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Standing for Nature in the United States Supreme Court: A Japanese Perspective

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"The opposition between nature and culture is one of the major ways in which Western cultures have understood their world and themselves. The tension between ideas of nature and culture has played a large role in America, a nation formed by people who imagined themselves imposing culture upon the terrain of nature."[1]

I. SUITS IN THE NAMES OF RIVERS AND BIRDS

In the United States, suits can be brought forth in the names of rivers or of birds.[2] Professor Christopher Stone's provocative law review article in 1972 entitled "Should Trees Have Standing?—Toward Legal Rights for Natural Objects" has attracted considerable attention and has even been quoted in a Supreme Court opinion.[3] It is intriguing for an outside observer like myself who is accustomed to the tradition of Continental Roman Law to find that animals and inanimate objects are accorded the same standing in courts as natural persons. In view of the recent trend in Japan of bringing forth environmental law suits in the names of endangered rabbits and birds,[4] the American precedents and legal arguments for granting animals and nature standing to sue are of

considerable comparative interest. The trend of suing in the names of natural objects has not taken hold in the United States, leaving only a few dozen scattered cases to be found in law reports. It is mostly unnecessary to sue in the name of trees and birds, as endangered species have been designated as legally protected under the Endangered Species Act, and because courts appear routinely to grant standing to sue to the many well-established environmental organizations that actively contest any actions by government or private parties that might adversely affect the habitats of designated species.

However, has the dichotomy between nature and culture mentioned above changed in the United States? Is there a shift from a human-centered perception of nature to a notion that we are only part of nature, and only one of countless species in our interwoven ecological environment? An eco-centered perspective is often regarded as strong in the Eastern tradition, but it appears to have made no difference in Japan as the natural environment has been severely damaged in the pursuit of industrial and economic development.

My inquiry focuses on the perception of nature expressed in some opinions of the United States Supreme Court in environmental cases. I will draw primarily upon two cases, twenty years apart, in which the Supreme Court dealt with the issue of standing of environmental organizations: Sierra Club v. Morton[5] in 1973 and Lujan v. the Defenders of Wildlife[6] in 1992. I will briefly describe TVA v. Hill[7] in 1978 in order to see the Court's application of the Endangered Species Act (ESA). I have found that a majority of the Justices' views toward nature over the years has remained highly legalistic and technically narrow, and that the Court's direction is clearly toward restricting any development of a broadly perceived notion of protecting nature or the ecosystem for its own sake, despite provisions in such ecological protection measures as the Endangered Species Act of 1972.

II. SIERRA CLUB V. MORTON AND JUSTICE DOUGLAS' DISSENTING OPINION

The Mineral King Valley is an area of great natural beauty and part of the Sequoia National Forest in California. The United States Forest Service, which is responsible for maintaining and administering national forests, began in the late 1940's to consider Mineral King as a potential site for recreational development. In 1965, the Forest Service invit-

ed bids from private developers for construction and operation of a recreational resort. Walt Disney Enterprises was chosen and submitted a master plan for developing a large scale commercial resort complex in 1969. The Sierra Club brought suit against the Secretary of the Interior, seeking declaratory and injunctive relief against granting approval or issuing permits for commercial development of Mineral King Valley. The district court granted a preliminary injunction, but the Court of Appeals (9th Circuit) later reversed.

The United States Supreme Court took the case and held (4–3) that the club lacked standing to maintain the suit because it failed to allege that it or its members were adversely affected by the proposed action.[8] The Sierra Club sued as a membership corporation with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" under the Administrative Procedure Act (APA).[9]

The primary issue before the Court was whether the Sierra Club had standing to sue. Standing is a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable. According to precedent, persons had standing to obtain judicial review of a federal agency action when they alleged that the challenged action had caused them "injury in fact." The injury alleged by the Sierra Club would have occurred entirely because of a change in the potential use of Mineral King, and the subsequent change in the aesthetics and ecology of the area. The club alleged that the development would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.

The Court recognized the alleged harm may have amounted to an "injury in fact" that was sufficient to lay the basis for standing under the APA, and stated that "aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[10] However, the Court also stated that the "injury in fact" test requires more than an injury to a cognizable interest; "It requires that the party seeking review be himself among the injured."[11] The Court's reasoning was as fol-

lows: the impact of the proposed development would not fall indiscriminately upon every citizen; the injury would be felt only by those who use Mineral King, and for whom the aesthetic and recreational qualities of the area would be damaged by the highway and ski resort; and the Sierra Club failed to allege that it or its members and their activities or pastimes would be affected by the Disney development project. In short, the club needed to show there would be some concrete and individualized injury to the organization or to its members, were the project to be carried out.

It would have been easy for the Sierra Club to allege individualized injury by providing proof that its members did actually use the area by hiking or trekking, and that their enjoyment would be adversely affected by the development. However, it apparently regarded any allegations of individualized injury as superfluous, believing it brought forth the suit as a "representative of the public." The Court rejected the club's stance of playing a public role or acting as a private attorney-general, by insisting that the club show individualized "injury in fact."[12]

The requirement of individualized injury is indeed superfluous and even trivializes the issue involved. Whatever potential injury there was in this case would have been directly inflicted on nature, not on persons who might use or enjoy nature. The Court should have addressed the issue of whether the Sierra Club had the experience, expertise, knowledge and capacity to represent affected nature.

Justice Douglas' dissenting opinion presents a different viewpoint from that held by the majority. It is straightforward and forceful: "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. . . . This suit would therefore be more properly labeled as Mineral King v. Morton."[13]

Justice Douglas was fully aware of the interwoven ecosystem when he stated: "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 depend-

ent 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."[14]

As to the question of who represents the river, he said: "Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or 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."[15]

Justice Douglas' viewpoint was based on his understanding of the manner in which government agencies work in environmental areas. He believed that agencies charged with environmental protection could not be trusted for the following reasons: (1) the regulatory standards given to those agencies are usually expressed in terms of the public interest; (2) the public interest, however, has so many differing shades of meaning that it is quite meaningless on the environmental front; (3) the pressure on agencies for favorable action one way or the other are enormous; (4) Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often; (5) those agencies are notoriously under the control of powerful interest groups who manipulate them through advisory committees, friendly working relations, or through the natural affinity with the agency which over time develops between the regulator and the regulated. It was crucial for Justice Douglas to have nature represented by environmental organizations so 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."[16]

It is important to note that the Supreme Court in Sierra Club v. Morton did recognize that injury to aesthetic and environmental values might be sufficient to confer standing even if the injury was shared by many. That remains its most significant legacy even today.

What happened after the Supreme Court decision is interesting and instructive. The Sierra Club on remand amended its complaint to allege that its members used the area and added nine individuals who regularly visited Mineral King as well as a group of property owners nearby. The club also added a new claim that the National Environmental Policy Act, which had become effective after the original lawsuit had been filed, requires the preparation of an environmental impact statement (EIS). The draft EIS released in 1976 said there would be a severe en-

vironmental impact from the proposed development and recommended that the project be scaled down. The project was never carried out and Mineral King remains unspoiled today.[17]

III. TVA V. HILL AND THE ENDANGERED SNAIL DARTER

In TVA v. Hill,[18] the plaintiffs' standing was not an issue. The Endangered Species Act provides standing for anyone to bring suit against parties who are not in compliance with the Act. The "citizen-suit" provision[19] has been included in major environmental legislation to encourage citizens to actively participate in regulatory and enforcement efforts for environmental laws. It has provided a very effective tool for environmental groups to make use of the courts in order to express and to realize their environmental ideals. TVA v. Hill is a good example of how effective citizens' use of the law and the courts can be. Furthermore a fish, the snail darter, not the human plaintiffs, became a major figure and focal point of the lawsuit. The Supreme Court applied the clear command of Congress plainly expressed in the Endangered Species Act to the case, and ordered the completion of a nearly completed dam stop in order to save the habitat of the snail darter. The Court refused to consider the case in terms of "utilitarian calculus," balancing the relative worth of the dam and the snail darter.

The Tennessee Valley Authority (TVA) began constructing the Tellico Dam on a stretch of the Little Tennessee River in 1967. The Endangered Species Act was passed in 1973. A species of small fish known as the snail darter was discovered in the waters of the river in the same year. The plaintiffs, a regional association of biological scientists and others, petitioned the Secretary of the Interior to list the snail darter as an endangered species. The Secretary, acting in accordance with the Act, in 1975 designated the snail darter as an endangered species under the Act. The snail darter lived only in that portion of the river which would be completely inundated by the reservoir created as a consequence; the dam's completion and the impoundment of water would have totally destroyed the snail darter's habitat. The Secretary instructed all federal agencies to take measures as necessary to ensure that their actions did not destroy or modify the snail darter's habitat.

Environmental groups brought forth an action in 1976, as authorized by the ESA, to enjoin completion of the dam and impoundment of the reservoir on grounds that such an action would violate the Act

by causing the extinction of the snail darter. The district court refused to issue an injunction and dismissed the complaint. The Court of Appeals (6th Circuit), however, reversed and remanded with instructions that the district court should issue a permanent injunction to halt all activities related to the Tillico Dam. The Supreme Court affirmed that decision.

The Court answered two questions presented: (1) would the TVA be in violation of the Act if it completed and operated the Tellico Dam as planned?; and (2) if the TVA's action offended the Act, would an injunction be the appropriate remedy for the violation? The Court held that both questions must be answered in the affirmative.

It seemed curious, as the Court noted, that the survival of a relatively small number of three-inch fish among all the countless millions of species in the river would require the permanent halting of a virtually completed dam for which Congress had expended more than $100 million. Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. The Court held, however, that the explicit provisions of the Endangered Species Act required precisely that result. The words of the ESA plainly commanded, as the Court held, that all federal agencies "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species or result in the destruction or modification of habitat of such species."[20] The Court pointed out that "this language admits of no exception."[21]

The Act encourages citizen involvement, the Court noted, with provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened, and bring civil suits in the federal district courts to force compliance with any provision of the Act.

The Court explicitly rejected the argument that in this case the burden on the public through the loss of millions of unrecoverable dollars would have greatly outweighed the extinction of the snail darter. The Court stated that "neither the Endangered Species Act nor Article III of the Constitution provides federal courts with authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'"[22]

As to the question of what remedy would have been appropriate, the Court found that it had no choice but to issue a permanent injunction,

since Congress had clearly struck a balance in favor of affording endangered species the highest of priorities. The Court stated that "our individual appraisal of the wisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."[23]

In this case, Chief Justice Burger wrote the opinion of the Court, joined by Justices Brennan, Stewart, White, Marshall, and Stevens. Justice Powell, joined by Blackmun, wrote a dissenting opinion, expressing the view that the Act did not apply to a project that was substantially completed when its threat to an endangered species was realized. Justice Rehnquist dissented on grounds that the Act did not prohibit the district court from refusing to enjoin completion of the dam.

After Sierra Club v. Morton, the Supreme Court has further dealt with the standing issue. Article III of the Constitution confines the federal courts to adjudication of actual "cases" and "controversies." To ensure the presence of a "case" or "controversy," the Court has formulated that Article III requires that a plaintiff must allege:(1) that the challenged action will cause the plaintiff some actual or threatened injury in fact; (2) that the injury is fairly traceable to the challenged action; (3) that the injury is likely to be redressed by the requested relief. The Court faced the standing issue again in an environmental case in 1992. The following analysis of the case focuses primarily on (1) the "injury in fact" requirement.

IV. LUJAN V. DEFENDERS OF WILDLIFE AND CITIZEN SUIT

Lujan v. Defenders of Wildlife[24] presented the issue of standing again. The Court dealt with two questions: (1) what does a member of an environmental organization need to show in order to satisfy the injury-in-fact requirements?; and (2) does he or she still need to show a concrete injury under the citizen-suit provision of the Endangered Species Act?

The Court engaged in a detailed discussion on how to evaluate the members' affidavits. The majority opinion decided that a person who brought forth a suit under the citizen-suit provision would also need to show a concrete injury. The majority opinion indicated, seemingly, that the member's injury would not become imminent until she set a specific date to revisit the habitat of the endangered species abroad. In

short, the Court ruled that the citizen-suit provision could not dispense with the injury-in-fact requirement.

The Endangered Species Act requires all federal agencies to consult with the Secretary of the Interior to confirm that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species. In 1978, the Fish and Wildlife Service and the National Marine Fisheries Service promulgated a joint regulation on behalf of the Secretary of the Interior, stating that the obligations imposed by the ESA extended to actions in foreign nations. However, a revised joint regulation, promulgated in 1986, reinterpreted the relevant provisions of the ESA to require consultation only for actions in the United States. Subsequently, Defenders of Wildlife, an environmental organization and its members, filed an action against the Secretary of the Interior, seeking (1) a declaratory judgment that the regulation was in error as to the geographical scope of ESA, and (2) an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation.

Defenders of Wildlife (plaintiffs) submitted affidavits to show "injury in fact" to its members in order to have standing to sue. One member stated in her affidavit that she had traveled to Egypt to observe the habitat of the endangered Nile crocodile and intended to do so again, and that she would suffer harm as a result of the role of the United States in overseeing and developing dam projects in Egypt. Another member's affidavit stated that she had traveled to Sri Lanka to observe the habitat of such endangered species as the Asian elephant and the leopard, and that a development project funded by the United States agency might severely shorten the future existence of these species. She also said this threat harmed her because she intended to return to Sri Lanka in the future in order to see these species.

The district court dismissed the suit for insufficient standing. On appeal, however, the Court of Appeals (8th Circuit) found that Defenders of Wildlife had its standing supported by these affidavits. The Supreme Court reversed the lower court decision and remanded the case. The issue before the Court was again whether the plaintiffs have standing to seek judicial review of the agency regulation. The Supreme Court held that the plaintiffs could not assert standing based on its members' affidavits, which did not support a finding of actual or imminent injury. The majority opinion seemed to indicate that the member's injury would not become imminent until she set a specific date to

revisit the habitat of the endangered species abroad.

The Court found that the two affidavits contained no information, showing how damage to the species would imminently injure the plaintiffs. The Court said that "the women 'had visited' the areas of the projects before the projects commenced proves nothing."[25] Further, the Court found that the plaintiffs' "profession of an 'intent' to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of when that some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[26] The Court held that the plaintiffs failed to demonstrate they had sustained an injury that would support standing.

The Court's standing requirements became more restrictive in this case, with the addition of various conditions, more than in previous requirements. However, Justices were far from unanimous in their understandings of the "injury in fact" requirement. Six Justices agreed that the plaintiffs' affidavits were not sufficient to support their standing. Three dissenting Justices thought they were sufficient. Justices differed widely as to what the plaintiffs needed to show in their affidavits in order to satisfy the "injury in fact" requirement.

Justice Kennedy, joined by Justice Souter, found that the plaintiffs had failed to demonstrate they themselves were "among the injured" as required in Sierra Club v. Morton. To satisfy this component of the standing inquiry, plaintiffs needed to demonstrate a "personal stake in the outcome." He suggested, "[w]hile it may seem trivial to require that [the plaintiffs] acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the [plaintiffs] will be using the sites on a regular basis, nor do [they] claim to have visited the sites since the projects commenced."[27] According to his suggestion, the plaintiffs could have established standing by buying airline tickets and making specific travel plans!

Justice Stevens, who concurred only in the judgment, disagreed with the majority's conclusion that the plaintiffs had not suffered "injury in fact" because they did not show damage to the endangered species would produce "imminent" injury to them. He considered an injury to an individual's interest in studying or enjoying a species and its natural

habitat occurring when someone's action harms that species and habitat. Therefore, he stated, the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than by the time that might elapse between the present and the time when the individuals would visit the area if no such injury were to occur. Also, he did not see the likelihood that the plaintiffs would have been injured by the destruction of the endangered species as "speculative" or "conjectural." Those injuries would have resulted as soon as the animals or their habitats were destroyed.[28]

Blackmun, joined by O'Connor, dissented, expressing his view that the plaintiffs raised genuine issues of fact as to injury that were sufficient for standing. According to Blackmun, a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either plaintiff would have soon returned to the project sites, thereby satisfying the "actual or imminent" injury standard. He criticized the majority for demanding an "empty formality" by requiring a "description of concrete plans" or "specification of when the some day for a return visit would be."[29] He found no substantial barriers preventing either plaintiff from simply purchasing plane tickets to return to the project sites.

Defenders of Wildlife proposed a series of standing theories in order to establish the organization's relationship with the involved endangered species. One theory, the "ecosystem nexus," is that any person who uses any part of a "contiguous ecosystem" that is adversely affected by a funded activity had standing even if the activity is located a considerable distance away. Another theory, "animal nexus," is an approach that confers standing to anyone who has an interest in studying or seeing the endangered animals anywhere on the globe. And the "vocational nexus" approach allows anyone with a professional interest in endangered species to sue.

The Court rejected all these theories as too broad. However, Justice Kennedy, joined by Justice Souter, was willing to see the possibility that in different circumstances, a nexus theory similar to the theories proposed by the plaintiffs might support a claim to standing.

The citizen-suit provision of the ESA posed another important issue in this case. Congress has included the citizen-suit provision in almost all major environmental protection laws. The provision provides that "any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental in-

strumentality or agency . . . who is alleged to be in violation of any provision of this chapter.''[30]

The Court of Appeals found that the plaintiffs had standing because they suffered a ''procedural injury.'' The court held that because the ESA §7(a)(2) requires inter-agency consultation, the citizen-suit provision creates a ''procedural right'' to consultation for all persons—so that anyone can file suit in federal court to challenge the failure of the Secretary of the Interior or of any other official to follow the correct consultation procedure, notwithstanding their inability to allege any discrete injury resulting from that failure. The court further held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, non-instrumental ''right'' to have the executive branch observe the procedures required by law.[31]

The Supreme Court rejected this view. The Court held that a plaintiff raising only a generally available grievance about government did not meet the constitutional requirements of cases and controversies. The Court emphasized that ''a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case and controversy.''[32]

The majority opinion warned that whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement, they would discard a principle fundamental to the separate and distinct constitutional role of the Third Branch— ''one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches.''[33]

The Court found that ''[v]indicating the public interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the chief executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutory prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.''[34]

The Court reasoned that "[t]o permit Congress to convert the undifferentiated public interest in an executive officer's compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be Faithfully executed' (Article II, §3). It would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department."[35]

The Court concluded that "in suits against the government, at least, the concrete injury requirement must remain."[36]

The majority opinion on the citizen-suit provision is more disturbing than its restrictive view on standing. The Court's standing requirements still leave environmental organizations with the various means to show "injury in fact." However, the majority's view on the citizen suit seems to reflect a very narrow understanding of the role of the courts. It would be disturbing if the majority's view were to persist and prevail, especially in environmental cases, for the following reasons: (1) it points to a direction away from engaging courts in the discourse involving environmental policy; (2) it tends to leave environmental matters largely in the hands of administrative agencies; (3) it discourages citizens' participation and involvement in enforcement of environmental law; (4) it contradicts the Congress' intent to protect the ecosystem and nature as expressed in major environmental legislation; and (5) it limits the exercise of judicial review where it is most needed.

The more the Court details the injury-in-fact requirement for standing, the more injury itself become trivialized and fictionalized. It has become increasingly apparent that the whole discussion is totally misdirected. What is imminent and concrete is the injury to nature, not to specific persons. The Court definitely retracted in Lujan v. Defenders of Wildlife whatever understanding of nature it expressed in Sierra Club v Morton and TVA v. Hill. The Court should be directing its attention to determining, as Justice Blackmun stated in his dissent, whether the plaintiffs show a "genuine issue" of material fact as to standing.

V. SOME COMPARATIVE COMMENTS

The recent attempt by environmentally concerned lawyers and

citizens in Japan to bring suits in the names of animals and birds appears to be a totally hopeless undertaking. The district courts have repeatedly dismissed these suits for trivial failures by the plaintiffs (Amami no kurousagi and yama sigi [black rabbits and snipes]) to meet legal formalities such as submitting a power of attorney and specifying a legal residence. However, concerned people have been inspired by Aldo Leopoldo's "land ethic" and Justice Douglas' dissenting opinion in Sierra Club v. Morton, and are determined to continue their legal attacks on behalf of nature.[37] They have attracted considerable attention from the mass media and have succeeded in raising a basic moral question as to the relationship between nature and culture.

Their efforts are all the more significant in a legal culture that does not possess some characteristics that are taken for granted in the United States. In Japan, no major environmental legislation contains a citizen-suit provision. There are no measures such as the U.S. National Environmental Policy Act, which requires an environmental impact statement. Government agencies are famous for providing administrative guidance to developers, and may ask them to file "environmental assessments" of proposed projects. However, those assessments are not required by law and are not made public for scrutiny or comment. There is no equivalent freedom of information act nor is there any way for ordinary citizens to access government information.

There are few measures that provide incentives for citizens to use the courts to resolve environmental disputes. Further, there are no class actions, no contingent fee arrangements, no punitive damages, no extensive pre-trial discovery, no extensive use of injunction and no jury system. In addition, courts insist on rigid standards for standing to sue. The plaintiffs need to show they have suffered "legal wrong" in a particular and discrete manner.

Under these circumstances, it is difficult to expect that active and strong environmental organizations will develop. The courts have not been noted for being helpful or understanding of environmental causes. However, the efforts to speak out for nature in the courts carry a strong power of moral persuasion against all adverse circumstances.

The endangered rabbits and birds are threatened with the extinction and their habitats are being invaded by large-scale construction of golf courses and housing projects. It is nature that must be protected as well as remedied. In this context, these suits in the names of natural objects and on behalf of nature serve, at least, a symbolic function of remind-

ing us that we are only part of nature and of the global ecosystem. They may have an impact on people's human-centered attitudes and may raise their consciousness about ecological ethics. They may also eventually foster the development of stronger and more effective environmental organizations in Japan. We desperately need active environmental groups with legal expertise which can stand for nature in the courts.

NOTES

[1] David A. Westbrook, Liberal Environmental Jurisprudence, 27 U.C. Davis L.Rev. 619, 674 (1994).

[2] Byram River v. Village of Port Chester, 394 F. Supp. 618 (1975) (suit in name of river and other plaintiffs to enjoin pollution by municipal sewage treatment plant; no reservation was expressed, however, regarding the river's appearance as a plaintiff. cited from Christopher Stone, Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective, 59 S. Cal. L.Rev. 1 (1985); Palila (Psittirostra bailleui) v. Hawaii Dept. of Land & Natural Resources, 639 F.2d 459 (1981) (defendants' action in maintaining feral sheep and goats in the critical habitat of Palila bird, which is on the endangered species list, constituted a "taking" within meaning of the Act).

[3] Stone's article appeared in 45 S. Cal. L.Rev. 450 (1972) and was cited by Justice Douglas in his dissenting opinion in Sierra Club v. Morton, 405 U.S. 727 at 724 (1972).

[4] There have been several cases brought before the courts in Japan in the names of endangered animals, birds and other natural objects. However, most of these cases have not gone far in the court proceedings because they were dismissed by the courts on the ground that those animals and birds could not be proper parties and could not claim standings to sue. Amami "Rights of Nature" suit was filed with the district court in Kagoshima in 1995, dismissed in 1996. Ohhishikui (wild goose) suit claiming damages was filed with the district court in Mito in 1995, dismissed in 1996; appeal dismissed by Tokyo High Court in 1996.

[5] 405 U.S. 727 (1972).

[6] 505 U.S. 3545 (1992).

[7] 437 U.S. 153 (1978).

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

[9] 5 U.S.C. §702: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[10] 405 U.S. 727 at 734.

[11] Id. at 735.

[12] Id. at 736. The Sierra Club states, after noting the fact that it might have chosen to assert individualized injury to itself or to its members as a basis for standing, that "The Government seeks to create a 'head I win, tails you lose' situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel

have shaped their case to avoid this trap." Id. at 740, n15.

[13] Id. at 741-2.

[14] Id. at 743.

[15] Id. at 745. Justice Blackmun supports Justice Douglas, by saying that "I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues." Id. at 757. According to him, Justice Douglas "makes only one addition to the customary criteria [of standing] (the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts." Id. at 759.

[16] Id. at 752.

[17] Robert V. Percival et al., ENVIRONMENTAL REGULATION: Law, Science, and Policy, 724 (2d ed. 1996).

[18] TVA v. Hill, 437 U.S. 153 (1972).

[19] The Endangered Species Act, §11 (g) (16 U.S.C. §1540 (g)), allows "any person" to commence as a civil action in a United States District Court to, inter alia, "enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision" of the Act "or regulation issued under the authority thereof . . ." (cited from TVA v. Hill, 437 U.S. 153 at 165, n15).

[20] The Endangered Species Act, §7 (16 U.S.C. §1536).

[21] 437 U.S. 153 at 173.

[22] Id. at 187.

[23] Id. at 194.

[24] Lujan v. Defenders of Wildlife, 505 U.S. 3545; 119 L.Ed 2d 351.

[25] 119 L.Ed. 2d 351 at 366.

[26] Id. at 366-67.

[27] Id. at 376.

[28] Id. at 378-79.

[29] Id. at 384.

[30] Endangered Species Act, 16 U.S.C. §1540 (g).

[31] Lujan v. Defenders of Wildlife, 911 F. 2d 117 (1990).

[32] Lujan v. Defenders of Wildlife, 119 L.Ed. 2d 351 at 372.

[33] Id. at 374.

[34] Id. at 374.

[35] Id. at 374-75. Justice Blackmun sees it differently: "In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates." 119 L.Ed 2d 351.

[36] Id. at 375. Professor Cass Sunstein rejects the notion that standing doctrine should be constitutionally based: "[t]he problem of concreteness has nothing to do with the question of standing. Whether a plaintiff is able to point to an injury peculiar to him is a question independent of the concreteness or abstraction of the dispute. For example, the dispute in Sierra Club v. Morton—the principal modern example of a case denying standing on injury-in-fact grounds—was hardly hypothetical or remote. Standing limitations are also said to be a way of ensuring sincere or effective advocacy. But institutional litigants not having injury in fact are particularly likely to be strong advocates. It is expensive to initiate a lawsuit, and those who do so without meeting the

standing requirements are especially committed." Sunstein, Standing and the Privatization of Public Law, 88 Colum. L.Rev. 1432, 1448 (1988). Also, see his analysis of the Supreme Court's opinion on Lujan v. Defenders of Wildlife: What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L.Rev. 163 (1992).

[37] In his dissenting opinion in Sierra Club v. Morton, Justice Douglas quoted Aldo Leopold's 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." 405 U.S. 727 at 752. Leopold's ALMANAC as well as Stone's article, "Should Trees Have Standing?" have been translated and published in Japan, respectively: MORI NO UTA GA KIKOERU, translated by Yoshiaki Niishima (1986, Shinrin Shobo); "Jyumoku no Toujisha Tekkaku" translated by Osamu Okazaki and Toshio Yamada in Gendai Shiso, vol. 18, no. 11 (1990, Seidosha).