The Trees Are Still Standing: The Backstory of *Sierra Club v. Morton*

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The query "Should trees have standing?" ranks among the iconic phrases in American jurisprudence. As environmental litigation blossomed in the 1970s, the Supreme Court took up the case of *Sierra Club v. Morton*.[1] Justice William O. Douglas's stirring dissent, arguing that "[t]he river as plaintiff speaks for the ecological unit of life that is part of it,"[2] was a rallying cry for opening the courts to protecting nature. Concern about ecology, in Douglas's view, "should lead to the conferral of standing upon environmental objects to sue for their own preservation."[3] Hence, the notion that trees have standing took root.

This article tells the backstory of how Douglas's dissenting opinion came to be, focusing on his longstanding relationship with the Sierra Club and the impact of an as-yet-unpublished law review article[4] that landed on Douglas's desk while the case was pending. For the first time, these events are explored through the lens of the case files in the lower courts, the Supreme Court docket, chambers papers from Justices Douglas, Potter Stewart, Thurgood Marshall, and Harry Blackmun, the Sierra Club archives, and interviews with key players. These sources provide a window into the debate about standing for environmental organizations, offers insights into the Justices' thought processes and judicial decision making, and highlights the ethical tensions surrounding judicial conflicts of interest and *ex parte* contacts with the Court.

The Man and His Mountains[5]

Although Douglas was a giant in the legal world, he is often remembered for his four wives, as a potential vice-presidential nominee, as a target of impeachment proceedings led by then-Congressman Gerald Ford, and for his tenure as the longest-serving Justice, even now, from 1939 to 1975. A committed civil libertarian, he authored landmark decisions about privacy,[6] free speech,[7] and criminal procedure.[8] But perhaps his most enduring legacy is his public and private advocacy for environmental causes and his success in that endeavor.[9]

Douglas's love for the mountains was his childhood refuge in Yakima, Washington. In his autobiography, *Go East Young Man,*

Douglas wrote, "My love of mountains, my interest in conservation, my longing for the wilderness—all of these were established in my boyhood in the hills around Yakima and in the mountains to the west of it."[10] After attending Whitman College and a brief stint teaching at Yakima High School, Douglas headed east to Columbia Law School.[11]

Although he toyed with returning to Washington to practice law and even dipped his toe in a country practice, Douglas eventually stayed in New York. He worked both as a lawyer at the now-famed Cravath firm and as a professor at Columbia. After an unexpected offer from Yale Law School —Douglas professed he "actually did not

Justice William O. Douglas's love of nature stemmed from his boyhood growing up in Yakima, Washington and hiking the mountains to the west. On the Court, he became "a one-man lobby shop for the environment."

know where [it] was"[12]—he moved to New Haven. He was at Yale only six years before the other Washington—the nation's capital—beckoned. Nonetheless, he maintained a physical and spiritual connection with Washington State. His summer home was a cabin in Goose Prairie, which he described as "my place in a sense that Washington, D.C., never could be. My roots are deep in the Prairie. I am a part of the rhythm of the place … ."[13]

With a strong interest in politics, ties to the Democratic Party, and an expertise in corporate law, it was no surprise that Douglas landed a job with Joseph P. Kennedy, the first Chairman of the Securities and Exchange Commission. Before long, he was confirmed as a commissioner. The *Yakima Republic* boasted in a January 29, 1936, editorial: "It is not every day that a Yakima boy can make the first page of the *Wall Street Journal*." Calling him "[l]iberal Douglas," the paper wrote that "[w]hether he reforms the world of finance and makes Wall Street a safe place for the lambs is not predictable, but he will do it if anybody can." Just a year later he was named chairman, only days before a stock market plunge on Black Tuesday, September 7, 1937.[14]

By then, Douglas was a Washington insider and a frequent guest at the poker parties of the President, Franklin Delano Roosevelt.[15] Roosevelt's nomination of Douglas to fill the seat of retiring Justice Louis D. Brandeis was not totally unexpected. In 1939, at the age of forty, Douglas joined the Court.

Despite joining the "third branch," Douglas kept a toe in politics and remained a Washington player.[16] Truman asked him to be his running mate in 1948 and Douglas demurred, writing in July 1948 "that politics had never been my profession and that I could serve my country best where I am."[17] He continued to receive overtures from Democratic players but, as he wrote to banker James Paul Warburg in January 1952,

> there are many things in the stream of events which I would like to change and some which perhaps I could change. But the court is a custodian of an important tradition. If we can keep the tradition alive, perhaps that is as great a contribution as one can expect to make.

He concluded that,

> after long reflection, [] my place in public life is on the Court.[18]

This personal resolution to stay on the Court was in contrast with a statement made earlier in his tenure, when he "said that the Supreme Court is an old man's job."[19]

Posterity has linked Douglas to environmental and conservationist causes, but Douglas's public commitment to the environment did not emerge until more than a decade after he took his seat on the Court. In 1954, several years after publishing his watershed autobiographical account of his spiritual connection with nature, *Of Men and Mountains,*[20] Douglas spearheaded a protest hike on the Chesapeake and Ohio Canal to save the canal from a proposed road. "With Douglas's leadership, the byway was stopped, and in 1970 Congress approved a historic park."[21] Later he protested a proposed highway down the Olympic coast in Washington State and teamed up with Olaus and Mardy Murie, iconic conservation advocates, on an expedition to the Brooks Range in Alaska to highlight the fragility of the Arctic landscape.[22]

In a manner unthinkable today, from his chambers at the Supreme Court, Douglas was a one-man lobby shop for the environment. This is not to say that other Justices, such as Brandeis and Felix Frankfurter, were not playing the political long game with their presidential contacts,[23] but Douglas's approach was laser focused on the environment and particular projects. He cajoled and persuaded

Douglas's advocacy for the environment included spearheading a protest hike in 1954 along the Chesapeake and Ohio Canal to save it from becoming a scenic highway. Charles A. Reich, clerk to Justice Black, is pictured walking behind Justice Douglas.

the Secretaries of the Interior and Agriculture, badgered the Forest Service and the National Park Service, and inveigled Senators and members of Congress to support his causes, all in the spirit of preserving wilderness. We know all of this because his papers are now public at the Library of Congress. His commitment to conservation and the wilderness was no secret, but the scope of his advocacy was not fully known during his lifetime.

Douglas believed that wilderness spaces provide solitude and strength and connect the individual to environmental and historical forces larger than oneself. He viewed automobiles as a culprit in the fight to preserve wilderness. In describing nature, his books, speeches, and court opinions are filled with references to "solitude," "sanctuary," and "refuge." In 1965, he published *A Wilderness Bill of Rights,* advocating that "[w]hen it comes to wilderness we need a similar Bill of Rights [to the U.S. Constitution] to protect those whose spiritual values extend to rivers and lakes, the valleys and the ridges, and who find life in a mechanized society worth living only because those splendid resources are not despoiled."[24] This theme would find its way into his dissent in *Sierra Club v. Morton*.

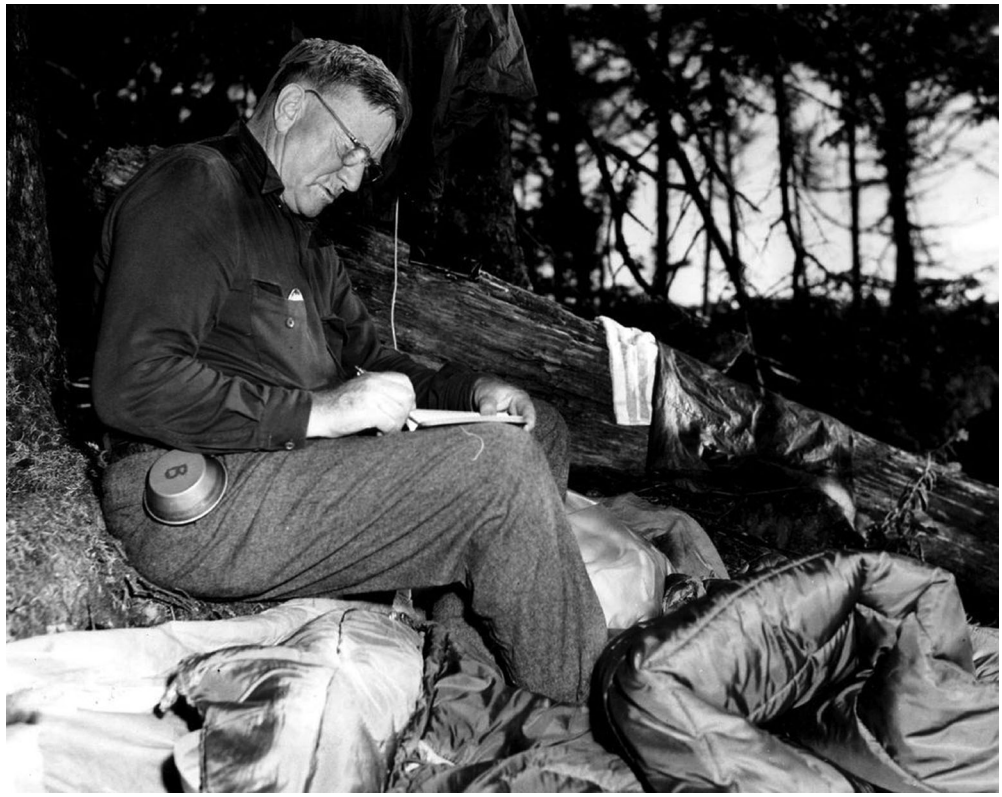
Legal Challenges to the Development of Mineral King

The Mineral King Valley is in central California. It is a twelve-mile glacial valley in the southern Sierra Nevada Mountains.[25] The

Sierra Club v. Morton story begins there, far from the rarified atmosphere of the Supreme Court. The valley's floor is an expanse of open, verdant meadows, which give way on both sides to steep, rocky slopes, dotted by clusters of ancient conifers. Above the tree line, sheer granite walls form sharp, towering peaks. Mineral King Valley nurtures beautiful flora, along with abundant and diverse wildlife, including black bears, mule deer, yellow-bellied marmots, and an array of freshwater fish. No commercial services are available. In short, Mineral King is a true wilderness.

In 1969, however, a normally benign force imperiled Mineral King's pristine and unspoiled vistas: Walt Disney Productions, Inc. The company received approval from the United States Forest Service to develop a $35 million year-round resort in the Mineral King Valley. Disney's construction plans included fourteen ski lifts, a chapel, an ice-skating rink, convenience shops, restaurants, a conference center, two large hotels, a heliport, and a 60,000 square-foot underground facility to house resort services. The company estimated that the resort would attract 2.5 million visitors within its first year of operation—approximately the same as today's annual traffic at Bryce Canyon National Park in Utah.[26]

Opposition arrived quickly and forcefully. Opponents pointed out that Mineral King's official name was, after all, the Sequoia National Game *Refuge*. They insisted that development would desecrate the fragile valley and destroy its ecosystem. In no time, bumper stickers bearing the message, "Keep Mineral King Natural," appeared across the region. Opponents also staged "hike-ins" at Mineral King and a march on Disneyland.[27]



Justice Douglas took notes for a book about protecting the wilderness during the three-day, twenty-two-mile hike along the Olympic Peninsula coast he undertook to protest a proposed highway.

Over time, the Sierra Club's position evolved, as did the scope of the planned resort. "In 1948 [the Club] viewed Mineral King as an area with high potential for ski development. In 1953 it was not opposed to making the area more accessible, and a policy favoring modest development still prevailed in the mid-Sixties."[28] Fast forward to 1965, the Club unsuccessfully sought a public hearing on the proposed development, and, in later correspondence with the Forest Service and the Department of the Interior, expressed specific objections to Disney's plans. With the Forest Service's approval, however, significant commercial development of the Mineral King Valley seemed inevitable.

But the Sierra Club refused to give up. In June 1969, the Club sued in the United States District Court for the Northern District of California.[29] A committee of the Sierra Club chose a young San Francisco lawyer, Leland R. Selna, Jr., as its lead counsel; he represented the Club through all of the proceedings, including the Supreme Court.[30]

The Sierra Club asked for a declaration that various aspects of Disney's proposed development violated federal laws and regulations governing the preservation of national parks, forests, and game refuges.[31] The Club also wanted preliminary and permanent injunctions restraining federal officials from granting approval or issuing permits for the development.[32] The Club sued as a membership corporation with "a special interest in the conservation and sound maintenance of the national parks and forests and particularly lands on the slopes of the Sierra Nevada mountains."[33]

In crafting its complaint, the Club had to make a strategic choice. As all good lawyers know, some actual or imminent injury or stake in the outcome of the controversy is required for purposes of standing to sue.[34] And, under the standard at the time, to obtain an injunction, a plaintiff needed to demonstrate "a strong likelihood or reasonable certainty" of prevailing and an irreparable injury, balancing the damage to both parties.[35]

The Sierra Club worried that if the court were to stop the project, the harm to Disney would outweigh any injury to the Club or its members. The potential injury to Mineral King's *environment*, however, would likely eclipse any harm to Disney. For that reason, the Sierra Club alleged only that the environment of Mineral King Valley would suffer injury; it did not allege any injury to itself or its members. The Ninth Circuit characterized the complaint in this way:

> The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. Certainly it has an "interest" in the sense that the proposed course of action indicated by the Secretaries does not please its officers and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all.[36]

Sierra Club's counsel recognized the risk of this approach: "It was a tortured issue. You had the risk of what happened, but it was a risk the Club wanted to take."[37] The Club's strong position "was that California already had more skiers than all resorts, including Mineral King, could accommodate, so in terms of harm to the body politic, stopping development would not take something away—it was not 'the final brick.'" But "the pathway to get to the resort, let alone what was to be on the site," was the focus of irreparable harm; the Club "was not saying the valley had standing but it was saying the irreparable harm was to the valley."[38]

At first, this strategy worked. After two days of hearings, the district court granted the Sierra Club's request for a preliminary

In 1969, Walt Disney Productions, Inc. received approval from the United States Forest Service to develop a $35 million ski resort in the beautiful Mineral King Valley. Opponents staged a hike-in.

injunction.[39] The court rejected the government's challenge to the Sierra Club's standing, writing that the Sierra Club "may be held to be sufficiently aggrieved to have standing as a plaintiff."[40] It also determined that the complaint raised questions "concerning possible excess of statutory authority, sufficiently substantial, and serious to justify a preliminary injunction."[41] The court topped off the opinion with this reminder:

> The court is not concerned with the controversy between so-called progressives and so-called conservationists. Our only function is to make sure that administrative action, even when taken in the name of progress, conforms to the letter and intent of the law … .[42]

The government quickly appealed—and won. In September 1970, the Ninth Circuit Court of Appeals reversed the judgment of the district court.[43] Regarding standing, the Ninth Circuit underscored that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them."[44]

Earlier in its opinion, the court concluded:

> We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority.[45]

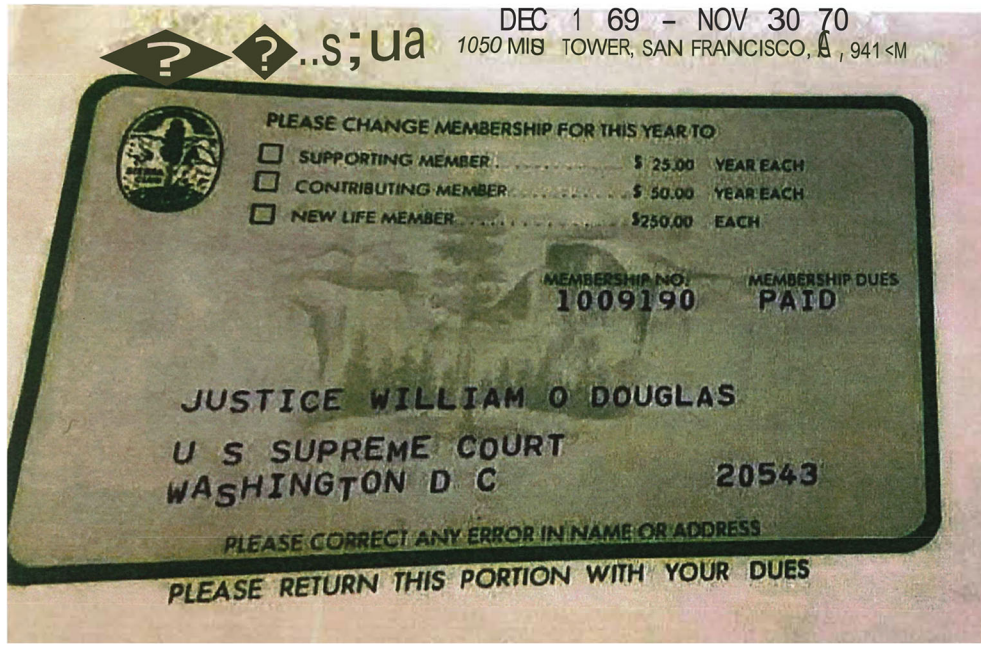
In closing the discussion of standing, the court pointed to two other cases where "the Sierra Club was joined by local conservationist organizations … with a direct and obvious interest" and contrasted them with this case, in which "[n]o such persons or organizations … joined as plaintiffs."[46] The Ninth Circuit vacated the injunction because the Club did not show irreparable injury or a likelihood of success on the merits.[47]

The Sierra Club was undeterred. On November 5, 1970, the Club petitioned the Supreme Court for a writ of certiorari.[48] Douglas's relationship with two institutions —the Sierra Club and the *Southern California Law Review*—would shape both his role and his legal theory in the case. This case was made for Douglas and Douglas was made for this case.

Justice Douglas and the Sierra Club

Douglas was no stranger to the Sierra Club. He had been a member for many years by the time the Club filed its petition; he even served on the Club's Board of Directors from 1961 to 1962. Upon receiving the John Muir Award from the Sierra Club in 1975, Douglas acknowledged that "[b]eing a director made me realize that my views as to policy in environmental matters do not always jibe with those of others, but my views are patterned after models" such as John Muir and Clarence Darrow.[49] The Sierra Club's case would throw into sharp relief Justice Douglas's views on environmental policy.

Douglas resigned as a director of the Sierra Club after just one year, stating that "in fairness to the office which I hold and in fairness to the Sierra Club I should no longer serve as a member of the Board of Directors."[50] He went on to detail that "[t]he reason that I am resigning is that I understand from some of our mutual friends that the Sierra Club, like other conservation agencies, may be engaging in litigation in the state of [sic] federal courts on



Over the years, Douglas meticulously saved communications from the Sierra Club, including his annual membership cards.

conservation matters which at least in their potential might reach this court."[51] He explained that during his time on the board, he was not aware of "any actual or contemplated litigation." And in an earlier letter to Charles Reich, his longtime friend and then a professor at Yale, Douglas wrote that he resigned "because the Club may, I hear, get into litigation."[52] The Sierra Club acknowledged the Justice's stated reason but wrote that it "[h]oped the Club can continue to benefit" from Douglas's "broad experience on behalf of conserving some of the non-completely-spoiled as well as wilderness parts of the earth."[53] Years later, however, Douglas would state that he resigned as a director not because of potential ethical conflicts but rather "because of the impossibility of getting to the [Club's] meetings in San Francisco."[54]

Whatever his reasons, the Sierra Club acknowledged Douglas's resignation but made him a "life member." Douglas did not abdicate this membership until his December 2, 1970 letter to Dr. Philip Berry, then president of the Sierra Club:

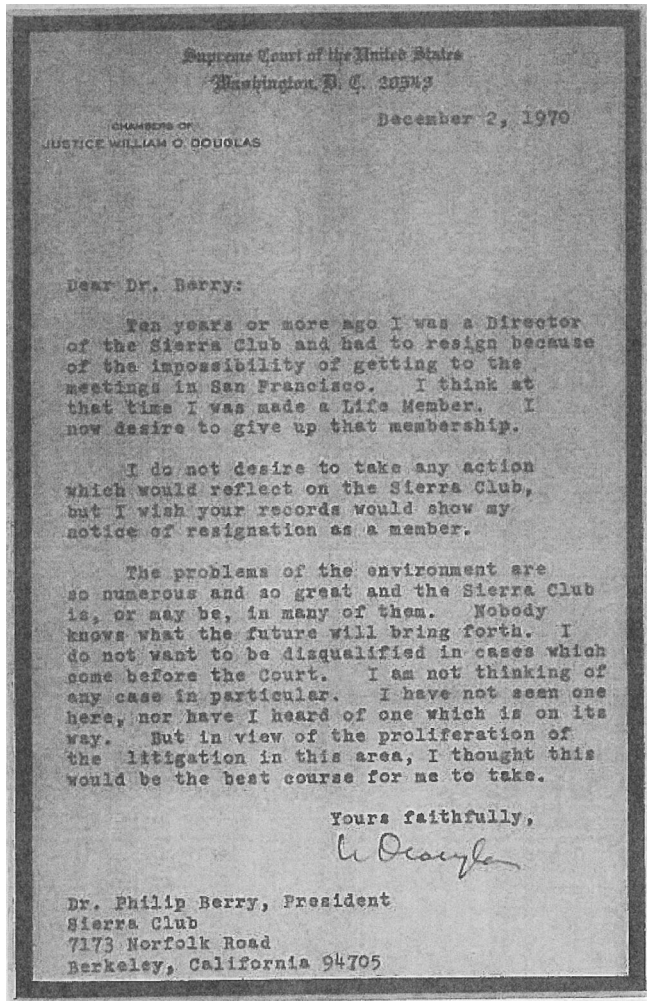
> The problems of the environment are so numerous and so great and the Sierra Club is, or may be, in many of them. Nobody knows what the future will bring forth. I do not want to be disqualified in cases which come before the Court. *I am not thinking of any case in particular.* I have not seen one here, nor have I heard of one which is on its way.[55]

According to an unsigned, undated memorandum in the Douglas files at the Library of Congress, Douglas checked with the Clerk's Office the day before authoring this letter to see whether there were any Sierra Club cases currently on the docket, and was erroneously told "No."[56]

The notion that Douglas was not "thinking of any case in particular" strains credulity and

surely Dr. Berry must have been taken aback at the reference as the litigation had been pending for years and the petition for certiorari was filed a month before. Why make such an inquiry and request, out of the blue, eight years after resigning from the board? By all indications, Douglas must have known the case was coming to, or was in, the Court, and he wanted to ensure that he could sit on the case.

Although Douglas had resigned from the Sierra Club Board long before, over the years he received and meticulously saved communications from the Club, including his annual membership cards. For example, a board report on litigation found in Douglas's files, dated in 1969, reflects that "Sierra Club standing to sue has taken a decided turn for the better with the recent decisions in *Sierra Club v. John Volpe* and in the Disney case." The summary also notes that the Club was seeking amicus status "in the United States Supreme Court in support of the adapso."[57] The report explains that the Club hoped to cabin the case "to commercial cases" and avoid



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 2, 1970

Dear Dr. Berry:

Ten years or more ago I was a Director of the Sierra Club and had to resign because of the impossibility of getting to the meetings in San Francisco. I think at that time I was made a Life Member. I now desire to give up that membership.

I do not desire to take any action which would reflect on the Sierra Club, but I wish your records would show my notice of resignation as a member.

The problems of the environment are so numerous and so great and the Sierra Club is, or may be, in many of them. Nobody knows what the future will bring forth. I do not want to be disqualified in cases which come before the Court. I am not thinking of any case in particular. I have not seen one here, nor have I heard of one which is on its way. But in view of the proliferation of the litigation in this area, I thought this would be the best course for me to take.

Yours faithfully,

W. O. Douglas

Dr. Philip Berry, President
Sierra Club
7173 Norfolk Road
Berkeley, California 94705

Douglas did not fully resign his Sierra Club membership until this December 2, 1970 letter to Dr. Philip Berry, the club's president. While he worries about having to recuse himself if the Sierra Club is involved in a case before the Supreme Court, he erroneously states that he was "not thinking of any case in particular." In fact, the Sierra Club had filed a cert. petition a month earlier.

extending it "to cases such as *Sierra Club v. Hickel* in which the plaintiff has noncommercial interests and is suing to preserve a public interest."[58]

In *Association of Data Processing Services Organizations, Inc. v. Camp*, an association of data processors sued the Comptroller of the Currency, challenging a ruling that permitted national banks to provide data services incidental to their banking services. In an opinion authored by Douglas, the Court upheld the association's standing and held that the association satisfied Article III's "case or controversy" requirement because it alleged that competition by the banks caused competitive injury. Citing earlier decisions, the opinion noted that an aggrieved party's "interest … may reflect 'aesthetic, conservational, and recreational' as well as economic values."[59]

Another reference point as to Douglas's likely familiarity with the appeal was his service as the Court's "Circuit Justice" assigned to the Ninth Circuit Court of Appeals.[60] In this role, he regularly attended the Ninth Circuit's judicial conferences and, in a nod to his western heritage, hired his clerks almost exclusively from states within the Ninth Circuit.[61] He would almost certainly have been aware of key Ninth Circuit decisions.

In addition, news of Disney and the Mineral King development had been percolating in the press for some time. Indeed, Douglas later acknowledged in his dissent that, although he had not visited the area, he "ha[d] seen articles describing its proposed 'development.'"[62] Contemporary articles had also appeared, for example, in the news sections of the *New York Times,* the *National Observer*, the *San Francisco Chronicle,* the *Fresno Bee,* and the *Los Angeles Times*.[63] And Douglas's long-time pal, Stewart Udall, Secretary of Interior, highlighted Mineral King in an article, noting that "some courts have grown surprisingly receptive to ecological arguments," citing a decision that "halted efforts by the U.S. Forest Service to lease Mineral King Valley in California to the Walt Disney organization, which wanted to turn this wilderness into a big ski resort."[64] Once the Ninth Circuit issued its opinion and the case was headed to the Supreme Court in the fall of 1970, Mineral King resurfaced in the press, including the *New York Times,* the *New York Post,* the *Wall Street Journal,* the *San Francisco Chronicle,* the *Far West News,* and the *Chicago Sun Times*.[65]

Only a few years before the Sierra Club case came before the Court, Douglas was once again in close contact with the Club in a major way. In 1967, Douglas and his wife Cathy Douglas Stone, recently married, headlined a protest hike—organized by the Cumberland Chapter of the Sierra Club—to fight the effort to dam the Red River Gorge in Kentucky. Several Sierra Club organizers, like others before them, wanted national attention; recruiting Douglas was central to their plan. Diane Sawyer, then a young reporter for the local television station, joined Douglas and filmed the hike. Another reporter characterized Douglas as "a showboat," which was precisely the point; one of the Sierra Club members concluded, "I'm not sure we could have stopped the dam if he hadn't come."[66] That same year, the Club again invoked Douglas's help: "We would greatly appreciate it if you would consider using your contacts with the Forest Service to see if it is possible to get deferment of [a] particular timber sale."[67]

Just a year after the hike, Douglas was in touch with David Brower, Executive Director of the Sierra Club, and offered to do "anything in particular you would like to have me do apropos of the Sierra Club salute to the First Lady [Lady Bird Johnson]."[68] Not one to mince words, he went on to say that no credit was due President Lyndon B. Johnson for the Red River Gorge, "of which I had something to do with," and castigated the President's environmental record:

Sierra v. Morton **forced the Court to confront incongruities between traditional standing doctrine and the relatively new field of environmental litigation. The Justices heard arguments on whether the Sierra Club had standing to sue on behalf of the environment (Mineral King Valley is pictured), as no harm had been caused to the organization itself.**

"I hope any publicity which is released will play down the achievements of LBJ as a conservationist, because the guy, in my view, is a complete phoney [sic] on that score."[69]

The protest hike at the Red River Gorge was not the only tie Douglas maintained with the Sierra Club. Just months before oral argument, he communicated with the Club in July 1971 about efforts to classify as wilderness the Cougar Lakes area of Washington State. The Sierra Club, which invested heavily in the fight, noted that resolution of the controversy would be "a question of strategy and tactics" and promised to keep Douglas advised.[70] Perhaps he viewed the Washington State controversy as divorced from the pending Sierra Club case, permitting him to coordinate with the Club while at the same time considering its appeal. Whatever Douglas's mindset, the Sierra Club later lauded him as "the highest-placed advocate of Wilderness in the United States."[71]

According to William Alsup, a clerk for the 1971–72 term, "the big question surrounding this case [*Sierra Club v. Morton*] was whether Justice Douglas would participate—it was a source of gossip around the Court. Douglas did not consult his clerks on the question. He was undecided whether to sit but ultimately decided to sit through argument."[72]

Douglas's extensive ties, both formal and informal, with the Sierra Club raise the kind of ethical questions that continue to command the attention of lawyers and scholars.[73] In thinking about conflicts of interest, it appears that Douglas focused on his Sierra Club board membership a decade before and the potential *actual* conflict of interest, while glossing over the question of appearances and his ongoing support of and

"connect[ion]" to the Club. At the time, Supreme Court Justices had a guiding ethics statute[74]—the precursor to today's 28 U.S.C. § 455—although they were always bound by their oath to "faithfully and impartially discharge and perform" the duties of judicial office.[75] The 1948 statute directly raises the question of appearance of conflict that would "make it improper," in the opinion of a Justice, to sit on the appeal. Although this version of the statute did not put in sharp relief the obligation to recuse when a Justice's "impartiality might reasonably be questioned," as today's version makes explicit,[76] the sentiment was certainly on the table. Indeed, maintaining the appearance of propriety is important in terms of public confidence in the judiciary.[77]

Once Douglas resigned from lifetime membership in the Sierra Club and overcame what he perceived as a potential actual conflict, whether he analytically considered the appearance of a conflict, we will never know. We do know that he contemplated the conflict issue and that the question was floating around the Court. By the time he married Cathy some five years earlier in 1966, she said he was "getting very concerned" about conflicts and that he was "less and less active" in environmental causes because he felt "it would present an actual or apparent conflict."[78] Nonetheless, it appears that he took a very narrow view of recusal vis-à-vis his environmental endeavors: "At times in the past Mrs. Douglas and I have hiked or in other ways protested certain government projects. In such cases the protester should not sit as a judge because he has at least a partial commitment on the merits."[79] Fortunately for Douglas, he had not joined the hiking protests in Mineral King Valley.

The Supreme Court's Opinion in *Sierra Club v. Morton*

On February 22, 1971, the Court agreed to hear the Sierra Club's appeal.[80] Although Douglas was an acknowledged conservationist and had focused very recently on his prior role with the Sierra Club, perhaps his concerns about conflicts informed his vote on granting a writ of certiorari: he did not take a position, but said, "pass."[81] The requisite four Justices voted to grant: Justices Harry Blackmun, William J. Brennan, John Marshall Harlan, and Hugo L. Black. Chief Justice Warren E. Burger and Justices Thurgood Marshall, Byron R. White, and Potter Stewart voted to deny the petition for certiorari.[82]

Morton was both historically and legally significant. The Supreme Court Historical Society lists it as one of the significant arguments of the Burger Court,[83] and it has been dubbed a "golden age classic" of environmental law.[84] Lawyers and judges nowadays are accustomed to seeing the Sierra Club in federal court, but *Morton* was the Club's first appearance as a party before the Supreme Court.[85] *Morton* also forced the Court to confront incongruities between traditional standing doctrine and the relatively new—and ever-evolving—field of environmental litigation.

Ultimately, the Court cleaved to tradition. In April 1972, the Court affirmed the Ninth Circuit in a 4–3 decision.[86] Justices William H. Rehnquist and Lewis F. Powell, who joined the Court in January 1972, did not participate in the decision.[87]

Justices Stewart, Burger, and Blackmun dominated questioning during the Sierra Club's argument.[88] Blackmun pressed on whether the record showed that some of the Sierra Club members used Mineral King, a point on which counsel acknowledged there was "no direct testimony." Blackmun rhetorically mused that "[t]his goes back to the days of John Muir, is it not?" He was apparently referring to the fact that Muir was the founder of the Sierra Club. Stewart was looking for a principle to cabin the argument: "I was just wondering how far your argument would go." Trying to save the situation, Leland Selna,

counsel for the Sierra Club, strategically pleaded: "We do not ask the court to be wide open."[89] Douglas was pretty quiet during oral argument. He pursued only one point: during the government's argument, he pointed out that Michigan had "enacted a law to give standing down to [a] citizen and [the] environment" and that a pending bill in Congress "did the same thing." Solicitor General Erwin Griswold shot back: "I am not sure that even Congress has the power to create a case or controversy … ."[90]

Curiously, at the conference a few days following argument, Douglas passed when his turn came to offer his view. (We now know that by that time Douglas had already produced a first draft of his dissent.) In contrast, Brennan gave a broad explanation of his position:

> This case did not require the Sierra Club to present the issue as broadly as it did. No injury in fact is pleaded. That relates to the use of the Mineral King area by Sierra Club members. That kind of evidence could be brought in under allegations on the petition. That supports the ruling of the district court and brings it under *Data Processing*. Is standing a function of the case or controversy requirement? It is a real case controversy, as my separate opinion in *Data Processing* shows. The latter allows aesthetic as well as economic factors to be taken into account.[91]

He queried "whether it is in the district court record," to which Justice White responded that "it is not."[92] Brennan went on to conclude, "I would not decide the broad question if we need not. I would reverse and remand."[93] Justice Blackmun was in accord. Justice Stewart, who authored the majority opinion, was direct and succinct: "I cannot agree with the district court; I agree with the court of appeals. I would be willing to decide the broad question and remand this, but I would prefer to affirm."[94]

Blackmun's notes from the conference are particularly revealing on the question of a potential conflict of interest: "The notes indicate that Justice Douglas initially passed when it came his turn to vote and then later explained that he might recuse himself from the case because he had been a member of the Sierra Club for ten years, and lately an honorary member, though he had resigned years ago."[95] Justice White responded, "everyone in the [United States] is not a private Attorney General."[96]

Apart from veiled criticism of Douglas's role in the Sierra Club, there was a "negative feeling" among some Justices that the Sierra Club set up "a test case to try to transform standing doctrine."[97] This recollection is not inconsistent with the Sierra Club's earlier-discussed litigation strategy and the recognition that its standing argument would be stretching the limits.

Writing for the Court, Justice Stewart —joined by Chief Justice Burger and Justices White and Marshall—held that the Sierra Club lacked standing to sue because it did not allege that the Club *itself* was injured by Disney's planned resort.[98] Justice Stewart explained that because "the Constitution's Case-or-Controversy Clause prohibits courts from issuing advisory opinions, any legal wrongs from which the Administrative Procedure Act protects must, at minimum, meet the prevailing constitutional requirements of standing."[99] The Sierra Club's legal interest in the case, according to the Court, seemed to rely on a "zone of interests" test that Justice Douglas had announced in two recent cases.[100] Declining to clarify the meaning of the term "zone of interests," however, the Court noted simply that broadening the categories of the necessary "injury" is fundamentally different "from abandoning

In 1972, Justice Potter Stewart (seated, left), joined by Justices Byron White, Thurgood Marshall, and Chief Justice Warren E. Burger, agreed with the Ninth Circuit that the Sierra Club had not alleged any legal interest in the case. Douglas (seated, second from left) advocated in his dissent for "a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where the injury is the subject of public outrage."

the requirement" that plaintiffs be injured at all.[101]

Justice Stewart circulated his initial draft majority opinion the same day Douglas circulated his dissent.[102] Justices White, Marshall, and Burger joined the final opinion.[103] Notably, the opinion contained a key footnote of advice to the Sierra Club: "Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure."[104] This footnote was inserted just a week before publication.[105]

How Justice Douglas's Dissent Came to Be

Douglas's dissent, buttressed with Stone's rights-of-nature theory, stemmed from a heartfelt belief that the courts should open their doors to citizen challenges. It is surprising that Blackmun's dissent, which was equally eloquent and founded on a firmer footing, generally goes unmentioned.

Justice Douglas's Dissent

Douglas penned one of the most famous and passionate dissents in the Supreme Court's history. He reasoned that the question of "standing" would be

> simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where the injury is the subject of public outrage.[106]

In other words, Justice Douglas favored a rule that would recognize Mineral King Valley *itself* as the plaintiff for purposes of standing.

Douglas's position was informed in part by the writings of Aldo Leopold, the father of wildlife ecology and the American wilderness system. Leopold viewed nature as an ecological community united by "the land ethic." According to Leopold, the land ethic "simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land."[107] Douglas believed that if this concept were applied to standing, "[t]hen there will be assurances that all of the forms of life" that inanimate, natural objects represent "will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams."[108]

Douglas borrowed the constitutional theory underlying his dissent from Christopher Stone's *Southern California Law Review* article, a preview of which landed in Douglas's lap just as he put pen to paper. How the article found its way to Douglas and into the dissent is a story of strategy and serendipity. Although much has been written by Stone[109] and others about Douglas's dissent and the role of Stone's theory, this article for the first time reconstructs the chronology based on the integration of Stone's writings and recollections, correspondence between the law review and Douglas, Douglas's papers, and the recollection of the law clerks.

The University of Southern California looms large in this story. Douglas was a prolific writer. He authored thirty-two books and hundreds of articles. His publications ran the gamut from law review pieces to *Good Housekeeping* and *Playboy* articles.[110] So it was no surprise that he agreed to write a preface for the *Southern California Law Review*'s first Law and Technology issue, scheduled for publication in 1972.[111] In the fall of 1970, the editor sent Douglas a tentative list of contributors, which did not include Stone because he had never been slated to write for that volume. The publication informed Douglas that manuscripts would be sent in Spring and Summer 1971.[112]

A year later, on November 17, 1971—perhaps not coincidentally the day of the argument in *Sierra Club v. Morton*—the editor sent Douglas "brief synopses of the articles which will appear in the issue" and offered to send the "full text" of the articles if that "would be more helpful."[113] Now, Stone's name was associated with the law review publication. The collection of synopses contained a one-paragraph summary of Stone's article but advised, "Professor Stone's draft has not yet been edited but because of its extraordinary nature, we are sending along a draft of the first sixty paragraphs."[114] Alongside technology-themed articles like "Personal Liberty and Behavior Control Technology and Freedom, Responsibilities and Control of Science," the Stone piece—then titled "Legal Rights for the Environment?"—was decidedly out of place.[115]

Stone recognized that Douglas "got a jump in looking at the article," including the early synopsis.[116] As it turns out, following the argument, Douglas wrote the first draft of his dissent in about two hours.[117] It was not uncommon for Douglas to do research during oral arguments and even to start drafting his opinion. He was known as a quick, although some said sloppy, writer.[118] His clerk, William Alsup, remembers it as "the most beautiful thing [he] had ever read."[119] He thought, "[This is] so vintage Douglas. I could not presume a law clerk to improve it," so he found a comma or moved a semicolon, but he did not want to change the opinion.[120] The criticism that Douglas's opinions read like "rough drafts" did not hold true here; the opinion evolved and was polished over the course of twelve iterations. The dissent's rationale for granting standing to inanimate objects more than resembles the Stone synopsis. In the first draft, Douglas explained that "[i]nanimate objects are

sometimes parties in litigation," and that "a ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole—[a] creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases."[121] These principles mirror the synopsis of Stone's article that Douglas had at the time of the first draft: "Investing objects with 'rights' is nothing new to the law, Stone observes instancing ships and corporate bodies."[122] In terms that Douglas echoed in his dissent, Stone wrote: "The river as plaintiff speaks for the ecological unit of life that is part of it," and "[t]hat is why these environment issues should be tendered by the inanimate object—itself."[123]

The law review's November 17 letter and its multiple enclosures surely had not arrived when Douglas penned his first draft that very day of oral argument. But, as luck would have it, Richard Jacobson, one of Douglas's law clerks who did not work on the case, had been a protégé and friend of Stone. As Jacobson put it, "I know how WOD [William O. Douglas] knew about Chris Stone's article. I am the culprit."[124] It is likely that Jacobson received an earlier summary directly from Stone or the law review and then passed it on to Douglas before the argument.

Once Douglas was privy to Stone's "trees have standing" theory, he was anxious to get the full article. Douglas's secretary immediately wrote back to the law review editor, "Mr. Justice Douglas has your letter of November 17. The draft of Professor Christopher Stone, however, was not enclosed. Inasmuch as time is of the essence, the Justice would appreciate your getting off the copy of this to him right away."[125] The urgency was, of course, that Douglas was in the throes of drafting a dissent that relied on Stone's analysis. Records do not reveal when a final copy of the article arrived in chambers, but by February 1972, new footnotes referencing the article had been inserted into the draft,[126] and Douglas cited the article in the final text of his dissent.[127]

After adopting Stone's theory in his initial drafts, Douglas expanded his dissent with an assault on the Forest Service. He had a stack of books on his desk, which he directed Alsup to "summarize into a series of footnotes to explain how the Forest Service has sold out to the logging industry."[128] Douglas asserted that "[t]he Forest Service—one of the federal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests."[129] This attack on the Forest Service was ironic; Gifford Pinchot, Chief of the United States Forest Service, was a "boyhood hero" and, along with Teddy Roosevelt, a "romantic woodsman." Of course that was before Douglas learned of "Pinchots" and the Forest Service's multiple use philosophy.[130]

In Alsup's words, placing footnotes in the dissent was a "tough assignment."[131] Because "there seemed to be no logical place to put the footnotes," Alsup wrote them in chronological order so they make sense when read sequentially. Douglas offered a rare compliment: "This is great. This is just what I wanted."[132]

In juxtaposition to Douglas's approach, the Solicitor General viewed the issue through the lens of separation of powers. As part of his opinion, Douglas appended an excerpt from the argument of the Solicitor General, who urged against "a system of government in which every legal question arising in the core of government would be decided by the courts" and warned that "[i]f there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the Court before the administrator … can take any action."[133]

The Genesis of Stone's Law Review Article

Serendipity and strategy guided Stone's article to Douglas's desk and ultimately to the first paragraph of his dissent. In a property class, Stone was lecturing about the development of property rules and how society defines property. Speaking off the cuff, "beyond his notes," he floated the general idea that a river could have its own persona and have standing. The students' reaction was derisive, to say the least, thinking that he had "gone too far."[134]

Stone pondered, "What would it take to give a river its own existence? What does it mean to dole out rights to nonhumans?" To test this theory, he needed a case with a standing issue, an object that had its own damages, and an effective remedy on behalf of nature.[135] When Stone asked the library to look for such a case, the reference librarian quickly came up with the Sierra Club case in the Ninth Circuit.[136] By then the case was headed to the Supreme Court.

The match was perfect, according to Stone: "This [case], it was apparent at once, was the ready-made vehicle to bring to the Court's attention the theory that was taking shape in my mind. Perhaps the injury to the Sierra Club was tenuous, but the injury to Mineral King—the park itself—was not."[137]

So Stone sat down with the editor-in-chief of the *Southern California Law Review* and what followed was a strategic effort to bring the article to the Supreme Court's attention, or more specifically, to Douglas's attention because of the likelihood of a sympathetic ear.[138] The coincidence that Douglas was writing a preface for the next volume of the law review was too good to hope for, so Stone quickly penned the piece.[139] Apparently, no one raised an ethical concern that sending a targeted legal missive to a single Justice in the form of an unpublished article while the appeal was pending might be seen as a violation of the *ex parte* contact rule and the Supreme Court's procedure for the filing of *amicus curiae* briefs.[140] It could be that the players were not familiar with professional conduct rules governing litigation or that they didn't consider the issue because they were sending a law review article, not a letter or other communication. Stone was a corporate law professor, not a litigator, and the law review was populated with students who had yet to practice law.

To be sure, law professors and others are often *amici curiae* in high-profile cases, but those submissions follow the Supreme Court's rules on the filing of amicus briefs. Indeed, this case generated considerable interest from outside groups. The Environmental Defense Fund, the National Environmental Law Society, and the Wilderness Society filed amicus briefs in support of the Sierra Club. On the other side, the County of Tulare, the American National Cattlemen's Association, and the Far West Ski Association filed briefs supporting the government's position. The Stone article fell well outside the deadline for filing an amicus brief, but its arrival over the transom had a monumental impact on Douglas's dissent.

Yes, Douglas was writing a preface for the law review, but Stone's article referenced the pending litigation, named the Sierra Club and other organizations as appropriate advocates for the environment, and was shoehorned in for a specific purpose—to float the nature's right proposition to Justice Douglas.[141] Final publication of the article virtually coincided with publication of the Court's opinion, which meant that it was not available to the Court, counsel, or the public until the spring of 1972. The preface Douglas wrote for the journal spoke generally to the intersection of law and technology, with a passing reference to the "environmental crisis … that gave us garbage unlimited."[142] No mention was made of Stone's article or its thesis.

In Stone's view, he had conceived of "other ways of looking at nature that others

had not considered."[143] The final version of his article, "Should Trees Have Standing?—Toward Legal Rights for Natural Objects," observed that inanimate objects are often parties to litigation, for example, ships in matters of maritime law, or corporations in most civil matters.[144] In other words, Stone believed that conferring rights on inanimate, natural objects—such as valleys, meadows, rivers, lakes, and even air—would not be extreme or unprecedented. Stone further concluded that economic and social policy favored bestowing such rights.[145] Douglas's dissent echoes Stone's thesis. Although the phrase, "should trees have standing?" was decidedly Stone's creation, it became so closely associated with Douglas's dissent that it is often attributed to Douglas.

Justice Blackmun's Dissent

Although Douglas's dissent is the one remembered today, Justice Blackmun, who also dissented, was equally passionate about nature and was expansive about the environmental impact of the Disney proposal.[146] Even though he was never tagged with the moniker of "environmentalist," he was "[a]lways a lover of nature,"[147] often walking in Theodore Roosevelt Island National Park. At the time of the *Morton* argument, Blackmun had been on the Court for just eighteen months; over time, "he generally became a reliable vote in favor of environmental interests."[148]

Unlike Douglas's papers, which are comparatively skimpy for such an important case, Blackmun's case file reflects a careful analysis before argument, including a series of questions posed by the appeal, a four-page memorandum from the Justice himself reflecting on the case, a law clerk bench memorandum, and detailed argument notes.[149] Foreshadowing his dissent, in his preargument note, Blackmun posited: "If petitioner has no standing, who conceivably does?"[150] Blackmun reflected on the Supreme Court's expansion of standing, stating, "Ten years ago Sierra would have had no recognizable standing. On the other hand, I think this court in the data processing and related cases has gone far down the road to uphold standing in a litigant."[151]

In the face of Douglas's flowery dissent, Blackmun's eloquent argument for nature is often overlooked. To begin, he highlighted "the Nation's and the world's deteriorating environment with its resulting ecological disturbances."[152] Blackmun took a practical approach, outlining the real world consequences of the majority's green flag for the project and recognizing that "[r]easons, most of them economic, for not stopping the project will have a tendency to multiply."[153]

Blackmun would have upheld the district court's judgment on the condition that the Sierra Club amend its complaint to allege some sort of injury to the Club or its members.[154] As a second option, Blackmun would have permitted "an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues."[155] Blackmun was confident that courts could fashion rules to ensure that such an "incursion upon tradition" would not be "very extensive."[156] In conference, he hinted that his view was a product of emotion, rather than reason. "I may be reaching for a position I emotionally desire enough here in the interest of Sierra Club members to sustain their standing."[157]

In contrast to Douglas, whose dissent had little in the way of facts about Mineral King, Blackmun focused on the scope of the project and emphasized the large number of visitors and automobiles that the development would spawn. And he noted that any actual user would be unlikely to challenge

The Mineral King controversy tarnished Walt Disney Productions' reputation as friendly to nature conservation. Walt Disney, who died in 1966, was an honorary life member of the Sierra Club and would probably have jettisoned the project when environmentalist opposition heated up. In 1977, the legal case was dismissed by agreement of the parties.

the project because of personal economic interests. He queried, "Are we to be rendered helpless to consider and evaluate allegations and challenges of this land because of procedural limitations rooted in traditional concepts of standing?"[158]

Brennan, who earlier had tried to get the appeal dismissed as improvidently granted, joined Blackmun's opinion as stated in the second alternative. He would have reached the merits, but he also noted his agreement with Blackmun "that the merits are substantial."[159]

Although hailed as a landmark standing decision, in reality the case also boiled down to a lesson in civil procedure and pleading. The Sierra Club had rolled the dice and lost in its effort to tie standing to place, not people. In the wake of the Court's ruling, the Sierra Club followed the advice of the majority and Blackmun: it returned to the district court with an amended complaint.[160] The second time around, the Sierra Club alleged a sufficient injury to its *members* to confer standing on the Club. The amended complaint also added a claim under the newly enacted National Environmental Policy Act.[161] The district court concluded that "notwithstanding the Court of Appeals' 'handwriting on the wall,' plaintiffs still have their right to proceed on the merits."[162]

Development of the proposed project stalled until the almost 600-page environmental assessment was completed in 1978. Despite Forest Service efforts to revive the plan, Disney was done. Ironically, like Douglas, Walt Disney had been a lifetime member of the Sierra Club, primarily in recognition of his pathbreaking nature series, *True-Life Adventures*. He died in 1966, long before the litigation heated up; despite his passion for the resort, had he lived, Disney

might well have jettisoned the project long before the company chose to fight the fight. In 1977, the case was dismissed by agreement of the parties.[163]

The State of Nature's Rights

The notion of standing for inanimate objects was not just an academic exercise. In fact, the rights of nature movement, sometimes referred to as "RoN," has gained some traction in the international arena over the past four decades. The Universal Declaration of the Rights of Mother Earth, which grew out of the World People's Conference on Climate Change and the Rights of Mother Earth, reflects these values.[164] Ecuador's constitution, for example, the first of its kind in affording rights to nature, now grants legal rights to rivers, forests, and other natural entities.[165] Similar provisions are being developed in Brazil, Argentina, and Nepal.[166] In New Zealand, recent agreements between the Crown and a local Maori population recognize the Whanganui River and Mount Taranaki as "persons" under the law.[167] Colombia's Supreme Court reached a similar conclusion regarding the Rio Atrato.[168] By contrast, India's Supreme Court recently rejected an effort to declare the Ganges River a person,[169] and the European Court of Human Rights rejected efforts to obtain standing to sue on behalf of a chimpanzee.[170]

As environmental litigation has expanded, conservationists in the United States have found some solace, albeit not necessarily success, invoking the theory underlying Douglas's dissent. This notion has yet to gain acceptance in American courts because of, as one commentator put it, "the attenuated, almost fictive connection between the interested or injured party and the threatened resource."[171] Not long after the decision in *Morton*, lawyers in New York sued in the name of the Byram River, although the river never had to face the standing issue because the complaint also named an individual "directly and adversely affected by the claimed pollution."[172]

Recognizing the standing hurdle in the courts, several local governments have enacted ordinances that directly give nature rights. For example, in an effort to target pollution, the Tamaqua Borough of Schuylkill County, Pennsylvania, adopted an ordinance that permits a civil enforcement suit against a person or corporation "who deprives any Borough resident, natural community, or ecosystem of any rights, privileges or immunities secured by [the] Ordinance."[173] That effort grew out of "a new approach to grassroots organizing centered on Democracy Schools, which trained community residents 'to confront the usurpation by corporations of the rights of communities, people and earth.'"[174] Douglas would have lauded this approach, as it mirrored his earlier advocacy of "Committees of Correspondence" to initiate local citizen action.[175]

The themes of wilderness and sanctuary were mainstays of Douglas's judicial philosophy. He surely would have embraced the views of biologist and nature writer David George Haskell, who wrote that "because life is a network, there is no 'nature' or 'environment' separate and apart from humans. … [T]he human/nature duality that lives near the heart of many philosophies is, from a biological perspective, illusory."[176] In his farewell letter to colleagues, Douglas analogized his time on the Court to a canoe trip in the wilderness, noting the Justices were "strangers at the start but warm and fast friends at the end."[177] Douglas hoped that future Justices would "leave these wilderness water courses as pure and unpolluted as we left those which we traversed."[178]

Although Douglas's views did not carry the day in *Sierra Club v. Morton* or later cases, the influence and impact of his dissent

on environmental litigation endures to this day. The trees remain standing.

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ENDNOTES

[1] 405 U.S. 727 (1972).

[2] *Id.,* at 743 (Douglas, J., dissenting).

[3] *Id.,* at 742.

[4] Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) [hereinafter *Should Trees Have Standing*].

[5] Adapted from M. Margaret McKeown, *Justice Takes a Side*, THE SEATTLE TIMES, Aug. 19, 2018. For general background about Douglas, see William O. Douglas, GO EAST YOUNG MAN, THE EARLY YEARS, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS (1974) [hereinafter GO EAST]; William O. Douglas, THE COURT YEARS, 1939–1975, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS (1980) [hereinafter THE COURT YEARS]; and Bruce Alan Murphy, WILD BILL, THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003) [hereinafter WILD BILL].

[6] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[7] *Terminello v. City of Chicago*, 337 U.S. 1 (1949).

[8] *Brady v. Maryland*, 373 U.S. 83 (1963).

[9] *See generally* HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE DOUGLAS (Stephen L. Wasby ed. 1990); NATURE'S JUSTICE, WRITINGS OF WILLIAM O. DOUGLAS, 21–27, 269–92 (James M. O'Fallon ed. 2000).

[10] GO EAST, p. 55.

[11] *Id.,* pp. 97, 117, 159.

[12] *Id*., p. 163.

[13] *Id.,* p. 237.

[14] *Id.,* p. 283.

[15] *Id.,* p. 317.

[16] *See* THE SECRET DIARY OF HAROLD L. ICKES, VOL. III, THE LOWERING CLOUDS 1939–41, pp. 172, 196, 544–45, 617–18 (1953–54) [hereinafter ICKES DIARY].

[17] Melvin I. Urofsky, THE DOUGLAS LETTERS, SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS, p. 219 (1987) [hereinafter DOUGLAS LETTERS].

[18] *Id.,* pp. 219–20.

[19] ICKES DIARY, p. 334.

[20] William O. Douglas, OF MEN AND MOUNTAINS (1950).

[21] McKeown, "Justice Takes a Side," p. 14.

[22] *Id.,* Douglas wrote about these hikes in MY WILDERNESS, THE PACIFIC WEST (1960).

[23] *See generally* Bruce Alan Murphy, THE BRANDEIS/FRANFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982); *see also* David Danelski, *The Propriety of Brandeis's Extrajudicial Conduct*, BRANDEIS AND AMERICA (Nelson L. Dawson ed., 1989).

[24] William O. Douglas, A WILDERNESS BILL OF RIGHTS (1965), p. 86.

[25] For a general description of Mineral King, *see* Roger Rapoport, *Disney's War Against the Wilderness*, RAMPARTS (Nov. 1971); *see also* Sierra Club advocacy flyer, Sierra Club Archives, Container 6:11. (Hereinafter, the Sierra Club Archives, housed at the University of California-Berkeley Bancroft Library, are referred to as "Bancroft SCA.")

[26] NATIONAL PARK SERVICE, VISITATION STATISTICS, https://www.nps.gov/orgs/1207/02-28-2018-visitation-certified.htm.

[27] Flyers from Mineral King Development Records, Collection 0037, Box 1, Folder 23 (Publicity 1968–1973), Special Collections, University of Southern California Libraries.

[28] Peter Browning, *Mickey Mouse in the Mountains*, HARPER'S MAGAZINE (Mar. 1972), p. 65; *see also* Draft Forest Service-Michigan State Study re litigation related to management of Forest Service lands, July 6, 1970, pp. 21, 46–50, Bancroft SCA, Container 6:11.

[29] *Sierra Club v. Hickel*, 1 Envtl. L. Rep. 20010 (N.D. Cal. 1969). The case began as *Sierra Club v. Hickel*—not *Morton*—because Walter J. Hickel was the Secretary of the Interior when the Club filed suit.

[30] Author's interview with Leland R. Selna, Jr., Dec. 4, 2018.

[31] *Sierra Club v. Hickel*, 433 F.2d 24, 26 (9th Cir. 1970).

[32] *Id.*

[33] *Id.,* at 29.

[34] *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 204–06 (1962) (framing the inquiry as: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.").

[35] *Sierra Club v. Hickel*, 433 F.2d at 33; 11 C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1, p. 139 (2d ed. 1955).

[36] *Sierra Club v. Hickel*, 433 F.2d at 29–30.
[37] Selna interview.
[38] *Id.*
[39] *See Sierra Club v. Hickel*, 1 Envtl. L. Rep. at 20014; *Sierra Club v. Morton*, 405 U.S. at 731.
[40] *Sierra Club v. Hickel*, 1 Envtl. L. Rep. at 20014.
[41] *Id.*
[42] *Id.*
[43] *Sierra Club v. Hickel*, 433 F.2d at 38.
[44] *Id.,* at 33.
[45] *Id.,* at 30.
[46] *Id.,* at 33.
[47] *Id.,* at 36–38.
[48] *Sierra Club v. Morton*, 405 U.S. 727 (1972), No. 70-34 (Pet. for Writ of Certiorari).
[49] THE COURT YEARS, p. 371.
[50] Douglas to Dr. Edgar Wayburn, President of the Sierra Club, Oct. 1, 1962, William O. Douglas Papers, Box 1763. [Hereafter, the William O. Douglas Papers, housed at the Manuscript Division of the Library of Congress, are referred to as the "Douglas Papers."]; *see also* DOUGLAS LETTERS, p. 62.
[51] *Id.*
[52] Douglas to Charles Reich, Sept. 11, 1962, Douglas Papers, Box 365.
[53] Wayburn to Douglas, Oct. 23, 1962, Douglas Papers, Box 1763; *see also* Wayburn to Douglas, Nov. 6, 1962, Douglas Papers, Box 1763.
[54] Douglas to Dr. Philip Berry, President of the Sierra Club, Dec. 2, 1970, Douglas Papers, Box 1764.
[55] *Id.,* (emphasis added).
[56] Author Unknown, Memorandum titled "WOD and the Sierra Club" (undated), Douglas Papers, Box 1545. This note lists key dates concerning Douglas' involvement with the Sierra Club.
[57] The "adapso" reference is to *Association of Data Processing Services Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), which was pending in the Court at the time and decided the following year.
[58] Minutes of Sierra Club Board Meeting, July 25, 1969, Douglas Papers, Box 1764.
[59] 397 U.S. at 154, 158.
[60] By statute, "[t]he Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court." 28 U.S.C. § 42.
[61] THE COURT YEARS, p. 171.
[62] *Sierra Club v. Morton*, 405 U.S. at 743–44 (footnote omitted).
[63] *Sierra Club Role Disputed by U.S.*, N.Y. TIMES, Feb. 10, 1970; *"American Alpine" in Style*, NAT'L OBSERVER, Dec. 27, 1965; *Government's View on Mineral King Case*, S.F. CHRONICLE, Jan. 10, 1970; *Wilderness Buckers' Lectures Oppose Disney's Mineral King*, FRESNO BEE, Dec. 11, 1968; *Disney Profits Sharply, Higher for 1st Quarter*, L.A. TIMES, Feb. 4, 1980.
[64] *When Government Turns Its Back on Pollution*, NEWSDAY, AUG. 25, 1970.
[65] *Sierra Club Will Appeal Ruling on Disney Project*, N.Y. TIMES, Sept. 20, 1970; *Sierra & Disney to High Court?*, N.Y. POST, Sept. 30, 1970; *Sierra Club's Attempt to Halt Disney Project Rejected by Court*, WALL STREET J., Sept. 21, 1970; *A Court Go-Ahead for Mineral King*, s.F. CHRONICLE, Sept. 18, 1970; *New Moves on Mineral King*, S.F. CHRONICLE, Nov. 6, 1970; *Sierra Club Seeks to Reverse Ruling on Disney Resort*, N.Y. TIMES, Nov. 6, 1970; *Appeals Court Quashes Mineral King Injunction*, FAR WEST NEWS, Oct. 1, 1970; *"Finest Winter recreation area" in courts*, CHI. SUN TIMES, Oct. 15, 1970.
[66] Tom Eblen, *50 years ago, Red River Gorge almost became a lake. The story of a hike that saved it*, LEXINGTON HERALD LEADER, Nov. 17, 2017, https://www.kentucky.com/news/local/news-columns-blogs/tom-eblen/article185173423.html (last visited Dec. 18, 2018).
[67] M. Brock Evans, Sierra Club Northwest Representative, to Douglas, May 31, 1967, Douglas Papers, Box 1764.
[68] DOUGLAS LETTERS, p. 252.
[69] *Id.*
[70] M. Brock Evans to Douglas, July 23, 1971, Douglas Papers, Box 559. Douglas' criticism of President Johnson is somewhat ironic, as Johnson wrote the foreword to *A Wilderness Bill of Rights*.
[71] VOICES FOR THE EARTH: A TREASURY OF THE SIERRA CLUB BULLETIN, 1893–1977 (Ann Gilliam ed., Sierra Club Books 1979), pp. 538–39. These introductory remarks were made in connection with a speech by Douglas, "Nature and Value of Diversity."
[72] Author's interview with William Alsup (now a U.S. District Judge for the Northern District of California), Jan. 18, 2017 [hereinafter Alsup interview I].
[73] *See, e.g.*, Robert Tembeckjian, *The Supreme Court Should Adopt an Ethics Code*, WASHINGTON POST, FEB. 6, 2019; Lincoln Caplan, *Does the Supreme Court Need a Code of Conduct?*, THE NEW YORKER, July 27, 2015.
[74] 28 U.S.C. § 24 (1948) ("Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest … or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding.").
[75] The Judiciary Act of 1789, ch. 20, 1 Stat. 73.
[76] 28 U.S.C. § 455 (requiring disqualification of any justice, judge, or magistrate judge "in which his impartiality might reasonably be questioned"); *see also* Chief Justice Roberts' emphasis on this obligation, SUPREME COURT OF THE UNITED STATES, 2011 YEAR-END

REPORT ON THE FEDERAL JUDICIARY (2011), available at https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.

[77] M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, J. APP. PRAC. & PROCESS 45 (2005).

[78] Author's Interview with Cathy Douglas Stone, Nov. 27, 2018.

[79] THE COURT YEARS, p. 370.

[80] 401 U.S. 907.

[81] Untitled note in *Sierra Club v. Morton* case file, Douglas Papers, Box 1545.

[82] *Id.*

[83] SUPREME COURT HISTORICAL SOCIETY, SIGNIFICANT ORAL ARGUMENTS 1955–1993: The Burger Court, http://supremecourthistory.org/history_oral_decisions_burger.html (last visited Dec. 18, 2018).

[84] James Salzman & J. B. Ruhl, *New Kids on the Block —A Survey of Practitioners Views on Important Cases in Environmental and Natural Resources Law*, 25 NAT. RESOURCES & ENV'T 15, 45 (2010).

[85] In a prior case, the Sierra Club appeared as amicus curiae. *See, e.g.*, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 396 U.S. 808 (1969) (order granting motion to appear as amicus).

[86] 405 U.S. at 741.

[87] Justices Hugo Black and John Marshall Harlan II retired from the Court before argument. SUPREME COURT OF THE UNITED STATES, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/members_ text.aspx.

[88] Oral Argument in *Sierra Club v. Morton* (Nov. 17, 1971), available at https://www.oyez.org/cases/1971/70-34; *see also* Brian S. Tomasovic, *Soundscape History and Environmental Law in the Supreme Court*, 896 LEWIS & CLARK L. REV. 913, 929 (2015).

[89] Oral Argument in *Sierra Club v. Morton*.

[90] *Id.* Oddly, in a note to Douglas before the argument, his clerk Kenneth Reed took the position that "[t]he standing question is not much in issue before this Court." (Kenneth R. Reed Note to Douglas, Nov. 5, 1971, Douglas Papers, Box 1545). That is a hard proposition to swallow in light of the history of the case and the focus of the Sierra Club's argument. Douglas was not a big note-taker so his files don't reveal whether he pressed the clerk on this point.

[91] THE SUPREME COURT IN CONFERENCE (1940–1985) – THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS (Del Dickson ed., Oxford Univ. Press 2001), pp. 133–34. Justice Brennan refers to *Association of Data Processing Service Organizations, Inc. v. Camp.*

[92] THE SUPREME COURT IN CONFERENCE, p. 134.

[93] *Id.*

[94] *Id.*

[95] Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP. 10637, 10657 (2005) [hereinafter Percival, *Blackmun Papers*].

[96] *Id*.

[97] Author's interview with Paul Gewirtz, law clerk to Justice Marshall, and now a professor at Yale Law School, Nov. 26, 2018. Gewirtz speculates that Stewart may have spread this view, but indicates that it definitely was not Marshall.

[98] 405 U.S. at 740–41.

[99] *Id.,* at 731–32.

[100] *Id.,* at 733 (citing *Data Processing*, 397 U.S. 150, and *Barlow v. Collins*, 397 U.S. 159 (1970)).

[101] *Id.,* at 738.

[102] First Draft Stewart opinion for the court, Thurgood Marshall Papers, Box 81, folder 11. (Hereinafter, the Thurgood Marshall Papers, housed at the Manuscript Division of the Library of Congress, are referred to as the "Marshall Papers.").

[103] 405 U.S. 727.

[104] Id., at 736 n.8.

[105] Percival, *Blackmun Papers*, p. 10657.

[106] 405 U.S. at 741 (Douglas, J., dissenting).

[107] *Id.,* at 752 (quoting ALDO LEOPOLD ET AL., A SAND COUNTY ALMANAC (1949), p. 204).

[108] *Id.*

[109] Christopher D. Stone, SHOULD TREES HAVE STANDING? LAW MORALITY AND THE ENVIRONMENT (3rd ed. 2010), p. 35 [hereinafter Stone, *Law Morality and the Environment*].

[110] Douglas said he wrote for *Playboy* because it "reaches 18 million youngsters." *Mr. Justice Douglas: Who Was William O. Douglas?* (Columbia Broadcast Systems, Inc. 1972). On October 30, 1970, Dagford Hamilton, Douglas' longtime literary assistant, elliptically raised the ethical question of disqualification based on Douglas' writings: "If you expand the Playboy ecology article into a fourth book for Random House, you will not be able to comment on proposed or pending cases like the fire ants but—I don't see why you can't comment on the misuse of defoliants in Vietnam which you have already mentioned elsewhere." Dag Hamilton to Douglas, Oct. 30, 1970, Douglas Papers, Box 889.

[111] Douglas to M.D. Talbot, Articles Editor of the *Southern California Law Review,* Oct. 10, 1970, Douglas Papers, Box 889; M.D. Talbot to Douglas, Nov. 17, 1971, Douglas Papers, Box 889 (enclosing a preview paragraph of Professor Christopher D. Stone's article, then titled *Legal Rights for the Environment Too?*).

[112] M.D. Talbot to Douglas, Nov. 10, 1971, Douglas Papers, Box 889.

[113] M.D. Talbot to Douglas, Nov. 17, 1971, Douglas Papers, Box 889.

[114] *Id.*
[115] *Id.*
[116] Author's interview with Professor Christopher D. Stone, April 4, 2018.
[117] Alsup interview I.
[118] L.A. Powe, Jr., a former clerk and now a professor at the University of Texas Law School, has been a pointed critic. He believes that Douglas' "published opinions often read like rough drafts" and thus "are easy to ignore." David G. Garrow, *The Tragedy of William O. Douglas*, The Nation, Mar. 27, 2003.
[119] Alsup interview I.
[120] *Id.* The twelve opinion drafts are contained in the case file. Douglas Papers, Box 1545.
[121] *Id.*
[122] M.D. Talbot to Douglas, Nov. 17, 1971.
[123] *Id.*
[124] Email from Richard Jacobson to the author, March 19, 2018.
[125] Letter from Nan Burgess, Secretary to Justice William O. Douglas, to M.D. Talbot, Nov. 21, 1971, Douglas Papers, Box 809.
[126] Case file for *Sierra Club v. Morton*, Douglas Papers, Box 1545.
[127] The article was initially entitled *Legal Rights for the Environment Too?* Douglas asked Alsup to look at the tentative draft of Stone's article, and the final version of the dissent was adjusted to reflect the new title of the article. Alsup to Douglas, Feb. 18, 1972, Douglas Papers, Box 1545; Alsup to Douglas, March 14, 1972, Douglas Papers, Box 1545.
[128] Alsup interview I; author's interview with William Alsup, Oct. 3, 2018 [hereinafter Alsup interview II].
[129] *Morton*, 405 U.S. at 748 (Douglas, J., dissenting).
[130] go east, p. 68.
[131] Alsup interview II.
[132] *Id.*
[133] *Morton*, 405 U.S. at 754.
[134] Stone interview.
[135] *Id.*
[136] *Id.*
[137] Stone, *Law Morality and the Environment*, iii.
[138] Stone was not the only enterprising individual reaching out to Douglas. A law student at Santa Clara University School of Law sent his law review article, *Standing and Sovereign Immunity: Hurdles for Environmental Litigants*. The student acknowledged that he was "committing some breach of procedure" but suggested that Douglas, "perhaps more than [his] fellow Justices, realize[d] the importance of standing for environmental litigants." Law Student to Douglas, Jan. 13, 1971, Douglas Papers, Box 1545.
[139] The link between Stone and the law review remains somewhat of a mystery. He wrote, "I can't recall how I learned that the law review had lined up Douglas; I am sure it was widely circulated. I was not the faculty advisor. I seem to remember that the editor in chief was behind the idea of a proposed the piece in the Tech Symposium. He was encouraging. It was written in short order." Stone email to author, April 18, 2018.
[140] Rule 42, Briefs of an Amicus Curiae, Rules of the Supreme Court (effective during 1971–72 time frame); ABA Model Code of Judicial Conduct, Rule 2.9(a); ABA Model Rules of Professional Conduct, Rule 3.5 (2016); the California State Bar Act and Rule of Professional Conduct, Rule 16 (in effect Oct. 1970) ("A member of the State Bar shall not … without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge. …").
[141] Stone, *Should Trees Having Standing,* p. 466.
[142] William O. Douglas, *Preface*, 45 S. Cal. L. Rev. 450 (1972).
[143] Stone interview.
[144] Stone, *Should Trees Have Standing?,* pp. 450, 452–53.
[145] *Id.,* pp. 473–80.
[146] *Id.,* 405 U.S. at 755 (Blackmun, J., dissenting).
[147] *See* Tinsley Yarborough, Harry A. Blackmun: The Outsider Justice (2008), p. 271. During law school in the 1970s, I often went to Theodore Roosevelt Island, where I saw Justice Blackmun taking a solitary stroll.
[148] Percival, "Environmental Law in the Supreme Court," 10663.
[149] Harry M. Blackmun Papers, Box 137, Folder 7. (Hereinafter, the Harry M. Blackmun Papers, housed at the Manuscript Division of the Library of Congress, are referred to as "Blackmun Papers.").
[150] Typewritten questions by H.A.B., Nov. 15, 1971, Blackmun Papers, Box 137, Folder 7.
[151] Case Memorandum by H.A.B., Blackmun Papers, Box 137, Folder 7.
[152] 405 U.S. at 755 (Blackmun, J., dissenting).
[153] *Id.,* at 756.
[154] *Id.,* at 756–57 (there is a similarity with the majority's footnote on amendment).
[155] *Id.,* at 757.
[156] *Id.*
[157] The Supreme Court in Conference, p. 134.
[158] 405 U.S. at 759.
[159] *Id.,* at 755 (Brennan, J., dissenting).
[160] *See Sierra Club v. Morton*, 348 F. Supp. 219, 219–20 (N.D. Cal. 1972).
[161] *Id.,* at 220.
[162] *Id.*
[163] Order Dismissing Action Pursuant to Stipulation, Bancroft SCA Container 5:3.
[164] This proclamation was presented to the United Nations, though it has not been adopted. *U.N. Prepares to Debate Whether 'Mother Earth' Deserves Human*

Rights Status, THE INTERNATIONAL UNION FOR CONSERVATION OF NATURE, May 2, 2011, https://www.iucn.org/content/un-prepares-debate-whether-mother-earth-deserves-human-rights-status.

[165] Andrew C. Revkin, *Ecuador Constitution Grants Rights to Nature*, N.Y. TIMES (Sept. 29, 2008), https://dotearth.blogs.nytimes.com/2008/09/29/ecuador-constitution-grants-nature-rights/?mcubz=3.

[166] Craig Kauffman & Pamela L. Martin, *Comparing Rights of Nature Laws in the U.S., Ecuador, and New Zealand: Evolving Strategies in the Battle Between Environmental Protection and "Development"*, Presented at International Studies Association Annual Conference, Baltimore, Md., Feb. 23, 2017, available at http://files.harmonywithnatureun.org/uploads/upload472.pdf.

[167] Sandra Postel, *A River in New Zealand Gets a Legal Voice*, NAT'L GEOGRAPHIC BLOG (Sept. 4, 2012), https://blog.nationalgeographic.org/2012/09/04/a-river-in-new-zealand-gets-a-legal-voice; Eleanor Ainge Roy, *New Zealand gives Mount Taranaki same legal rights as a person*, THE GUARDIAN (Dec. 22, 2017), https://www.theguardian.com/world/2017/dec/22/new-zealand-gives-mount-taranaki-same-legal-rights-as-a-person.

[168] Nicholas Bryner, *Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem*, INT'L UNION FOR CONSERVATION OF NATURE (Apr. 20, 2018), https://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem.

[169] *India's Ganges and Yamuna rivers are 'not living entities'*, BBC NEWS (July 7, 2017), https://www.bbc.com/news/world-asia-india-40537701.

[170] *See Stibbe v. Austria*, No. 26188/08 (decision letter issued Jan. 22, 2010).

[171] Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L. Q. 1, 3 (2016) (advocating the importance of giving nature access to the courts).

[172] *Byram River v. Vill. of Port Chester, N.Y.*, 394 F. Supp. 618, 620 (S.D.N.Y. 1975) (dismissing claims against the state agency on Eleventh Amendment grounds but otherwise sustaining jurisdiction).

[173] Tamaqua Borough, Schuylkill County, Pa., Ordinance No. 612 § 12.1 (Sept. 19, 2006); *see also, e.g.*, SANTA MONICA, CAL., MUNICIPAL CODE ch. 4.75 (2013).

[174] Kauffman & Martin, "Comparing Rights of Nature Laws," 9.

[175] Adam M. Soward, *William O. Douglas's Wilderness Politics: Public Protest and Committees of Correspondence in the Pacific Northwest*," 37 W. HIST. Q. 21, 21–22 (2006).

[176] DAVID GEORGE HASKELL, THE SONGS OF TREES x (Viking Press 2017).

[177] Douglas letter to the Chief Justice and Associate Justices, Nov. 14, 1975; *see also* Percival, *Environmental Law in the Supreme Court*.

[178] *Id.*