable natural regions of California: the southern end of the great temperate rain forest that stretches up the Pacific coast and into southern Alaska.²²⁴ It is the home of the giant redwoods, some over 2000 years old, of abundant wildlife, and of the Yurok people, who have lived in villages amid the forests bordering Weroy (the Klamath River) since the 14th century.²²⁵

Today, the Yurok is the largest tribe in California with 6,000 members.²²⁶ Their culture centers around the river, which provides their staple food, salmon; however, for decades, the health of the river has been threatened, first by upstream dams and mining, and, more recently, by

²²² *Id.* (The Native American environmental group Honor Earth and CELDF assisted the Chippewa).

²²³ Crescent City California, *About Crescent City and Del Norte County*, <https://crescentcity.org/about.html> [<https://perma.cc/P7FA-BJ6D>] (Crescent City is the only incorporated city in Del Norte County which encompasses 1,230 square miles and is home to about 28,00 people, 6400 of whom live in Crescent City, and also home to abundant wildlife: bear, mountain lions, bobcats, huge herds of elk and deer, and many smaller species.)

²²⁴ Jaymi Heimbuch, *Get to Know North America's Temperate Rainforests*, TREEHUGGER (Sep. 2, 2020), <https://www.treehugger.com/facts-about-north-americas-temperate-rain-forests-4869747> [<https://perma.cc/S68L-YSHQ>].

²²⁵ Anna Smith, *How the Yurok Tribe is reclaiming the Klamath River*, HIGH COUNTRY NEWS: BUREAU OF INDIAN AFFAIRS (June 11, 2018), <https://www.hcn.org/issues/50.10/tribal-affairs-how-the-yurok-tribe-is-reclaiming-the-klamath-river> [<https://perma.cc/NX97-YW4F>].

²²⁶ *Id.*

global warming.²²⁷ Many groups, including the Yurok, have worked tirelessly to save the river; and, in 1981, it was federally designated as a Wild and Scenic River, which afforded some protections, but not enough.²²⁸ Recent river restoration efforts have focused on four upstream hydro-electric dams, slated for removal in the year 2022; but a recent report from the current federal administration casts doubt on the project, leaving the river's future uncertain.²²⁹

In 2019, the Yurok people adopted a “Resolution Establishing the Rights of the Klamath River,” which describes their relationship to Nature and the river:

The Yurok Constitution Preamble provides in part that “[i]n times past and now Yurok people bless the deep river, the tall redwood trees, the rocks, the mounds, and the trails. We pray for the health of all the animals, and prudently harvest and manage the great salmon runs and herd of deer and elk. We never waste and use every bit of the salmon, deer, elk, sturgeon eels, seaweed, mussels, candlefish, otters, sea lions, seals, whales, and other ocean and river animals ... This whole land, this Yurok country, sated in balance, kept that way by our good stewardship, hard work, wise laws, and constant prayers to the Creator.

The Yurok Tribe and its members have had a strong relationship with Weroy, also known as the Klamath River, since time immemorial and Yurok culture, ceremonies, religion, fisheries, subsistence, economics, resident, and all other lifeways are intertwined with the health of the River, its ecosystem, and the multiple species reliant on a thriving Klamath River ecosystem[.]²³⁰

The resolution also declares that harvesting sustainably and protecting the Klamath River ecosystem are inherent sovereign rights of the Yurok people and “international legal norms” declared under the

²²⁷ California Wilderness Coalition, *Fact Sheet: Klamath Wild & Scenic River*, <https://www.calwild.org/portfolio/fact-sheet-klamath-wild-scenic-river/> [https://perma.cc/X3XP-DP37].

²²⁸ See National Wild and Scenic Rivers System, *Klamath River, California*, <https://www.rivers.gov/rivers/klamath-ca.php> [https://perma.cc/E2R5-CWDM].

²²⁹ Hal Berntot & Lynda Mapes, *Feds Reject Removal of 4 Lower Snake River Dams in Key Report*, SEATTLE TIMES (Feb. 27, 2020), <https://www.seattletimes.com/seattle-news/feds-reject-removal-of-4-snake-river-dams-in-key-report/>.

²³⁰ York Tribe, *Resolution of the York Tribal Council No. 19-40*, (May 9, 2019), <http://files.harmonywithnatureun.org/uploads/upload833.pdf> [https://perma.cc/WN8R-TV6Y].

United Nations Declaration of the Rights of Indigenous Peoples.²³¹ Thus, to secure “the highest protection of the Klamath River through recognition of legal rights,” the resolution recognizes the rights of the Klamath River “to exist, flourish, and naturally evolve; to have a clean and healthy environment free from pollutants; to have a stable climate free from human-caused climate change impacts, and to be free from contamination by genetically engineered organisms.”²³²

The resolution concludes by proclaiming the Yurok’s intent to adopt an ordinance that will protect the river against threats to its health.²³³ According to the tribe’s general counsel, tribal member Amy Cordalis, adoption of the resolution creates the possibility of bringing cases in the Yurok tribal court to remedy harms to the river in a wholistic manner, which is not possible under federal environmental laws, because they merely address specific symptoms.²³⁴ Commenting on the resolution’s adoption, the tribal chairman, Joseph L. James, said, “It is and always will be our responsibility to defend this river by any means necessary.”²³⁵

Thus, while the U.S. community rights laws focus mainly on local communities’ rights to control local environments, Native American resolutions emphasize human unity with Nature, dependence upon Nature, and responsibility for Nature’s welfare.

B. SOME U.S. CITIES HAVE ADOPTED ENACTMENTS THAT FOCUS ON THE ENVIRONMENT’S RIGHTS RATHER THAN ON DIMINISHING CORPORATE POWER AND MAXIMIZING LOCAL AUTHORITY

Some cities in the U.S. have enacted measures that focus on respect for Nature rather than on establishing local sovereignty and diminishing

231 *Id.*

232 *Id.*

233 *Id.*

234 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/> [<https://perma.cc/Z65U-32JQ>].

235 Yurok Chairman Joseph L. James, *Tribe Passes powerful resolution*, YUROK TODAY (May 2019) at 3, http://www.yuroktribe.nsn.us/documents/Yurok_May_2019_newsletter_WEB.pdf [<https://perma.cc/AUU2-7G9W>].

corporate powers. A few are limited in scope and intended to draw attention to imperiled animals. For example, in 2014, the Board of Supervisors of San Francisco and of Malibu joined in the widespread movement opposing the captive exploitation of orcas by theme parks.²³⁶ The resolutions state, “every Whale has the right to be free of captivity and remain unrestricted in their native habitat.”²³⁷ Other cities have taken broader approaches to recognize Nature’s rights.

1. Santa Monica Incorporated Nature’s Rights Into its Existing Law and Policy as a Unifying Philosophical Foundation for Its Environmental Laws, Policies, and Programs

Santa Monica is a small dense city of eight square miles with 92,000 residents.²³⁸ It is surrounded, on land, by the megalopolis of Los Angeles.²³⁹ Despite its urban character, the city is strongly connected to Nature by its location, with the downtown situated atop bluffs overlooking the beaches of Santa Monica Bay, which sweep in a crescent connecting the Santa Monica Mountains to the north with the headlands

²³⁶ See Reese Halter, *Malibu Protects Dolphins and Whales*, HUFFINGTON POST (Mar. 5, 2014), https://www.huffpost.com/entry/malibu-protects-dolphins_b_4901374 [<https://perma.cc/DGP2-5BZX>]; see also Laura Bridgman, *San Francisco Declares: every whale and dolphin has the right to be free*, THE ECOLOGIST (Oct. 23, 2014), <https://theecologist.org/2014/oct/23/san-francisco-declares-every-whale-and-dolphin-has-right-be-free> [<https://perma.cc/P6LE-78DT>].

²³⁷ See *Id.* (Two years later, the State of California banned holding orcas in captivity for performance or entertainment, prohibited captive breeding, the import/export of orcas, and the sale of genetic material. AB 2305, South Carolina bans the display of all cetaceans). See also Animal Welfare Institute, *Cetacean Anti-Captivity Legislation and Laws*, <https://awionline.org/content/cetacean-anti-captivity-legislation> [<https://perma.cc/JE6W-XHGP>].

²³⁸ World Population Review, *Santa Monica, California*, <https://worldpopulationreview.com/us-cities/santa-monica-ca-population> [<https://perma.cc/36MX-NMYG>].

²³⁹ Paul R. Spitzzeri, *All Over the Map: “Map Showing Annexations and Boundaries of City of Los Angeles,” 31 January 1918*, THE HOMESTEAD BLOG (Jan. 31, 200), <https://homesteadmuseum.wordpress.com/2020/01/31/all-over-the-map-map-showing-annexations-and-boundaries-of-city-of-los-angeles-31-january-1918/> [<https://perma.cc/3F9V-MSNB>].

of the Palos Verdes Peninsula to the south.²⁴⁰ The city thus faces westward towards the oceanfront, which is the city's defining feature.

The environmental movement took root in Santa Monica forty years ago with the founding of the nonprofit organization Heal the Bay, which successfully fought sewage pollution of the bay and significantly restored the marine life.²⁴¹ In the ensuing decades, the city institutionalized environmentalism by creating an expert sustainability task force to advise the city council, adopting and three times updating a municipal sustainability plan, establishing a division of city employees dedicated to promoting sustainability, funding multiple programs to protect and restore the environment, and successfully undertaking environmental litigation.²⁴²

In 2011, environmental leaders encouraged the city's sustainability task force to recommend the adoption of a law recognizing Nature's rights.²⁴³ The task force discussed the proposal and ultimately conveyed it to the staff of the environmental program, who worked with the task force chair, the Earth Law Center, and the city attorney to formulate a proposal for council consideration.²⁴⁴ That working group proposed that the city council first consider a resolution describing and supporting the world-wide rights of the Nature movement and direct preparation of an ordinance recognizing the natural world's rights.²⁴⁵

²⁴⁰ *Id.*

²⁴¹ Elaine Woo, *Environmentalist began Heal the Bay*, LA TIMES (Oct. 14, 2009), <https://www.latimes.com/archives/la-xpm-2008-oct-14-me-green14-story.html> [<https://perma.cc/6BDD-HUUI>].

²⁴² Office of Sustainability and Environment, *City of Santa Monica*, <https://www.smgov.net/departments/ose/> [<https://perma.cc/UJ4B-5AQA>]. See e.g., Bob Pool, *Santa Monica sues 7 oil firms over tainted water wells*, LA TIMES (June 20, 2000), <https://www.latimes.com/archives/la-xpm-2000-jun-20-me-42804-story.html> [<https://perma.cc/C4DR-Z2US>].

²⁴³ Clifford Crespi Kaplan, *Perspectives on Rights of Nature in Santa Monica, California*, UNIVERSITY OF TEXAS, December, 2016, p.18-22, (describing the development of Santa Monica's Sustainability Rights Ordinance); (Attorney Linda Sheehan of Earth Law Center, Heal the Bay Director Dr. Mark Gold, and Shannon Biggs of Movement Rights were among those making the recommendations to the taskforce).

²⁴⁴ *Id.*

²⁴⁵ Santa Monica City Council, *City of Santa Monica Regular City Council Meeting Agenda*, (Jan. 24, 2012), <https://www.smgov.net/departments/council/agendas/2012/20120124/a20120124.htm> [<https://perma.cc/56K9-5765>]. (This two-step process was favored because it afforded

In 2012, the city council unanimously adopted its resolution recognizing that both humans and Nature have the right to a habitat that sustains life.²⁴⁶ The legislative findings supporting the resolution include, among others:

WHEREAS, THE City of Santa Monica recognizes the rights of natural communities and ecosystems within Santa Monica to exist, thrive, and evolve; and

WHEREAS, because ... Santa Monica recognizes that its future welfare depends upon the welfare of the natural environment, the City has long been committed to protecting, preserving, and restoring the environment; and ...

WHEREAS, it has become apparent that existing local, national, and international policies and laws ... have proven to be fundamentally inadequate to ensure environmental sustainability, and the growing environmental crisis necessitates a re-examination of the underlying societal and legal assumptions about our relationships with the environment; and (...)

WHEREAS, our current legal system classifies the natural world as human property, which may be used by its human owners for their own, private economic benefits, generally with minimal regard to the health of the environment; and

WHEREAS, (...) worldwide, national and local environmental communities are urging governments to adopt a new paradigm based upon recognition that people have fundamental environmental rights, as do natural communities and ecosystems, that the health of the world's populations and ecosystems depends on the full protection of these rights, and that asserted corporate rights cannot take precedence over these rights to human and environmental health and well-being; (...).²⁴⁷

Based on these and other findings, the city council resolved, among other things that:

the opportunity to educate the council and community about the rights of Nature movement before incorporating the concept into local law).

²⁴⁶ *Id.*

²⁴⁷ *An ordinance of the City Council of the City of Santa Monica Establishing Sustainability*, (Mar. 12, 2013), <https://www.smgov.net/departments/council/agendas/2013/20130312/s2013031207-C-1.htm> [<https://perma.cc/QX87-WML8>].

The City of Santa Monica supports local recognition of the fundamental rights of natural communities and ecosystems to exist, thrive and evolve, and supports effectuating these rights by modifying local law and policy as needed to better protect and sustain, for current and future generations, the natural environment upon which we all depend.²⁴⁸

The city council directed staff to prepare a proposed Sustainability Rights Ordinance, and the ordinance was submitted to the Council in 2013.²⁴⁹ The ordinance recognizes the rights of city residents to clean fresh and ocean waters; clean air; healthy, locally grown food; a sustainable climate, which supports both thriving human life and a flourishing biodiverse environment; waste disposal systems, which do not degrade the environment; and a sustainable energy future based on renewable energy sources.²⁵⁰ The ordinance recognizes that natural communities and ecosystems “possess fundamental and inalienable rights to exist and flourish in the City of Santa Monica.”²⁵¹ The ordinance addresses implementation and compliance by requiring biennial reports and hearings on “the state of the local environment, the realization of the rights recognized in [the ordinance], and the City’s progress in effectuating and enforcing the Sustainable City Plan.”²⁵²

The Sustainability Rights Ordinance does not address any specific environmental threat; nor does it seek to diminish or strip away corporate rights.²⁵³ Instead, it expresses an environmental ethic that serves as the philosophical and legal foundation for the City’s environmental laws, policies, and programs. After its adoption, the Sustainability Rights

²⁴⁸ *Id.*

²⁴⁹ City of Santa Monica, *City Council Report - Introduction and First Reading of an Ordinance Establishing Sustainability Rights*, (Mar. 12, 2013), <https://www.smgov.net/departments/council/agendas/2013/20130312/s2013031207-C.htm> [<https://perma.cc/6W36-9BDV>].

²⁵⁰ Santa Monica Mun. Code Chapter 12.02, <https://www.qcode.us/codes/santamonica/> [<https://perma.cc/6NVV-YA6L>].

²⁵¹ *Id.* at § 12.20.030.

²⁵² *Id.* § 12.02.040.

²⁵³ *Id.* at 12.02.030(c) (Instead, it declares that corporate entities do not enjoy special privileges under law that would subordinate the community’s rights to their private interests).

Ordinance was incorporated into the Sustainable City Plan as a guiding principle for the effectuation of the plan.²⁵⁴

2. *The Town of Crestone, Colorado Recognized the Rights of Nature and Honored Earth Through Adoption of a Resolution Recognizing and Celebrating Humans' Relationship to the Natural World*

Crestone is a small town situated on a subalpine plateau surrounded by the towering Sangre de Cristo mountains, some over 14,000 feet high.²⁵⁵ Long a spiritual refuge, the area is home to twenty-three religious and spiritual centers.²⁵⁶ Crestone formally recognized Nature's rights by adopting a resolution recognizing Nature as a unitary, living entity.²⁵⁷ Like the Native American enactments and Mora County's ordinance, Crestone's resolution expresses the human community's connection to the natural world and responsibility for Nature's welfare.²⁵⁸ The resolution is quoted here, in its entirety, to emphasize the contrast between the resolution and other rights of Nature enactments adopted by cities in the U.S.:

²⁵⁴ City of Santa Monica California, *Staff Report 3719: Public Hearing to Accept the 2019 Sustainability Rights Report*, OFFICE OF THE CITY CLERK CITY OF SANTA MONICA (Feb. 5, 2020 5:30 PM), http://santamoniacityca.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=1222&MediaPosition=&ID=3719&CssClass= [https://perma.cc/5UQ9-G9B5]. (The city has implemented the biennial public hearing and reporting requirement by preparing and publicly presenting a report on the city's attainment of environmental goals established by the Sustainable City Plan).

²⁵⁵ Uncover Colorado, *Crestone, Colorado*, <https://www.uncovercolorado.com/towns/crestone/> [https://perma.cc/AHR3-VKFY]. See also World Population Review, *Crestone, Colorado*, <https://worldpopulationreview.com/us-cities/crestone-co-population> [https://perma.cc/5QNW-WL4E] (The current population is 154 people).

²⁵⁶ Finn-Olaf Jones, *For Many a Follower, Sacred Ground in Colorado*, N.Y. TIMES (Jan. 22, 2008) <https://www.nytimes.com/2008/01/11/travel/escapes/11crestone.html> [https://perma.cc/8X8T-GTNV].

²⁵⁷ Resolution 005-2018 was adopted and signed by Mayor Kairina Danforth on August 9, 2018. The resolution was prepared with assistance from the Earth Law Center, and the processes of preparation and adoption are described by Myra Jackson and Grant Wilson, *Rights of Nature Takes Hold in Crestone, Colorado*, VT. J. OF ENV'T L., (Oct. 11, 2018), <http://vjel.vermontlaw.edu/rights-nature-takes-hold-crestone-colorado/> [https://perma.cc/SW5E-FPYE].

²⁵⁸ *Id.*

Whereas, an abiding reverence for nature defines and unites the Town of Crestone, whose residents share a deep spiritual connection to the natural world around them (...) the Sangre de Cristo Wilderness, the high alpine desert valley, the old growth cedar and pinon forests, the abundant wildlife, and the life-sustaining waters of the North Crestone Creek; and

Whereas, Town residents have long understood that humans are part of and dependent upon the natural world, which provides the necessities of life – air, water, food and home – and also nourishes the human spirits, thereby enabling humans not merely to exist, but also to flourish; and

Whereas, special recognition of the primacy of this relationship exists in the region long before the Town of Crestone was founded, when Native American Tribes considered the area to be sacred land and journeyed here for rites of passage, seeking insight and rejuvenation; and

Whereas, today, as in the past, visitors and residents alike receive nourishment, inner peace and spiritual renewal from the religiously pristine sacred land, and Town residents reciprocate these gifts by serving as stewards of the natural environment; and

Whereas, the understanding that humans must protect the natural world, though felt with particular intensity in Crestone, is widespread in society, as is demonstrated by the existence of both state and federal laws protecting in environment in general and clean, plentiful water in particular; and

Whereas, the Board of Trustees therefore wishes to join the growing number of communities, cities and nations around the world that have recognized nature's rights,

Now, therefore, be it resolved (...) that consistent with this widespread understanding and in furtherance of Crestone's particular commitment to environmental stewardship, the Town of Crestone does officially recognize that nature, natural ecosystems, communities, and all species possess the intrinsic and inalienable rights which must be effectuated to protect life on Earth.²⁵⁹

Consistent with its identity as a spiritual center that honors Earth, the town celebrated the resolution's adoption with a community gathering at which residents welcomed a Tejuana delegation of Mamo elders from

Columbia, South America, who were touring the United States, promoting human life in harmony with Nature.²⁶⁰

V. THE EXPERIENCE OF ADOPTING AND DEFENDING LOCAL ENACTMENTS RECOGNIZING NATURE’S RIGHTS OFFERS LESSONS THAT MAY GUIDE FUTURE EFFORTS TO EXPAND NATURE’S RIGHTS

The body of work described above supplies a trove of useful information from which much might be learned about incorporating recognition of Nature’s rights into U.S. law. The two general approaches described in this article differ significantly. The Native American enactments described above are positive declarations of the spiritual belief and ethical understanding that all life is one and humans are responsible for Nature’s welfare. Likewise, Crestone’s is a positive declaration of the community’s relationship with the natural world and the need for humans to respect Nature. Santa Monica’s resolution and ordinance are official enactments adopting a new philosophical and ethical foundation to strengthen and guide the city’s implementation of its sustainability plan and city environmental programs.

In contrast, the promotion, adoption, and defense of the community rights laws, described above, presents a much more dramatic and complex picture. Those laws were intended to do much more than stop environmentally destructive activities and promote human respect for the environment. They were intended to enhance local legal authority, diminishing federal and state authority, strip corporations of long-established constitutional rights, and create new legal rights and remedies. This effort was big and bold, successful by some measures but not by others. Much might be learned from it; this section sketches only a few of the possibilities.

²⁶⁰ *The Tejuna Families to Visit Crestone Aug.9*, CRESTONE EAGLE, (Aug. 2018) Vol. 29 No. 8, https://crestoneagle.com/wp-content/uploads/2019/08/Crestone_Eagle_Vol29_No8.pdf [https://perma.cc/NVR8-JWVS].

A. THE WIDESPREAD ADOPTION OF COMMUNITY RIGHTS LAWS IN THE U.S. DEMONSTRATES THE POTENTIAL AND POWER OF GRASSROOTS ORGANIZING TO COMBAT LOCAL ENVIRONMENTAL THREATS; AND EXPERIENCE SHOWS THAT COMMUNITIES REMAIN ENGAGED, DESPITE RISKS AND SETBACKS

The positive response to the Community Rights Movement in many diverse communities across the U.S. indicates widespread hunger for local control of environmental hazards.²⁶¹ CELDF's sophisticated use of electronic media to publicize their work enabled community members, who had felt powerless to avert local environmental threats, to find information and assistance.²⁶² The large number of community rights ordinances that were adopted in cities large and small demonstrates that once empowered with knowledge and provided with support, people will exercise their democratic rights to protect their community's health and welfare.²⁶³ Once politically involved, they will work long and hard, fighting to overcome significant obstacles to protect their communities' environments, as is illustrated by the communities' stories in Section II of this article.

Moreover, as the community experiences described above show, local governments and communities will revise approaches and alter courses when necessary. After the laws were invalidated, most communities did not abandon their efforts to protect the local environment.²⁶⁴ Community members in Grant Township pursued the

²⁶¹ Community Rights U.S., *Community Rights Ordinances Across the U.S.*, <https://communityrights.us/community-rights-ordinance-campaigns-across-the-us/> [<https://perma.cc/Q9YF-QDP2>] (The organization Community Rights US reports that over 200 community rights laws have been adopted in the United States).

²⁶² See e.g. Community Environmental Legal Defense Fund, Press Releases and Blogs, <https://celdf.org/category/news/press-releases-and-blogs/> [<https://perma.cc/KE8J-68QE>] (as of late April, 2020, the organization had issue and posted, 20 press releases in the preceding 6 months).

²⁶³ See Community Rights U.S., *supra* note 264. (Community Rights US reports that community rights laws have been adopted in 12 U.S. states, with the largest number Pennsylvania, where 63 cities and towns have adopted them).

²⁶⁴ *Id.* § III, at 14-26. (Describing court decisions and communities' responses).

legal battle over state law preemption.²⁶⁵ Mora County leaders explored alternative avenues for protecting their rural quality of life.²⁶⁶ Lafayette's city government revised its laws and policies to discourage fracking.²⁶⁷ Thus, the community rights movement catalyzed long-term, local efforts to protect local environments, illustrating the efficacy of grassroots organizing as a means of accomplishing both legal and social change.

B. THE EXPERIENCES OF ADOPTING AND DEFENDING THE COMMUNITY RIGHTS LAWS SHOWS THAT THE BOUNDARY BETWEEN STATE AND LOCAL CONTROL OF ACTIVITIES IMPACTING THE ENVIRONMENT MAY BE REDRAWN THROUGH POLITICAL ACTION AND LITIGATION

Disregarding the attempts to strip corporations of constitutional rights, the legal battles undertaken by Pennsylvania townships, Mora County, and Lafayette, Colorado were fought to shift authority over use of the environment from states to localities. In Mora County, although the federal court's decision was adverse to the county, it recognized the possibility of some local control.²⁶⁸ By rejecting an attorney general's decision, rendered some while ago, based on subsequent changes in case law, the court established, with clarity, that field preemption by state law did not preclude all local regulation of fracking activities in New Mexico.²⁶⁹

In Colorado, by adopting SB 19-181, the state legislature altered the standards applicable to the issuance of extraction permits, apparently increasing the authority of local governments.²⁷⁰ This was an important change in state law and policy, at least partially attributable to residents' widespread support for a statewide anti-fracking initiative and local

²⁶⁵ *Id.* at 16-18. (Describing Grant Township's continued legal battle against state preemption).

²⁶⁶ *Id.* at 19-20. (Describing Mora County's continued environmental protection work).

²⁶⁷ *Id.* at 21. (Describing Lafayette City's continued environmental work).

²⁶⁸ *SWEPI v. Mora Cnty.*, 81 F.Supp.3d.1075, 1193-1194 (D.N.M. 2015).

²⁶⁹ *Id.*

²⁷⁰ Colorado Rev.Stat.34-29-20-104(1), expressly empowering local governments to regulate surface impacts of oil and gas operations to protect against or minimize adverse impacts on the public health, safety, and welfare and upon the environment.

governments' adoption of laws regulating fracking activities.²⁷¹ Though the local fracking prohibitions were invalidated in court, and the initiative measure failed, the people had sent a strong message to their state legislators; and the message was heard.²⁷² The meaning and impact SB 19-181 remain uncertain, partly because the state regulatory agency has not yet adopted implementing regulations; but its adoption has given Colorado communities new hope of protecting health, quality of life, and local environments through local action.²⁷³

Similarly, the Pennsylvania townships were afforded a new opportunity to use the Environmental Rights Amendment²⁷⁴ of the state constitution as support for their claims of the local authority by a state supreme court decision reinvigorating that amendment.²⁷⁵ Thus, in the case brought by the state Department of Energy, the court has rejected a state motion to dismiss and ruled that the township may proceed to trial on its claims that a state statute preempting local regulation is invalid under the Environmental Rights Amendment.²⁷⁶

These examples of alterations in the boundaries between state and local control may inspire new efforts to secure local authority in the courts, in state legislatures, and even through initiative measures seeking amendment of state constitutions.²⁷⁷

²⁷¹ Ballotpedia, *Colorado Proposition 112, Minimum Distance Requirements for New Oil, Gas, and Fracking Projects Initiative (2018)*, [https://ballotpedia.org/Colorado_Proposition_112,_Minimum_Distance_Requirements_for_New_Oil,_Gas,_and_Fracking_Projects_Initiative_\(2018\)](https://ballotpedia.org/Colorado_Proposition_112,_Minimum_Distance_Requirements_for_New_Oil,_Gas,_and_Fracking_Projects_Initiative_(2018)) [https://perma.cc/JPP4-398R].

²⁷² *Id.* (Noting that the state regulatory agency subsequently imposed distance requirements).

²⁷³ John Aguilar, *In New Era of Oil & Gas Regulation, Colorado Communities Waste No Time in Writing Own Rules*, DENVER POST (May 6, 2019), <https://www.denverpost.com/2019/05/06/colorado-oil-and-gas-local-regulations-181/>

²⁷⁴ Const. of the Cmwlth of Pa. *supra* note 156.

²⁷⁵ *See* Pa. Evtl. Defense Found. V. Commonwealth, 161 A.3d 911 (Pa. 2017).

²⁷⁶ Cmwlth. v. Grant Twp., No. 126 M.D. 2017 (Filed March 2, 2020).

²⁷⁷ *See* MAYA K. ROSSUM, *THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT* (2017) (advocating amendments to state constitutions as the best means of achieving legal protections for Nature).

C. THE JUDICIAL RESPONSE TO LOCAL RIGHTS OF NATURE LAWS PROVIDES GUIDANCE THAT CAN BE USED IN FORMULATING AND DRAFTING FUTURE LAWS

As the only decision on the legality of a typical provision recognizing Nature’s general rights to “exist, flourish and naturally evolve”, the decision in *Drewes Farms Partnership v. The City of Toledo* provides important guidance on the formulation of laws recognizing Nature’s rights in the United States. Invalidating the Lake Erie Bill of Rights based on the vagueness of that provision and the provision establishing Toledoans’ right to “self-government in their local community,” the court commented that:

With careful drafting, Toledo probably could enact valid legislation to reduce water pollution. (...) [However], LEOR was not so carefully drafted. (...) Frustrated by the status quo, LEBOR supporters knocked on doors, engaged their fellow citizens, and used the democratic process to pursue a well-intentioned goal: the protection of Lake Erie. As written, however, LEBOR fails to achieve that goal. This is not a close call. LEBOR is unconstitutionally vague and exceeds the power of municipal government in Ohio. It is therefore invalid in its entirety.²⁷⁸

Proponents and drafters of laws recognizing Nature’s rights could avoid these legal pitfalls by linking a general provision recognizing Nature’s rights with specific prohibitions or standards established by the same local law or by another. In observing that an Ohio city could probably enact valid legislation to protect water quality, the judge noted that Madison, Wisconsin had successfully restricted the use of phosphorus-containing fertilizers within city limits.²⁷⁹ Such a local law could include language recognizing Nature’s rights as the foundational principle underlying and supporting the law’s specific restriction on fertilizer use. Likewise, the recognition of Nature’s rights could be

²⁷⁸ *Drewes Farm P’ship. v. City of Toledo*, Case No. 3:19CV 434 Order Invalidating Lake Erie Bill of Rights, Feb. 27, 2020, at 8.

²⁷⁹ *Id.* at 8, *citing* *CropLife America, Inc. v. City of Madison*, 432 F.3d 732, 733 (7th Cir. 2005) (as an example of a local water quality law, which had been upheld in court).

included within legislative findings or the statement of purpose of a local law banning single-use, plastic grocery bags or a law prohibiting the use of anticoagulant rodent pesticides. Similarly, the *Drewes Farms* decision does not preclude the adoption of local ordinances that recognize rights of Nature as the aspirational and philosophical foundations for other more specific environmental laws or environmental policies and programs; however, the *Drewes Farms* decision probably makes inadvisable the inclusion of remedies provisions in such laws.²⁸⁰ Resolutions, which are formal expressions of the local legislative body's opinion or will, not laws, are unaffected by the decision.²⁸¹

As to Nature's personhood, or procedural right of standing, the limited judicial consideration of the issue in the community rights ordinance litigation demonstrates judicial resistance to the expansion of legal personhood through legislative action.²⁸² Community groups sought to intervene and raise the standing issue as intervenors. Although the intervention was denied, and the issue was therefore not squarely addressed, the courts provided comments. In *Highland Township*, the district court said that it did "not see ... how a watershed could be considered a proper party."²⁸³ On appeal of the intervention denial, the appellate court declined to address the issue but referenced a case in which another court had observed that animals' standing need not be considered because humans could litigate the issues.²⁸⁴ In *Grant Township*, the appellate panel observed that federal Rule 17 does not allow a watershed to participate as a party but the court declined to make a specific holding on the question.²⁸⁵ These statements might be considered in pursuing or prioritizing efforts to create legal personhood and standing for Nature and natural communities through local legislation. Attempts to achieve standing for individual, nonhuman

²⁸⁰ The inclusion of judicial remedies provision, particularly criminal remedies, would increase the risk by indicating that the legislative body intended that the law should establish a judicially enforceable standard and thus the law would be subject to the same legal analysis as was applied to Toledo's law in *Drewes Farms*.

²⁸¹ *Resolution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁸² See § III.A.(2), *supra*, p.17-18.

²⁸³ *Seneca Resources Corp. v. Highland Twp.*, Case No. 16-289 (W.D.Pa) Memorandum Opinion, Sept. 20,2017, note 5.

²⁸⁴ *Seneca Resources Corp. v. Highland Twp.*, 863 F.3d 245 (3rd Cir.2017) note 4.

²⁸⁵ *Pa. Gen. Energy Co. v. Grant Township*, 658 F. App'x 37, (3rd Cir. 2016), fn. 2.

animals or nonhuman species might, eventually, be a more fruitful approach in the U.S.²⁸⁶

VI. REVIEWING THE UNDERLYING ETHICAL ASSUMPTIONS AND GOALS OF THE RIGHTS OF NATURE MOVEMENT, IN LIGHT OF THE EXPERIENCE GAINED OVER THE LAST FIFTEEN YEARS, MAY ENHANCE EFFORTS TO RECOGNIZE AND EFFECTUATE NATURE’S RIGHTS IN THE U.S.

The mounting environmental crisis, together with the significant body of experience garnered to date, suggests that the goals and philosophical underpinnings of the rights of Nature movement in the U.S. are ripe for review.

A. CONSIDERATION SHOULD BE GIVEN TO PLACING MORE EMPHASIS ON HUMAN RESPONSIBILITIES TO NATURE

In “The Rights of Nature: Triumph for Holism or Pyrrhic Victory,” Professor Mryl L. Duncan, observes that much environmentalism is focused not on Nature, but the needs and wishes of humans.²⁸⁷ Professor Duncan discusses the ethics of seeking the attainment of “rights” for Nature, and he asks the question, “[w]hat are we trying to accomplish?”²⁸⁸ He suggests that the answer is: a more satisfactory way of interacting with Nature, developed by adopting a more eco-centric or holistic approach to decision making” and by placing more emphasis on human responsibilities.²⁸⁹ Whether or not one agrees with Professor Duncan’s answer, a review of goals is surely warranted by the extremity of the mounting environmental crisis and the accumulated experience of adopting and defending local enactments. As described above, most of

²⁸⁶ See BOYD, *supra* note 25. (Suggests a pathway to achieving harmony with Nature by moving from recognition of the rights of “sentient” animals to the rights of species and, then, to the rights of forests, rivers, ecosystems, and all Nature).

²⁸⁷ Duncan, 31 WASH. L. J. 62 (1991).

²⁸⁸ *Id.* at 64.

²⁸⁹ *Id.* at 65.

the U.S. laws recognizing Nature's rights have been primarily intended to reduce corporate destruction of the environment by diminishing corporate legal rights and enhancing local authority. While these efforts have yielded some positive results, corporate constitutional rights remain intact, and the only judicial decision addressing the legality of Nature's rights provision declared the provision to be unconstitutional.

Meanwhile, Nature is in immediate and grave danger.²⁹⁰ Eliminating corporate constitutional rights, revamping federalism, or even attaining legal recognition of Nature's legal personhood may be, at best, long and difficult endeavors of uncertain result. Given the planetary emergency, simpler routes and goals should, at minimum, be explored. These may include Professor Duncan's suggested goal of promoting environmental ethics and life in harmony with Nature by refocusing on human responsibilities and seeking a more eco-centric or holistic approach to decision making.

Doing so would not require a wholesale change of course. Native American enactments are already leading us in this direction by emphasizing that humans are part of Nature and are responsible for Nature's care.²⁹¹ Moreover, the approach of adopting local laws recognizing Nature's rights need not be abandoned. Instead, as Professor Duncan suggests, a course adjustment might be undertaken by simply encouraging a broader and less legalistic understanding of the term "rights."²⁹² Thus, the phrase "rights of Nature" could be understood to describe our respect for Nature and our ethical responsibility to protect the natural world of which we are a part.²⁹³ The use of the term "rights" in this way has been common in the "animal rights" movement in the

²⁹⁰ See e.g., Sustainable Development Goals, *UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating'*, (May 6), <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/> [<https://perma.cc/B94L-G7NJ>]; Marlowe Hood, *Scientists Warn Multiple overlapping Crises Could Trigger Global Systemic Collapse*, SCIENCE ALERT (Feb. 5, 2020), <https://www.sciencealert.com/hundreds-of-top-scientists-warn-combined-environmental-crises-will-cause-global-collapse> [<https://perma.cc/5ZW7-R6KD>].

²⁹¹ See § IV.A.

²⁹² Duncan, *supra* note 290, at 68-69.

²⁹³ *Id.*

United State for decades.²⁹⁴ Just as the term is widely understood to signify our respect for (nonhuman) animals and our responsibility to protect their lives and welfare, Nature's rights may be apprehended as our responsibilities.

As to the issue of standing, prioritizing responsibilities to and for Nature over efforts to secure Nature's legal personhood might better align efforts with the reality of our relationship to Nature. In the United States, seeking to make Nature a legal "person," on procedural par with natural persons, corporations, and ships, may not promote true comprehension of our relationship to the natural world. From the scientific and religious perspectives, Nature is not one of us "persons;" instead, we are merely a part of Nature. And, as a practical matter achieving standing for Nature may be less urgent than working to secure Nature's substantive rights to exist and naturally evolve.

B. PROMOTION OF RESPECT FOR NATURE COULD BE MORE WIDELY INCORPORATED WITHIN THE WORK OF LOCAL GOVERNMENT AS WELL AS INTO LOCAL LAWS

In *Noah's Second Voyage: The Rights of Nature as Law*, Professor Oliver Houck provides a comprehensive history of Nature's rights and an explanation of why they should be recognized in law.²⁹⁵ One of the many reasons he offers is that, in decision-making processes, recognition of Nature's rights can function as a "pulse-check in the nature of the due process that ensures decisions (...) meet standards fundamental to the earth as a whole."²⁹⁶ Like Professor Duncan's, Professor Houck's article reminds us that mere recognition of Nature's rights is not enough; rights must be adopted as organizational values and effectuated through action. Thus, in the municipal government context, once a city officially recognizes Nature's rights, those rights, to be meaningful, must be effectuated.

²⁹⁴ BOYD, *supra* note 25, at 25-59 (Describing the potential evolution of animal welfare laws into the development of animal rights).

²⁹⁵ Oliver Houck *Noah's Second Voyage: The Rights of Nature as Law*, TUL. ENV'T'L. L. J. 1 (2017-2018).

²⁹⁶ *Id.* at 42.

As to decision making, respect for Nature is already incorporated into some decisions through environmental review processes mandated by state or federal laws that require consideration of proposed projects' impacts on the environment.²⁹⁷ Similar processes could be utilized for other types of decisions. As to city council decisions, staff could be required to include an assessment of the impacts on Nature in any staff report recommending, for example, a new law, policy, or program.

Respect for Nature could also be effectuated by routinely tracking and publishing reports on the environment's health. Santa Monica's Sustainability Rights Ordinance requires a biennial written report and public hearing on "the state of the environment, the realization of the rights recognized in [the ordinance], and progress in effectuating and enforcing the Sustainable City Plan(...)." ²⁹⁸ And, the City has developed a system of environmental metrics and scorecards which are incorporated into the report and are posted on the city's website.²⁹⁹ This reporting and scoring mechanism provides a stream of information about how the city and the environment are doing, which is helpful in setting priorities for environmental work, as well as in making a wide variety of decisions.

Such a system may be feasible only in cities with resources adequate to fund environmental staff positions and programs. However, a city with a smaller budget could simply appoint a staff member to serve as the environmental ombudsperson who would speak for the natural world in the decision-making process or conjunction with other governmental activities. For example, if the city council in a coastal city was considering allowing beverage carts to operate on the beach-front promenade, the ombudsperson could provide information about the impact of plastic waste on aquatic life and recommend, as a permit condition, that the cart offer only paper straws.

Professor Hauk points out that, around the world, diverse initiatives are responding to the environmental crisis; and though he advocates for

²⁹⁷ See e.g., National Environmental Protection Act, 42 U.S.A., §§ 4321-4370; California Environmental Quality Act, Public Resources Code § 2100, et seq.

²⁹⁸ Santa Monica Mun. Code §§12.02.040 and 12.02.050.

²⁹⁹ City of Santa Monica Office of Sustainability and the Environment, *Sustainable City Report Card*, (Apr. 30, 2013), https://www.smgov.net/Departments/OSE/Categories/Sustainability/Sustainable_City_Report_Card.aspx [<https://perma.cc/CSF7-K5ZB>].

the approach of incorporating Nature’s procedural and substantive rights of Nature into U.S. law, he recognizes that there is room for many approaches.³⁰⁰ Likewise, cities may effectuate their laws or policy statements recognizing Nature’s rights in a variety of ways. What matters is the internalization of respect for Nature as an institutional and community value and the expression of that value through action, not merely through words.

C. MAKING PROGRESS BY SAYING “YES” TO LIFE IN HARMONY WITH NATURE

In her article “Implementing Rights of Nature Through A Sustainability Bill of Rights”, Linda Sheehan invites us to:

[M]ove forward from what we say “no” to (such as hydrofracking and coal mining) to what we say “yes” to (such as water self-reliance.) Rights-based laws on paper are important, but a way of life that recognizes the rights of nature is inspiring and necessary. We need to envision what a society looks, and acts like under a system of law that recognizes the rights of nature.³⁰¹

Thus, Ms. Sheehan counsels that progress depends upon learning to live in new ways.

Most community rights laws in the United States have been adopted in response to specific, local environmental threats.³⁰² Thus, many prohibited, and thus said “no” to specific, dangerous activities, often related to fracking. However, as Ms. Sheehan points out, it is not enough for local governments to simply say “no” to fracking and similarly destructive activities. Protecting life on Earth requires shouldering the responsibility of saying “yes” to alternatives and new ways of living that do not depend upon environmental destruction.

³⁰⁰ Houck, *supra*, note 298, at p.48-49.

³⁰¹ New Zealand J. PUB. & INT’L. LAW, Vol 13 (June 2015), p.89-106, p.103. (Ms. Sheehan is the founder and former director of Earth Law Center and was instrumental in the passage of Santa Monica’s Sustainability Rights Ordinance).

³⁰² See § II, describing the threats that each of five cities faced and addressed in the adoption of their community rights laws.

Local governments can and must help communities and individuals make this transition. For instance, to use Ms. Sheehan's example, a community that embraces the goal of water self-sufficiency, might develop programs that encourage and help residents to reduce their water usage, through education and incentives, as well as restrictions.³⁰³ Likewise, a local government could provide education about food waste, the environmental cost of depositing food waste in landfills, and methods for backyard composting; or, a city could promote healthy eating by facilitating farmers markets and food cooperatives or education about vegetable gardening; or, a city could facilitate energy conservation by providing free energy audits of residents' homes. And each of these programs could be built upon an adopted and publicized foundation of Nature's rights and life in harmony with Nature.

Many cities lack the financial resources necessary to support environmental programs, but all city governments communicate, in some way, with their residents. And, those lines of communication can be used to convey messages encouraging community members to respect the natural world. Thus, city newsletters, websites, notices, and press releases can publicize the city's environmental values and help residents do their part. Even utility bills, vehicles, and signage can convey messages about respecting Nature. A utility bill can include a sentence encouraging customers to contact the city for tips on conserving water or power. Likewise, trucks that collect trash and recyclables might bear signage asking residents to: "Protect Earth, Our Home, Recycle." A sign on a riverfront walk could say, "Respect the River. Please use trash receptacles."

In our society, we are constantly bombarded with commercial advertising messages from private entities, encouraging us to consume more; and those messages are effective. Those entities have no legal responsibility for the general welfare. In contrast, local governments are responsible for public health, safety, and welfare; and they can speak for the natural world by sending messages about how to live in harmony with Nature. Indeed, consistent with their responsibility to protect the general welfare, they arguably must do so. Science has demonstrated, what

³⁰³ Sheehan, *supra* note 304, at 104.

indigenous peoples have always known, and developed societies have forgotten: human welfare and Nature's welfare are indivisible.

CONCLUSION

The work described in this article, undertaken by community members, organizers, local officials, lawyers, judges, tribal leaders, state legislators, and others participating in the U.S. rights of Nature movement has generated a valuable body of experience. It should be acknowledged and respected through study and use. Hundreds of communities have adopted laws or resolutions recognizing Nature's rights; and in securing the adoption of those laws, thousands of people learned more about their democratic rights and were empowered to become participants in their local governments and a cause much larger than themselves and their communities. Local governments responded to their concerns. Local legislation was adopted. Industry and state governments responded. Legal conflicts arose; and the courts addressed them. City leaders and governments made course corrections based on judicial guidance and developments in state law. Obstacles arose; people learned, increased, or altered their efforts, and persisted. Progress was made, but much more is needed, and time is perilously short.

Fortunately, help is available from around the world. The global scientific community continues to teach vital lessons about the web of life and what must be done to protect it. Indigenous peoples are translating their wisdom and experience into bold action and serving as role models.³⁰⁴ Governments and organizations are providing expertise and resources. Religious leaders are providing inspiration and guidance about caring for our common home and all creation.³⁰⁵ The United Nations is

³⁰⁴ See e.g. Meredith N. Healy, *Fluid Standing: Incorporating the Indigenous Rights of Nature Concept into Collaborative Management of the Colorado River Ecosystem*, CO. NAT'L. RES. L. REV., Vol.30 2, 2019, at 327-360. (Recommending that the Colorado River be protected using a New Zealand model which recognizes a rivers rights and establishes a means of effectuating them).

³⁰⁵ See The Holy See, *Encyclical Letter Laudato Si' of the Holy Father Francis on Care for our Common Home*, http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html [<https://perma.cc/V5GJ-PJ87>]; see also Yale School of Environment, *Climate Change Statements from the World Religions*,

providing a forum, connecting the world-wide efforts, and promoting the recognition of new norms.³⁰⁶ We have available the knowledge, experience, models, guidance, support, and inspiration that we need to collectively say “yes” to living in harmony with Nature as individuals, communities, societies, and one world.

YALE U. F. ON RELIGION AND ECOLOGY, <https://fore.yale.edu/Climate-Emergency/Climate-Change-Statements-from-World-Religions> [<https://perma.cc/U3XM-RYST>].

³⁰⁶ United Nations: Harmony with Nature, *Programme*, <http://www.harmonywithnatureun.org/> [<https://perma.cc/KXU9-7L6A>] (last visited Sep. 6, 2020).