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Constitutional Law - Standing to Sue in Environmental Litigation: Sierra Club v. Morton

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CONSTITUTIONAL LAW—STANDING TO SUE IN ENVIRONMENTAL LITIGATION: SIERRA CLUB v. MORTON*

The Sierra Club, a non-profit conservation organization, obtained a preliminary injunction in the district court restraining federal officials[1] from granting their approval or issuing permits in connection with a proposed recreational development[2] in Mineral King Valley of the Sequoia National Forest. The Sierra Club based its claim upon Section 10 of the Administrative Procedure Act (A.P.A.)[3] which accords judicial review to a ". . . person [who is] suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute. . . ."[4] The Court of Appeals for the Ninth Circuit, however, reversed the district court, holding instead that the club lacked standing to sue because it failed to specifically allege its interests were aggrieved or adversely affected within the meaning of the rules of standing.[5] On appeal, the Supreme Court affirmed the court of

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* 405 U.S. 727 (1972).

1. The Secretary of the Interior, Secretary of Agriculture, Superintendent of Sequoia National Park, Regional Forester, Forest Service and Forest Supervisor of the Sequoia National Forest.

2. The proposed plan of Walt Disney Enterprises, Inc., approved by the Forest Service, consists of a $35.3 million complex composed of motels, restaurants, swimming pools, parking lots and other structures designed to accommodate 14,000 visitors daily. The complex is to be constructed on 80 acres of valley floor. Other facilities include swimming pools and 20 ski lifts, as well as power generating and sewage treatment plants.

3. 5 U.S.C. § 701 *et seq.* (Supp. II, 1967).

4. 5 U.S.C. § 702 (Supp. II, 1967). The Sierra Club contended that the Secretary of Agriculture, who has the responsibility under Congress for the management of national forests, exceeded his authority and acted arbitrarily in approving the proposed master plan, and also that the Secretary of the Interior unlawfully approved the construction of a highway and power transmission lines through and across park lands without holding the required public hearings. The Sierra Club pleaded that for many years, by reason of its activities and conduct, it had exhibited a *special interest* in the conservation and sound management of national parks, game refuges and forests of the United States. They asserted that they regularly served as a responsible representative of persons with similar conservation interest and alleged that those interests would be *vitally affected* and *aggrieved* by the defendants' acts. Brief for Appellant at 17-18, Sierra Club v. Morton, 405 U.S. 727 (1972).

5. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970). The court stated that Sierra Club had not alleged a sufficient interest to maintain an adversary position between itself and the defendants. They ruled a showing of injury to a direct legally protected interest was necessary to attack the proposed Mineral King development. *Id.* at 33.

appeals. It held: "[A] person has standing to seek judicial review under the Administrative Procedure Act only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise."[6]

Decisions in the past few years have brought a significant relaxation of the technical requirements for standing.[7] The appellate court decision in *Sierra Club*, however, returned to the traditional concept of standing as one requiring the plaintiff to show a tangible injury to its interests. In affirming the appellate court decision, the Supreme Court would permit federal courts to deny standing to any person or group whose interest was not "direct"[8] and who failed to specifically allege that it or its members would be "affected in any of their activities or pastimes. . ."[9] by the challenged governmental action. The Court, for example, specifically required that the petitioner assert individualized harm to itself or its members to be accorded standing to obtain review of administrative action. In the process, the Court explicitly recognized that the interest alleged to have been injured may reflect the "aesthetic, conservational and recreational as well as economic values."[10]

The decision is broad in the sense that it qualifies a large class of individual and organizational plaintiffs to subject governmental action to judicial review. On the other hand, the decision is restrictive in the sense that the Court re-emphasized some of the more narrow traditional notions of standing[11] as a prerequisite to judicial review. Thus, *Sierra Club* poignantly illustrates the difficulties associated with actions instituted by environmental action groups seeking review of administrative agency actions. Moreover, the decision also serves as a guide for future actions: (1) by outlining the allegations necessary for plaintiffs to be accorded

6. Sierra Club v. Morton, 405 U.S. 727 (1972). The petitioner failed to assert individualized harm to itself or its members and therefore lacked standing to maintain the action.

7. *See generally* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

8. Appellant claimed a "special interest" by reason of its long standing role in conservation and protection of the natural resources of the Sierra Nevada Mountains. The complaint alleged the proposed development was "personally displeasing or distasteful" to the Sierra Club and its members. Brief for Appellant at 21, Sierra Club v. Morton, 405 U.S. 727 (1972).

9. 405 U.S. at 735. The Sierra Club failed to state in its pleadings and affidavits that its members *use* the Mineral King area for any purpose much less that their use would be affected by the proposed actions of the defendant.

10. *Id.* at 738.

11. In Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939), the Court ruled that one is without standing unless "the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* at 137-38.

"standing to sue," (2) by broadening the interests protected, and (3) by identifying the proper persons who may successfully represent the public interest in such litigation.

Standing to sue became a major constitutional issue in 1923 when the Supreme Court in *Frothingham v. Mellon*[12] declined to accord judicial review to a taxpayer seeking to restrain the Secretary of the Treasury from making expenditures under an act of Congress. The Court ruled it had no power *per se* to review the acts of Congress unless the plaintiff demonstrated ". . . that he [has] sustained or is immediately in danger of suffering some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally."[13] The direct injury or threat of injury requirement permeated the law for the next forty years.

The doctrine of "standing to sue" was summarized in *Associated Industries of New York, Inc. v. Ickes*[14] as follows:

> In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justicible 'controversy,' without which, under Article III §2 of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen.[15]

The Court went on, however, to permit actions to be brought by "any non-official person" or group of persons *specifically authorized by Congress* to bring a suit to "prevent action by an officer in violation of his statutory powers."[16] Standing, therefore, effectively barred federal court review of certain governmental action which affected the public-at-large, unless the complaining party could show a direct injury or threat of injury to his legally protected interests.[17] Lower courts invoked the stringent requirements for standing to maintain the separation of powers concept. The judiciary hesitated to review governmental acts which would assume a position of authority over governmental acts of a coequal branch of government.

Baker v. Carr[18] took the first significant step toward clarifying the concept of standing. Unlike earlier decisions, *Baker* defined the fundamental concept of standing as focusing on the party seeking review rather than

12. 262 U.S. 447 (1923).

13. *Id.* at 488.

14. 134 F.2d 694 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

15. *Id.* at 700.

16. *Id.* at 704. This is the "private Attorney General's" concept.

17. Poe v. Ullman, 367 U.S. 497 (1961); Doremus v. Bd. of Educ., 342 U.S. 429 (1952); Tileston v. Ullman, 318 U.S. 44 (1943).

18. 369 U.S. 186 (1962).

on the issues sought to be adjudicated. Thus, the gist of the question of standing is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness"[19] exists. In essence, standing goes to the question of whether the party seeking judicial review is the proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.

The *Baker* decision set the pace for a trend toward relaxed requirements for standing and evolved a new approach to the problems surrounding this area of the law. Six years later, in *Flast v. Cohen*,[20] the Supreme Court examined the functional and consequential limitations imposed by standing on the ability to sue in the federal courts. The Court held that standing was not an absolute constitutional bar (in reference to Article III §2) upon suits, but rather was a self-imposed rule of restraint which required that plaintiffs show a personal stake in the outcome of the controversy.[21] Obviously, the function served by the "personal stake" requirement was to guarantee a genuine controversy, which sharpens the presentation of issues and is consistent with the exercise of judicial power under the constitutional limitations of Article III. The groundwork was thus laid for the evolution of suits challenging administrative actions along a broad line of issues. The principal struggle emerged between the interests of individual persons or groups labeled as either concerned citizens or environmental action groups, and the challenged acts of administrative agencies.

The decisions which set the stage for the appellate court and Supreme Court rulings in *Sierra Club* outlined the criteria necessary to satisfy the standing requirement for federal judicial review in "environmental" suits. These decisions were split into two significant classifications: (1) actions where the party relied upon a specific statute authorizing invocation of the judicial process, and (2) actions where the party relied upon Section 10 of the A.P.A.[22] In *Hardin v. Kentucky Utilities Co.*,[23] for example, a private utility sought to enjoin the Tennessee Valley Authority from

19. *Id.* at 204.

20. 392 U.S. 83 (1968).

21. Affirming and clarifying the *Baker* holding, Justice Douglas' concurring opinion expanded the concept further by saying "[The plaintiff's] stake in the outcome of litigation may be *de minimis* by financial standards, yet very great when measured by a particular constitutional mandate." This was a step toward recognizing injury to non-economic interests as those sufficient to establish standing. 392 U.S. at 109.

22. *See* note 4 *supra* and accompanying text.

23. 390 U.S. 1 (1968).

supplying electrical power to towns primarily served by the private utility, in contravention of a 1959 statute forbidding such activity. The rationale expounded by the Court was that parties whose interests were to be protected by statute have standing to ask the court to specifically enforce those statutory provisions. The *Hardin* opinion is important to *Sierra Club* primarily because of the negative position that has been read into the opinion, namely that, *unless* the interest is specifically protected by statute, the parties do not have standing.[24]

In the many cases where standing has been found, the courts have uniformly concluded either that the plaintiffs had a "legally protected interest," or, that Congress had created a statutory legal right in the plaintiffs and conferred standing upon them to protect their interests.[25] Most persons seeking judicial review, who were not specifically conferred standing by statute, relied upon Section 10 of the A.P.A. The early decisions construed Section 10 language under different formulations of "legal wrong" and "legal interest" as constitutional prerequisites for standing.[26] In *Association of Data Processing Service Organizations v. Camp*[27] and *Barlow v. Collins*,[28] the Supreme Court stated that the requirement of standing differs from the "legal interest" test. Standing concerns "the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[29] The traditional concept of injury to a recognized legal interest was rejected. Instead, the Court inserted as a broad classification for interests to be protected as those which "may reflect the 'aesthetic, conservational and recreational' as well as economic values."[30] The decisions continued the

24. This contention was successfully argued by government counsel in the appellate court. Brief for Appellant at 13, Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

25. Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970). Jenkins v. McKeithen, 395 U.S. 411 (1969); Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

26. *See* Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Kansas City Power and Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955).

27. 397 U.S. 150 (1970).

28. 397 U.S. 159 (1970).

29. Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970).

30. *Id.* at 154.

trend toward enlarging the class of persons who may protest administrative action and therefore gave environmental groups a considerably stronger basis for asserting injury to their interests. While economic interest had long been recognized as sufficient to lay a basis for standing (with or without a specific statutory provision), *Data Processing* and *Barlow* led the way toward granting plaintiffs standing based on non-economic interests.

Scenic Hudson Preservation Conference v. FPC[31] became one of the most clearly illustrative examples of the broadened standing requirements. Despite vigorous claims by the defendants that Scenic Hudson did not have standing because it failed to claim the traditional "personal economic interest,"[32] the petitions were still heard by the court. In so holding, the court interpreted Section 313(b) of the Federal Power Act, which gave parties a right to review if " . . . aggrieved by an order issued by the Commission . . . ,"[33] as not limited to personal economic injury, but rather as being broad enough to include those who by their activities and conduct have exhibited a special interest in the aesthetic, conservational and recreational aspects of power development.[34]

Similar reasoning persuaded other courts to allow environmental action groups the special right to challenge proposed actions of the Department of Interior and Department of Health, Education and Welfare on the basis of aesthetic and recreational interests of its members in lieu of the more traditional direct economic injury. In *Road Review League v. Boyd*,[35] for example, the plaintiffs were conferred standing by the court based on Section 10 of the A.P.A. The court stated that it could

> see no reason why the word 'aggrieved' should have different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act. . . . The 'relevant statute,' *i.e.*, the Federal Highways Act, contains language which seems even stronger than that of the Federal Power Act, as far as local and conservation interests are concerned.[36]

Similarly, in *Citizens Committee for the Hudson Valley v. Volpe*,[37] plaintiffs were accorded standing to challenge the proposed construction

31. 354 F.2d 608 (2d Cir. 1965). The FPC had granted New York's Consolidated Edison a license to construct a hydroelectric project on the Hudson River at Storm King Mountain. The license was opposed by conservation groups (including the Sierra Club) who asserted threatened injury to conservation interests.

32. *Id.* at 615.

33. Act of Aug. 26, 1935, ch. 687, Title II, § 313, 49 Stat. 860.

34. 354 F.2d at 616.

35. 270 F. Supp. 650 (S.D. N.Y. 1967).

36. *Id.* at 661.

37. 425 F.2d 97 (2d Cir. 1970).

of a freeway as "aggrieved parties" under the A.P.A. as well as the Department of Transportation Act and the Hudson River Basin Compact Act.

Nonetheless, while the liberal interpretation and application of the A.P.A. in environmental litigation was being applied in most federal courts[38] throughout the United States, the Ninth Circuit Court of Appeals balked in the *Sierra Club* case.[39] The ninth circuit, in reversing the district court decision, denied the plaintiffs judicial review because (1) no adversary position was stated between the Sierra Club and the federal officials by the Club's assertion of a "special interest" in the conservation and maintenance of national parks; and (2) plaintiff did not assert that any of their own property or members' property interest was damaged or threatened by the agency action. The court observed:

> We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials . . . acting under Congressional and Constitutional authority.[40]

The court distinguished *Scenic Hudson* on the ground that standing there was conferred by Section 313(b) of the Federal Power Act, which specifically grants the right of review to aggrieved parties. In *Sierra Club*, however, no such statute was involved. The court also went on to distinguish *Road Review League* by noting that plaintiffs in that case were persons who would be directly affected by the government proposal and had alleged specific economic injury.

Thus, the *Sierra Club* decision on its face seemed to reverse the trend toward liberalization of standing requirements and carried forth the negative interpretation of *Hardin*.[41] In holding that the Sierra Club complaint failed to allege a sufficient interest to confer standing, the court specifically distinguished its holding from those in other federal courts which had accorded the club standing to object to alleged infringement upon natural resources, by stating that the Sierra Club had been joined in those actions by local residents and *users* of the affected area.[42]

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38. West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Brooks v. Volpe, 329 F. Supp. 118 (W.D. Wash. 1971); Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970).

39. 433 F.2d 24 (9th Cir. 1970).

40. *Id.* at 30.

41. *See* note 24 *supra* and accompanying text.

42. Judge Trask's recent opinion in Alameda Conservation Association v. California, 437 F.2d 1087 (9th Cir.), *cert. denied,* Leslie Salt Co. v. Alameda Conservation Association, 402 U.S. 908 (1971), confirms the ninth circuit's strict in-

Oddly, the appellate court decision holds, on the one hand, that standing may be grounded upon "aesthetic, conservational and recreational interests" and that the proposed actions are alleged to be "personally displeasing or distasteful" to the Sierra Club and its members, and yet concludes, on the other hand, that the Sierra Club is not "aggrieved" or "adversely affected" within the meaning of the rules of standing. In support of that view, they rely on Black's Law Dictionary to define "aggrieved" as "having suffered loss or injury; damnified; injured."[43] The real reasons for the court's inconsistency, however, is not readily explainable. One possible explanation is that the traditional allegation of injury-in-fact has been much too heavily relied upon in the decision.[44]

In any event, by affirming[45] the ninth circuit opinion, the Supreme Court has not specifically affirmed the strict approach to standing applied by the ninth circuit. In fact, the opinion elucidates and affirms some of the liberalized prerequisites of standing while requiring the complainant to allege an injury to his own interest in order that the dispute will be adjudicated in an adversary context. The Court acknowledged that recreational development of the Mineral King wilderness area and the attendant destruction or adverse effects on the aesthetics and ecology of the area constituted "injury in fact sufficient to lay the basis for standing under §10 of the A.P.A."[46] But the Court concluded that such specific injury would occur only to those who *use* the Mineral King area and as such was not a concern of persons generally.[47]

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terpretation of standing requirements. The opinion stated that "[s]tanding is not established by suit initiated by this association simply because it has as one of its purposes the protection of the 'public interest' in the waters of the San Francisco Bay. . . . Although recent decisions have considerably broadened the concept of standing, we do not find that they go this far." *Id.* at 1090.

43. 433 F.2d at 32, n.8.

44. A clue to the ninth circuit's reluctance to "liberalize" its notions of standing seems to stem from a concern over the flood of litigation argument. In Alameda Conservation Association v. California, 437 F.2d 1087 (9th Cir. 1971), Judge Trask's opinion stated that if various political, social, economic or environmental clubs were to be granted standing to challenge elected state officials to protect a public interest they "could wreak havoc with the administration of government, both federal and state," 437 F.2d at 1090.

45. 405 U.S. 727 (1972).

46. *Id.* at 734-35.

47. Justice Douglas' dissent focused on the general public concern for protection of the environment and suggested, "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." *Id.* at 741-42. Justice Blackmun's dissent recognized the Sierra Club's complaint not as "ordinary, run-of-the-mill litigation. The case poses . . . significant aspects of a wide, growing, and disturbing problem . . . the world's deteriorating environment. . . . Must our law be

The decision draws direct attention to the Sierra Club's failure to state either in its pleadings or affidavits that any of its members *use* Mineral King for any purpose, much less that they would be affected by agency actions. In fairness, it can be observed that the Sierra Club specifically declined to assert individualized harm[48] asserting instead that this was a public action involving questions of natural resources and that the Club's proven, dedicated and long-standing concern in such matters was sufficient in itself to give it standing as a representative of the public interest. The Court met this point, however, by observing that in the prior cases cited as authority by the Sierra Club, the plaintiffs had either a specific statutory grant of standing or had alleged injury to a direct economic interest. Thus, the Court concluded that once an individual person seeking review is granted standing, even under the most liberal rules, he may assert the public interest in support of his claim against the agency.

While the Court obviously agreed that current decisions had liberalized the standing requirements and broadened the categories of injury and interests protected from injury, it plainly did not abandon the requirement that the party seeking review suffer or be threatened with injury. In its strongest language, the Court reaffirmed that

> a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the A.P.A.[49]

While the decision might appear to have effectively foreclosed all administrative action from judicial review by individuals or public interest groups, the opinion specifically reiterated, "[t]he test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief."[50]

Examining the Court's holding in conjunction with prior cases, *Sierra Club* affirms the ability of individuals or environmental action groups to assert the public interest. But it does so only after that person or group has asserted injury to its own interest. Since we have not yet approached

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so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit. . .?" *Id.* at 755-56.

48. Sierra Club asserted that the proposed development effected the whole society and was a matter of general public importance. Brief for Appellant at 19, Sierra Club v. Morton, 405 U.S. 727 (1972).

49. 405 U.S. at 739.

50. *Id.* at 740, n.15.

the point of Justice Douglas' dissent[51] and conferred standing to the inanimate object about to be destroyed, environmental groups or concerned citizens will have to work within the liberally interpreted confines of the more traditional notions of standing.

Clearly, an imaginative expansion of the traditional notions of standing is needed to enable organizations such as the Sierra Club which have well recognized interests in the area of the environment to litigate environmental issues.[52] While the initial reaction to the *Sierra Club* holding indicates a setback in the battle to preserve the nation's natural resources, it will likely prove to be the impetus needed to move toward new concepts and imaginative expansion of standing in environmental litigation. By requiring plaintiffs to allege a direct interest, the Court is merely affirming the constitutional notions of "complete adverseness" rather than imposing an insurmountable burden on persons seeking relief. Environmental groups, especially those with extensive national membership, should find little difficulty in asserting a direct interest and proving that some of its members *use* the particular environmental area the group is trying to protect.[53] The strength of the opinion lies in the recognition that aesthetic, conservational and recreational values have attained the status of "legally protected interests" and in the resultant ability of citizens groups to vindicate a public interest. As this note goes to print the Sierra Club has amended its complaint to comply with the Supreme Court's opinion and refiled it in the District Court of Northern California.

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51. *Id.* at 741.

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

53. *See* S.C.R.A.P. v. United States, 4 ERC 1312 (D.D.C. 1972). Plaintiff, Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), is an unincorporated association concerned with enhancing the quality of human environment for its members. S.C.R.A.P. sought and obtained a preliminary injunction against the Interstate Commerce Commission preventing the ICC from granting a 2.5 percent railroad freight surcharge, claiming the surcharge would boost the shipping costs of recyclable materials discouraging their use. The defendants rigorously contested plaintiff's standing arguing plaintiff had no more than a general interest in seeing the law enforced and have not distinguished themselves from other citizens also concerned with the environment.

The plaintiffs in amending their complaint to comply with the holding in *Sierra Club*, alleged that its members use the forests, streams, mountains and other resources and that their use would be disturbed by the non-use of recyclable goods. The Court afforded standing relying on the *Data Processing* and *Sierra Club* holdings.