



## Nature's Day in Court

Earth jurisprudence calls for a legal system that respects the intrinsic value of Earth and all its beings. A major requirement of such a system is that laws provide nature with access to justice. Can members of the Earth community seek relief in our judicial system – i.e., do they have “standing to sue”?

For standing doctrine, judges look to authority granted by Article III § 2 of the U.S. Constitution (the “cases or controversies” clause).<sup>1</sup> The Article III litmus test evolved from cases in which organizations tried to obtain standing to enforce environmental laws. The test is: (1) A plaintiff must have suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision.<sup>2</sup> Environmental groups cannot say they were harmed because nature was harmed, even if their mission is to protect nature. They must allege their members were harmed (e.g., lost opportunities to bird-

watch), and any decision by the court must redress that particular injury (i.e., stopping the project must restore bird-watching opportunities).

But will a nonhuman plaintiff ever be able to go to court to protect its interests, given those strict conditions? Positive signals indicate this could happen, starting with the 1972 Mineral King Valley case<sup>3</sup> in which Sierra Club was denied standing to stop a proposed Disney ski development because it failed to allege that it or its members were adversely affected by the proposed action – no “injury in fact” existed.

The positive sign for nature appeared in Justice Douglas’ oft-cited dissent. He persuasively argued that contemporary public concern for protecting nature’s “ecological equilibrium” should confer standing upon environmental objects to sue for their own preservation.

Several cases brought on behalf of nature are not persuasive, either because standing was not challenged or the arguments were questionable.<sup>4</sup> But in 2004, an unsuccessful 9th Circuit Court of Appeals case seemed to open possibilities. In *Cetacean Community v. Bush*, a lawyer filed suit on behalf of marine mammals

to fight sonar activities harmful to them. Despite being denied standing, the opinion stated: “nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans”<sup>5</sup> and concluded that nature can be represented – if Congress so indicates in the relevant legislation. (Here, the statutes protecting marine mammals did not grant standing to cetaceans.)

This is promising (although only controlling in the 9th District) because it creates a precedent affirming that no explicit Constitutional barrier to standing for nature exists. Earth jurisprudence advocates could use this to lobby for amendments granting nonhuman subjects the right to enforce environmental laws. Moreover, if lawyers can keep asserting nature’s right to sue, the door is open to allowing nature its day in court even without such provisions. Although the current Supreme Court is dominated by judges whose philosophy is more prone to limiting than expanding court access, future appointments could change those dynamics.<sup>6</sup>

– Mary Munson, J.D., LL.M.

Legal director, Center for Earth Jurisprudence

1 Other tests for standing based on prudential considerations are less relevant for this inquiry.

2 *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

3 *Sierra Club v. Morton*, 405 U.S. 727 (1972).

4 Lauren Magnotti, Note: *Paving Open The Courthouse Door: Why Animals’ Interests Should Matter When Courts Grant Standing*, 80 St. John’s L. Rev. 455 at 480 - 81 (2006).

5 *Cetacean Community v. Bush*, 249 F. Supp. 2d 1206, 1210 (D. Haw. 2003), aff’d, 386 F.3d 1169 (9th Cir. 2004).

6 David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 Harv. Envtl. L. Rev. 79 (2004).

## In It Together

On November 12, 2009, the Center for Earth Jurisprudence hosted a workshop that explored means of protecting and managing the “commons,” specifically Florida Bay. Superintendent of Everglades National Park Dan Kimball, the featured speaker, discussed the intricacies of the process to welcome and incorporate citizen feedback in the management plan for Florida Bay. Although “the planning process is nothing that happens quickly,” interim steps have resulted, for instance, in implementing the public’s suggestions for a pilot “pole/troll” zone in the Snake Bight area to avoid leaving propeller scars in the delicate fabric of the legally protected seabed.

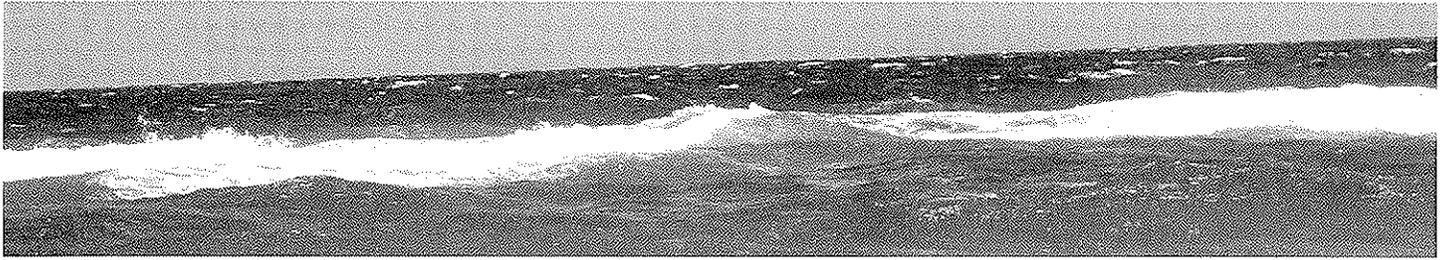
Protecting Florida Bay is an involved proposition: its complex ecosystem is matched by “a complex institutional ecosystem” of overlapping mandates and rules ranging from regulatory Acts down to the Superintendent’s Compendium. Superintendent Kimball stressed, “We can’t do it without partners.” Indeed, two valued partners were represented on the panel. Jason Bennis, a marine policy manager of the National Parks

Conservation Association ([www.npca.org](http://www.npca.org)), presented the perspective of a nonprofit advocacy group. He underscored efforts to protect the Bay through, e.g., contributions to the innovative Eco-Mariner program ([www.EcoMariner.org](http://www.EcoMariner.org)), a free online course offering boaters information about Florida Bay). Also, angler and president of RS Environmental Consulting Rainer Schael presented the viewpoint of the recreational users – “always as friends and occasionally at odds” – and drew attention to the historic role of sportsmen in supporting parks.

For more information about management planning, visit [www.nps.gov/ever/parkmgmt/planning.htm](http://www.nps.gov/ever/parkmgmt/planning.htm).

**Every time I talk to a savant I feel quite sure that happiness is no longer a possibility. Yet when I talk with my gardener, I’m convinced of the opposite.**

Bertrand Russell



Photos by Mark Israel

## The road to somewhere – Ecosystem management

Increasingly, the federal government has incorporated ecosystem considerations into wildlife management and protection, an instance of law upholding the intrinsic value of nature. In 2008, the Bush Administration applied an ecosystem-based approach to the Endangered Species Act (ESA) to various species found only on the island of Kauai.<sup>1</sup> In 2009, the Obama Administration also embraced an ecosystem approach in the context of the ESA<sup>2</sup> and in ocean management.<sup>3</sup>

The theory is not new. After all, when Congress passed the ESA in 1972, the stated purpose included the protection of species and the ecosystems upon which they depend.<sup>4</sup> But in practice, wildlife management has typically been one species, one fishery, one Habitat Conservation Plan (HCP) at a time. As recently as 2000, a multi-species HCP was considered somewhat experimental.<sup>5</sup> In sum, ecosystem management – like all other approaches

to environmental law and policy – still faces significant factual, legal and policy obstacles.

As a factual matter, listing multiple at-risk species within a single threatened ecosystem can be a straightforward exercise. But for other types of agency actions, such as active management of a landscape, the objectives of an ecosystem approach become far less obvious. In many cases, ecosystem management means attempting to manage a human-modified and exotic-infested ecosystem that faces an unpredictable future, especially considering climate change. For example, in the Everglades, invasive pythons and plants have altered the food chain, massive hundred-year-old canal systems provide flood control for millions of people but compartmentalize the ecosystem and sea level rise presents unknown risks to low-lying areas. In that context, it is difficult even to define the objectives, never mind achieve them.

Legal challenges present another barrier. By definition, an ecosystem approach considers broad-scale habitat needs, but beneficial changes within an ecosystem might help one species and harm another. The absolute dictates of our legal system do not tolerate such nuances of wildlife management. For

example, the ESA's prohibition against take of endangered species can be used by single-minded but sophisticated environmental interest groups that oppose any harm to any individual species. Conversely, decisions to manage ecosystems may affect private lands, triggering the inevitable clash with individual liberties and private property rights. Do the needs of the many outweigh the needs of the few or the extinction of the one?<sup>6</sup> When do the needs of the many trigger just compensation for the taking of private lands?

Ecosystem management presents difficult policy debates. Most importantly, given the factual and legal uncertainties, how much money will legislators be willing to risk in order to attain an uncertain objective? Then again, can we afford another Earth? Perhaps, as with Winston Churchill's view of democracy, ecosystem management is the worst possible approach to environmental law and policy – except for all the others that have been tried.<sup>7</sup>

– Keith Rizzardi, J.D.

Publisher of [www.ESAblog.com](http://www.ESAblog.com)

1 [www.fws.gov/home/feature/2008/pdf/KauaiPressRelease.pdf](http://www.fws.gov/home/feature/2008/pdf/KauaiPressRelease.pdf).

2 [www.nytimes.com/gwire/2009/09/08/08greenwire-obama-admin-confronts-candidate-species-backlog-22609.html](http://www.nytimes.com/gwire/2009/09/08/08greenwire-obama-admin-confronts-candidate-species-backlog-22609.html).

3 [www.whitehouse.gov/assets/documents/09\\_17\\_09\\_inlinterim\\_Report\\_of\\_Task\\_Force\\_FINAL2.pdf](http://www.whitehouse.gov/assets/documents/09_17_09_inlinterim_Report_of_Task_Force_FINAL2.pdf).

4 ESA, 16 U.S.C. 1531(b); see also 59 Fed. Reg. 34274 (Friday, July 1, 1994).

5 [www.fws.gov/endangered/bulletin/2000/07-08/20-22.pdf](http://www.fws.gov/endangered/bulletin/2000/07-08/20-22.pdf).

6 As per Mr. Spock, "Star Trek: The Wrath of Khan," (1982).

7 Speech in the House of Commons (Nov. 11, 1947).



**Terrence "Rock" Salt, "The Everglades and Ecosystem Restoration – Sharing the Corps Values":** Principal deputy assistant secretary of the army (Civil Works) Terrence "Rock" Salt has accepted the Center for Earth Jurisprudence's invitation to speak at St. Thomas University. As a highly respected appointee of the president, one of Mr. Salt's leadership responsibilities is to provide vision, oversight and direction to the Army Corps of Engineers (ACE) in their work to restore the Florida Everglades; he shares insights gained from many years of experience dealing with the practical and political challenges of saving the Everglades on **December 3, 2009, at 12 noon**; Moot Courtroom, St. Thomas University, 16401 N.W. 37 Ave., Miami Gardens, FL 33054. Free admission; please let us know you will attend at [crauseo-danclair@stu.edu](mailto:crauseo-danclair@stu.edu).

The Center for Earth Jurisprudence presents **"Who's Next? (And What Will We Leave Them?): Safeguarding Earth for Future Generations," on March 26, 2010**, in Orlando, Florida. Panels discuss connections between human health and the health of ecosystems; efforts to balance human needs with preserving Earth's species and wild spaces; and legal approaches to combat global warming and its consequences. For information, contact Jane Goddard at 321-206-5788 or [jgoddard@mail.barry.edu](mailto:jgoddard@mail.barry.edu).

**Call for Papers:** Consider writing an article for the CEJ's upcoming electronic symposium issue, "Continuing the Great Work: A Tribute to Thomas Berry's Contribution to Earth Jurisprudence." Visit <http://earthjuris.org/about/call-for-environmental-law-papers/> for more information.