Should nature be able to take you to court?

By Rebecca Tuhus-Dubrow | July 19, 2009
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Last February, the town of Shapleigh, Maine, population 2,326, passed an unusual ordinance. Like nearby towns, Shapleigh sought to protect its aquifers from the Nestle Corporation, which draws heavily on the region for its Poland Spring bottled water. Some Maine towns had acquiesced, others had protested, and one was locked in a protracted legal battle.

Shapleigh tried something new – a move at once humble in its method and audacious in its ambition. At a town meeting, residents voted, 114-66, to endow all of the town's natural assets with legal rights: "Natural communities and ecosystems possess inalienable and fundamental rights to exist, flourish and naturally evolve within the Town of Shapleigh." It further decreed that any town resident had "standing" to seek relief for damages caused to nature – permitting, for example, a lawsuit on behalf of a stream.

Shapleigh is one of about a dozen US municipalities to have passed measures declaring that nature itself has rights under the law. And in 2008, when Ecuador adopted a new constitution, it recognized nature's "right to exist, persist, maintain itself and regenerate its own vital cycles, structure, functions and its evolutionary processes." A campaign is also underway in Europe for a UN Universal Declaration of Planetary Rights, which would attempt to enshrine such principles in international law, following the model of the Universal Declaration of Human Rights.

These developments are part of a small but growing movement that aims to reorient the relationship between the earth and the law. Advocates argue that natural objects should not be treated as mere property, vulnerable to exploitation or destruction as owners see fit, but as rights-bearing entities with intrinsic value. The Community Environmental Legal Defense Fund (CELDF), a Pennsylvania-based nonprofit, works with communities such as Shapleigh to protect local ecosystems, and more towns are considering ordinances in the same vein. The Center for Earth Jurisprudence, established in 2006, works with two Florida law schools, developing a legal philosophy based on respect for the planet, and seeking avenues in current law to advance that goal.

"Someone needs to be able to represent the rivers," says Patricia Siemen, director of the Center for Earth Jurisprudence. "Someone needs to be able to represent the forests."
Of course, the notion will strike skeptics as preposterous. Would we need to worry about offending litigious shrubs? With a boulder, or a swamp, as a witness in the proceedings? Critics dismiss the idea as grandstanding that could clog the courts with frivolous cases.
But proponents see it as part of an ongoing progression, an expansion of rights that slowly brings about an increasingly just society. After all, not so long ago, slaves and women were in some legal regimes deemed property, just as nature is today. Now we all accept universal human rights. The concept of animal rights has also become familiar, if much more contested. Advocates of this agenda see the extension of rights to ecosystems as the natural next step. And they believe it could spark a profound shift in our relations with nature, leading to more effective environmental protections.

"The language of rights has a great deal of currency. It's the most powerful of our ethical terms," says John Baird Callicott, a philosophy professor at the University of North Texas. "Rights shift the burden of proof from those who are defending nature to those who want to exploit it."

In the view of proponents, the idea is less outlandish than it may seem. Other nonhuman entities have long enjoyed certain rights under our legal system: ships and corporations are two examples of entities entitled to "personhood," meaning they can bring lawsuits to court. What's more, proponents say, the extension of rights invariably seems absurd before it happens. When the economy depended on slave labor, emancipation was unfathomable even to many who abhorred slavery. In retrospect, though, it seems morally imperative and historically inevitable.

Yet bestowing rights on nature poses considerable practical and philosophical challenges. In the case of the declarations in towns like Shapleigh, it isn't always clear how they will be enforced. (So far, Nestle has not attempted to set up operations in Shapleigh, but it's hard to say whether that is a result of the ordinance.) Granting standing – the ability to sue in the name of a natural object – is a more modest, specific goal, but stipulating "inalienable rights" strikes some legal experts as both vague and infeasible. Critics also argue that because the language of rights is indeed potent, we ought to be wary of diluting that force by spreading rights too thin. And they question whether the concept of rights and interests can be applied to nature in any meaningful way.

"All the interests in nature conflict. Trees fight each other for sun and water," says Mark Sagoff, an environmental philosopher at the University of Maryland. "Granting rights to nature would just be a distraction from the policy progress we've made."

The debate ultimately centers on the basis of legal rights. Historically, they have been strongly associated with human beings. All of the formerly rightless entities who now seem so clearly deserving of rights – infants, for example, or women, or African-Americans – share one conspicuous trait: they're people. (Corporations and ships, it could be argued, represent conglomerations of people.) When extended to animals, rights have often been based on affinities with humans: sentience, the ability to suffer. The question is how starkly we distinguish between human and nonhuman life. Is membership in the biosphere alone enough to merit rights?

The notion of nature's rights has long been cherished in environmentalist circles; the idea cropped up in the writings of Sierra Club founder John Muir in the late 19th century and the influential ecologist Aldo Leopold in the mid-20th century. But the first sustained legal argument is usually attributed to Christopher Stone, a law professor at the University of Southern California. In 1972, Stone wrote an article entitled "Should Trees Have Standing?", which laid out the case for expanding rights that is now commonly cited. (The essay, originally published in the Southern California Law Review, will be reissued by Oxford University Press in 2010.)

Stone lamented that although one could sue to protect nonhuman life, one had to prove "injury" to humans. Damages, when awarded, went to compensate the human plaintiff, not to restore the natural object. He argued that natural objects themselves should be eligible to be plaintiffs (represented, of course, by human trustees or guardians). Furthermore, the natural objects should benefit directly from a favorable judgment – funds should go to restoring the damage wrought.

Stone drew an analogy to the legal status of "incompetents," such as children or senile elders, who may not be able to articulate their interests: guardians can make informed judgments about those interests and represent them in court.

As it happened, a highly pertinent case was before the Supreme Court at the time. In Sierra Club v. Morton, argued in 1971, the Sierra Club tried to stop Walt Disney Enterprises from building a ski resort in a pristine California valley called Mineral King. The Court decided that the Sierra Club itself lacked standing, although it could sue on behalf of its members, who could claim they suffered recreational or aesthetic injuries (for example, from the lost opportunity to hike in the area).

Serendipitously, Justice William O. Douglas had been slated to write the preface for an issue of the Southern California Law Review, and Stone had rushed his article into that issue, hoping that the justice would read it. The strategy worked: Douglas dissented, echoing Stone's thesis. "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," he wrote. "This suit would therefore be more properly labeled as Mineral King v. Morton."

For a time, the idea appeared to gain some currency. In 1973, the Endangered Species Act became law, including a provision for "citizen suits" on behalf of listed species. The provision, Professor Callicott has argued, grants de facto standing to the endangered wildlife (although this view is controversial). In any case, the law implicitly recognized the worth of life that has no instrumental use for people.

In 1974, Laurence Tribe, the prominent Harvard law professor, elaborated on Stone's reasoning in an article for the Yale Law Journal. He wrote that the legal system's focus on human injuries reinforced anthropocentric values, creating a vicious circle that could further increase callousness to other life forms: "What the environmentalist may not perceive is that, by couching his claim in terms of human self-interest – by articulating environmental goals wholly in terms of human needs and preferences – he may be helping to legitimate a system of discourse which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the initial impetus for his own protective efforts."

In 2008, Francisco Benzoni, then a business professor at Duke, published an article in the Duke Environmental Law and Policy Forum, citing Tribe's paper and reviving the point. "The current jurisprudence on standing embeds a value theory without any articulation or discussion about whether that's the value theory we should adopt," says Benzoni.

In the intervening years, a number of lawsuits have named nonhumans, usually animals, as plaintiffs. The rulings have been inconsistent. In one oft-cited case, Palila v. Hawaii, in 1988, the Ninth Circuit Court of Appeals explicitly endorsed the standing of a bird, writing that it "has legal status and wings its way into federal court as a plaintiff in its own right." In 2004, however, the same court (but different judges) dismissed that statement as nonbinding "rhetorical flourishes."

The need to frame arguments in terms of their human effects has led to some almost comically contorted claims. In Animal Welfare Institute v. Kreps, in 1977, several environmentalist groups

sued to stop US firms from importing baby sealskins from South Africa, asserting that their members suffered aesthetic, recreational, and educational losses from the brutal deaths of the seals. One of the members announced a plan to visit South Africa. Remarkably, the groups won the case on appeal. But some who applaud the outcome question the method.

"Oh, for Pete's sake, just sue in the name of the seals," says Stone, the author of the seminal paper on rights for nature. "The seals are being bludgeoned to death and somebody's saying, 'I want to be seeing seals.' That's not what it's about. It's a very backwards way of getting the case into court."

Some champions of nature's rights see a glimmer of promise in a recent ruling. In the 2004 case Cetacean Community v. Bush, about the effect of the Navy's use of sonar on whales and dolphins, the Ninth Circuit, which is one level below the Supreme Court, denied standing to the creatures. However, the opinion left an opening, noting that "nothing in the text of Article III [of the US Constitution] explicitly limits the ability to bring a claim in federal court to humans." It would be up to Congress, the judge suggested, to stipulate that the nonhuman life under a law's protection has standing to sue. Some environmentalists, such as the staff at the Center for Earth Jurisprudence, now hope Congress can be persuaded to do just that – and their ideal legislation would not be limited to animals, either.

Among scholars with environmentalist sympathies, there is vigorous debate over whether standing for natural objects is the most sensible approach to defending ecosystems. After all, it's possible to enlarge the scope of our concern and protection without granting legal rights per se. Rights advocates contend that presenting legal cases in terms of human impacts is too anthropocentric, but critics invert that logic. They say we are projecting onto nature our assumptions about its interests. Ultimately, in their view, even the most radical environmentalist embodies human values, and we should just say so.

Richard Stewart, a law professor at New York University, believes that inanimate objects such as trees and rivers do not have interests or values. Rather, he says, the argument really concerns "human ideas about what's good for nature."

The distinction can be subtle. It doesn't mean we must diminish the worth we assign to nature; it just means acknowledging that we as a society are assigning the value. We could, for example, liberalize standing for humans – make it easy for people to sue to protect nature, without granting official standing to the natural objects. If we could sue to preserve a valley because developing it offends our moral sensibilities, this would indicate that nature matters beyond its strictly instrumental uses. But, according to this perspective, it matters to us humans, not in some transcendent way that is independent of our judgments.

Indeed, some critics ask, how do we know what nature prefers? Perhaps Mineral King wanted to host a ski resort, Mark Sagoff has suggested; perhaps a beach wants to welcome tourists, or a river wants to make electricity. As Sagoff puts it, "Old Man River might want to do something for a change, other than just rolling along."