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Standing Problems - Sierra Club v. Hickel, 433 F.2d 9th Cir. 1970, The

V. Henry Rothschild III

COMMENT
THE STANDING PROBLEMS—SIERRA CLUB v. HICKEL, 433 F.2d (9th Cir. 1970) †

In the case of *Sierra Club v. Hickel,* one of the questions before the court was: If hundreds of acres of national forest are ordered for development into an all-year recreational area, does a conservation club with nationwide membership of close to 80,000 suffer an injury sufficient for a federal court's review?

A definitive answer to this question is of considerable importance, particularly in an era when both governmental agencies and private organizations are mushrooming, and the points of frictional contact between such public and private concerns are inevitably increasing.

The legal issue raised is that of standing to sue in federal court. Under Article III, Section 2 of the U.S. Constitution, the "case or controversy" clause, a federal court lacks the jurisdiction to entertain any action unless the claimant can show that he has been injured.

Traditionally and particularly as it was shaped by early 20th century case law, the test for standing was restrictive,[1] in that the alleged injury had to be actual, personal and direct. Only when " . . . the right invaded [was] a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confer[red] a privilege . . . "[2] was the complainant allowed standing. Nothing short of violation of "a private substantive legally protected interest . . . "[3] would suffice.

Today, the restrictive rule is undergoing important change. Modern tendency of the court is to stress the public nature and effect of the injury suffered, with marked de-emphasis on the plaintiff's personal "legal interest" injury.[4]

Last year, in *Association of Data Processing Service Organization, Inc. v. Camp,*[5] the U.S. Supreme Court formally recognized the

†Certiorari has been granted by the United States Supreme Court. 91 S. Ct. (1971), 39 U.S.L.W. 3353 (U.S. Feb. 22, 1971).

1. Davis, *The Liberalized Law of Standing,* 37 U. Chi. L. Rev. 450, 469 (1970).

2. Tennessee Elec. Power Co. v. T.V.A., 306 U.S. 118, 137-38 (1939).

3. Assoc. Industries v. Ickes, 134 F.2d 694, 700 (2d Cir. 1943).

4. Sometimes termed "the private attorney general" approach, the rationale is simple, but sensible. Challenge of official agency action by a party whose concern is unofficial, but representative of community or public concern, will be entertained. Such allowance is based primarily on the court's awareness that if this particular plaintiff is denied standing, the legality of the agency's act might feasibly escape judicial review. The stress is on insuring proper exercise of agency authority. Because the plaintiff offers the court such opportunity, for the sake of convenience and justice, he is transformed into an attorney general—his claim being that of the community. *See* FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

5. Ass'n of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150 (1970).

modern approach, and established a guide for applying the liberalized law.

Professor Davis, in his most recent article,[6] analyzes that decision:

> The old test of "a recognized legal interest" was specifically rejected. In its place were two new tests. The first, based on Article III, was "injury in fact, economic or otherwise." The Court found this test satisfied by the injury from new competition. The second test . . . was "whether the interest sought to be protected by the complainant is arguably within the zone of the interests to be protected or regulated by the statute or constitutional guarantee in question."

In light of these new legal developments reflecting the liberalized trend, how then did the *Sierra* court resolve the question before it?

The U.S. District Court for the Northern District of California determined in an unreported decision, that Sierra Club had suffered sufficiently to be allowed access to the courtroom.

The Court of Appeals for the Ninth Circuit reversed by a two-to-one majority.

The court acknowledged the *Camp* decision. It concisely and accurately recapitulated the liberal significance of that holding: " 'Standing to sue', as the phrase indicates, [now] refers to the posture of the plaintiff, not the 'legal interest' to be unravelled."[7] It recited the new two-part rule, actually quoting it from the text of the *Camp* opinion. Then, by an analysis which effectively ignored the new test, the court proceeded to a reversal of the District Court's holding:

> *The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened.* Certainly it has an "interest" in the sense that the proposed course of action indicated by the Secretaries does not please its officers . . . . [but w]e do not believe such club concern without a *showing of more direct interest* can constitute standing in the legal sense. . . .[8] We do not believe that the . . . complaint alleges that . . . its members possess a sufficient interest for standing to be conferred. There is no allegation in the complaint that members . . . would be affected by the actions of the defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them (emphasis added).[9]

The *Sierra* court's decision appears to revolve around a new concept—the "directness of interest injured" standard. Application of such a standard points to the unavoidable inquiry as to whether the

6. Davis, *supra* note 1, at 453.
7. Sierra Club v. Hickel, 433 F.2d 24, 31 (9th Cir. 1970).
8. *Id.* at 30.
9. *Id.* at 33.

plaintiff's claim is enforceable at law. This search for a legal remedy goes to the merits, and *Camp*, very specifically rejected such a search for the substantive value of the claim as a basis for deciding standing.[10]

In effect, the court has reverted to an application of the "legal interest" test. It is this error in approach which culminates in its ultimate error in the decision. If the court had followed the letter and spirit of the *Camp* test, the results would have been as follows:

The initial requirement is for a finding of "injury in fact."

The *Sierra* court quotes the *Camp* opinion: ". . . injury in fact, [may be] economic or otherwise."[11] It further concedes "[t]he adverse effect, of course, need not be economic, but, as the Supreme Court has recently observed, may be aesthetic, conservational or recreational."[12] The Supreme Court under the facts of *Camp* was satisfied that a business was injured in fact by the existence of new sales competition. Such a finding appears indicative of the breadth and liberality of this requirement.

In its complaint, Sierra Club asserted that it had taken a special interest in the conservation and sound maintenance of the national parks and forests, and particularly lands on the slopes of the Sierra Nevada Mountains; that such special interest would be "vitally affected" and "aggrieved" by the acts of constructing the proposed recreational development; that the Secretaries' acts of authorizing such construction were illegal—"administrative lawlessness"—in that they violated enumerated statutes.[13] It is more than mere likelihood that upon the facts as set out in the complaint, Sierra suffered damages sufficient to pass the initial requirement of "injury in fact."

Properly then, having found injury in fact, the court should move to the second phase of the test—Was the alleged injury *arguably* within the *zone* of interests to be protected or regulated by the statute or constitutional provision in question?

Judge Hamley, who dissented on the standing issue, provides the answer:

10. "The 'legal interest' test goes to the merits. The question of standing is different." Ass'n of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150, 153 (1970). Further, in a footnote, that "the existence or non-existence of a 'legal interest' is a matter quite distinct from the problem of standing." *Id.* at 153 n. 1.

11. *Id.* at 152.

12. Sierra Club v. Hickel, 433 F.2d 24, 32 (1970); *see also* Ass'n of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150, 154 (1970).

13. *See* 16 U.S.C. § 497 (1964), authorizing the Secretary of Agriculture to issue permits limited by maximum number of acres and years. Sierra's argument was that the Department of Agriculture was attempting to illegally circumvent this limit by granting additional lands for development based on a revocable permit. *See*, 16 U.S.C. § 45(c), contended by Sierra to prohibit the Secretary of the Interior from issuing permits for power transmission lines in the national forest without specific congressional authority.

> The Sierra Club represents thousands of members who have a deep interest in the aesthetic, conservational and recreational values *of a kind intended to be safeguarded by the statutes in question,* and the regulations and practices thereunder[14] (emphasis added).

Such a dissent is alone sufficient evidence of the "arguability" of Sierra's protected interest under the specified statutes.

The key to an affirmative resolution here is again the accent on liberality which marks this new test over the traditional one, now discarded.

Recall that standing to sue is a judicial concept, distinct from actual adjudication of the case. A grant of standing is by no stretch of the imagination the court's guarantee that the plaintiff will prevail. It means only that the court can accept jurisdiction—it has the power to hear the parties' arguments, see the evidence submitted and determine the issues in controversy. The final decision depends on the substantive law.

There exists an argument that the courts will be inundated by a wave of newly unleashed litigants if standing is liberally meted out. A realistic counter, the truth of which has been borne out in numerous cases, is that ". . . opening the doors to anyone 'injured in fact' will not appreciably increase the number of parties who seek to litigate. It will cause an enormous drop in the huge volume of litigation in the federal courts about the complexities of the law of standing."[15] *Sierra Club v. Hickel* is one of the numerous cases that support this contention. Very close to 50 percent of the court's entire opinion is devoted to a confused and confusing explanation of what standing is, and why ultimately it is to be denied. By allowing a hearing on the merits, the court would have been half way into determination of its next case, with a much fuller and more satisfying judicial result.

When it is considered that 75 percent of the public lands are located within the jurisdiction of the Ninth Circuit,[16] the apparent confusion and conservatism of that court in its view of standing take on added significance. Here denial of standing to the Sierra Club serves to shield official agency action from judicial scrutiny in a geographical area where such action should be most exposed to review.[17] Such an outcome can only serve as detrimental precedent for the "private attorney general."

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14. Sierra Club v. Hickel, 433 F.2d 24, 38.
15. Davis, *supra* note 1, at 471.
16. Carver, *The Federal Proprietary Functions–A Neglected Aspect of Administrative Law,* 19 A.B.A. Ad. Law Rev. 107, 113 (1966); *see* Comment, *Standing of Conservationist Organization to Challenge Federal Agency Action as "Private Attorney General"–Sierra Club v. Hickel,* 433 F.2d 24 (9th Cir. 1970), 5 Suffolk L. Rev. 513, 524 (1971).
17. Comment, *supra* note 16, at 524.