

Evaluating The Legal Standing Of Natural Elements

By **Susan Lutzker and Thomas Wallentin** (March 22, 2023)

The John F. Kennedy Center for the Performing Arts has announced a 10-year plan for environment-themed programming.

The initiative will be kicked off by a month of performances, installations, exhibits and other events celebrating the world's rivers, starting on March 22, World Water Day.

Launched in 1993 by the United Nations, this international observance is intended to highlight the importance of fresh water. According to the U.N.:^[1]

Dysfunction throughout the water cycle undermines progress on all major global issues, from health to hunger, gender equality to jobs, education to industry, and disasters to peace. In 2015, the world committed to Sustainable Development Goal (SDG) 6 as part of the 2030 agenda — the promise that everyone would have safely managed water and sanitation by 2030. Right now, we are seriously off-track.



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The View From the U.S. and Latin America

First U.S. Case to Test the Rights of Waterways

Wilde Cypress Branch v. Beachline South Residential LLC, filed on April 26, 2021, in Florida State Court is the first lawsuit of its kind in the U.S.^[2]

This case is moving through the Florida courts and is attempting to provide a novel legal route toward protecting the world's waters from adverse development. The plaintiffs are Wilde Cypress Branch, Lake Mary Jane and the other waterways of Orange County, Florida, as well as Charles O'Neal as president of Speak Up Wekiva on behalf of the waters of Orange County.

The defendants are Beachline South Residential, the company proposing a major commercial/residential project that would allow the removal of wetlands, and the secretary of the Florida Department of Environmental Protection, the official charged with reviewing the dredge and fill permit applications.

As background, in November 2020, voters of Orange County — by an astonishing 89.2% — voted to amend their home rule charter to provide for the rights of waterways within the county to protect themselves against pollution and to maintain a healthy ecosystem, and for the rights of citizens of the county to fresh, unpolluted water.^[3]

The charter amendment provided that the waterways themselves — as well as citizens of the county — have standing to enforce the charter amendment.

Meanwhile, in anticipation of the November ballot initiative, in June 2020 the Florida state Legislature acted to preempt the amendment by amending the Florida Environmental Protection Act to prohibit Florida counties from affording legal rights to elements of nature.

The lawsuit seeks a declaration that the proposed development would violate the provisions of the county's charter and an injunction prohibiting the secretary of the Florida DEP from issuing the wetlands dredge and fill permit necessary for the project to proceed. Authority to issue the permit, although required by the federal Clean Water Act, had been delegated to the state during the Trump administration.

The complaint alleges that the rights of the plaintiff water bodies to exist would be violated by the proposed dredge and fill permits.

The judge ruled that the 2020 Florida law preempted the charter amendment and dismissed the case. It is currently on appeal to the Sixth District Court of Appeals. Initial briefing is in process.

Origins of the Concept in the U.S.

While this is a novel case in U.S. courts, the concept is not new.

The idea that objects of nature have legal rights was first expressed by Christopher Stone, a law professor at the University of Southern California in a 1972 law review article, "Should Trees Have Standing? Toward Legal Rights for Natural Objects." Stone argued:[4]

I am quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment — indeed, to the natural environment as a whole.

Stone's article was apparently rushed into print in the hopes it might influence the outcome of an important environmental case pending before the U.S. Supreme Court.[5]

The 1972 case of *Sierra Club v. Morton* had been brought by the Sierra Club to enjoin Walt Disney Productions' planned theme park, which would require the construction of an access road through Sequoia National Park. The Supreme Court affirmed the U.S. Court of Appeals for the Ninth Circuit holding that the Sierra Club lacked standing to bring the suit.

Quoting Stone's article, a draft of which had allegedly been backchanneled to him, Justice William O. Douglas wrote a fervent dissent:

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. ... 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.[6]

Global Precedents

Worldwide, rights of natural objects have been seen as a way to fill gaps in intellectual property systems that leave indigenous cultural property, especially land-based intellectual property, vulnerable to exploitation.

In 2008 Ecuador provided legal rights for elements of nature in its constitution, the first country to do so. Article 71 of the Ecuadorian Constitution provides:

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

This provision has been enforced in the Ecuadorian courts.

In a case presented on March 30, 2011, before the Provincial Court of Loja, environmental groups successfully sued local authorities over the polluted state of the Rio Vilcabamba,[7] obtaining an injunction[8] against the local government's road widening project, which was causing the deposit of debris into the river.

The project had been ongoing for three years without an environmental impact assessment.

On Nov. 10, 2021, the Constitutional Court of Ecuador held that mining in the Los Cedros Protected Forest violates the rights of nature as set forth in the constitution.[9]

Given the importance of mining to the country's economy, the decision in favor of protecting the flora, fauna and fragile ecosystems of the forest is especially significant.

Other countries in Latin America and elsewhere have provided similar legal protections. In 2017, for example, the Whanganui River on the North Island of New Zealand, considered by the Maori people as an ancestor, was recognized as a legal entity.[10]

In 2021 the Magpie River in Quebec, which is a culturally significant spot for the First Nation Innu of Ekuanitshit, was granted legal personhood by local authorities with nine legal rights, including the right to sue.[11]

The View From Europe

The Rights of Mar Menor – Developments in Spain

Mar Menor is a saltwater lagoon on the Costa Calida in southeast Spain.

Despite several existing laws intended to protect this ecosystem, agricultural and development abuses had it headed toward collapse, with two ecologic nightmares within the last three years, each resulting in massive fishkill.

In an extraordinary action, in June 2020, 640,000 Spaniards asked for a referendum to recognize Mar Menor as a separate legal entity with a right of citizens to sue in court on behalf of the waterway. In 2022 the Spanish House of Representatives, followed by the Spanish Senate, passed a corresponding law, which became effective on Oct. 3, 2022.[12]

The law, the first of its kind in Europe, recognizes Mar Menor as a legal entity with its own rights. These rights include:

- The right to exist and to evolve naturally;
- The right to be protected from actions that would prejudice the ecosystem;
- The right to conservation by appropriate actions to preserve species and habitats;
and
- The right of restoration by actions to reestablish the natural dynamic.

Anyone — even if not harmed directly — may now file a lawsuit, and infringers are subject

to substantial financial and other penalties.

Three boards — one consisting of representatives of public authorities and citizens of nearby public communities, one supervising body, and one scientific advisory board — shall jointly act as guardians of Mar Menor.

The example of Mar Menor demonstrates that in order to preserve nature for future generations, we need to shift the legislative focus from an anthropocentric angle of sight to an ecocentric one, treating nature for legal purposes as not the object of laws but as a holder of its own rights.

Existing environmental public law is based upon and evaluated on the shortsighted merits and consequences of its provisions, which are primarily or even solely to benefit man.

But nature needs to be on a level playing field: not state versus nature but state and nature.

Precedents for Mar Menor

Granting rights to elements of nature may sound new, but the concept of granting rights to an entity with no proprietors is not.

A "Stiftung" — or foundation or trust — under Austrian law belongs only to itself.

The sole task of its board of trustees is to act as representatives of the trust in accordance with the purposes outlined in the deed of gift.

Therefore, conceptually, we only need to give life to a deed of gift of nature. That can be done in each country on its constitutional law level, based on a new globally binding, recognized and accepted widening of the understanding that not only human dignity but also the dignity of nature is inviolable.

There are already about 100 initiatives in over 30 countries worldwide to give legal status to elements of nature.[13] A few of these have been discussed earlier in this article.

From an Anthropocentric to an Ecocentric World View

Our current crisis is not only about climate change, CO2 and rising air temperatures.

It is also about water pollution from a myriad of causes. It is our entire ecosystem and hence human survival that is endangered.

As we learned — or should have learned — from the unfortunate choice of pandemic language — ie social distancing instead of physical distancing — words are powerful and choice of language creates expectations and has consequences.

The wrong word results in the wrong focus, which results in the wrong actions. Thus, the vocabulary about crises of nature also needs to change. Instead of the words climate crisis or climate-neutral, we should substitute earth crisis or earth-neutral or eco crisis or eco-neutral.

Let us learn from past experiences and see the complete and holistic eco picture, the painting of nature, or Naturgemälde, as understood by scientist, explorer and naturalist

Alexander Humboldt, with no single fact considered in isolation.[14]

But whatever path we decide to follow — the anthropocentric or the ecocentric — we have two options.

The first is to stay in the driver's seat, acting proactively, considering ourselves as part of nature with all its interdependencies and being a part of constructive and sustainable developments aimed at keeping humanity alive.

Or, we can lean back, reacting — if at all — passively and see what evolution has prepared for us as humans in the future.

If put to a vote — I hope the majority will vote for the first option. If so, since nature has no voice itself, we will need to act on its behalf.

Granting legal standing to elements of nature such as waterways represents such an action and a critical shift in thinking from the anthropocentric to the ecocentric, a change in focus much better suited to human survival on this planet.

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[1] Accelerating change, United Nations (Mar. 17, 2023, 11:21 AM), <https://www.un.org/en/observances/water-day>.

[2] Complaint, Wilde Cypress Branch et. al. v. Beachline South Residential, 2021-CA-004420-O (Fla. 9th Cir. Ct. Apr. 26, 2021).

[3] For background on this case as well as much of the historical background discussed here, see the New Yorker magazine article, "A Lake in Florida Suing to Protect Itself," (Apr. 18, 2022), <https://www.newyorker.com/magazine/2022/04/18/a-lake-in-florida-suing-to-protect-itself>.

[4] Christopher, D. Stone, Should Trees Have Standing – Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450, 456 (1972).

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

[6] Id. at 742-43.

[7] Natalia Greene, The first successful case of the Rights of Nature implementation in Ecuador, Global Alliance for the Rights of Nature (May 21, 2011), <https://www.garn.org/first-ron-case-ecuador/>.

[8] Granted Constitutional Injunction 11121-2011-0010.

See https://www.earthlaws.org.au/wp-content/uploads/2016/07/RON_Vilcabamba-Ecuador-Case-complete.pdf.

[9] Ecuador's Los Cedros Protected Forest Granted Constitutional 'Rights of Nature' by Highest Court, Life Terra (July 5, 2022), <https://www.lifeterra.eu/en/blog/ecuador-s-los-cedros-protected-forest-granted-constitutional-rights-of-nature-by>.

[10] Kate Evans, The New Zealand River that became a legal person, BBC (Mar. 20, 2020), <https://www.bbc.com/travel/article/20200319-the-new-zealand-river-that-became-a-legal-person>.

[11] Morgan Lowrie, Quebec River granted legal rights as part of global 'personhood' movement, CBC (Feb. 28, 2021, 9:10 AM), <https://www.cbc.ca/news/canada/montreal/magpie-river-quebec-canada-personhood-1.5931067>.

[12] BOE Boletín oficial del estado, Núm. 237, Lunes 3 de octubre de 2022, Sec.I. Pág. 135131 (<https://www.boe.es/boe/dias/2022/10/03/pdfs/BOE-A-2022-16019.pdf> ; 17th March 2023).

[13] See, Harmony with Nature, United Nations, Rights of Nature Law and Policy (<http://www.harmonywithnatureun.org/rightsOfNature/>; 17th March 2023).

[14] Anja Müller, Ein gemeinsames Band umschlingt die ganze organische Natur" - Georg Forsters und Alexander von Humboldts Reisebeschreibungen im Vergleich (Dissertation TU Berlin, 2021), p 317 subs (<https://api-depositonce.tu-berlin.de/server/api/core/bitstreams/e9061026-6c62-4a4d-ba73-8ac44055ce72/content> ; 17th March 2023).