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STANDING FOR ENVIRONMENTALISTS: SIERRA CLUB v. MORTON

*Sierra Club v. Morton*¹ is the first Supreme Court decision to squarely decide the issue of whether public conservation groups alleging only a generally-shared public injury have standing to initiate judicial review.² The issue arose as a result of a United States Forest Service decision, in 1965, to develop the Mineral King Valley game refuge located in the California Sierra Nevadas. The original Forest Service Prospectus³ called for a three million dollar, 80-acre development. The plan included ski lifts, tramways, parking, hotel accommodations and necessary sanitation, supply and maintenance facilities.⁴ Despite Sierra Club's (Club) persistent efforts to challenge the original decision to develop the valley, the Forest Service accepted Walt Disney Enterprises' vastly expanded plan.⁵ There had been no public notice or hearing.⁶ In addition to the main development, an improved road and high voltage power line which would traverse nine miles of the Sequoia National Forest were planned.⁷ Before the road construction contract could be awarded, however, the Club sought and obtained a preliminary injunction⁸ on the grounds that the Forest and Park Services, and the Secretaries of Agriculture and the Interior had exceeded their respective statutory authority, acted in violation of

1. 405 U.S. 727 (1972).

2. *Id.* See also 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.07 (1958).

3. 405 U.S. at 729. The terms of the Prospectus which described the project and invited bids are set out in Browning, *Mickey Mouse in the Mountains*, HARPERS MAGAZINE, Mar. 1972, at 68.

4. Browning, *supra* note 3.

5. The Disney development proposal included 22 to 27 ski lifts, a 3,600 car garage, a 1,030 room hotel with lodging for 3,310 people, restaurants, boutiques, a theater, equestrian and convention centers, indoor and outdoor pools, a skating rink, hospital, heliport and excursion trains from the garage to the lodge. It is estimated that 14,000 people will visit the area daily. In addition to the original 80-acre site, the Forest Service issued a year-to-year lease on 300 more acres. *Id.*

6. 405 U.S. at 730 n.2. See 36 C.F.R. § 211 (1972); 43 C.F.R. § 4 (1972). Both the Forest Service and the Department of the Interior have regulations requiring public hearings on proposed projects. *Id.*

7. 405 U.S. at 729, 758.

8. *Sierra Club v. Hickel*, Civil No. 51464 (N.D. Cal., Aug. 4, 1969).

national park regulations and failed to hold proper public hearings.⁹ On appeal, defendant agency successfully challenged the Club's standing to sue. The complaint did not assert that the Club's property, organization or its individual members would be harmed by the decision.¹⁰ Hence, the injunction was vacated due to the Club's failure to show either irreparable injury or a likelihood of success on the merits.¹¹

The court of appeals treated the Club's suit as an attempt to judicially overrule a legislative decision and concluded:

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 the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority.¹²

Apparently this language caused the Club to refrain from alleging an individualized injury on appeal. The Club's reply brief argued that the circuit court's reasoning left the Club with no chance of success.¹³ The Club could have asserted individualized injury to itself or its members, but they would have been faced with the answer that "assertion of a private, unique injury . . . does not warrant an injunction adverse to a competing public interest."¹⁴ The result would have been a bar to injunctive relief. Alternatively, they could have alleged prospective harm to the general public interest, but the result would have been a loss of standing for failure to assert a private, unique injury.¹⁵ In denying that no remedy existed, the Supreme Court, in a four to three decision, affirmed the dismissal without prejudice to enable the Club to include an allegation of individualized injury in its complaint.¹⁶

9. *Id.* at ———. In addition to violations of public hearing requirements, the Sierra Club alleged that the Forest Service had granted more acreage to the project than allowed by 16 U.S.C. § 497 (1970), and that the road and power line grants violated 16 U.S.C. §§ 1, 41, 43 (1970).

10. *Sierra Club v. Hickel*, 433 F.2d 24, 30 (9th Cir. 1970).

11. *Id.*

12. *Id.*

13. 405 U.S. at 740 n.15.

14. *Id.*

15. *Id.*

16. *Id.* at 735-36 n.8.

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The majority rationale was based on two theories. First, a party initiating judicial review of agency action may represent the public only if it first has standing in its own right because either its corporate self or aggregate membership has suffered "injury in fact."¹⁷ Thus, although the Court did not question the allegations that "the development would destroy . . . the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations," it held that "the party seeking review must be himself among the injured."¹⁸ Secondly, the Court believed that without a requirement of individualized injury, there would be no way to exclude "organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process."¹⁹

Justices Douglas, Blackmun and Brennan dissented. Justice Douglas argued for adoption of a rule that would allow standing to the natural resources themselves—to be represented by those willing to protect the endangered resource.²⁰ Douglas distinguished responsible environmentalists from persons who are merely caught up in the news and flock to defend the latest issue.²¹ Justice Blackmun believed the merits of the case too important to be denied consideration by inflexible rules and proposed alternative solutions. He argued that the Sierra Club either be allowed to amend its complaint on appeal or be afforded standing under a liberalized rule that would include groups or persons with long-standing sincerity and dedication to improving environmental quality.²² Justice Brennan agreed with Justice Blackmun's second alternative.²³

Standing to sue is basically a control technique designed to insure that the parties seeking access to the courts will truly represent the legal interests or positions they assert. The belief is that the more directly threatened a party is, the more diligent he will be in present-

17. *Id.* at 734-35.

18. *Id.* at 735.

19. *Id.* at 740.

20. *Id.* at 741. See also Stone, *Should Trees Have Standing, Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

21. 405 U.S. at 752.

22. *Id.* at 757-58.

23. *Id.* at 755.

ing the issues.²⁴ This in turn sharpens the focus of the suit. In administrative law, the test has crystallized into one of "injury in fact" or a showing that the plaintiff's interests are or will be directly threatened by agency action.²⁵ For many years economic injury alone was recognized as sufficient to confer standing.²⁶ In the 1950's, however, the Court expanded the scope of protection to include consumers of regulated products,²⁷ as well as persons or groups alleging injury to aesthetic, environmental, scenic and historic values.²⁸ The persistent question has been whether the requisite directness of injury to those asserting non-economic values is met by groups alleging only the public's interest in environmental preservation. Generally, that question is answered in the negative, but initiators who can represent the public interest only after a showing of direct injury are distinguished from intervenors into an ongoing suit in that the latter are deemed only to be raising related issues that the court could raise on its own motion.²⁹

Despite a general trend toward liberalized standing in other circuits,³⁰ the Ninth Circuit has increasingly refused to grant standing to public interest groups. The underlying rationale of the requirement

24. See generally THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 599-601 (N. Small & L. Jayson eds. 1964) and cases collected therein.

25. *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); *Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Cramp v. Board of Pub. Educ.*, 368 U.S. 278 (1961); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970); *Citizens Comm. v. Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963); *Lee v. CAB*, 225 F.2d 950 (D.C. Cir. 1955); *State v. Pennsylvania-New York Cent. Transp. Co.*, 323 F. Supp. 487 (D. Del. 1971); *Coalition for United Community Action v. Romney*, 316 F. Supp. 742 (N.D. Ill. 1970); *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20 (S.D.W. Va. 1969), *aff'd*, 429 F.2d 423 (1970); *American President Lines v. Federal Maritime Bd.*, 112 F. Supp. 346 (D.D.C. 1953).

26. See, e.g., *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1967); *City of Chicago v. Atchison T. & S.F.R. Co.*, 357 U.S. 77 (1958); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

27. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

28. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

29. See K. DAVIS, *supra* note 2.

30. Davis, *The Liberalized Law of Standing*, U. CHI. L. REV. 450 (1970).

seems to be the fear that the courts would be flooded by public interest suits attempting to overturn agency decisions.

In *Brooks v. Volpe*,³¹ the court, in denying standing to three conservation groups³² attempting to initiate a suit to enjoin a highway project on the border of a campground, said:

The requirement that litigants have standing to sue is not met by an association, such as [any one of] these, simply because the organization has as its purpose such laudable goals as preservation of the scenic, recreational, and wilderness values of areas. . . .³³

Perhaps the strongest statement against giving standing to groups alleging only a publicly shared interest in the outcome is contained in *Alameda Conservation Association v. State of California*.³⁴ In that case, both individuals and the Alameda Conservation Association (Alameda) attacked the constitutionality of a California statute under which a salt company claiming ownership of submerged land in San Francisco Bay had commenced land filling operations. The complaint alleged irreparable injury and petitioned for injunctive relief. The individuals alleged they lived near the Bay and that the value of their homes would be substantially decreased by the flushing and cooling effect of the Bay on the climate. Alameda merely alleged a publicly shared interest in preserving the natural characteristics of the Bay.³⁵ Again the individuals prevailed, but Alameda's complaint was dismissed by the court with its statement that:

However well intentioned the members may be, they may not by uniting create for themselves a super-administrative agency or a *parens patriae* official status with the capability of over-seeing and of challenging the action of the appointed and elected officials of the state government. . . .

Were it otherwise the various clubs, political, economic and social now or yet to be organized, could wreak havoc with the administration of government, both federal and state. *There are other forums where their voices and their views may be effectively*

31. 329 F. Supp. 118 (W.D. Wash. 1970).

32. *Id.* at 119. The three clubs were The North Cascades Conservation Council, The Alpine Lakes Protective Society and The Federation of Western Outdoors Clubs.

33. *Id.* at 119-20.

34. 437 F.2d 1087 (9th Cir.), *cert. denied*, 402 U.S. 908 (1971).

35. *Id.*

presented, but to have standing to submit a “case or controversy” to a federal court, something more must be shown.³⁶ (*Emphasis added.*)

Clearly, *Morton* is the logical outgrowth of the *Brooks* and *Alameda* reasoning. There is no clear indication, however, that governmental agency functions will be halted by large numbers of intervention suits. Generally, the courts have been reluctant to limit standing on the basis of the “court flooding” argument: first, because the reason is considered insignificant in comparison to the issues involved;³⁷ and second, because the agency review statutes severely limit both the time of filing for review and the number of jurisdictions in which petitions for review may be filed.³⁸

Moreover, there is an alternative method, long recognized in other circuits, which allows wide and responsible public participation together with objective criteria by which frivolous challenges can be excluded. In *Scenic Hudson Preservation Society v. Federal Power Commission*,³⁹ the Society was held to have standing to challenge the Federal Power Commission’s authorization of a federal dam project which would inundate an area rich in colonial history and scenic beauty. The basis for standing was that “those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of ‘aggrieved’ parties under [the Federal Power Act].”⁴⁰ Similarly, *Izaak Walton League of America v. St. Clair*⁴¹ held that the League’s Illinois chapter had demonstrated requisite adversity by virtue of its long-standing activity in conservation matters.⁴² An Arkansas federal district court case, *Environmental Defense Fund v. Corps of Engineers*,⁴³ allowed a New York corporation to join five local conservation societies in a petition to enjoin an Army Corps of Engineers’ project which allegedly would pollute Ozark waterways. The court said “There can be no doubt that the corporate plaintiffs are interested and antagonistic enough to present the issues vigorously

36. *Id.* at 1090.

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

38. See, e.g., *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

39. 354 F.2d 608 (2d Cir. 1965).

40. *Id.* at 616.

41. 313 F. Supp. 1312 (D. Minn. 1970).

42. *Id.* at 1317.

43. 325 F. Supp. 728 (E.D. Ark. 1971).

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and with . . . concrete adverseness. . . ."⁴⁴ No individual interest was asserted. Finally, in *Cape May County Chapter, Inc. and Izaak Walton League of America v. Macchia*⁴⁵ the League was afforded standing to challenge a dredging permit which allegedly would have allowed destruction of an unusual marine life community. The basis for standing was the interest exhibited by the League in the past.⁴⁶

The policy reasons behind liberalized standing seem more sound than the rationale to the contrary as expressed in *Morton*. First, intervention suits by groups such as the Sierra Club have been recognized as necessary to implement the purposes of the National Environmental Policy Act⁴⁷ and its requirement that all agencies take the environmental impact of proposed projects into account before issuance of permits.⁴⁸ Second, the criteria of long-standing interest, ability and willingness to research and finance litigation provide natural requirements by which the courts can control access to the review machinery. Third, a realistic, practical assessment of the limited number of persons or groups who are truly capable of maintaining public interest suits is presented.⁴⁹ Finally, contrary to the claim that there would be a flood of litigation, defendant agencies are free to move for class action designation of suits under Rule 23 of the Federal Rules of Civil Procedure⁵⁰ to prevent repetitive harassment.

The law seems to be that a conservationist society does not have standing to initiate judicial review of agency actions unless it alleges some individualized injury to its property, activities or members. Any trend toward a more liberalized standing requirement has been extinguished, but only by a four to three decision.

44. *Id.* at 735-36.

45. 329 F. Supp. 504 (D.N.J. 1971).

46. *Id.* at 511. Four other cases, *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Upper Pecos Ass'n v. Stans*, 328 F. Supp. 332 (D.N.M. 1971); *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971); *Environmental Defense Fund v. Corps of Eng'rs*, 324 F. Supp. 878 (D.D.C. 1971), although frequently cited as standing for the same proposition, are of questionable authority since plaintiffs in the above-mentioned cases actually alleged individualized injury to their respective members.

47. 42 U.S.C. §§ 4331 *et seq.* (1970). See generally Note, *A Preliminary Assessment of the National Environmental Policy Act of 1969*, 1973 URBAN L. ANN. 209.

48. 42 U.S.C. § 4332(c) (1970).

49. 313 F. Supp. at 1317.

50. FED. R. CIV. P. 23. See, e.g., *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (Jud. Pan. Mult. Dist. Lit. 1968).

While we increasingly rely on agencies to fill in the complexities of Congressional policy, public access to the courts is being denied to those best able to articulate possible shortcomings in agency actions. Knowledgeable and dedicated groups (whether environmentally-oriented or not) who are in a better position to analyze these complex agency actions, but are without the requisite directness of injury, must now either turn to the legislatures or hope the new make-up of the Supreme Court will result in a reconsideration of the standing argument. Thus, the decision in *Morton* extends far beyond the immediate environmental question.

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