

# STANDING TO CHALLENGE THE DISPOSITION OF LAND IN ALASKA: A PROPOSED REMEDY FOR THE INADEQUACIES IN THE CURRENT CASE LAW

## I. INTRODUCTION

Since 1977, the Alaska Supreme Court has decided four cases evaluating the standing of the taxpayers and citizens of Alaska to bring suit challenging the disposition of Alaska lands by state or local officials.<sup>1</sup> The court granted the plaintiff standing to sue in three cases, and denied the plaintiff standing to sue in one. The defendant in each case was the Alaska governmental official or body responsible for the challenged land disposition. Taken together these four cases are confusing and difficult to reconcile. This note examines the four cases and the basis of the taxpayer's and citizen's standing to sue. The note concludes by recommending a single, clear doctrine controlling the standing of Alaska's taxpayers and citizens to challenge the governmental disposition of land in Alaska.

## II. BACKGROUND OF STANDING TO SUE IN ALASKA

Standing to sue is a jurisdictional doctrine used to determine whether a party is sufficiently affected by a controversy to have it decided by the courts.<sup>2</sup> Before a court may hear and decide a dispute, it must determine that the plaintiff has standing to bring the suit in that court. The trend in both federal and state courts in recent years has been to move away from a restrictive and exclusionary approach to standing and toward a policy of increased accessibility to judicial forums.<sup>3</sup> This liberal trend is evident in decisions of the Alaska courts, which have interpreted standing broadly to favor such increased accessibility.<sup>4</sup>

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1. The four cases are: *Hoblit v. Comm'r of Natural Resources*, 678 P.2d 1337 (Alaska 1984); *Carpenter v. Hammond*, 667 P.2d 1204 (Alaska), *appeal dismissed*, 464 U.S. 801 (1983); *Gilman v. Martin*, 662 P.2d 120 (Alaska 1983); *State v. Lewis*, 559 P.2d 630 (Alaska), *cert. denied*, 432 U.S. 901 (1977).

2. BLACK'S LAW DICTIONARY 1260 (5th ed. 1979).

3. *Coghill v. Boucher*, 511 P.2d 1297, 1303 (Alaska 1973).

4. *See, e.g., Moore v. State*, 553 P.2d 8, 23 (Alaska 1976).

To have standing to sue in Alaska courts, the plaintiff must have a personal stake in the outcome of the litigation.<sup>5</sup> This stake is evidenced by an injury-in-fact.<sup>6</sup> The Alaska Supreme Court has noted that “[w]hile the injury-in-fact requirement has been relaxed, it has not been abandoned, as it is necessary to assure the adversity which is fundamental to judicial proceedings. However, the degree of injury need not be great.”<sup>7</sup>

The federal standing to sue doctrine arises from the requirement set forth in article III, section 2 of the United States Constitution that a “case or controversy” exist before federal courts are empowered to decide a case. This constitutional provision has been interpreted to mean that the suit must be presented “in an adversary context and in a form historically viewed as capable of judicial resolution.”<sup>8</sup> Because article III, section 2 does not apply to state courts, and because the Alaska Constitution has no similar language, the Alaska standing requirements are essentially only court-created rules of judicial self-restraint.<sup>9</sup> Only Alaska precedent controls the Alaska doctrine of standing to sue.

In accordance with their liberal approach to standing questions in general, Alaska courts have broadly construed the standing requirements for taxpayers and citizens challenging the disposition of Alaska land.<sup>10</sup> This approach has increased the number of Alaska citizens who can attack state and local administrative actions disposing of state property.<sup>11</sup> Increased accessibility to judicial forums is a laudable policy objective. Problems exist in the pursuit of this objective, however, because the Alaska cases interpreting standing in the taxpayer and citizen suits regarding the disposition of land have not been consistent with each other. Furthermore, the cases have failed to clearly articulate a workable standard with which to evaluate standing controversies.

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5. *Id.*

6. *Wagstaff v. Superior Court*, 535 P.2d 1220, 1225 (Alaska 1975).

7. *Id.* (footnote omitted). See *Sisters of Providence, Inc. v. Dep't of Health & Social Serv.*, 648 P.2d 970, 974 (Alaska 1982); *Falcon v. Alaska Public Offices Comm'n*, 570 P.2d 469, 474 (Alaska 1977); *City of Homer v. Dep't of Natural Resources*, 566 P.2d 1314, 1318 (Alaska 1977).

8. *Falcon*, 570 P.2d at 475 (citing *Flast v. Cohen*, 392 U.S. 83, 101 (1968)).

9. *Id.* See *Sisters of Providence*, 648 P.2d at 974; *Moore*, 553 P.2d at 24 n.25 (noting that standing to sue in Alaska is a judicial rule of self-restraint which avoids abstract questions and advisory opinions).

10. *Wickersham v. Commercial Fisheries Entry Comm'n*, 680 P.2d 1135, 1139 (Alaska 1984).

11. See *Coghill*, 511 P.2d at 1303.

### III. THE *STATE V. LEWIS* TEST OF TAXPAYER AND CITIZEN STANDING

The leading case in Alaska on the standing of taxpayers and citizens to bring suit challenging the disposition of land is *State v. Lewis*.<sup>12</sup> *Lewis* resulted from a breakdown in the land selection process set forth in the Alaska Native Claims Settlement Act ("ANCSA") enacted in 1971.<sup>13</sup> Pursuant to ANCSA, Alaska Natives formed corporations and received rights to select lands in Alaska and to share in the sale of minerals from those lands. This procedure worked well with all the Native corporations except for Cook Inlet Region, Inc. ("Cook").<sup>14</sup> In an attempt to resolve the Cook difficulties, Alaska agreed to transfer land to the United States in order to augment the holdings from which Cook could select. Several Alaska taxpayers, who were not members of the Cook corporation, brought an action against the state, challenging the validity of this three-way exchange of land.<sup>15</sup> An Alaska superior court held that the special state statute authorizing Alaska's transfer of land to the United States was unconstitutional and enjoined the transaction. The Alaska Supreme Court reversed and held that the special statute was constitutional.<sup>16</sup>

In *Lewis*, the Alaska Supreme Court examined for the first time the issue of "whether a taxpayer without a direct financial stake in a particular government expenditure or a citizen who suffers no economic loss has standing to vindicate the public interest."<sup>17</sup> While the court noted that the suit resembled a typical taxpayer or citizen suit in many respects, it chose not to decide whether to extend its "liberal interpretation . . . to permit standing in all such suits."<sup>18</sup> The court held "only that under the particular facts involved here," the plaintiffs had a sufficient personal stake in the outcome to guarantee the adver-

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12. 559 P.2d 630 (Alaska), *cert. denied*, 432 U.S. 901 (1977).

13. 43 U.S.C. § 1601-28 (1982).

14. *Lewis*, 559 P.2d at 633. Cook had severe difficulties completing its land selections because of previous federal land withdrawals from Alaska, state land selections, and non-Native land settlement patterns. The other eleven regional Native corporations managed to avoid these problems with their land selections.

The United States Department of the Interior, Alaska, and Cook reached an agreement in an attempt to resolve Cook's difficulties. This agreement is entitled "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area." *Id.* at n.5. It is set out in H.R. REP. NO. 729, 94th Cong., 1st Sess. 35, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 2376, 2402.

15. *Lewis*, 559 P.2d at 632-34.

16. *Id.* at 633-34. This special legislative act is entitled An Act Relating to the Cook Inlet Land Exchange; and Providing for an Effective Date, ch. 19, 1976 Alaska Sess. Laws 1.

17. 559 P.2d at 634 (footnote omitted).

18. *Id.* at 634-35.

sity fundamental to judicial proceedings.<sup>19</sup>

Alaska courts had not previously been confronted with the exact standing question at issue in *Lewis*. The Alaska cases cited in *Lewis* were background cases articulating Alaska's general standing policy<sup>20</sup> and the need for an injury-in-fact.<sup>21</sup> The court seemed to base its decision entirely upon federal case law<sup>22</sup> and selected legal commentary.<sup>23</sup> The court based its conclusion that the plaintiffs had standing to sue on four factors:<sup>24</sup>

1. The plaintiffs alleged violations of two *specific* state constitutional limitations (on mineral alienation and special legislation);<sup>25</sup>
2. The transaction involved an enormous amount of land and its potential economic impact on the state treasury was vast;<sup>26</sup>
3. The plaintiffs alleged injury beyond economic injury (the loss of "mineral resources in land originally selected from the federal gov-

19. *Id.*

20. *Id.* at 634, n.7.

21. *Id.* at 635, n.10.

22. *Id.* at 634 nn. 8-9, 635 & n.14. The court cited and briefly discussed: *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Flast v. Cohen*, 392 U.S. 83 (1968).

23. *Lewis*, 559 P.2d at 634 n.8, 635 n.13. The court cited and briefly discussed: 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22.09 (1958), §§ 22.09-.10 (Supp. 1965); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968) [hereinafter cited as *Standing*]; Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1970).

24. *Lewis*, 559 P.2d at 635.

25. *Id.* Those specific violations are the restraints on the alienation of mineral resources in ALASKA CONST. art. VIII, § 9, and restrictions on local and special legislation in ALASKA CONST. art. II, § 19.

*Art. VIII, § 9. Sales and Grants.* Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservation of access shall not unnecessarily impair the owner's use, prevent the control of trespass, or preclude compensation for damages.

*Art. II, § 19. Local or Special Acts.* The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination. Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected.

26. *Lewis*, 559 P.2d at 635. The court did not estimate how great the economic injury to the state treasury might be if the challenged transaction was permitted. The land conveyed by Alaska to the United States in the *Lewis* transaction appears to be in excess of 470,000 acres. H.R. REP. NO. 729, 94th Cong., 1st Sess. 48-50, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 2376, 2415-17.

ernment under the Statehood Act”);<sup>27</sup> and

4. There was no one in a better position to complain than the plaintiffs.<sup>28</sup>

Because of “the totality of the circumstances” in *Lewis* and “the strong policy favoring review of alleged *specific* constitutional violations by state officials,” the court held that it could appropriately reach the merits of the controversy and granted the plaintiffs standing to sue.<sup>29</sup>

The *Lewis* court chose not to make its decision applicable to all taxpayer and citizen suits.<sup>30</sup> Later decisions, however, have applied the *Lewis* factors to taxpayer and citizen suits with different factual situations than *Lewis*. Some of these decisions are arguably inconsistent with *Lewis*. In order to correctly apply the *Lewis* factors to later controversies with dissimilar facts, it is important to first understand the legal doctrine upon which *Lewis* is based.

In *Lewis*, the Alaska Supreme Court relied heavily on the United States Supreme Court decision in *Flast v. Cohen*.<sup>31</sup> In *Flast*, the Supreme Court modified the former principle that a federal taxpayer had no standing to challenge the legality of a federal expenditure.<sup>32</sup> The Court decided that “Taxpayers have standing to challenge the constitutionality of federal expenditures under ‘specific clauses’ of the Constitution, and the Establishment and Free Exercise Clauses of the First Amendment are ‘specific clauses.’”<sup>33</sup> Unfortunately, the Court did not state which, if any, other clauses the Court would regard as specific.<sup>34</sup> The Court held that alleged violations of specific constitutional limitations frame the issues with specificity and adverseness, are pursued with vigor, and therefore are appropriate for judicial resolution.<sup>35</sup>

The *Lewis* decision also relied on the reasoning of Professor Kenneth Culp Davis. Davis’s view, adopted in *United States v. Students*

27. *Lewis*, 559 P.2d at 635. How this injury is distinct from economic injury is not clear, but it may relate to Alaska’s political influence and self-reliance. The court states that it is “inclined to recognize that harm to nontraditional and intangible interests may be sufficient to create an ‘injury-in-fact,’” *id.*, and cites *Standing*, *supra* note 23, for the proposition that an “identifiable trifle” is the basis for standing to fight out a question of principle. *Lewis*, 559 P.2d at 635, n.13.

28. *Id.* at 635.

29. *Id.* at 636 (emphasis added).

30. See *supra* notes 18-19 and accompanying text.

31. 392 U.S. 83 (1968).

32. This principle was established by *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). See 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:23-24 (2d ed. 1983).

33. 4 DAVIS, *supra* note 32, § 24:24 at 299 (discussing *Flast*, 392 U.S. at 102-04).

34. 4 DAVIS, *supra* note 32, § 24:24 at 300.

35. *Flast*, 392 U.S. at 106.

*Challenging Regulatory Agency Procedures* (SCRAP),<sup>36</sup> a case cited by the Alaska Supreme Court in *Lewis*, is that "an identifiable trifle is enough for standing to fight out a question of principle: the trifle is the basis for standing and the principle supplies the motivation."<sup>37</sup> According to Davis, it is clear under federal law "that standing may rest upon a trifle, and it is equally clear that at least a trifling interest of the plaintiff is always required."<sup>38</sup> The *Lewis* opinion cited three other federal cases<sup>39</sup> in which the Supreme Court denied standing for want of the trifling interest.<sup>40</sup> Davis's trifling interest language had been quoted in at least one earlier Alaska Supreme Court decision.<sup>41</sup>

The *Lewis* court does not identify the specific constitutional limitations that might satisfy the first of the four crucial standing requirements it enunciated. The *Flast* decision is likewise of little assistance to courts attempting to identify such limitations.<sup>42</sup> *Flast* stated that constitutional limitations affecting taxing and spending by the United States government are specific restrictions, but did not delineate other sufficiently specific restrictions.<sup>43</sup> *Lewis* clearly goes beyond *Flast* by holding that a constitutional limitation is a specific restriction if it directly restricts the disposal of mineral resources affecting the state's revenue, or directly restricts the authority of the state government to enact special legislation. Yet the precise nature of a "specific constitutional limitation" remains unclear.

The second and third *Lewis* requirements for standing demand that the plaintiff allege that he has suffered or will suffer some objective injuries from the challenged action. The alleged objective injuries suffered by the taxpayers and citizens in *Lewis* are difficult if not impossible to measure, and seem to be no more than mere "trifling" interests under Davis's terminology. They are remote and speculative. The magnitude of the land transaction may be enormous, and it may cause losses to the state treasury over several years, but the cost to one

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36. 412 U.S. 669, 689 n.14 (1973); see *supra* note 22.

37. *Standing*, *supra* note 23, at 613; see 4 DAVIS, *supra* note 32, § 24:18 at 283. This view is also quoted in *Lewis*, 559 P.2d at 635 n.13.

38. *Standing*, *supra* note 23, at 613.

39. 559 P.2d at 635 & n.14. The cases the court cited are: *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

40. See 4 DAVIS, *supra* note 32, at § 24:19. *Richardson* and *Reservists* clearly hold that if a plaintiff is to have standing, he must have suffered an injury, and a controversy without an injury is insufficient. *Id.* § 24:20 at 288. "[T]he attenuated character of the particular impact on the plaintiff should be relevant but not conclusive against jurisdiction." Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 304 (1961).

41. See *Wagstaff v. Superior Court*, 535 P.2d 1220, 1225 n.7 (Alaska 1975).

42. See, e.g., 4 DAVIS, *supra* note 32, at § 24:24.

43. 392 U.S. at 105-06.

individual taxpayer and citizen in Alaska is likely to be insignificant. The individual plaintiff's noneconomic interest in having the state retain mineral rights is likewise insubstantial. The harm alleged by the plaintiffs is of small value when spread among all taxpayers and citizens in Alaska. But there is, nonetheless, some harm alleged. The court thus seemed to endorse the Davis view that a trifling injury supports standing to sue.

The fourth standing factor in *Lewis* — that no one is in a better position than the plaintiff to bring suit — was not adopted from the federal case law or the legal commentary that *Lewis* examined. This factor was introduced in an earlier Alaska standing case, which arose “in a slightly different context.”<sup>44</sup> This factor is attenuated in importance by the court's own recognition that “the requisite injury cannot be created by the absence of a more appropriate plaintiff.”<sup>45</sup> Nevertheless, the lack of a more appropriate plaintiff remains a factor that Alaska courts must consider under *Lewis*.

In summary, the *Lewis* court decided that a taxpayer and citizen has standing to sue the state or local government when certain factors are present. The first factor is that the plaintiff must allege two violations of specific state constitutional limitations. The second and third factors require that injuries-in-fact be sustained by the plaintiff. These injuries need not be certain. The *Lewis* court was satisfied with speculative economic interests coupled with an interest in protecting the state from an allegedly unwise transaction. The fourth factor requires that no one be in a better position than the plaintiff to bring the action.

Since *Lewis* did not rule on all taxpayer and citizen actions, the presence of all four factors may not always be required. The court decided that the particular facts of *Lewis* mandated standing; it did not hold that standing would be denied in other less compelling factual situations. A case whose facts present less than all four factors may therefore also compel the court to grant a particular plaintiff standing to sue.<sup>46</sup>

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44. *Lewis*, 559 P.2d at 635 (citing *K & L Distrib., Inc. v. Murkowski*, 486 P.2d 351, 354 (Alaska 1971) (holding that a distributor has standing as a competitor to challenge a tax credit given to a brewery where taxpayer and citizen status was not alleged)).

45. *Id.*

46. At this point it is important to note that taxpayer and citizen suits to challenge land dispositions may possibly arise under the Alaska Administrative Procedure Act (“APA”), ALASKA STAT. § 44.62.010-.650 (1959). The fact that a suit is brought under the APA will not affect this note's analysis.

The APA provides that “An *interested person* may get a judicial declaration on the validity of a *regulation* by bringing an action for declaratory relief in the superior court.” *Id.* § 44.62.300 (emphasis added). A *regulation* is limited to a “rule, regulation, order, or standard of general application . . . adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it.” *Id.*

## IV. POST-LEWIS CASES

A. *Carpenter v. Hammond*

In the 1983 decision of *Carpenter v. Hammond*,<sup>47</sup> the Alaska Supreme Court elaborated on *State v. Lewis*.<sup>48</sup> *Carpenter* involved a challenge to the 1981 reapportionment of the Cordova, Alaska, electoral district, with Governor Hammond named as the defendant.<sup>49</sup> The plaintiff was a resident of Anchorage who alleged that his status as a registered voter gave him standing to challenge the reapportionment under article VI, section 11 of the Alaska Constitution.<sup>50</sup> The supreme court affirmed the trial court's finding that Carpenter's status as a registered voter did in fact give him standing,<sup>51</sup> but added that he also had standing as a taxpayer and citizen under the *Lewis* factors.<sup>52</sup>

The court held that *Lewis* stressed the following factors: two alleged violations of specific constitutional provisions, the land transaction's significant impact on the state treasury, and the lack of anyone in a better position than the plaintiff to litigate the complaint.<sup>53</sup> In *Carpenter*, however, there was only one alleged violation of a constitutional provision.<sup>54</sup> The only alleged injury to the plaintiff mentioned in the opinion was that the disputed drawing of election district lines

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§ 44.62.640(a)(3) (1970). An *interested person* is not defined but has been interpreted to require otherwise normal standing requirements. *Sisters of Providence*, 648 P.2d at 974 ("We have recognized the right of interested [persons] to challenge administrative decisions where the party demonstrates a sufficient personal stake in the outcome of the controversy."); *Coghill*, 511 P.2d at 1303-04. A state agency is defined as an "organizational unit of the executive branch." ALASKA STAT. § 44.62.640(a)(4) (1970).

The jurisdiction of the superior court to make a declaratory judgment is limited to the "case of an actual controversy within the state." *Id.* § 22.10.020(b) (1980). The requirement of an actual case or controversy in actions seeking declaratory relief does not differ from the standards applicable in other civil actions. *Jefferson v. Asplund*, 458 P.2d 995, 999-1000 (Alaska 1969).

The analysis for standing, therefore, is the same regardless of whether the suit is brought under the APA. In actuality, the APA has not been used frequently to bring pure taxpayer and citizen suits — probably because of its limited substantive applicability. The Alaska cases discussed in this note do not arise under the APA.

47. 667 P.2d 1204 (Alaska), *appeal dismissed*, 464 U.S. 801 (1983).

48. 559 P.2d 630 (Alaska), *cert. denied*, 432 U.S. 901 (1977).

49. 667 P.2d at 1205, 1208.

50. *Id.* at 1208-09. ALASKA CONST. art. VI, § 11 states: "Any qualified voter may apply to the superior court to compel the governor . . . to correct any error in redistricting or reapportionment."

51. *Carpenter*, 667 P.2d at 1209.

52. *Id.* at 1210.

53. *Id.*

54. *Id.* at 1208. The allegation was that the Cordova district's reapportionment violated ALASKA CONST. art. VI, § 6, which permits the governor to redistrict voting areas subject to the limitation that each district be a "contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. . . . Application must be filed within thirty days."



“arguably will have a significant impact on the state.”<sup>55</sup> Finally, the court held that no one was in a better position than the plaintiff to litigate the issues presented because no one else brought suit within the thirty-day period allowed by Alaska’s Constitution.<sup>56</sup>

It was unnecessary for the supreme court in *Carpenter* to discuss the *Lewis* factors after it recognized plaintiff’s standing as a registered voter under article VI, section 11. Its interpretation of *Lewis* is thus only dictum, but it does shed light upon the *Lewis* standing factors. The court apparently determined that “specific constitutional limitations” include a constitutional restriction on the governor’s authority, even if that restriction is completely unrelated to the state treasury. Also, under *Carpenter* the allegation of a single specific constitutional limitation will apparently satisfy the first *Lewis* requirement. With respect to the second and third *Lewis* factors, the court apparently reasoned that an “arguable” effect on the state (truly only a trifling interest) could be a sufficient injury-in-fact on which to ground standing, even though that effect is speculative and not economic. As for the fourth *Lewis* factor, the court apparently viewed the time to consider whether anyone is in a better position to complain than the plaintiff as being the time at which the case is decided, rather than the time at which the injury occurred. There were certainly persons in a better position than the plaintiff to challenge the reapportionment within the thirty-day period, had any of them cared to do so.<sup>57</sup> The lack of another timely challenge apparently creates a strong presumption that the plaintiff is in the best position to sue. This presumption further undermines the *Lewis* approach by lessening the significance of the fourth factor as a barrier to standing.

### B. *Gilman v. Martin*

The Alaska Supreme Court did not discuss *Lewis* in its 1983 decision of *Gilman v. Martin*.<sup>58</sup> In *Gilman*, residents of the Kenai Peninsula Borough challenged the validity of a borough land sale lottery ordinance involving 825 acres.<sup>59</sup> The ordinance required applicants to be residents of Kenai for at least one year before they became eligible to participate in the land sale lottery.<sup>60</sup> Martin, a member of the Kenai Assembly, filed suit against the borough of Kenai and Gilman, its mayor. Martin later added two plaintiffs who were new residents of

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55. 667 P.2d at 1210.

56. *Id.* at 1210, n.13; see ALASKA CONST. art. VI, § 6.

57. The plaintiff lived in Anchorage, which is a great distance from Cordova. Residents of Cordova were more closely affected by the improper districting and were, therefore, in a better position to challenge it.

58. 662 P.2d 120 (Alaska 1983).

59. *Id.* at 123.

60. *Id.* at 121.

Kenai and thus ineligible to participate in the lottery. The plaintiffs alleged that the ordinance violated the equal protection clauses of both the United States and Alaska Constitutions.<sup>61</sup> The superior court held the ordinance unconstitutional and the supreme court affirmed in part.<sup>62</sup>

The supreme court held that the standing of the two additional plaintiffs was "obvious" since they were directly prevented from participating in the land lottery.<sup>63</sup> The court then held that Martin had standing as a taxpayer and citizen.<sup>64</sup> The court held, without examining or citing any authorities, that:

Any resident or taxpayer of a municipality has a sufficient interest in the disposition of a *significant* number of acres of the municipality's land to seek a declaratory judgment as to the validity of the disposition. Thus, as a resident and taxpayer of Kenai, Martin has a sufficient personal stake in the outcome of this controversy to assure the adversity that is fundamental to judicial proceedings.<sup>65</sup>

The court did not define *significant*, but apparently 825 acres qualified as significant within the context of *Gilman*.

While *Lewis* was expressly not made controlling of all taxpayer and citizen suits against the government — thus allowing less compelling factual situations to warrant standing— *Gilman's* radical lowering of the standing threshold requires some analysis and discussion of precedent and authority, and not just an unexplained blanket assertion. *Gilman* should have addressed the *Lewis* analysis, especially since the *Carpenter* decision, which determined standing according to the *Lewis* factors, was decided by the supreme court during the same year as *Gilman*.

In *Gilman*, the supreme court strayed even farther from the *Lewis* rationale than it did in *Carpenter*. In fact, *Gilman* completely undermines the *Lewis* decision. The *Lewis* transaction involved 470,000 acres.<sup>66</sup> The interest each taxpayer and citizen in Alaska has in 470,000 acres is certainly much greater than the interest each taxpayer and citizen in Kenai has in 825 acres.<sup>67</sup> The *Lewis* decision's analysis of complicated factors would have been unnecessary if *Gilman* had

61. *Id.* at 122. See U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); ALASKA CONST. art. I, § 1 ("all persons are equal and entitled to equal rights, opportunities, and protection under the law").

62. The supreme court agreed that the statute was unconstitutional as a violation of equal protection, but found no violation of the Alaska gambling statute. *Gilman*, 662 P.2d at 121-22.

63. *Id.* at 123.

64. *Id.*

65. *Id.* (emphasis added).

66. See *supra* note 26.

67. See *infra* note 81.

been the controlling law, for the *Gilman* court undertook no analysis at all. After *Gilman* it is unclear whether a taxpayer or citizen challenging the disposition of Alaska land must allege violations of specific constitutional limitations, suffer injury, and be in the best position to challenge the government action, or must only allege the disposition of a "significant" amount of Alaska land.<sup>68</sup>

### C. *Hoblit v. Commissioner of Natural Resources*

In the 1984 decision of *Hoblit v. Commissioner of Natural Resources*,<sup>69</sup> the Alaska Supreme Court denied a taxpayer and citizen standing to challenge a state administrative decision to sell land adjoining his on Ismailof Island.<sup>70</sup> Hoblit's neighbor had applied for a preference right to purchase the disputed land. Alaska's Commissioner of Natural Resources approved the application and then gave public notice of the preference right and a deadline for any objections in the *Homer News* on four different dates.<sup>71</sup> The Commissioner reexamined the preference right following Hoblit's objection and concluded that it was properly granted. Hoblit then sued to challenge the decision and alleged standing as a taxpayer, a representative of the public interest, and a property owner.<sup>72</sup> The superior court dismissed the suit for a lack of standing.<sup>73</sup> The supreme court affirmed the denial of Hoblit's standing as a taxpayer but remanded for an inquiry to determine whether the possibility of future trespasses on Hoblit's land might qualify as an injury-in-fact, which would warrant standing.<sup>74</sup>

The supreme court in *Hoblit* examined *Lewis, Carpenter*, and

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68. Under the *Lewis* factors the plaintiffs in *Gilman* would have had no standing to sue. The only alleged violation of a constitutional limitation in *Gilman* was that the lottery was a violation of the equal protection clauses of the U.S. and Alaska Constitutions. In contrast to the alleged violations of constitutional limitations in *Lewis* and *Carpenter*, see *supra* notes 25, 42, 43, & 54 and accompanying text, the equal protection clause is a relatively unspecific limitation. It does not directly proscribe any particular authority of the state government or its agencies and subdivisions. Furthermore, while Martin may have sufficiently alleged an injury-in-fact in the litigation simply by being a resident of the municipality that was improperly attempting to dispose of its land, there were, unquestionably, persons in a better position than Martin to challenge the lottery. Two others with "obvious" standing joined Martin as plaintiffs in the same action. See *Gilman*, 662 P.2d at 123.

69. 678 P.2d 1337 (Alaska 1984).

70. *Id.* at 1338, 1341 (Hoblit lived on Ismailof Island, which is near Homer in the Kachemak Bay, off the Kenai Peninsula).

71. *Id.* at 1338. The Commissioner of Natural Resources may give a preference right to purchase or lease land from the state, under ALASKA STAT. § 38.05.035(b)(3) (1984), to any person who has made improvements in the land but has been denied title to it through error or omission of others.

72. 678 P.2d at 1339.

73. *Id.* at 1339-40.

74. *Id.* at 1341-42.

*Gilman* before deciding to deny *Hoblit* standing as a taxpayer. The court distinguished *Lewis* by stating that *Hoblit* did not allege a transaction of the size or with the potential economic impact of the transaction involved in *Lewis*.<sup>75</sup> The court did not distinguish *Carpenter* and did not explain why *Carpenter* had standing as a taxpayer and citizen when he did not allege a transaction anywhere near the magnitude of that in *Lewis* or any potential economic impact. The court distinguished *Gilman* by declining to reduce the meaning of a "significant number of acres" from 825 to twenty.<sup>76</sup> The *Hoblit* decision, however, is inconsistent with the *Lewis*, *Carpenter*, and *Gilman* decisions, and the supreme court should have granted *Hoblit* standing to sue.

*Hoblit* had standing under the *Lewis* and *Carpenter* tests. *Hoblit* alleged two violations of constitutional limitations, although these are not mentioned in the supreme court's decision. He alleged that the Commissioner did not give proper notice of the preference right, thereby violating article VIII, section 10 of the Alaska Constitution, which provides for such notice when state lands are leased or disposed.<sup>77</sup> *Hoblit* also alleged a violation of article VIII, section 17 of the Alaska Constitution, which prohibits disposal of land through personal favoritism.<sup>78</sup> The latter allegation may not qualify as a specific constitutional limitation because it is an indirect restriction, but the first allegation seems to involve a specific constitutional limitation. It prevents the Commissioner of Natural Resources and the Alaska Division of Land from disposing of lands except under certain procedures

75. *Id.* at 1341.

76. *Hoblit*, 678 P.2d at 1341. In *Hoblit* the supreme court leaves open two difficult questions: What number of acres between twenty and 825 is significant? To whom must the land be significant — the state, the plaintiff, or the defendant?

77. Reply to Appellee's Brief at 9, 10, 17-18, *Hoblit*, 678 P.2d 1337 (1984). ALASKA CONST. art. VIII, § 10 states: "Public Notice. No disposal or leases of state lands, or interests therein, shall be made without prior public notice . . . as may be required by law." ALASKA STAT. § 38.05.945(b) states:

Notice . . . shall be given at least thirty days before the action by publication in newspapers . . . of general circulation in the vicinity of the proposed action and . . . posting in a conspicuous location in the vicinity of the action, notification of parties known or likely to be affected by the action, or another method calculated to reach affected persons.

*Hoblit* alleged that Ismailof Island is remote and that there is no newspaper of general circulation in the area. ALASKA STAT. § 38.05.945(b) (1984) applied through art. VIII, § 10 thus required notice of the preference right to be posted.

78. *Hoblit*, 678 P.2d 1337; Appellee's Brief at 35, n.17, *Hoblit*; Reply to Appellee's Brief at 18, *Hoblit*.

The constitutional provision that *Hoblit* alleged had been violated, ALASKA CONST. art. VIII, § 17 states: "Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated. . . ."

specified by law.<sup>79</sup> Hoblit alleged at least the same number of violations of specific constitutional limitations as the plaintiffs alleged in *Carpenter* and arguably the same number as the plaintiffs in *Lewis* alleged.

Hoblit also alleged an injury-in-fact of more than trifling proportions. As a land owner on a small, isolated island, he was alarmed by the disposal of neighboring land in a seemingly improper manner. He was alarmed by a change in the state's easements on the land, which he claimed would result in trespassing upon his property.<sup>80</sup> Hoblit's alleged injury-in-fact is at least as great as the injuries alleged by the plaintiffs in *Carpenter* and *Lewis*.

Hoblit also satisfied the final *Carpenter* and *Lewis* requirement, and thus had standing under the rationale of those two cases. There was no one in a better position to sue than Hoblit. As in *Carpenter*, no one else brought suit before the objection period expired. Also, there are only a few residents of Ismailof Island, none of whom were in a better position to complain than Hoblit, whose property adjoined the disputed land.

Hoblit also had standing under the *Gilman* test. Hoblit's interest in the disposition of twenty acres of land on a small, sparsely populated island is much greater than Martin's interest in 825 acres of the Kenai Peninsula in *Gilman*.<sup>81</sup> Hoblit clearly alleged at least as great an injury as the plaintiff in *Gilman*. The court should have granted Hoblit standing to sue as a taxpayer and citizen challenging the disposition of state land.

#### V. A SIMPLE SOLUTION TO THE CONFUSION CREATED BY THE CASE LAW

The Alaska Supreme Court decisions in *State v. Lewis*,<sup>82</sup> *Carpenter*

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79. See *United States Smelting, Refining, and Mining Co. v. Local Boundary Comm'n.*, 489 P.2d 140, 143 (Alaska 1971) (holding that while some types of public policy questions are beyond the court, others, "such as whether statutory notice requirements were followed, are readily decided by traditional judicial techniques").

80. 678 P.2d at 1341.

81. In 1980 Kenai Peninsula Borough's population was 4326, while Alaska's was 400,142. COMMERCIAL ATLAS AND MARKETING GUIDE 223 (Rand-McNally Co. 112th ed. 1981). The 825 acres in *Gilman* divided by Kenai's 4326 residents equals an interest of less than 0.20 acres per resident of Kenai. The 470,000 acres in *Lewis* divided by 400,142 persons equals an interest of almost 1.2 acres per citizen of Alaska. In contrast, Hamilton Cove on Ismailof Island had only fifteen residents in 1980. COMMERCIAL ATLAS AND MARKETING GUIDE 223 (Rand-McNally Co. 112th ed. 1981). Twenty acres divided by 15 persons equals an interest of 1.33 acres per person. Certainly Hoblit's interest, on a person per acre basis, is greater than that of the plaintiffs in either *Gilman* or *Lewis*.

82. 559 P.2d 630 (Alaska), cert. denied, 432 U.S. 901 (1977).

*ter v. Hammond*,<sup>83</sup> *Gilman v. Martin*,<sup>84</sup> and *Hoblit v. Commissioner of Natural Resources*<sup>85</sup> confuse the law and do not stand well together. Neither the courts nor the Alaska taxpayer and citizen can determine from these four cases what is required to establish standing to challenge a state disposition of land.

The *Lewis* standing factors are fraught with problems. First, *Lewis* only compels standing when all of the factors are present. It is unclear whether less compelling fact situations will also provide standing, as *Carpenter* suggests, and, if so, how compelling such situations need to be. Second, the *Lewis* court did not provide a standard for determining what constitutional provisions are "specific." "Specific constitutional limitations" appears only to be a term of art applied to an occasional constitutional provision. Third, what constitutes an injury-in-fact is not clear, and Alaska courts have held that remote, uncertain, and speculative injuries are sometimes sufficient. An argument can be made that none of the plaintiffs in *Lewis*, *Carpenter*, *Gilman*, or *Hoblit* had any traditional injury-in-fact. Finally, the time at which a plaintiff should be deemed to be in the best position to sue is not defined and often seems glossed over.

The *Gilman* test completely undermines *Lewis*. *Gilman* compels standing when the plaintiff alleges the governmental disposition of a "significant" amount of land. *Gilman* invites endless debate and uncertainty about what amount of land is "significant," and about the size of the community in which the significance is evaluated. Inevitably, "significant" will be defined by some arbitrary cut-off point, denying standing to some plaintiffs and granting it to others who challenge only marginally larger land dispositions. If the *Gilman* approach is accepted, the *Lewis* factor test may be completely unnecessary. On the other hand, perhaps the *Gilman* court meant for the *Lewis* test to apply when plaintiffs do not allege the disposition of a "significant" amount of land.

The Alaska Supreme Court should clear up the uncertainties in the law of taxpayer and citizen standing to challenge the disposition of land in Alaska. Since the tests used in *Lewis*, *Carpenter*, *Gilman*, and *Hoblit* are problematic, the best solution would be to completely abandon all formalistic tests. The Alaska Supreme Court should adopt the position that taxpayers and citizens always have standing to challenge governmental land dispositions. Any test for injury or standing is eliminated. This simple solution would not require the supreme court to overrule precedent. This solution merely serves to extend the scope of standing conferred by the prior cases.

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83. 667 P.2d 1204 (Alaska), *appeal dismissed*, 464 U.S. 801 (1983).

84. 662 P.2d 120 (Alaska 1983).

85. 678 P.2d 1337 (Alaska 1984).

Support for the elimination of all standing requirements in the limited context of challenges to state land dispositions can be found in the work of Professor Kenneth E. Scott. Scott has advocated the elimination of all tests for standing in general.<sup>86</sup> His idea is that litigation delays and the commitment of time and resources erect an initial screening barrier of considerable height. Before bringing suit, the plaintiffs must feel strongly enough about the issues to pay these costs. These high costs cut down the amount of litigation and provide a guarantee of the plaintiff's personal stake in the outcome of the controversy. If there were no personal involvement or adverseness, the plaintiff would not engage in the costly pursuit of litigation.<sup>87</sup> As Professor Scott observed, "The idle and whimsical plaintiff, . . . who litigates for a lark, is a specter which haunts the legal literature, not the courtroom."<sup>88</sup> Professor Scott's position provides a simple, automatic measure of sufficient interest — the willingness of the plaintiff to sue. Difficult questions of specific constitutional limitations, injuries-in-fact, and "significant" amounts of land are eliminated.<sup>89</sup>

Access screening is, moreover, a job for which the judiciary is ill-suited. A judge has no ready way to estimate a person's grievance, especially when it is not economic.<sup>90</sup> Professor Scott's suggestion completely removes the problem of estimating the relative magnitude of injuries to people with different personal values.<sup>91</sup> Support for the Scott position is further seen in that some states already automatically allow standing in taxpayer and citizen actions in a variety of circumstances.<sup>92</sup> Since Alaska courts already grant standing to plaintiffs with questionable injuries-in-fact, the adoption of Professor Scott's suggestion in the context of state land dispositions would not be a drastic change and would save lawyers and the judiciary time and energy.<sup>93</sup>

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86. Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 645-92 (1973). This view is acknowledged in 4 DAVIS, *supra* note 32 at § 24:6, :24 (noting that courts often decide questions without an adversary context, such as consent decrees, pleas of guilty, enforcement of subpoenas unresisted, voluntary petitions in bankruptcy, etc.), and in Comment, *supra* note 23, at 913 (attorney fees and costs sufficiently deter harassment suits).

87. Scott, *supra* note 86, at 673-74.

88. *Id.* at 674.

89. *See id.* at 677.

90. *Id.* at 682.

91. *Id.* at 692.

92. *See* 4 DAVIS, *supra* note 32, at § 24:6, :10 (discussion of public actions that are allowed in New York for nonfiscal matters, and in New Jersey, Massachusetts, Minnesota, South Dakota, Nebraska, New Mexico, California, and Kentucky); Jaffe, *supra* note 23, at 1279 (discussion of nonfiscal New York public action cases); *St. Clair v. Yonkers Raceway, Inc.*, 13 N.Y.2d 72, 77-81, 192 N.E.2d 15, 16-19, 242 N.Y.S.2d 43, 45-49 (1963) (cited in *Lewis*) (recommending allowance of all public actions in New York).

93. The *Lewis* decision implicitly adopted the position that a merely trifling inter-

## VI. CONCLUSION

By eliminating all tests of standing for Alaska taxpayers and citizens to bring suit challenging the disposition of Alaska lands, the Alaska Supreme Court can end the confusion created in the last eight years by four irreconcilable cases. The costs and time commitments associated with litigation against the Alaska government erect a lawsuit screening barrier of a height sufficient to thwart frivolous challenges. There have been few challenges to Alaska land dispositions in the past. Eliminating the conflicting standing requirements that now exist probably will not increase litigation of cases involving the state's disposition of land. The new approach will, however, eliminate the potential for unfair and arbitrary decisions regarding access to judicial forums and will clear up a confused area of the law.

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est is a sufficient injury-in-fact to allow a plaintiff standing to litigate. *See supra* notes 43-44 and accompanying text. The *Carpenter* decision moved beyond this position and held that an "arguable" impact on the state would be a sufficient injury-in-fact to support the plaintiff's standing. *See supra* note 55 and accompanying text. *Gilman* moved yet further by presuming, without discussion, that a resident of a municipality has a sufficient interest in a "significant" amount of land to constitute an injury-in-fact. *See supra* note 65 and accompanying text. These three cases show a definite trend of the Alaska Supreme Court away from requiring certain, traditional injuries-in-fact to support standing and toward allowing all plaintiffs standing to challenge the disposition of state lands.