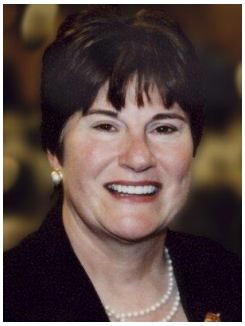
Legal Standing For Nature: The Road Not Taken

By **U.S. Circuit Judge Margaret McKeown** (January 6, 2023)



Margaret McKeown

In its final sitting of 2022, the U.S. Supreme Court heard argument on whether Texas has Article III standing to challenge Biden administration guidelines regarding immigration enforcement priorities.[1] The constitutional importance of standing in federal litigation is no less critical or controversial today than it was in the 20th century.

Fifty years have passed since former Supreme Court Justice William O. Douglas raised the iconic query: Should trees have standing? In its 1972 landmark decision, Sierra Club v. Morton, the high court confronted the bounds of standing doctrine, evaluating which plaintiffs have a "sufficient stake in an otherwise justiciable controversy" to satisfy Article III.[2]

The Sierra Club's fight to preserve a mountain wilderness in California forced the justices to interrogate who stood to suffer from a planned development. Had the club's members alleged a concrete injury?[3] Or, as Justice Douglas proposed in dissent, was the greatest harm to the environmental wonders themselves?[4]

The court's decision in Morton marked a turning point for the blossoming field of environmental litigation. Only two years before, Douglas expressed his skepticism of efforts to restrict access to the courts, writing that "[g]eneralizations about standing to sue are largely worthless as such,"[5] and highlighted that standing "may reflect 'aesthetic, conservational, and recreational, as well as economic, values.'"[6]

Taking a page from Douglas' earlier opinion, the court in Morton at once recognized "[a]esthetic and environmental well-being" as cognizable interests, but also required plaintiffs to demonstrate a material and personal injury.[7] The "zone of interest" analysis became enshrined in standing doctrine.

In the decades since, however, the court has set an increasingly stringent standard for organizational standing, which has narrowed the entrance to the courthouse for many plaintiffs with aesthetic and environmental claims.

The Sierra Club v. Morton Story

Far from the palatial halls of the Supreme Court lies Mineral King Valley, a 12-mile glacial expanse nestled in California's southern Sierra Nevada Mountains. The valley's verdant meadows and rocky slopes are home to ancient conifers, diverse flora and abundant wildlife.

The battle to preserve these pristine and unspoiled vistas began in the mid-1960s, when the U.S. Forest Service spearheaded a project to develop a year-round ski resort there. The Walt Disney Co. won the bid with plans to build an enormous Alpine-style hotel and recreational complex.

The resort's name, Yesterland, fostered nostalgia, but Disney planned to offer its 2.5 million annual visitors all the most modern conveniences, including a major road expansion to deliver skiers to the resort.[8] The Sierra Club, which had long been attentive to the region's future, sued in the U.S. District Court for the Northern District of California, seeking declaratory and injunctive relief.[9]

To demonstrate the requisite irreparable injury and a "strong likelihood or reasonable certainty" of prevailing in order to obtain injunctive relief, the Sierra Club lawyers made a creative and controversial decision.[10] Worried that a court might view Disney's potential harm as greater than Sierra Club members' suffering, the lawyers claimed only potential injury to Mineral King's environment.[11]

As counsel explained, the club "was not saying the valley had standing but it was saying the irreparable harm was to the valley."[12] The strategy worked before the district court, but the U.S. Court of Appeals for the Ninth Circuit proved less receptive to the Sierra Club's innovation.

In 1970, the appellate court held that the "club concern" did not amount to standing since there is "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the government] other than the fact that the actions are personally displeasing or distasteful to them."[13]

The Supreme Court agreed. Former Justice Potter Stewart's majority opinion rejected the Sierra Club as a plaintiff because it had not claimed that the club or its members would suffer an actual injury from the proposed resort.[14]

However, the court did acknowledge that environmental losses could lead to a justiciable injury and, in a prophetic footnote, left open the possibility that the Sierra Club might amend its complaint to satisfy this standard.[15] Indeed, the Sierra Club did just that, but ultimately the case was resolved when Disney dropped its effort to develop the resort.[16]

Justice Douglas — the court's longest-serving member and a masterful dissenter — presented another possibility. If a ship or a corporation could have legal personhood, why not valleys, meadows, rivers and lakes too?[17] While he was certainly sympathetic to the Sierra Club members' claims, he believed that the urgency of environmental preservation demanded a more inclusive view of standing.

Douglas stressed, "Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."[18] He went on to emphasize that:

[B]efore these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.[19]

Standing Doctrine Today

Federal courts have not heeded Justice Douglas' call in the half-century since his landmark dissent. In fact, the Supreme Court has in recent years espoused an increasingly restrictive view on standing. A debate rages on regarding when aesthetic objections are a matter of mere displeasure or distaste, as the Ninth Circuit regarded the Sierra Club's claims, or rise to the level of a justiciable injury.

Two environmental law decisions in the 1990s set the course for modern standing doctrine. In 1990, in Lujan v. National Wildlife Federation, the court evaluated whether an environmental organization had standing to challenge certain Bureau of Land Management land-use designations under the Administrative Procedure Act.[20]

Writing for a 5-4 majority, former Justice Antonin Scalia noted that the affidavits of the organization's members met the zone of interests test, because "'recreational use and aesthetic enjoyment' are among the sorts of interests" the statutes at issue were intended to protect. But he concluded that the members ultimately failed to allege that their personal interests were "actually affected" and fell short of establishing standing.[21]

Justice Scalia further honed the court's framework for standing in 1992, in Lujan v. Defenders of Wildlife.[22] The court articulated a three-part test for evaluating whether the "irreducible constitutional minimum of standing" exists. In short, plaintiffs must demonstrate (1) an injury in fact, (2) causation and (3) redressability.[23]

The Defenders of Wildlife, which challenged federal regulations regarding the geographic scope of the Endangered Species Act, fell short of this standard. Justice Scalia concluded that the plaintiffs' professed concerns about their ability to observe endangered animals abroad rested on "some day intentions" that were ultimately too speculative to satisfy the actual or imminent injury requirement.[24]

Scalia's influential formulation required individualized injury and rejected broad allegations of harm.[25] Scholars and advocates immediately recognized the decision's potential impact on future environmental citizen suits.[26]

Environmental advocates adapted their standing strategy in the wake of Lujan, and achieved a rare victory in Friends of the Earth Inc. v. Laidlaw Environmental Services Inc. in 2000. Writing for a 7-2 majority, former Justice Ruth Bader Ginsburg held that organizations representing residents of South Carolina's North Tyger River had standing to sue an industrial polluter for violations of the Clean Water Act.[27]

Unlike in the first Lujan decision, where the plaintiffs' challenges to increased mining activity on public lands were too abstract, Friends of the Earth had "adequately documented injury in fact" through sworn statements of how the challenged activity would impede the area's aesthetic and recreational value.[28] The Lujan and Friends of the Earth decisions remain doctrinal touchpoints on standing.

The justices have since splintered over whether states have standing to challenge environmental pollution. In Massachusetts v. U.S. Environmental Protection Agency, a 5-4 majority held in 2007 that states could sue the EPA for failing to properly regulate greenhouse gases.[29]

Four years later, however, in American Electric Power Company v. Connecticut, an eight-member court stood at an impasse: Four justices believed that at least some of the state, municipality and land trust plaintiffs had standing, while another four concluded that no plaintiff did.[30] Unable to resolve this split, the court assumed without deciding the standing issue and proceeded to the merits.[31]

In the past two years, the court has continued to raise the standing bar for plaintiffs bringing statutory claims. In Trump v. New York, the court concluded in 2020 that the plaintiffs' challenge to the Trump administration's proposed plan to add a citizenship

question to the census was not ripe and lacked standing.[32]

The same year, in Thole v. U.S. Bank NA, retirees were blocked from bringing a class action alleging pension plan mismanagement under the Employee Retirement Income Security Act because they lacked a "concrete stake" in the lawsuit's outcome, which would not affect their past or future benefit payments.[33] The following year, in California v. Texas, the court held that neither the state nor the individual plaintiffs challenging the Affordable Care Act's minimum essential coverage provision had standing.[34]

Most recently, the court's 2021 decision in TransUnion LLC v. Ramirez reinforced limits on standing for statutory claims, holding that only those plaintiffs whose personal information had actually been disclosed to a third party could proceed in a class action under the Fair Credit Reporting Act.[35]

The Supreme Court's rigorous requirements for standing have led circuit courts to diverge on when plaintiffs may seek recourse for environmental and aesthetic injuries. Just last March, in Glynn Environmental Coalition Inc. v. Sea Island Acquisition LLC, the U.S. Court of Appeals for the Eleventh Circuit addressed whether a "local environmentalist who regularly visits an area of wetlands to recreate and enjoy their natural beauty has standing to complain about the filling of the wetland with outside materials because it has diminished her aesthetic interest."[36]

Invoking Sierra Club v. Morton, the court concluded that the environmentalist had effectively alleged an injury in fact to her "aesthetic well-being," even if she had not personally waded into the wetlands.[37]

The U.S. Court of Appeals for the Fifth Circuit has been less receptive. While the court acknowledged in its 2019 decision in Center for Biological Diversity v. EPA that "pollution interfering with [a plaintiff's] aesthetic enjoyment may cause an injury in fact," it held that a plaintiff cannot "manufacture standing" by seeking out oil spills and then alleging an injury from viewing them.[38]

Meanwhile, the U.S. Court of Appeals for the D.C. Circuit found standing lacking for a landowner alleging that a natural gas station constituted a "looming eyesore" in Environmental Defense Fund v. Federal Energy Regulatory Commission, in 2021, and for a circus employee challenging inhumane elephant handling practices in American Society for the Prevention of Cruelty to Animals v. Feld Entertainment Inc. in 2011.[39]

While the trees remain standing in Mineral King Valley, Justice Douglas' vision of empowering natural objects to sue on their own behalf never came to fruition. He often said he was dissenting for the future, and, indeed, the future has brought some vindication of his theory.

Although federal courts have largely remained unreceptive, more than 40 local governments have enacted ordinances that empower nature with legal rights.[40] And at the end of 2022, the city council of Port Townsend, Washington, passed a resolution recognizing the rights of orca whales.[41]

The "rights of nature" movement has also gained traction in nations around the globe. From Ecuador and Uganda to Bangladesh and New Zealand, numerous countries have granted some constitutional rights to natural entities such as rivers and forests.[42]

The Supreme Court, of course, leads the way for all federal courts' approach to standing.

Yet, as we consider the evolution of this doctrine, it is important to remember Justice Douglas and the implications of the road not taken.

M. Margaret McKeown is a judge on the U.S. Court of Appeals for the Ninth Circuit, and is the author of "Citizen Justice: The Environmental Legacy of William O. Douglas — Public Advocate and Conservation Champion."

[1] Transcript of Oral Argument, United States v. Texas (2022) (No. 22-58).

[2] Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

[3] Id. at 728, 734–35.

[4] Id. at 741–43 (Douglas, J., dissenting).

[5] Assoc. of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970).

[6] Id. at 153–54 (quoting Scenic Hudson Pres. Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965)).

[7] Id. at 734–35.

[8] See M. Margaret McKeown, Citizen Justice: The Environmental Legacy of William O. Douglas — Public Advocate and Conservation Champion 143 — 45 (Potomac Books, 2022).

[9] Sierra Club v. Hickel, 1 Env't L. Rep. 20010 (N.D. Cal. 1969); see also Sierra Club v. Hickel, 433 F.2d 24, 26 (9th Cir. 1970) (describing relief sought).

[10] McKeown, supra note 8, at 145–46.

[11] Id.

[12] Id. at 146.

[13] Hickel, 433 F.2d at 30, 33.

[14] See Sierra Club v. Morton, 405 U.S. at 735, 738–41.

[15] Id. at 735 n.8.

[16] McKeown, supra note 8, at 157.

[17] See Morton, 405 U.S. at 743 (Douglas, J., dissenting). Although Douglas drew in large part from an unpublished article by Christopher Stone, a law professor at the University of Southern California, these ideas reflected Douglas's long-standing view on the importance and spirituality of nature. See Christopher D. Stone, Should Trees Have Standing? Toward

Legal Rights for Natural Objects (William Kauffman Inc., 1974); see also McKeown, supra note 8, at 152 — 57 (detailing the connection between Stone's writings and Douglas's dissent).

[18] Morton, 405 U.S. at 741–42 (Douglas, J., dissenting).

[19] Id. at 750 (Douglas, J., dissenting).

[20] Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 875 (1990).

[21] Id. at 886–89.

[22] Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992). On the decision's doctrinal significance, see also Scott R. Anderson, Revisiting Standing Doctrine: Recent Developments, Policy Concerns, and Possible Solutions, Brookings Inst. 8 (2022).

[23] 504 U.S. at 560–61.

[24] Id. at 563–64 (internal quotations marked omitted).

[25] Notably, Justice Blackmun, who served on the Court from 1970 to 1994, dissented in both Lujan cases, as he had in Sierra Club v. Morton.

[26] See, e.g., Karin P. Sheldon, Lujan v. Defenders of Wildlife: The Supreme Court's Slash and Burn Approach to Environmental Standing, 23 Envt'l L. Rev. 10031 (1993); Cass R. Sunstein, What's Standing After Lujan — Of Citizen Suits, Injuries, and Article III, 91 Mich. L. Rev. 163 (1992).

[27] Friends of the Earth Inc. v. Laidlaw Env't Servs. Inc., 528 U.S. 167, 180–88 (2000).

[28] Id. at 183.

[29] Massachusetts v. EPA, 549 U.S. 497, 517–21 (2007).

[30] Am. Elec. Power Co. Inc. v. Connecticut, 564 U.S. 410, 420 (2011). Justice Sonia Sotomayor did not participate.

[31] Id.

[32] Trump v. New York, 141 S. Ct. 530, 535–37 (2020).

[33] Thole v. U.S. Bank, N.A., 140 S. Ct. 1615, 1619–21 (2020).

[34] California v. Texas, 141 S. Ct. 2104, 2112 (2021).

[35] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208–10 (2021). Although the Supreme Court in TransUnion endeavored to resolve a circuit split, federal appellate courts have since continued to diverge over the meaning of "concrete harm," especially when the alleged injury is economic, emotional or informational. Compare Maddox v. Bank of N.Y. Mellon, 19 F.4th 58, 64 — 66 (2d Cir. 2021), and Campaign Legal Ctr. v. Scott, 49 F.4th 931, 936–39 (5th Cir. 2022), with Lupia v. Medicredit Inc., 8 F.4th 1184, 1190–93 (10th Cir. 2021), and Laufer v. Arpan LLC, 29 F.4th 1268, 1272–75 (11th Cir. 2022); see also Diana M. Eng, Andrea M. Roberts and Alina Levi, The Aftermath of TransUnion v. Ramirez: An Emerging

Circuit Split, N.J. L.J., Jan. 3, 2023, https://www.law.com/njlawjournal/2023/01/03/the-aftermath-of-transunion-v-ramirez-an-emerging-circuit-split/.

[36] Glynn Env't Coalition Inc. v. Sea Island Acquisition LLC, 26 F.4th 1235, 1237 (11th Cir. 2022). The Eleventh Circuit reached a similar resolution in favor of environmentalists' standing in Black Warrior Riverkeeper Inc. v. U.S. Army Corps. of Eng'rs., 781 F.3d 1271, 1280–83 (11th Cir. 2015).

[37] Glynn, 26 F.4th at 1241 (cleaned up); see also id. at 1240–42.

[38] Ctr. for Bio. Diversity v. EPA, 937 F.3d 533, 540–41 (5th Cir. 2019).

[39] See Env't Defense Fund v. FERC, 2 F.4th 953, 969 (D.C. Cir. 2021); Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't Inc., 659 F.3d 13, 17–18, 28 (D.C. Cir. 2011).

[40] McKeown, supra note 8, at 158.

[41] Katie Surma, Port Townsend Recognizes Rights of Endangered Southern Resident Orcas, Seattle Times, Dec. 7, 2022, https://www.seattletimes.com/seattle-news/environment/port-townsend-recognizes-rights-of-endangered-southern-resident-orcas/.

[42] McKeown, supra note 8, at 157–58.