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Federal Procedure - Standing to Sue in Environmental Protection Suits. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970)

Richard C. Josephson

requirement of a useable amount to sustain a conviction for illegal possession of a narcotic, and established that the quantity was sufficient if it were capable of chemical analysis and identification.

DOUGLAS S. WOOD

Federal Procedure—STANDING TO SUE IN ENVIRONMENTAL PROTECTION SUITS. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

The Sierra Club[1] sought a declaratory judgment and injunctive relief from the proposed development of a resort area and the construction of a highway on federal lands under the administrative jurisdiction of the Departments of Agriculture and Interior.[2] The plaintiffs contended that in granting permits for the development the Secretaries exceeded their authority, and that the result would be "permanent destruction of natural values" and "irreparable harm to the public interest." The district court granted a preliminary injunction[3] and the defendants appealed. The Court of Appeals for the Ninth Circuit reversed, holding that the injunction was improperly granted.[4] Although determining that the defendants should prevail on the merits, the court disposed of the case on the theory that the plaintiffs lacked the necessary standing to sue.

"Simply stated but difficult to apply, standing has been called 'one of the most amorphous concepts in the entire domain of the public

1. The Sierra Club is a non-profit California corporation organized for the purpose of protecting the integrity of the environment and promoting conservation, and has a history of involvement in the preservation of scenic and recreational resources. Although the Club draws upon the entire country for its membership, the court found that there was no allegation in the complaint that local residents of the Mineral King Valley were members.

2. The Secretary of Agriculture, pursuant to acceptance of the lowest bid for the project, issued a permit for development to Walt Disney Industries. The proposed plan called for the construction of overnight accommodations, automobile parking facilities, a cog railway, ski trails and lifts, and sewage treatment plants. The State of California, with the permission of the Secretary of Interior, proposed to construct an access road and power transmission lines through the Sequoia National Park and Forest to facilitate the proposed resort.

3. Sierra Club v. Hickel, No. 51,464 (N.D. Cal., July 23, 1969). The court asserted jurisdiction and granted relief under the Administrative Procedure Act, 5 U.S.C. § 702 (Supp. V, 1970), which provides: "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." The injunction was issued under the authority of 5 U.S.C. § 705 (Supp. V, 1970).

4. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom.* Sierra Club v. Morton, 91 S.Ct. 870 (1971), reprinted in 1 ENVIRONMENTAL REP. 1669 (1970).

law.' " [5] In the early case of *Frothingham v. Mellon*[6] the Supreme Court dealt with the standing of an individual taxpayer, only indirectly affected, to challenge the legality of governmental action.[7] In holding that a taxpayer *qua* taxpayer lacked the elements of standing to sue, the Court phrased the test as one requiring injury, that is, that the plaintiff has ". . . sustained or is immediately in danger of sustaining some direct injury as a result of its [the statute's] enforcement . . . ." [8]

In 1939 the Court refined its position in *Frothingham* by specifying the nature of the right to be protected.[9] Under this standard, it was necessary to establish injury to 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." [10] This was the position maintained by the Court until the landmark case of *Flast v. Cohen*[11] in 1968.

Distinguishable on its facts from *Frothingham*,[12] *Flast* again placed

5. 433 F.2d at 28, quoting from Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970).

6. 262 U.S. 447 (1923).

7. The taxpayer sued the Secretary of the Treasury on the theory that federal expenditures under the Maternity Act were illegal because the authorization exceeded the authority conferred on Congress by the Constitution. *Id.* at 479.

8. *Id.* at 488.

9. Tennessee Power Co. v. T.V.A., 306 U.S. 118 (1939).

10. 306 U.S. at 137-8. *See also* Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), which suggested the "private Attorney Generals" theory:

> While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

11. 392 U.S. 83 (1968); *see* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

12. 392 U.S. at 104-06, 107, 114, 115, 117.

before the Court the issue of the standing of a taxpayer to challenge the legality of an administrative action. In finding that standing existed, the Court determined that the difference between *Flast* and *Frothingham* was the claim of an infringement of a constitutional right of the taxpayer in *Flast*,[13] as opposed to a mere disagreeable appropriation by Congress alleged by the taxpayer in *Frothingham*. It is clear, nevertheless, that *Flast* seriously eroded the foundation of the Court's previous line of decisions.[14] The inquiry was expanded from the nature of the right to the interest of the plaintiff,[15] and the test was stated in terms of "a logical nexus between the status asserted and the claim sought to be adjudicated." [16] To establish this nexus, the taxpayer was required to show not only that she was directly affected by the governmental action, but also that the action violated a protection guaranteed by the Constitution.[17]

The Court developed a broader concept of standing in *Association of Data Processing Service Organizations, Inc. v. Camp*.[18] This test requires the plaintiff to first show injury in fact, either economic or otherwise, and secondly, that the interest involved is protected under the Constitution or applicable statute.[19] This bifurcated standard closely parallels that established in *Flast*, for the aggrieved party must show that both portions of the test are met in order to have standing to sue. However, by holding that the interest is no longer limited to the narrow concept of legal rights, but ". . . may reflect 'aesthetic, conservational, and recreational' as well as economic values," [20] the Court considerably expanded the scope of the interests which may be adjudicated. Al-

13. The taxpayer claimed that the payment of federal funds in support of religious and sectarian schools violated the free exercise and establishment clauses of the first amendment to the Constitution. *Id.* at 85-86.

14. *See, e.g.*, 392 U.S. at 107 (Douglas, J., concurring); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968).

15. *See* Jenkins v. McKeithen, 395 U.S. 411, 423 (1969): "In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. . . . The decisions of this Court have also made it clear that something more than an 'adversary interest' is necessary to confer standing." *See also* Baker v. Carr, 369 U.S. 186, 204 (1962): "Have the appellants alleged such a personal stake in the outcome of the controversy, as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."

16. 392 U.S. at 102.

17. *Id.* at 102-03.

18. 397 U.S. 150 (1970); *see also* Barlow v. Collins, 397 U.S. 159 (1970).

19. 397 U.S. at 152-53.

20. *Id.* at 154.

though the test as expressed clearly has two parts, the courts of appeals have not been uniform in their application of it.[21] The District of Columbia Circuit has adopted the most liberal construction and has made the test solely one of injury in fact.[22]

The Ninth Circuit in *Sierra Club* also failed to apply the literal wording of the *Data Processing* test. Although specifically questioning the necessity of an inquiry into the nature of the interest, the court used injury as the only determining factor,[23] and decided that the interest of the plaintiff was not sufficient even to establish this. In discussing the prior cases in which the Sierra Club had been accorded standing, the court determined that the key factor had been the joinder of the Club with local organizations composed of residents or users of the area in question.[24] The court noted that although the interest alleged was conservational under the *Data Processing* rule the plaintiffs had failed to show that it was of a serious enough nature to make them aggrieved or adversely affected.

The opinion makes it clear that the nature of the injury must be a legal wrong, and that displeasure with governmental action which affects only a proclaimed conservational interest will not suffice.[25] *Sierra Club,*

21. Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969); Southern Suburban Safeway Lines, Inc. v. City of Chicago, 416 F.2d 535 (7th Cir. 1969); Arnold Tours, Inc. v. Camp, 408 F.2d 1147 (1st Cir. 1969); Protestants and Other Americans v. Watson, 407 F.2d 1264 (D.C. Cir. 1968); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

22. This was the test urged by Justices Brennen and White in *Data Processing*, 397 U.S. at 167 (concurring opinion); *see, e.g.*, Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Air Reduction Co. v. Hickel, 420 F.2d 592 (D.C. Cir. 1969); National Ass'n of Sec. Dealers v. S.E.C., 420 F.2d 83 (D.C. Cir. 1969).

23. 433 F.2d at 31: "The significance of the language is not entirely clear. . . . We submit that it does not establish a test separate and apart from or in addition to the test which the Court first looked to. . . ."

24. *Id.* a 33:

> In holding that the complaint fails to allege that the Club has the requisite standing to institute this action, we are aware that federal courts have accorded the Club standing to object to alleged administrative infringement upon natural resources in two recent cases. . . . In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action. No such persons or organizations with a direct and obvious interest have joined as plaintiffs in this action.

25. United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) (radio station listeners found to be persons aggrieved); Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (specific statutory provision granting standing, and actual economic interest affected); Powelton Civic Home Owner's Ass'n v. Department of H.U.D., 284 F. Supp. 809 (E.D. Pa. 1968)

therefore, represents not only a serious impediment to environmental protection suits by conservation groups having no legal interest, but also a retreat from the recent holdings of the Supreme Court, and a return to the test of violation of a legal right.

RICHARD C. JOSEPHSON

(persons whose homes and property would be taken to implement an urban renewal project); Road Review League, Town of Bedford v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967) (persons whose property would be taken by the construction). The court in *Sierra Club*, 433 F.2d at 31, stated that "[t]he *Powelton* case would be in point if the homes of residents at Mineral King were to be razed and those homeowners objected", thus indicating that the Ninth Circuit has yet to reject the old 'legal right' test of Tennessee Power Co. v. T.V.A., 306 U.S. 118 (1939).

It further appears to this writer that the interest and injury of the plaintiffs in *United Church* was barely distinguishable from that of the Sierra Club in this case, and it is submitted that the court's finding concerning the interest of the Club was unwarranted and incorrect under a proper interpretation of *Data Processing*. *See* Hamley, J., concurring in *Sierra Club*, 433 F.2d at 38; Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970); Davis *supra* note 21; Richards, *Walton v. St. Clair: The Standing Question*, 4 NATURAL RESOURCES LAWYER 47 (1971); Note, *The Essence of Standing: The Basis of a Constitutional Right to be Heard*, 10 ARIZ. L. REV. 438 (1968).