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Falling on Standing: Ursus Americanus v. Wildlife Services

Zach Zipfel

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Ursus Americanus v. Wildlife Services

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> "To be intimate with the land . . . is to enclose it in the same moral universe we occupy, to include it in the meaning of the word community."[2]
>
> "There is yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. Land . . . is still property. The land-relation is still strictly economic, entailing privileges but not obligations."[3]

I. INTRODUCTION

The law, by its very nature, moves slowly. It is a deliberate and stubborn process, reluctant to bow to the whims of political fancy or popular opinion. At its heart is the concept of *stare decisis* which means literally "to stand by things decided."[4] This concept dictates that a court look to the *past* to determine the law for the *present* and, while it provides a measure of predictability to the law, it is by definition a backward-looking concept.

Science, on the other hand, is a forward-looking concept. Often with an eye on improving human lives, science has pushed the bounds of understanding through the rapid development of technology. As science has developed, it has illuminated our understanding of the natural world. The appreciation of ecosystems is continually expanding in such a way as to make the world seem larger every day.

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1. J.D. Univiersity of Montana School of Law, 2006.
2. Barry Lopez, *The Rediscovery of North America* 34 (1st ed., Vintage Books 1992).
3. Aldo Leopold, *A Sand County Almanac* 238 (Ballantine Books 1949).
4. Black's Law Dictionary 661 (Bryan A. Garner ed., 2d pocket ed., West 2001).

Environmentalism is stuck somewhere in between. It started by attempting to preserve vestiges of primeval America - the idea that there once was a time in which North America existed in a vacuum, free of human influence, and that environmentalists should struggle to preserve these parcels of land that reflected this "natural" state of the New World.[5] And while in time an environmental "movement" did develop, only in the last twenty to thirty years have environmental organizations consistently sought redress in the courts to protect the interests they seek to preserve.

Significantly, the law is ill-suited to afford environmental litigants the protection they seek. An institution such as the law, which bases its very existence in the past, has few mechanisms for addressing the concerns of environmentalism, which has only arrived on the scene in the last century. Even the flurry of environmental legislation passed in the 1960's and 1970's leaves a fundamental gap in the law's ability to provide a coherent and nuanced appreciation of the values of natural processes. Laws such the Clean Water Act, the Clean Air Act, the Endangered Species Act, and the Wilderness Act take a piecemeal approach, each seeking to protect an independent and distinct part of Earth's natural systems, but none take a holistic approach to ecosystem management. Other legislation of the time, such as the National Environmental Policy Act, Federal Land Policy Management Act, and the National Forest Management Act are more process driven and, rather than seeking to protect particular components of ecosystems, directs the management functions of administrative agencies.

Although such legislation was a historic shift in the human approach towards the natural world, there are significant gaps in this approach. These gaps become more glaring as science continues to develop at such a rapid rate and our understanding of ecosystems and natural processes continues to flourish. All too frequently, these laws, revolutionary when passed, are now left with their feet nailed to the proverbial floor, unable to provide the protection that science increasingly tells us is needed. As University of Colorado law professor, Charles Wilkinson put it, "[w]e need to acknowledge the tendency of the law, as an institution, to shut out the small and the innovative."[6]

One area in which the law's limitations for environmental litigants is particularly apparent is in the concept of standing. While courts have made inroads in acknowledging the interests that a love of nature fosters and environmentalism seeks to protect, a well-rounded and thoughtful approach to standing for environmental litigants is still lacking. This limitation is exemplified by the decision in *Ursus Americanus v. Wildlife Services*.[7]

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5. For an overview of the evolution of environmental thought in American history *see* Roderick Nash, *Wilderness and the American Mind* (4th ed., Yale University 2001).

6. Charles Wilkinson, *The Eagle Bird: Mapping a New West*, 13 (rev. ed., Johnson Books 1999).

7. 2004 WL 2127182 (D. Or. Sept. 23, 2004).

II. FACTS OF *URSUS AMERICANUS V. WILDLIFE SERVICES*

The United States Department of Agriculture's Wildlife Services (Wildlife Services) program provides assistance to local landowners dealing with wildlife problems on their property.[8] Such assistance typically consists of removing or killing wildlife depredating on livestock or destroying crops. The Wildlife Services receives funding from the fees charged to landowners utilizing the program's services. However, for Oregon residents, Wildlife Services is not the only means of dealing with troublesome wildlife. Specifically, by statute, an Oregon landowner may kill any "cougar, bobcat, red fox or bear" without need of a permit.[9] Thus, Oregon landowners have two options available: contract with Wildlife Services to remove the wildlife or take matters into their own hands.

In *Ursus*, a coalition of environmental and animal rights groups challenged Wildlife Services' compliance with the National Environmental Policy Act (NEPA) in its decision to kill black bears causing damage to timber on local landowners' property in western Oregon.[10] Specifically, plaintiffs alleged that Wildlife Services violated NEPA by failing to complete an Environmental Impact Statement (EIS).[11] Alternatively, plaintiffs claimed that Wildlife Services "prepared an inadequate Environmental Assessment (EA) upon which it based its Finding of No Significant Impact (FONSI)."[12]

In January 2003, Wildlife Services published a Notice of Availability for an EA which determined that its bear control program would not have any significant environmental impacts that were not already disclosed in the earlier EIS.[13] Three months later, Wildlife Services published a Notice of Availability for the FONSI.[14] Plaintiffs responded in May by filing suit and seeking a temporary restraining order in United States District Court.[15] At the conclusion of oral arguments on the temporary restraining order, the court determined plaintiffs lacked standing and dismissed the case without prejudice. Plaintiffs filed a subsequent lawsuit six months later.[16]

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8. United States Department of Agriculture, *Wildlife Services - Oregon*, http://www.aphis.usda.gov/ws/pdf/oregon.pdf (accessed Mar. 23, 2005).
9. Or. Rev. Stat. Ann. § 498.012(2)(a) (West 2003).
10. *Ursus Americanus*, 2004 WL 2127182 at 1.
11. *Id.*
12. *Id.*
13. *Id.* at 2.
14. *Id.*
15. *Id.*
16. *Id.*

III. HOLDING

The court never ruled on the issue of whether Wildlife Services failed to comply with NEPA. Rather, the court held the plaintiffs lacked standing and granted defendant's motion for summary judgment.[17]

Specifically, the court agreed with defendant's arguments that plaintiffs lacked standing because they were unable to show injury in fact or redressability.[18] In this finding, the court relied on testimony from individuals who claimed they would be affected by Wildlife Services' bear control program. In earlier oral arguments for the temporary restraining order, plaintiffs introduced one individual who claimed she would suffer "psychological injury" by knowing that bears which had traversed her property might be killed and that she would suffer a diminished opportunity to view bears in the area, if they were killed.[19] Later, at oral argument on summary judgment, plaintiffs relied on a hunter who claimed he would have diminished chances of successfully hunting black bears and a photographer who claimed a diminished chance of successfully photographing bears, if the Wildlife Services killed them.[20]

The court found that these injuries were "tenuous" and, in a footnote, noted the individuals' injuries were logically at odds with one another because the photographer's interest would be theoretically lessened whether it was Wildlife Services or the hunter killing the bears.[21] Additionally, the court relied on the fact that it was uncontested that the overall black bear population in western Oregon remained healthy, regardless of any regional variations.[22]

As to redressability, the court stated that regardless of whether Wildlife Services engaged in further NEPA analysis, there was no proof that this would stop the killing of bears because Oregon law allows landowners to kill troublesome bears without first obtaining a permit.[23] Thus, if Wildlife Services did not kill the bears, local landowners would. In response, plaintiffs argued that even if landowners continued to kill bears, there was no evidence that they would do so in as great of numbers as if Wildlife Services did the killing.[24] The court, however, disregarded the argument saying there was no factual support for it in the record.[25]

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17. *Id.* at 1.
18. *Id.* at 4.
19. *Id.*
20. *Id.*
21. *Id.* at n. 2.
22. *Id.* at 4.
23. *Id.* at 5.
24. *Id.*
25. *Id.*

IV. BACKGROUND OF STANDING FOR ENVIRONMENTAL LITIGANTS

The concept of standing finds its genesis in the "cases" and "controversies" requirement of Article III of the United States Constitution. Specifically, the Constitution limits the American judiciary's authority to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a Party."[26] Over time, courts have found that a prospective plaintiff must show three essential elements: "(1) injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's challenged action; and (3) the likelihood, rather than mere speculation, that the injury will be redressed by the court's favorable decision."[27]

In addition, a plaintiff bringing a claim under NEPA must show that the injury is within the "zone of interests" that NEPA is intended to protect.[28] Essentially, the zone of interests test asks whether the suit is so marginally related or inconsistent with the purposes of the underlying statute that one could not presume Congress, in passing the act in question, intended to allow such a suit.[29] The test is "not a demanding one . . . [as the] asserted interest need only be arguably within the zone of interests;" as such, a "rough correspondence of interests is sufficient."[30]

Generally, standing analysis for environmental litigants focuses on the injury in fact requirement. Such claims brought under NEPA are typically considered procedural injuries.[31] Notably, it is not the harm to the *environment* the plaintiff must establish, but rather harm to the *plaintiff* from the perceived environmental harm.[32] Environmental plaintiffs sufficiently allege injury when they establish that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" if the action at issue is allowed.[33] In *Friends of the Earth v. Laidlaw Environmental Services*, the Supreme Court granted standing because plaintiffs' members made specific allegations of harm as a result of the environmental damage – specifically a reluctance to use a polluted river. The mere fact that the plaintiffs *did not* use the river because it was polluted was insufficient to prevent a finding of standing.[34] Additionally in *Laidlaw*, a plaintiff who lived 20 miles away was still held to have standing.[35] Thus, a potential plaintiff need not live near to the challenged activity. Rather, it is

26. U.S. Const. art. III, § 2.
27. *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001).
28. *Douglas County v. Babbitt*, 48 F.3d 1495, 1499 (9th Cir. 1995).
29. *Clarke v. Securities Indus. Assn.*, 479 U.S. 388, 399 (1987).
30. *Presidio Golf Club v. Natl. Park Serv.*, 155 F.3d 1153, 1158 (9th Cir. 1998).
31. *Sierra Club v. U.S. Fish and Wildlife Serv.*, 235 F. Supp. 2d 1109, 1122 (D. Or. 2002).
32. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 181 (2000).
33. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).
34. *Laidlaw*, 528 U.S. at 184.
35. *Id.* at 182.

sufficient to show "repeated recreational use . . . accompanied by a credible allegation of desired future use . . . even if relatively infrequent."[36]

Even mere desire to watch an animal for aesthetic purposes is "undeniably a cognizable interest for purposes of standing."[37] Notably, in *Lujan v. Defenders of Wildlife*, the Supreme Court struck down an environmental group's challenge to federal funding of overseas programs which might have an impact on endangered species in other countries.[38] The Court, led by Justice Antonin Scalia, determined that because Defenders of Wildlife's members had not suffered injury to a cognizable interest, they failed to meet the injury in fact portion of standing.[39] Specifically, the Court found the affidavits of the group's members lacking insofar as none of the individuals were actually in the countries in question or had specific itineraries for trips in the near future.[40] Although the Court later acknowledged that the redressability portion of standing was most obviously lacking,[41] it is probably Justice Scalia's treatment of the injury in fact question that is most likely to be remembered. Indeed, as Justice Blackmun noted in his dissent, "[b]y requiring a 'description of concrete plans' or 'specifications of *when* the some day [for a return visit] will be' the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent [plaintiffs] from simply purchasing plane tickets to return to the Aswan and Mahaweli projects."[42]

Once a plaintiff claiming a procedural injury "establishes injury in fact under NEPA, the causation and redressability requirements are relaxed."[43] Significantly, in order to establish redressability the plaintiff asserting procedural standing is *not required to show that properly following the procedures will yield the result they seek.*[44] In a footnote, the court in *Lujan* acknowledged that a plaintiff living near the construction site of a federal dam would have procedural standing to challenge the agency's failure to comply with NEPA, even if he could not establish that NEPA compliance would have prevented the construction of the dam.[45]

Although causation and redressability are less frequently at issue in cases dealing with standing for environmental litigants, they too can serve as a basis for a determination that a plaintiff lacks standing. For example, plaintiffs challenging the U.S. Fish and Wildlife Service's decision to partially fund a state agency's moose hunting program failed the redressability re-

36. *Ecological Rights Found. v. P. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000).
37. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992).
38. *Id.* at 578.
39. *Id.* at 564.
40. *Id.*
41. *Id.* at 568.
42. *Id.* at 592 (Blackmun, O'Connor, JJ., dissenting) (internal citation omitted).
43. *Cantrell*, 241 F.3d at 682.
44. *Id.*
45. 504 U.S. at 573, n. 7.

quirement because it was acknowledged the program would continue even without the federal funding.[46] Additionally, in *Lujan*, the Court found that plaintiff's challenge to federal agency actions lacked standing because the agencies were not parties to the suit and, thus, any favorable judgment would not be enforceable against them.[47] Thus, because the agencies could not be prevented from continuing to fund the challenged programs, the plaintiffs failed to adequately establish redressability.

Despite the considerable amount of case law over the last three decades addressing standing for environmental plaintiffs, perhaps the most critical consideration of the concept comes from the Supreme Court's 1970 opinion in *Sierra Club v. Morton*.[48] In a subtle twist of judicial logic, reminiscent of Justice John Marshall in *Marbury v. Madison*,[49] the Court managed to both dismiss the Sierra Club's complaint for lack of standing and, at the same time, establish a new rule for environmental litigants that recognized injuries to aesthetic and environmental values as sufficient to confer standing.[50] While dismissing the Sierra Club's complaint for lack of standing because it failed to aver that its members used the area in question and would be affected by the proposed ski resort, the majority noted in a footnote that, "our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure."[51]

However, it was Justice William O. Douglas, in his dissenting opinion, who not only went one step further than the majority in his willingness to confer standing, but gave an eloquent voice to the very interests environmentalists seek to protect, for which the case is most remembered. Justice Douglas argued that mountains, forests, rivers and other natural features, because they are essential to Americans' way of life, should have standing to sue on their own behalf.[52] Specifically, Justice Douglas believed courts could simply name an individual who had a vested and emotional interest in the place, as something akin to a guardian ad litem, to act on behalf of the place.[53] Such individuals would have to be those who knew the place – those who had camped or hiked there or who had run the river – and would not include those who merely "flock" to defend the place because of widespread media attention.[54] While considered extreme at the time, the vision Justice Douglas had, in many ways, has come to fruition. Today, environmental litigants, in order to establish injury in fact, frequently are required

46. *Fund for Animals v. Babbitt*, 2 F. Supp. 2d 570, 575 (D. Vt. 1997).
47. 504 U.S. at 568.
48. 405 U.S. 727.
49. 5 U.S. 137 (1803).
50. *Sierra Club*, 405 U.S. at 738-40.
51. *Id.* at 735.
52. *Id.* at 749-50.
53. *Id.* at 750, n. 8.
54. *Id.* at 751-53.

to bring individuals before the court, via testimony or affidavit, stating their interest in the place and explaining how the activity in question limits their enjoyment.

Ultimately, the court in *Ursus*, while purporting to follow this line of case law and standing jurisprudence, simply disregards many of the above holdings. While in the end the court probably reaches the right result, it did so for the wrong reasons. Along the way, it shows a flippant disregard for existing caselaw; sadly it is this disregard which may be the legacy of the opinion.

V. ANALYSIS

While the court in *Ursus* found plaintiffs' claim lacked most in redressability, the *essential* weakness of the holding rests in its failure to adequately address the individual plaintiffs' claimed injuries (specifically, the woman wishing to watch bears, the hunter and the photographer). However, this failure is not solely the fault of the court. Rather, it is a failure that goes to the heart of the American legal system and its inability to account for the interests environmentalists seek to protect.

The court chose to adhere to a rigid and formal approach to the concept of standing. The problem with this approach, however, is its unequal application to potential plaintiffs. A corporation wishing to bring a claim, for example, against the United States Forest Service for denial of a permit to cut timber or mine a hillside, if denied, has essentially established injury in fact. Such a plaintiff might still be prevented standing to bring such a claim by one or both of the other requirements, but the injury in fact is nearly presumed: the corporation has been prevented from doing something economic in nature and, as a result, has been injured. Denial of an economic opportunity is virtually *per se* injury in fact.

On the other hand, what economic interest does someone have in watching a ruby-crowned kinglet? Where is the money to be made from sitting under a cottonwood tree, its furrowed bark at your back and the autumn sun on your face? How much is your first glimpse of a wild bear worth?

The courts are unwilling to recognize economic value in certain environmental interests. On one hand, this is a good thing. When environmental interests undergo economic analysis they invariably lose out to jobs, opportunity and continuing development. On the other hand, it poses an additional question: what value *do* they have and how should it be accounted for in the courtroom? Courts' answers have been simply to recognize certain types of environmental interests as meeting the injury in fact requirement for standing. Indeed, over the past couple of decades, courts have increasingly liberalized this standard. The Supreme Court has even gone so far as to say, "[t]he desire to use or observe an animal species, even

for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing."[55]

However, this standard, while a step in the right direction, fails in two respects. First, by failing to presume an injury in fact in the same way that an economic injury is virtually presumed, it places the additional burden on environmental litigants to spend considerable time and effort finding individuals who can claim a significant interest in the place at issue, just to appease the court. This showing requires that someone prove in words that they love a place. By its very nature such a showing is vastly more difficult to prove than showing, for example, the loss of an economic opportunity. Regardless of how liberally this standard is applied, there still will be situations in which individual plaintiffs are denied standing simply because a judge finds they lack enough of a vested interest in a place and therefore, have not been "injured."

Second, this standard allows for a vastly different application depending on the jurisdiction. For example, in *Ursus* the court practically scoffed at the notion that during earlier oral arguments one of the individual plaintiffs claimed to have suffered a "psychological injury" from knowing that bears which had been on her property might be killed by Wildlife Services. Additionally, the court found it doubtful that the woman suffered any injury from having a diminished opportunity to view bears after Wildlife Services killed them.[56] Although the *Ursus* court was not dealing with this specific woman (she had testified at earlier oral arguments, but not at the particular trial which was the basis of the opinion), the court found her claimed injury to be so spectacularly deficient that it decided to discuss her claim even though it was no longer before the court. It is difficult to see, how an individual claiming an interest in being able to watch bears on her property fails to meet the standard set forth by the Supreme Court in *Lujan* ("[T]he desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing").[57] Indeed, this determination so egregiously ignores the *Lujan* standard that it raises the question of whether the court regressed to a formalistic approach for showing injury in fact that is so rigid and strict as to approach the code pleading standards that existed prior to the adoption of the Federal Rules of Civil Procedure. Perhaps the court was waiting to hear the "magic words" and determined that a claim of "psychological injury" was not magic enough to suffice for standing. The practical difference, between acknowledging a legal interest in watching wildlife and recognizing a "psychological injury" from being *prevented* from watching wildlife is simply an exercise in se-

55. *Defenders of Wildlife*, 504 U.S. at 562-63.
56. *Ursus Americanus*, 2004 WL 2127182 at 4, n.8.
57. 504 U.S. at 562-63.

mantics - unfortunately an exercise the *Ursus* court was willing to undertake.

The court then scrutinized the plaintiffs', a hunter and a photographer, stating their injuries were "tenuous" and logically inconsistent.[58] Again, applying by the *Lujan* standard, it is difficult to see how a hunter and photographer could not meet the injury in fact standard. If wishing to merely watch animals is a cognizable interest for standing, how is wishing to hunt or photograph them not? Additionally, the court's decision to point out the apparent "conflict" between an interest in hunting and photographing bears is entirely beside the point. Each interest in the animals is reliant simply on the black bear's existence. It does not matter that the interests are not the same.

The court also noted the plaintiffs were unable to point to specific areas in which bear populations would be impacted. This, too, is a weak application of the injury in fact standard, primarily because it was uncontested that bears would be killed. The mere fact that plaintiffs were unable to predict specifically which bears and where they would be killed not only fails to address plaintiffs' alleged injuries resulting from bear killings, but also shows a basic ignorance for the very nature of wildlife population dynamics. Additionally, it suggests a dichotomy between injury in fact for fixed geographic landmarks versus wildlife, which are inherently mobile. Most significantly, the court simply ignored the obvious: it is axiomatic that if bears in a particular area are being exterminated by government agents, then there will be fewer bears.

Excluding case law relied upon for summary judgment; the *Ursus* court cited nine cases for substantive standing requirements for environmental litigants.[59] Notably, in all of those cases except one, the plaintiffs were found to have established injury in fact.[60] Specifically, an incredibly diverse group of plaintiffs were found to have established injury in fact: birdwatchers;[61] individuals who were prevented from using rivers because of pollution;[62] a county challenging NEPA compliance in the designation of critical habitat for spotted owls;[63] a country club challenging NEPA compliance for destruction of a building;[64] an Indian tribe challenging the Clin-

58. *Ursus Americanus*, 2004 WL 2127182 at 4.

59. Specifically, in order they are: *Cantrell*, 241 F.3d 674; *Laidlaw*, 528 U.S. 167; *Douglas County*, 48 F.3d 1495; *Presidio Golf Club*, 155 F.3d 1153; *Defenders of Wildlife*, 504 U.S. 555; *Ecological Rights Foundation*, 230 F.3d 1141; *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002); *Fund for Animals*, 2 F. Supp. 2d 570; and *Sierra Club v. Fish and Wildlife Services*, 235 F. Supp. 2d 1109.

60. *Lujan*, 504 U.S. at 562, 568 (finding that plaintiffs had established neither injury in fact nor redressability).

61. *Cantrell*, 241 F.3d at 680.

62. *Laidlaw*, 528 U.S. at 184; *Ecological Rights Foundation*, 230 F.3d at 1150-51.

63. *Douglas County*, 48 F.3d at 1501.

64. *Presidio Golf Club*, 155 F.3d at 1159-60.

ton administration's "Roadless Rule" for national forests;[65] and an environmental group's challenge of federal funding of a state predator control study.[66] If a country club is able to fall within the "zone of interest" for injury in fact for a NEPA claim, it is unclear how a wildlife photographer and a hunter fail to.

Indeed, this is perhaps the weakest link in the *Ursus* decision. Although the court does not go so far as to say that the hunter and photographer definitively had not suffered injury - probably because it knew it would decide the case on redressability instead - its condescending discussion of their claimed injuries is borderline antagonistic and simply disregards the case law upon which the decision is based.

VI. A DIFFERENT APPROACH

While it should be noted that the *Ursus* court probably decided the case correctly on redressability, it is the court's faulty application of injury in fact for which it will most likely be remembered. It is for this reason, that a new standard of injury in fact for environmental litigants could be applied without flooding the court system with new cases or creating a new cause of action.

The standard for injury in fact as it now exists not only lets cases such as *Ursus* slip through the cracks, but it also focuses almost exclusively on "charismatic mega-fauna:" the large and exciting animals such as wolves and grizzly bears which, while significant, comprise a small part of an intact ecosystem. As science continues to further our understanding of the ecological underpinnings of wild places, environmental litigation which is limited to such popular symbols might save good mountain views while letting biological diversity fall by the wayside. For example, how might one establish injury in fact for degradation of micro-organisms in the soil? By the standard applied in *Ursus*, no one could legitimately claim a sufficient interest in such seemingly insignificant creatures as to establish standing. Increasingly, science tells us that such organisms are essential building blocks for viable, functioning ecosystems, which is to say, if there is no healthy dirt, there are no grizzly bears.[67]

Courts have made efforts at relaxing standing requirements to allow environmental litigants access to the courtroom. For example, once plaintiffs bringing a claim under NEPA have established injury in fact, the causation

65. *Kootenai Tribe*, 313 F.3d at 1112-13.

66. *Sierra Club v. FWS*, 235 F. Supp. 2d at 1124, 1126-27.

67. Despite their reputation as predators, grizzlies' diets consist largely of vegetation, including grasses, sedges, horsetail, biscuit root, fireweed, roots, truffles, tubers and bulbs - all plant life which requires healthy soil conditions to grow. In the process of searching out such food sources, grizzlies engage in what many biologists refer to as "gardening:" digging up large patches of soil and in the process increasing available nitrogen in the ground, thereby enhancing future growth of the bear's food sources. For further discussion of grizzly habitat needs, *See* Daniel Mathews, *Rocky Mountain Natural History* (Raven Editions, 2003).

and redressability requirements are relaxed.[68] Unfortunately, this standard is backward. A more effective approach would be to greatly reduce the injury in fact requirement, so as to almost presume injury, while keeping the same standard for causation and redressability. This would insure that wild places would not go unspoken for, while at the same time prevent the creation of a new cause of action. Courts would still be free to dismiss a case on the basis of standing if the named defendant was not responsible for the act in question (causation) or if the court was unable to fix the problem (redressability). However, this would end what is essentially an additional burden required for environmental plaintiffs. More specifically, it would be a step in the right direction toward acknowledging the inherent value of the natural world.

In many ways, such a change would be another step toward realizing Justice Douglas's vision in his *Sierra Club v. Morton* dissent.[69] While Justice Douglas's opinion, at first glance, seems rather extreme, upon further examination it is essentially what environmental litigants are forced to show today. For example, while calling for inanimate natural places to have standing on their own, Justice Douglas later explains that an individual with sufficient personal knowledge and interest in the place should be named as guardian ad litem for the purposes of litigation.[70] Sadly, it is in the application, however, that the spirit of the Justice Douglas dissent is ignored. Indeed, it is this fundamental acknowledgment that the world does not simply exist for human purposes that is absent from the American legal system and the Court's opinion in *Ursus*. As Justice Douglas himself put it:

> 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.[71]

VII. CONCLUSION

The holding in *Ursus* relies on a cold, formal "logic" that ignores all that makes it special to exist on this Earth. It is a logic born of economic interests with little regard for the bear, intent instead on shutting out "the small

68. *Cantrell*, 241 F.3d at 682.
69. 405 U.S. at 741-55.
70. *Id.* at 750.
71. *Id.* at 743.

and the innovative."[72] Such a system knows nothing of the weight of a pack on your back and seven days of trail in front of you. It is ignorant of migration, disregards the wisdom of the fox, and ignores the sound of a breeze through ponderosa pines. Such a system of laws is a result of a centuries-long process of lessons taught and lessons learned. Yet it has not a lemming's knowledge of how to choose a good site for winter hibernation.

Indeed, it is a circular logic that says no one can speak for the protection of a black bear roaming the banks of the Rogue River in western Oregon and then says it is OK to kill that bear because no one has spoken for it. Tell that to the bear who simply wishes to scratch its claws on the bark of a Douglas fir, or to the Douglas fir which simply wishes to have a bear scratch its bark.

72. Wilkinson, *The Eagle Bird* at 13.

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