A number of environmental advocates have been pushing a new strategy for environmental protection – seeking to pursue legal rights for elements of nature (such as rivers, lakes, ecosystems, or species), sometimes in alliance with Native American tribes. This approach is not unique to the United States – rights of nature legal approaches have been used in New Zealand, Bolivia, and Ecuador.

Will this approach produce better outcomes for environmental law? A recent article by Eduardo Penalver (now President of Seattle University) and Laura Spitz (University of New Mexico) answers, probably not. Penalver and Spitz examine whether rights of nature might advance environmental protection in the legal context in three ways: procedural (changing who is able to advance environmental claims in court), substantive (changing the outcome of lawsuits seeking environmental claims), or rhetorical (changing the political, legal, or cultural narrative around protecting environmental resources).

Penalver and Spitz conclude that, at best, rights of nature might help in the rhetorical context. The procedural benefits of rights of nature seem elusive – a lake cannot enter into court and directly articulate their needs or claims, so it will necessarily fall to a human to claim to represent a lake. That of course raises the question of which human might represent the lake, which replicates the issues that courts face today in deciding (through doctrines such as standing) which parties are appropriate to raise claims in the environmental context. And indeed, many of the claims that might be raised on behalf of natural entities already can be raised by humans directly, based on evidence that the human uses and enjoys the relevant natural resource.

The substantive benefits of rights of nature are similarly elusive according to Penalver and Spitz. Natural entities are made up of many species and physical components, each of which may be threatened or protected by a particular legal rule. Courts are thus faced with the question of articulating what the substance of any rights would be – directly drawing on the rights of what individual people might have seems inapposite, given the very different needs and contexts of humans versus natural entities. And of course empowering courts to make these decisions, rather than elected bodies, raises difficult separation of powers and competency questions. Indeed, one of the most famous examples of granting rights to a natural entity, the Whanganui River in New Zealand, appears to have not changed the underlying substantive rules for river management, according to Penalver and Spitz.

But if granting natural entities rights changes the framing for our engagement with

nature, it might then change how courts think about substantive rights for nature – such that even if the formal substantive standards stayed the same, those standards might be applied in ways more sensitive to the needs of natural entities. More broadly, articulating rights on behalf of natural entities might change how political bodies such as legislatures or administrative agencies act in making natural resource decisions.

Here Penalver and Spitz acknowledge the potential – but also the risks. Identifying natural entities as separate from humans might also create opposition and separation of people from nature and highlight zero-sum thinking around environmental protection that has political costs.

I think Penalver and Spitz's analysis is correct. When I teach the seminal Supreme Court case Sierra Club v. Morton, I note Justice Douglas' dissent in which he famously called for natural features to be able to have standing to advance legal claims, and I ask my students whether the legal system would be better if Douglas' position had won out. Douglas' own opinion argues that, if natural features did have standing, they could be represented by individuals who use and enjoy their resources – which is pretty much the standard we have today. I've always been puzzled as to the legal leverage that Douglas' position would have gained, and I think Penalver and Spitz have crystallized nicely the arguments behind that skepticism.