

# Representing Ecosystems in Court: An Introduction for Practitioners

Lindsey Schromen-Wawrin\*

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The life of the law has not been logic; it has been experience. . . . The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient . . . . [Do not suppose that] because an idea seems very familiar and natural to us, that it has always been so. Many things which we take for granted have had to be laboriously fought out or thought out in past times.

—Oliver Wendell Holmes, *The Common Law*<sup>1</sup>

## I. INTRODUCTION

Western law treats the earth as property. One of the rights of property owners is the right to destroy their property. In short: The earth is property. We own it. So we have the right to destroy it.

Instead of simply being property, what if the earth had rights? For example, the basic right to exist. This right could then be enforced or

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\* © 2018 Lindsey Schromen-Wawrin. Attorney in Port Angeles, Washington (Klallam (nəxˈsʰəyəm) Territory). J.D. *summa cum laude* from Gonzaga University School of Law in 2013. B.A. from Oberlin College in 2002; studied systems ecology, environmental studies, and chemistry. I am writing this Article from the experience of having represented two ecosystems in Pennsylvania, the Little Mahoning Watershed and Crystal Spring Ecosystem, and having consulted with attorneys representing ecosystems in other locations. This Article accompanies my talk at the Rights of Nature Symposium at Tulane University Law School on October 27, 2017, available at <https://celdf.org/rights-nature-symposium-2017-video/>. Thank you to everyone who has helped to bring this work forward; I'm honored to be able to walk with you.

1. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1-2 (Belknap Press of Harv. Univ. Press 2009) (1881).

defended in court, where the earth's ecosystems directly advocate for their own rights.

In this Article, I explore some of the issues that arise when ecosystems appear in court. I am not looking at what rights an ecosystem or the earth should have but rather the procedural issues around representing ecosystems in court. I hope this Article is a useful initial reference for litigants preparing to structure their attorney-client relationships and advocate in court. This area of law is developing rapidly, so please treat this Article simply as an introduction.<sup>2</sup>

## II. CONCEPTUALIZING ECOSYSTEMS IN THE LAW

Ecologist Aldo Leopold opened his 1949 essay, *The Land Ethic*,<sup>3</sup> with a graphic reminder of Western society's relationship to property:

When god-like Odysseus returned from the wars in Troy, he hanged all on one rope a dozen slave-girls of his household whom he suspected of misbehavior during his absence.

This hanging involved no question of propriety. The girls were property. The disposal of property was then, as now, a matter of expediency, not of right and wrong.

....  
.... There is as yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. Land, like Odysseus' slave-girls, is still property. The land-relation is still strictly economic, entailing privileges but not obligations.

There is now a growing body of academic literature on "rights of nature," which is a term that generally includes rights for individual nonhuman animals, populations, communities, and whole ecosystems.<sup>4</sup> This Article focuses on representing ecosystems (and not on representing nonhuman animals, either individually or collectively) due to the unique issues that arise at the ecosystem scale. Why? Because humans are part of ecosystems.

The legal discourse on ecosystem rights almost always points back to property law professor Christopher Stone's seminal 1972 law review article *Should Trees Have Standing?—Toward Legal Rights for Natural*

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2. A useful starting point for updates on ecosystem rights globally might be GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE, <https://therightsofnature.org/> (last visited Feb. 8, 2018), and in the United States, COMMUNITY ENVTL. LEGAL DEF. FUND, <https://celdf.org/rights/rights-of-nature/> (last visited Feb. 8, 2018).

3. ALDO LEOPOLD, A SAND COUNTY ALMANAC 217-18 (1966).

4. See generally RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS (1989).

*Objects.*<sup>5</sup> Stone’s article influenced Justice Douglas’ dissenting opinion in *Sierra Club v. Morton*,<sup>6</sup> a 1972 United States Supreme Court case that began the development of contemporary standing doctrine in environmental law cases.<sup>7</sup> Justice Douglas’ dissent argued for “the conferral of standing upon environmental objects to sue for their own preservation” and that “[t]hose who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.”<sup>8</sup>

Stone’s and Douglas’ initial framing of ecosystem rights concerned the specific issue of standing, and the Supreme Court has subsequently developed standing doctrine to bar the courthouse door to many environmental litigants. Thus, much of the academic literature and case

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

6. Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 1-4 (1985).

7. See, e.g., Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1, 10-11, 20 (2007).

8. For easy reference, more of Justice Douglas’ dissent is provided below:

The critical 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 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. . . . Inanimate objects are sometimes parties in litigation. 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. The ordinary corporation is a “person” for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.

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.

...

Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

*Sierra Club v. Morton*, 405 U.S. 727, 741-45 (1972) (Douglas, J., dissenting) (citations and footnotes omitted).

law about rights of nature wrestles with the standing issue.<sup>9</sup> As we engage in that struggle, we must not lose sight of the larger goals we have for transforming our relationship with the earth. We must not lose sight of *why* we want the earth to have enforceable rights.

#### A. *Humans and the Rest of Nature*

External colonialism (also called exogenous or exploitation colonization) denotes the expropriation of fragments of Indigenous worlds, animals, plants and human beings, extracting them in order to transport them to—and build the wealth, the privilege, or feed the appetites of—the colonizers, who get marked as the first world. . . . In external colonialism, all things Native become recast as ‘natural resources’—bodies and earth for war, bodies and earth for chattel.

....  
 .... In the process of settler colonialism, land is remade into property and human relationships to land are restricted to the relationship of the owner to his property. Epistemological, ontological, and cosmological relationships to land are interred, indeed made pre-modern and backward. Made savage.

—Eve Tuck and K. Wayne Yang, *Decolonization Is Not a Metaphor*<sup>10</sup>

In order to transform our relationship with the earth, we must stop isolating humans from nature. Unfortunately, we have been trained for a long time to separate ourselves from the rest of the earth and to think of ourselves as apart from (and above) the ecosystems that are our homes.<sup>11</sup>

We continue to uphold that estranged worldview even as we discover how wrong it is. At a macro level, we cannot study ecosystems, or even global biogeochemical cycles, without including the effects that humans have on the system.<sup>12</sup> No longer is there an “out there” or “away” in which we can dispose of “waste” without noticeable effect. At the micro level, the field of epigenetics shows us that we can no longer study genes without studying the molecular environment that triggers

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9. *E.g.*, Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 *ECOLOGY L.Q.* 1 *passim* (2016).

10. Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 *DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y* 1, 4, 5 (2012), <http://www.decolonization.org/index.php/des/article/view/18630> (emphasis omitted).

11. Essentially, we are still stuck thinking in the 17th century paradigm of René Descartes’ mind-body dualism. For one critique of dualistic thinking and its pervasive role in our social and political structure, see Gerald E. Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1057 *passim* (1980).

12. *E.g.*, U.S. GLOB. CHANGE RESEARCH PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT (NCA4), VOLUME I (2017), [https://science2017.globalchange.gov/downloads/CSSR2017\\_FullReport.pdf](https://science2017.globalchange.gov/downloads/CSSR2017_FullReport.pdf).

gene expression. In other words, our genetics (nature) is not independent of our environment (nurture). We need to discard the “nature versus nurture” concept because it inaccurately separated the organism from its environment.<sup>13</sup>

How we think about our relationship with the rest of nature has real significance. In the “settlement” of the American West, one justification for displacing indigenous peoples from their lands was (and remains) the concept of uninhabited “wilderness.”<sup>14</sup> Ecosystems such as the now-famous national parks of Yellowstone, Glacier, and Yosemite were shaped by indigenous land management practices, but wilderness advocates viewed native activities as harming unspoiled and pristine nature.<sup>15</sup> “Nature” could not have people in it. “Nature” is out there, and we are certainly not a part of it.

This estranged worldview still exists and is still taught. I live near Washington’s Elwha River, which had two hydropower dams blocking salmon access and ecosystem functions. After almost a century of advocacy by the Elwha Klallam people, and with the help of non-native environmental organizers, the federal government decided to remove the dams.<sup>16</sup> Fish are running up the river and flourishing in the revived estuary and nearshore habitats. They did not need any invitation—other than getting the dam obstructions out of their way. One of the dam spillways, now perched on the wall of a canyon about sixty meters above the flowing river, remains for historic preservation. On this spillway, the National Park Service constructed interpretive kiosks. In 2017, the park installed audio recordings narrating the kiosks. The introduction to the recordings of the kiosk promises listeners an opportunity to “learn . . . how nature and humans are now restoring the river.”<sup>17</sup> Thus, even in the middle of an ecological restoration project that shows us how much we are a part of the ecosystem in which we live, we continue to teach that we are separate from nature.<sup>18</sup>

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13. *E.g.*, *Epigenetics*, NOVA SCIENCENOW (July 24, 2007), <http://www.pbs.org/wgbh/nova/body/epigenetics.html> (“Once nurture seemed clearly distinct from nature.”).

14. *E.g.*, MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* (2000).

15. *Id.*

16. *E.g.*, LYNDA MAPES, *ELWHA: A RIVER REBORN* (2013).

17. Unit Recording at Olympic National Park: Audio Description for Three Out of Six Wayside Units Along Spillway on former Columbia River Glines Canyon Dam (recorded by author on Apr. 1, 2018).

18. This is not to say that all narratives about the Elwha River restoration separate humans from nature. For example, see the short film by Director Jessica Plum, featuring Cameron Macias, *Think Like a Scientist: Renewal*. Howard Hughes Medical Institute, *Think*

I used to teach children about the Elwha River restoration. As part of general science education, I would teach a definition of “ecosystem” for grade-school students as “all the living and non-living parts of the natural world.” (For older students, substitute “biotic” and “abiotic” for “living” and “non-living.”) Occasionally, one of my students—always a native student—would ask me, quietly, on the side, like speaking heresy, “What do you mean by ‘*non-living*’ parts of the natural world?” Awkwardly, I would say something like, “You don’t have to believe it, but just put it down on the state-mandated test if you need to.” To top off this deep irony, the slogan of the science education center where I worked was “connecting people to the natural world.”<sup>19</sup>

We continue to teach this estranged worldview, this belief that humans are not part of nature. Our dogged persistence in this flawed paradigm is no surprise, though, since our language does not really define how we fit with the rest of nature. Cultural academic Raymond Williams wrote a book, *Keywords*, exploring the meanings and contexts of cultural vocabulary. His entry on the word “Nature” begins as follows:

Nature is perhaps the most complex word in the language. It is relatively easy to distinguish three areas of meaning: (i) the essential quality and character of something; (ii) the inherent force which directs either the world or human beings or both; (iii) the material world itself, taken as including or not including human beings. Yet it is evident that within (ii) and (iii), though the area of reference is broadly clear, precise meanings are variable and at times even opposed. The historical development of the word through these three senses is important, but it is also significant that all three senses, and the main variations and alternatives within the two most difficult of them, are still active and widespread in contemporary usage.<sup>20</sup>

Williams draws attention to the contestation within the very definition of “nature” with regard to whether it includes humans. Two of his three definitions contain alternative forms, characterized by whether nature includes human beings. After exploring the history of the word “nature,” Williams concludes that:

The complexity of the word is hardly surprising, given the fundamental importance of the processes to which it refers. But since

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*Like a Scientist: Renewal*, NAUTILUS (2018), <http://nautil.us/issue/57/communities/how-the-elwha-river-was-saved>.

19. I asked for “connecting people to the rest of nature,” to no avail.

20. RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 184 (1976) (emphasis added).

nature is a word which carries, over a very long period, many of the major variations of human thought, often, in any particular use, only implicitly yet with powerful effect on the character of the argument—it is necessary to be especially aware of its difficulty.<sup>21</sup>

As legal practitioners representing nature, it is particularly necessary for us to be especially aware of the powerful effect of how we situate humans in ecosystems. If we reinforce the estranged worldview where humans are separate from nature, we undercut the very goals that we are trying to achieve by representing ecosystems in the first place.

### *B. Humans as the Speaking Part of Ecosystems*

It is easy for us to fall back into believing that humans are not part of the ecosystem that we represent. We see this in the seminal legal works in this field by Stone and Douglas, which characterized nature as an “inanimate object.”<sup>22</sup> Justice Douglas’ framework does not challenge the paradigm that separates humans from the rest of nature. Instead, he looks to outdoor recreationists (effectively, tourists), to defend nature (again, viewed as “out there,” or “wilderness”<sup>23</sup>):

[E]nvironmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life 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

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21. *Id.* at 189.

22. *Sierra Club v. Morton*, 405 U.S. 727, 741-42, 745, 749, 752 (1972) (Douglas, J., dissenting).

23. For more background on issues with the concept of wilderness (which is a critical concept bolstering the estranged worldview where humans are not part of nature), see, e.g., William Cronon, *The Trouble with Wilderness: Or, Getting Back to the Wrong Nature*, in *UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE* (William Cronon ed., 1995), reprinted in [http://www.williamcronon.net/writing/Trouble\\_with\\_Wilderness\\_Main.html](http://www.williamcronon.net/writing/Trouble_with_Wilderness_Main.html) (“Far from being the one place on earth that stands apart from humanity, [wilderness] is quite profoundly a human creation—indeed, the creation of very particular human cultures at very particular moments in human history. It is not a pristine sanctuary where the last remnant of an untouched, endangered, but still transcendent nature can for at least a little while longer be encountered without the contaminating taint of civilization. Instead, it’s a product of that civilization, and could hardly be contaminated by the very stuff of which it is made. Wilderness hides its unnaturalness behind a mask that is all the more beguiling because it seems so natural. As we gaze into the mirror it holds up for us, we too easily imagine that what we behold is Nature when in fact we see the reflection of our own unexamined longings and desires. For this reason, we mistake ourselves when we suppose that wilderness can be the solution to our culture’s problematic relationships with the nonhuman world, for wilderness is itself no small part of the problem.”).

people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.<sup>24</sup>

This quote by Justice Douglas frames one of the central challenges in representing nature.<sup>25</sup> But Douglas missed a key issue because he was viewing humans as separate from nature: It is not so much that “[t]hose inarticulate members of the ecological group cannot speak”; rather, the problem is we do not know how to listen.<sup>26</sup> It is easy to say that this semantic distinction does not really matter for our practical litigation purposes, but if we are serious about the transformative potential of ecosystem rights, then our litigation must challenge the worldview that distances us from the rest of nature. We cannot just say that the ends justify the means, because our means are the ends in the making.

Douglas’ *Sierra Club v. Morton* dissent resolves this “speaking agent” issue by suggesting that “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.”<sup>27</sup> In other words, until our legal system learns to listen to what the earth is telling us, we are going to have to rely on people who know an ecosystem’s “values and wonders” in order “to speak for the entire ecological community.” However, who those people should be is a thorny issue.

What I say here will certainly be contentious, but I strongly believe that there must be involvement of the people who are part of the ecosystem when the ecosystem appears in court. It is not enough to have a tourist-connection to a place, because the recreationist, or the scientist, or even the well-intentioned environmental nonprofit organization, too often have interests opposed to the local or indigenous peoples of the

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24. *Sierra Club*, 405 U.S. at 752.

25. See also Trayce A. Hockstad, *Rats and Trees Need Lawyers Too: Community Responsibility in Deodand Practice and Modern Environmentalism*, 18 VT. J. ENVTL. L. 105, 108 (2016) (“Although the recent ecological conversation has centered on rights for natural objects and the idea that environmental interests should be separated from human interests, these propositions have diluted the correct understanding of environmental responsibility. We need not attempt to divorce the interests of the environment from those of humanity, because humanity is utterly dependent on the preservation of natural resources. Instead of isolating environmental interests in the name of pursuing rights for non-human objects, counsel should be appointed to advocate for the injury caused to local citizens by loss of biodiversity in the affected area. This approach toward environmental litigation is best, because (1) it acknowledges the responsibility of the human community to care for the environment based on a sense of order common in legal history, and (2) it best satisfies modern standing requirements for litigation, enabling effective and sustainable environmental protection for the community.”).

26. E.g., DAVID ABRAM, *THE SPELL OF THE SENSUOUS: PERCEPTION AND LANGUAGE IN A MORE-THAN-HUMAN WORLD* (1996).

27. *Sierra Club*, 405 U.S. at 752.



ecosystem in question.<sup>28</sup> We should not allow rights of nature to become another theory justifying colonialism. To help prevent that, the people *of* the ecosystem in question must be speaking on its behalf.<sup>29</sup> This does not mean the ecosystem cannot rely on experts (like a scientist, or nongovernmental organization's staff), but it does mean that the people who speak *for* the ecosystem must be part of the ecosystem. "Nothing about us without us," as the saying goes.

This is entirely different from the legal model of "guardianship." A "guardian" requires a "ward"—meaning an "incapacitated person," a legal person unable to communicate to the court.<sup>30</sup> Ecosystems are not incapacitated because the humans in the ecosystem are part of the ecosystem and they are able to communicate its interests in litigation.

### III. PROCEDURAL ISSUES IN REPRESENTING ECOSYSTEMS

The western legal system is not built for ecosystems. In our modern era, historical practices where nature had procedural rights have been laughed out of the courtroom.<sup>31</sup> Thus, representing ecosystems in court requires overcoming hurdles in justiciability and the rules of civil procedure.

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28. *E.g.*, John O'Neill, *Who Speaks for Nature?*, in *HOW NATURE SPEAKS: THE DYNAMICS OF THE HUMAN ECOLOGICAL CONDITION* 261 (Yrjö Haila & Chuck Dyke eds., 2006), reprinted in <https://pdfs.semanticscholar.org/cf03/2dd40ea25d61beb53e59dc65983359ed4422.pdf> ("discuss[ing] some of the problems deliberative democracy has in taking nature into account in public decision making").

29. *E.g.*, Tuck & Yang, *supra* note 10, at 6 ("In order for the settlers to make a place their home, they must destroy and disappear the Indigenous peoples that live there. Indigenous peoples are those who have creation stories, not colonization stories, and how we/they came to be in a particular place—indeed how we/they came to *be a place*. Our/their relationships to land comprise our/their epistemologies, ontologies, and cosmologies. For the settlers, Indigenous peoples are in the way and, in the destruction of Indigenous peoples, Indigenous communities, and over time and through law and policy, Indigenous peoples' claims to land under settler regimes, land is recast as property and as a resource.").

30. *Black's Law Dictionary* provides the first definition for "guardian" as "1. One who has the legal authority and duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability." *Guardian*, BLACK'S LAW DICTIONARY (9th ed., 2009) (The second and final definition for "guardian" is not any more useful to ecosystem advocates: "2. *Hist.* A mesne lord who was entitled to treat an infant heir's lands for all practical purposes as the lord's own, enjoying fully their use and whatever profits they yielded. At the end of the guardianship, when the heir reached majority, no accounting was owed by the mesne lord."). See also *Guardianship*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("guardianship: 1. The fiduciary relationship between a guardian and a ward or other incapacitated person, whereby the guardian assumes the power to make decisions about the ward's person or property. A guardianship is almost always an involuntary procedure imposed by the state on the ward.")

31. *E.g.*, Hockstad, *supra* note 25.

### A. *Justiciability*

Justiciability<sup>32</sup> doctrines have become the bane of environmental law, at least for litigants seeking to protect the environment.<sup>33</sup> The central justiciability issue for ecosystems is standing, although the other doctrines (ripeness, mootness, advisory opinion, political question, etc.) can certainly help sink a case. Nonhuman animals have been seeking admission to courts for years, and their cases provide a framework for thinking through standing for ecosystems.

In *Cetacean Community v. Bush*, the world's whales, dolphins, and porpoises sued the United States federal government in an attempt to stop their injury from military sonar.<sup>34</sup> The Ninth Circuit Court of Appeals analyzed whether the cetaceans had standing:

Standing involves two distinct inquiries. First, an Article III federal court must ask whether a plaintiff has suffered injury to satisfy the “case or controversy” requirement of Article III. . . .

Second, if a plaintiff has suffered sufficient injury to satisfy Article III, a federal court must ask whether a statute has conferred “standing” on that plaintiff. Non-constitutional standing exists when “a particular plaintiff has been granted a right to sue by the specific statute under which he or she brings suit.”<sup>35</sup>

In the first inquiry, whether cetaceans have constitutional standing, the Ninth Circuit concluded, “Article III does not compel the conclusion that a statutorily authorized suit in the name of an animal is not a ‘case or controversy.’”<sup>36</sup>

It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of judicially incompetent persons such as infants, juveniles, and mental incompetents.<sup>37</sup>

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32. “Justiciability” is “[t]he quality or state of being appropriate or suitable for adjudication by a court.” *Justiciability*, BLACK’S LAW DICTIONARY (9th ed. 2009).

33. *E.g.*, David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, HARV. ENVTL. L. REV. 79, 86, 93 (2004).

34. *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004).

35. *Id.* at 1174-75 (citations omitted).

36. *Id.* at 1175.

37. *Id.* at 1176 (citations omitted). The court’s analogy to Article III not preventing artificial persons from accessing the courts is powerful and resonates with many people. *See, e.g.*, Erin Fitz-Henry, *Challenging Corporate “Personhood”: Energy Companies and the “Rights” of Non-Humans*, POL. & LEGAL ANTHROPOLOGY REV. (forthcoming Nov. 2018).

In the second inquiry, whether the statutes under which the cetaceans sued authorized their private right of action, the Ninth Circuit found that the language of the statutes relied on by the plaintiff animals (the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), the National Environmental Policy Act (NEPA), and the federal Administrative Procedure Act (APA)) did not provide statutory standing for animals.<sup>38</sup> The Ninth Circuit concluded:

“[I]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.” In the absence of any such statement in the ESA, the MMPA, or NEPA, or the APA, we conclude that the Cetaceans do not have statutory standing to sue.<sup>39</sup>

*Cetacean Community* is instructive here, even though it concerns animal standing (rather than ecosystem standing). *Cetacean Community* shows that the restriction on species standing in past cases is based on the lack of legislative authorization, not in a limitation inherent in the federal judiciary—namely, Article III of the United States Constitution.

Thus, to overcome the standing hurdle, the ecosystem must be authorized to bring the claim (or defend against it). *Cetacean Community* shows that the current federal environmental statutory scheme does now allow for animals to sue under the citizen standing provisions.<sup>40</sup> Ecosystem litigants face the same issue. Federal environmental statutes do not expressly allow ecosystems to sue, just as they do not allow animals to sue. Hence, ecosystems must either rely on new legislation that recognizes the earth’s rights and authorizes ecosystem standing or convince the courts to authorize them under existing claims. This second path could include common law claims (environmental torts, etc.) or constitutional claims (the earth’s rights as penumbral rights, due process rights, inherent rights, public trust, etc.). Notably, the first path involves the legislative branch, while the second path relies entirely on judges. Practitioners are already trying both in state and federal courts.<sup>41</sup>

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38. *Cetacean Cmty.*, 386 F.3d at 1176-79.

39. *Id.* at 1179 (quoting *Citizens to End Animal Suffering & Exploitation, Inc. v. New Eng. Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993)).

40. *Id.* (lawmakers who “intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue . . . should, have said so plainly” (quotation omitted)).

41. After Grant Township, Pennsylvania, enacted an ordinance recognizing ecosystem rights and authorizing ecosystems to appear in court to protect those rights, I represented a community group and the Little Mahoning Watershed in an attempt to intervene into a lawsuit between an oil and gas company and the township. See *Penn. Gen. Energy Co. v. Grant Twp.*, 658 Fed. Appx. 37 (2016) (unpublished). I also represented a community group and Crystal

*B. Real Party in Interest and Capacity to Sue and Be Sued Under Civil Procedural Rules*

Federal Rule of Civil Procedure 17 (FRCP 17) details who may bring suit in federal court. FRCP 17(a)(1) provides:

An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought: (A) an executor; (B) an administrator; (C) a guardian; (D) a bailee; (E) a trustee of an express trust; (F) a party with whom or in whose name a contract has been made for another's benefit; and (G) a party authorized by statute.

FRCP 17(b) provides rules for determining who has capacity to sue and be sued. It provides specific rules for individuals and corporations, then states that “for all other parties, by the law of the state where the court is located.”<sup>42</sup>

Obviously, these rules do not contemplate ecosystems as parties.

Fortunately, both the “real party in interest” and “capacity to sue and be sued” rules allow for legislation to authorize a party to appear in court. Thus, where legislation recognizes ecosystem rights, it should also provide express textual authorization to address these provisions of FRCP 17 (and the equivalent state court rules).<sup>43</sup> This should be done even when the authorization is by local law, as the ecosystem can argue that courts apply local law when considering capacity under “the law of the state where the court is located.”<sup>44</sup>

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Spring Ecosystem in a similar intervention attempt. *See Seneca Res. Corp. v. Highland Twp.*, 863 F.3d 245 (2017). Both of these cases were decided on whether the proposed intervenors (including the ecosystems) were adequately represented by existing parties (namely, the townships) (*see* FED. R. CIV. P. 24(a)), and therefore the ecosystem rights and standing issues were merely footnotes. In Oregon, the Siletz River Ecosystem attempted to intervene in a lawsuit after Lincoln County, Oregon, voters passed an initiative recognizing ecosystem rights. *Capri v. Jenkins*, 17CV23360 (Cir. Ct. Lincoln Cty., 2017). These cases represent examples of local governments making law to recognize ecosystem rights and authorizing ecosystems directly protecting those rights in court. For an example of the second path—going directly to the courts—see *Colo. River Ecosystem v. Colorado*, 2017-cv-02316 (D.C. Colo., filed Sept. 25, 2017), Amended Complaint, Dkt. 19, filed Nov. 6, 2017, <https://www.courtlistener.com/recap/gov.uscourts.cod.174436.19.0.pdf>.

42. FED. R. CIV. P. 17(b)(3).

43. Also include, in ecosystem rights legislation, provisions to support an intervention into federal (FRCP 24) or state court.

44. *E.g.*, *Gaston v. N.Y.C. Dep't of Health Office of Chief Med. Exam'r*, 432 F. Supp. 2d 321, 329 (S.D.N.Y. 2006) (“Under the New York City Charter, ‘all actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law.’ Thus, the OCME is not a suable entity, and claims against OCME are subject to dismissal.” (citation omitted)).

If challenged under FRCP 17,<sup>45</sup> ecosystems should argue both the express text of the authorizing statute or ordinance and also that their participation effectuates the purpose of FRCP 17 in ensuring that a defendant not face subsequent similar actions.<sup>46</sup>

FRCP 17(b) has been a barrier for animal plaintiffs attempting to use existing statutory claims.<sup>47</sup> Thus, these procedural rules underscore the value of legislatively recognizing ecosystem rights, rather than simply looking to judges to jump these hurdles alone.

#### IV. CONCLUSION

We have all the ingredients for transforming the legal system to be capable of protecting ecosystem rights. Now we need to labor in the legislative and judicial kitchens to remake this system, and our relationship to the earth.

This Article advocated that the fight for ecosystem rights will be most effective if it works side by side with the fights for decolonization and for democracy.<sup>48</sup> These fights are intertwined, mutually reinforcing, and will be stronger together.

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45. Early in the modern environmental law era, some ecosystems were named parties in court and got there without challenge. At least one river, one marsh, and one brook were named parties in United States federal courts. *Byram River v. Vill. of Port Chester*, 394 F. Supp. 618, 621 (S.D.N.Y. 1975) (“The River (which is named as a plaintiff in the action) is a federal navigable river . . .”); *Sun Enters., Ltd. v. Train*, 532 F.2d 280, 284 (2d Cir. 1976) (“The appellants—petitioners, who were plaintiffs below, are: . . . No Bottom Marsh, the marsh through which the brook which receives the discharge flows; and Brown Brook, which is classified by New York State as a trout stream on Sun’s property.”).

46. *E.g.*, *Prevor-Mayorsohn Caribbean, Inc. v. P.R. Marine Mgmt., Inc.*, 620 F.2d 1, 4 (1st Cir. 1980) (“The basic purpose of Rule 17(a)’s insistence that every action be prosecuted in the name of the real party in interest is to protect a defendant from facing a subsequent similar action brought by one not a party to the present proceeding and to ensure that any action taken to judgment will have its proper effect as *res judicata*.” (citations omitted)).

47. Where an individual dolphin brought suit, the court applied rule 17(b) to determine whether the dolphin had capacity to sue. *Citizens to End Animal Suffering & Exploitation, Inc. v. New Eng. Aquarium*, 836 F. Supp. 45 (D. Mass. 1993). The court looked to “the law of the individual’s domicile” to see whether the dolphin had capacity. *Id.* at 45 (citing FED. R. CIV. P. 17(b)(1)). The court determined that the dolphin lacked capacity because there was no law on point. *Id.*; *see also* *Haw.’n Crow (‘Alala) v. Lujan*, 906 F. Supp. 549, 552 (D. Haw. 1991).

48. By democracy in this context, I mean the political power of the people to act for the public good. *See* Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 *passim* (2000).