

Sierra Club v. Morton

405 U.S. 727 (1972) — Supreme Court of the United States

Mr. Justice Douglas, dissenting

*Note for the reading group: This is a **dissent** — the losing side. The Court's majority held that the Sierra Club lacked standing to sue over a planned Disney ski resort in Mineral King Valley because the Club had not alleged injury to itself or its members. Douglas answers with a different proposal entirely: let the valley sue. His dissent directly cites Christopher Stone's essay "Should Trees Have Standing?" (our next reading), which was written, in part, to influence this very case. The dissent's main text is reproduced in full from the U.S. Reports (public domain); footnotes are gathered at the end, with three long ones abridged as marked.*

I share the views of my Brother Blackmun and would reverse the judgment below.

The critical question of "standing"¹ 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 injury is the subject of public outrage. 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. See Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King v. Morton*.

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes.² The corporation sole — a creature of ecclesiastical law — is an acceptable adversary and large fortunes ride on its cases.³ The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.⁴

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes — fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water — whether it be a fisherman, a canoeist, a zoologist, or a logger — must be able to speak for the values which the river represents and which are threatened with destruction.

I do not know Mineral King. I have never seen it nor traveled it, though I have seen articles describing its proposed "development"⁵ notably Hano, *Protectionists v. Recreationists — The Battle of Mineral King*, N.Y. Times Mag., Aug. 17, 1969, p. 25; and Browning, *Mickey Mouse in the Mountains*, Harper's, March 1972, p. 65. The Sierra Club in its complaint alleges

that “[o]ne of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains.” The District Court held that this uncontested allegation made the Sierra Club “sufficiently aggrieved” to have “standing” to sue on behalf of Mineral King.

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of “government by the Judiciary.” With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the “public interest.” Yet “public interest” has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852, 42 U.S.C. § 4321 et seq., and guidelines for agency action have been provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed. Reg. 7724.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.⁶ As early as 1894, Attorney General Olney predicted that regulatory agencies might become “industry-minded,” as illustrated by his forecast concerning the Interstate Commerce Commission:

“The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things.” M. Josephson, *The Politicos* 526 (1938).

Years later a court of appeals observed, “the recurring question which has plagued public regulation of industry [is] whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.” *Moss v. CAB*, 139 U.S. App. D.C. 150, 152, 430 F.2d 891, 893.

The 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.⁷

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before 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.⁸

Perhaps they will not win. Perhaps the bulldozers of “progress” will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupe in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life⁹ which it represents 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. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

Ecology reflects the land ethic; and Aldo Leopold wrote in *A Sand County Almanac* 204 (1949), “The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.”

That, as I see it, is the issue of “standing” in the present case and controversy.

Footnotes

1. See generally *Data Processing Service v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968). See also Mr. Justice Brennan's separate opinion in *Barlow v. Collins*, *supra*, at 167. The issue of statutory standing aside, no doubt exists that “injury in fact” to “aesthetic” and “conservational” interests is here sufficiently threatened to satisfy the case-or-controversy clause. *Data Processing Service v. Camp*, *supra*, at 154.

2. In rem actions brought to adjudicate libelants' interests in vessels are well known in admiralty. *G. Gilmore & C. Black, The Law of Admiralty* 31 (1957). But admiralty also permits a salvage action to be brought in the name of the rescuing vessel. *The Camanche*, 8 Wall. 448, 476 (1869). And, in collision litigation, the first-libeled ship may counterclaim in its own name. *The Gylfe v. The Trujillo*, 209 F.2d 386 (CA2 1954). Our case law has personified vessels: “A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching

she is a mere congeries of wood and iron In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed She acquires a personality of her own.” *Tucker v. Alexandroff*, 183 U.S. 424, 438.

3. At common law, an officeholder, such as a priest or the king, and his successors constituted a corporation sole, a legal entity distinct from the personality which managed it. Rights and duties were deemed to adhere to this device rather than to the officeholder in order to provide continuity after the latter retired. The notion is occasionally revived by American courts. E.g., *Reid v. Barry*, 93 Fla. 849, 112 So. 846 (1927); see generally 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 50-53 (1963); 1 P. Potter, *Law of Corporations* 27 (1881).

4. Early jurists considered the conventional corporation to be a highly artificial entity. Lord Coke opined that a corporation's creation “rests only in intendment and consideration of the law.” *Case of Sutton's Hospital*, 77 Eng. Rep. 937, 973 (K.B. 1612). Mr. Chief Justice Marshall added that the device is “an artificial being, invisible, intangible, and existing only in contemplation of law.” *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819). Today, suits in the names of corporations are taken for granted.

5. Although in the past Mineral King Valley has annually supplied about 70,000 visitor-days of simpler and more rustic forms of recreation — hiking, camping, and skiing (without lifts) — the Forest Service in 1949 and again in 1965 invited developers to submit proposals to “improve” the Valley for resort use. Walt Disney Productions won the competition and transformed the Service's idea into a mammoth project 10 times its originally proposed dimensions. For example, while the Forest Service prospectus called for an investment of at least \$3 million and a sleeping capacity of at least 100, Disney will spend \$35.3 million and will bed down 3,300 persons by 1978. Disney also plans a nine-level parking structure with two supplemental lots for automobiles, 10 restaurants and 20 ski lifts. . . . [Remainder of footnote, detailing visitor-density projections and recreation-impact literature, omitted for length.]

6. [Long footnote on industry advisory committees inside federal agencies and the literature of regulatory capture — omitted for length. Worth reading if the agency-capture argument interests you; see the full opinion.]

7. [Long footnote documenting the Forest Service's alignment with logging interests, clearcutting policy, and reforestation backlogs — omitted for length; see the full opinion.]

8. Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians ad litem, executors, conservators, receivers, or counsel for indigents. The values that ride on decisions such as the present one are often not appreciated even by the so-called experts. “A teaspoon of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth. . . . When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time.” *Conserve — Water, Land and Life*, Nov. 1971, p. 4. [Leopold's Spessart passage from *Round River*, quoted in the original footnote, omitted for length.]

9. Senator Cranston has introduced a bill to establish a 35,000-acre Pupfish National Monument to honor the pupfish which are one inch long and are useless to man. S. 2141, 92d Cong., 1st Sess. They are too small to eat and unfit for a home aquarium. But as Michael Frome has said: “Still I agree with Senator Cranston that saving the pupfish would symbolize our appreciation of diversity in God's tired old biosphere, the qualities which hold it together and the interaction of life forms. When fishermen rise up united to save the pupfish they can save the world as well.” *Field & Stream*, Dec. 1971, p. 74.

Appendix to Opinion of Douglas, J., Dissenting

Extract from the oral argument of the Solicitor General (the government's counter-position, which Douglas appends in full — excerpted here):

“As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from the complaint here, its interest would be widely affected [a]nd that ‘it would be aggrieved’ by

the acts of the defendant, has standing to raise legal questions in court.

“But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies that we have in our governmental system? Are there not many questions which must be decided by the courts? Why should not the courts decide any question which any citizen wants to raise? . . .

“Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. . . .

“If 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, sworn to uphold the law, can take any action. I'm not sure that this is good for the government. I'm not sure that it's good for the courts. I do find myself more and more sure that it is not the kind of allocation of governmental power in our tripartite constitutional system that was contemplated by the Founders.”

Source: 405 U.S. 727, 741–755 (Douglas, J., dissenting). Text of U.S. Supreme Court opinions is in the public domain. Prepared for the Personhood Research Group.