Bin Four

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASE NO. 4682

APPLICATION OF EL PASO NATURAL
GAS COMPANY FOR AMENDMENT OF THE
RULES AND REGULATIONS GOVERNING
THE BLANCO-MESAVERDE GAS POOL,
SAN JUAN AND RIO ARRIBA COUNTIES,
NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

These matters come before the Commission at 9 a.m. on June 29, 1972, at Santa Fe, New Mexico, before the Oil Conservation Commission, hereinafter referred to as the "Commission," pursuant to motions to intervene in the above-entitled cause and a motion for an order from the Commission limiting and defining the evidence it will receive and consider in the above-entitled cause and restricting such evidence to those matters provided for by the Statutes of New Mexico, and a motion for the continuance of the above-entitled cause until such time as the Commission has prepared an environmental impact statement.

NOW, on this 6th day of July, 1972, the Commission, a quorum being present, having considered each of the above-described motions, the arguments presented therewith, and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof.

(2) That Section 65-3-10, New Mexico Statutes Annotated, 1953 Compilation, empowers and gives the duty to the Commission to prevent the waste of hydrocarbons and to protect the correlative rights of owners of interests in said hydrocarbons.

(3) That Section 65-3-5, New Mexico Statutes Annotated, 1953 Compilation, gives the Commission jurisdiction and authority over all matters relating to the conservation of oil and gas.

(4) That "waste" and "correlative rights" are defined by Sections 65-3-3 and 65-3-29, respectively, New Mexico Statutes Annotated, 1953 Compilation.

(5) That the public has a vital interest in the conservation of the natural resources of the State of New Mexico.

(6) That the Commission's decision to approve or disapprove the application of El Paso Natural Gas Company in Case 4682 must be predicated upon the prevention of the waste of hydrocarbons and the protection of the correlative rights of owners of property in the Blanco-Mesaverde Gas Pool.

(7) That the Commission will receive evidence that is relevant to the prevention of waste of hydrocarbons and the protection of correlative rights.

READ INTO RECORD *

(8) Evidence concerning market demand, curtailment of gas supplies, energy crisis, and environmental impact will be received by the Commission and considered in its determination to approve or disapprove the application if the party offering same can show the relevance of such matters to the prevention of waste and the protection of correlative rights.

(9) The Commission also has the authority to gather for informational purposes evidence concerning market demand, curtailment of gas supplies, energy crisis, and environmental matters, though such are not to be considered in its determination of approval or disapproval of the subject application.

(10) That the Commission will receive evidence concerning market demand, curtailment of gas supplies, energy crisis, and environmental matters if offered by a party merely for informational purposes.

(11) That after it has made its decision to approve or disapprove the application upon the basis of evidence that is relevant to waste and protection of correlative rights, and if that decision should be to approve the application, it will consider evidence offered for informational purposes only to the fullest extent possible in the implementation of the decision.

*

(12) That the New Mexico Oil Conservation Commission is not required by Section 12-20-6, New Mexico Statutes Annotated, 1953 Compilation, to prepare an environmental impact statement prior to the hearing of this case.

IT IS THEREFORE ORDERED:

2 conditions for intervention

(1) In accordance with the above, the three petitioners, the New Mexico Environmental Improvement Agency, the New Mexico Municipal League, and the New Mexico Public Service Commission each are hereby granted permission to intervene in the above-styled cause, subject to the following:

A. Evidence offered or which is elicited on cross-examination which is not relevant to the waste of hydrocarbons shall be admitted for informational purposes only.

READ INTO RECORD

B. Evidence which is offered or which is elicited on cross-examination which is relevant to the waste of hydrocarbons shall be admitted for all purposes.

(2) To the extent that the above findings are in conflict with the motion of Southern Union Production Company, Southern Union Gathering Company, and Southern Union Gas Company, said motion is denied; to the extent the above findings are not in conflict with said motion, the motion is granted.

(3) That the motion of the New Mexico Environmental Improvement Agency to continue the above-entitled cause until such time as the New Mexico Oil Conservation Commission has prepared an environmental impact statement is hereby denied.

(4) That jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

BRUCE KING, Chairman

ALEX J. ARMIJO, Member

A. L. PORTER, Jr., Member & Secretary

S E A L

dr/

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

MICHAEL P. GRACE
and CORRINE GRACE,

Plaintiffs,

vs. No. 46933

OIL CONSERVATION COMMISSION,
I.R. TRUJILLO, CHAIRMAN,
ALES J. JARAMILLO, MEMBER,
A.L. PARKER, MEMBER and
SECRETARY OF COMMISSION

Defendants

# MEMORANDUM BRIEF IN SUPPORT OF INTERVENTION

# THE NEW MEXICO GASOLINE RETAILERS ASSOCIATION

# THROUGH THEIR EXECUTIVE DIRECTOR HAROLD FRYE

Robert H. Borkenhagan
1011 Simms Building
Albuquerque, New Mexico 87101
Attorney for Intervener

POINT I

According to New Mexico Rules of Civil Procedure, Rule 24 (a)(2):

> (a) Upon timely application anyone shall be permitted to intervene in an action:. . . (2)when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (As amended 1969.)

Thus a party who wishes to intervene must make a timely application and show that (1) he has an interest in the property or transaction which is the subject of the action, (2) the disposition of the action may impair his ability to protect his interest, and (3) his interest may not be adequately represented by an existing party. 3B Moore, Federal Practice, ¶24.09-1[1].

The first question to be answered is whether the application to intervene is timely. There are only a few cases on this question in New Mexico, but they provide sufficient guidance to determine that this application is timely. In Tom Fields, Ltd. v. Tigner, 61 N.M. 382, 386, 301 P.2d 322 (1956), the New Mexico Supreme Court said that the timeliness of an application depends on the circumstances of each case. The Court enunciated a more specific test in Speer v. Sierra County Commissioners, 80 N.M. 741, 742, 461 P.2d 156(1969). The Court indicated that intervention is timely in "those situations where the question in controversy is pending and has not been settled." It is clear that the application of the New Mexico Gasoline Retailers is timely since the question in controversy has not yet been settled.

Second, the applicant for intervention must show that he

has an interest. Since there is no New Mexico law directly on point, a description of how the federal courts have dealt with this problem is appropriate since the Federal Rule is substantially identical to the New Mexico rule.

> The present rule covering interventions coming to us from the federal practice and procedure, we naturally turn to federal texts and decisions for clarification of the same. . . .Tom Fields, Ltd. v. Tigner, supra at 385-386.

The federal cases show that the level of interest that the applicant must show varies greatly with the type of litigation involved and there does not seem to be any general definition.

> We know of no concise yet comprehensive definition of what constitutes a litigable 'interest' for purpose of standing and intervention under Rule 24(a). . . .We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of law suits by involving as many apparently concerned persons as is compatible with efficiency and due process. Nuesse v. Camp, 385 F.2d 694 (C.A.D.C. 1967).

In litigation involving broad issues of public interest, the courts have interpreted the interest requirement liberally. For instance, in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967), a civil antitrust suit, the United States Supreme Court allowed intervention under Rule 24(a) by the State of California which applied to intervene to assure that competition would not be impaired in California; by California Edison which purchased large amounts of natural gas from El Paso and was also interested in retaining competition in California; and by Cascade Natural Gas Corp., a distributor which received its sole source of supply from the El Paso subsidiary which was being affected by the suit. Justice Douglas, writing for the Court, noted that "some elasticity was injected" into the Rule by the 1966 amendment. (The same amendment to Rule 24

occurred in New Mexico in 1969.) Justice Stewart and Justice Harlan dissented on the ground that private parties should not be allowed to intervene in government antitrust suits.

According to Moore, Cascade

> . . .represents an expanded application of 'interest' in holding a state, a customer, and a competitor have a sufficient interest to intervene in a government antitrust divestiture proceeding when that interest is inadequately represented. 3B Moore, ¶24.09-1[2].

In Nuesse v. Camp, supra, the Court of Appeals for the District of Columbia allowed a state banking commissioner to intervene of right in a suit by a state bank to enjoin the United States Comptroller of the Currency from authorizing a national bank to open a branch bank where the state law did not permit branch banking. The state banking commissioner would not have been allowed to intervene under the pre-1966 version of Rule 24(a).

The case which is most useful and most directly on point in the present context, however, is General Motors Corp. v. Burns, 50 F.R.D. 401 (D. Haw. 1970). In that suit General Motors was attempting to enjoin the enforcement of a Hawaii law which it alleged violated the Commerce Clause of the United States Constitution. The statute had to do with licensing automobile dealers. The Hawaii Automobile Dealers Association (HADA) and the National Automobile Dealers Association (NADA) attempted to intervene under Rule 24(a) and (b).

The district court held that HADA had sufficient interest to intervene of right because it had lobbied for the law in the state legislature and its members would be affected by the disposition of the suit.

The court denied NADA the right to intervene since only a few of its members were located in Hawaii where they would

be affected. NADA's interest in the constitutionality of the Hawaii law because of its sponsorship of similar legislation in other states was not sufficiently great to give it the right to intervene. The court did allow NADA the right to intervene under Rule 24(b), since their expertise would be helpful to the correct adjudication of the issues.

In the present case the New Mexico Gasoline Retailers should be allowed to intervene of right under Rule 24 (a) since they have a sufficient interest in the suit. Because the issues in this suit involve ramifications of broad public concern, the more liberal test should be applied. The members of the Gasoline Retailers will be affected by the outcome of the suit. Any change in the production of natural gas will have an immediate and direct effect on the supply, price and demand for petroleum products such as gasoline. Any administrative or judicial decision with regard to the supply of natural gas should take into account the interests of all groups which will be affected.

If the supply of natural gas is curtailed, there will be more of a demand for heating oil and other petroleum products that can be substituted for natural gas. In order for refineries to meet that increased demand, they will have to cut back their production of gasoline. It is apparent, in view of the impact that the gasoline shortage of the summer of 1973 had on the gasoline retailers, that the New Mexico Gasoline Retailers have an interest in protecting the adequacy of gasoline supplies. The present suit directly involves that interest.

Third, the applicant must show that his ability to protect his interest will be impaired if he is not allowed to intervene. In their Comments to Rule 24(a) the Advisory Committee used the term "substantially affected" in defining the level of

impairment to the ability to protect the applicant's interest that is necessary to allow intervention. 3B Moore, ¶24.01 [10].

In General Motors Corp. v. Burns, supra, the court held that HADA's ability to protect its interest would have been substantially affected since, if the law were declared unconstitutional, that would have ended the matter as far as HADA was concerned.

However, the court held that NADA's ability to protect its interest in sponsoring legislation nationwide would not be substantially affected by one more decision interpreting the Commerce Clause.

In the present case, the New Mexico Gasoline Retailers would have no other way in which they could protect their interest in administrative and judicial decisions affecting oil and gas conservation, other than by intervention, either in administrative hearings or in court proceedings subsequent to the hearings.

Fourth, the applicant must show his interest is not adequately represented by any of the existing parties. Here again, the test depends on the type of litigation involved. The strict test determines that the applicant is adequately represented if (1) there is no collusion between the parties; (2) the representing party has no interest adverse to the applicant; and (3) the representing party is not remiss in litigating the suit. If any of these elements is present, the applicant is not adequately represented. Levin v. Mississippi River Corp., 47 F.R.D. 294 (S.D.N.Y. 1969). This test, however, has generally been applied only in suits involving damages.

In General Motors Corp., v. Burns, supra at 404, the court said:

> In damage suits the financial stake of the parties in the outcome justifies a presumption that they

> will attack or defend vigorously and resourcefully. . .
>
> In contrast to damage cases which adopt a strict test of adequate representation, there are a number of injunctive actions that adopt a liberal test thereon. (footnote citing cases omitted.) These cases, if they refer to the wording of Rule 24(a) at all, stress the phrase in old Rule 24(a) that one may intervene if his representation "may be" inadequate. . . .

This "may be" test was the test applied in Nuesse v. Camp, supra; and Smuck v. Hobsen, 408 F.2d 175 (App.D.C. 1969); both of which involved injunctive type relief and dealt with issues of relatively great public import. This was also the test that was applied in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra, although the issue was not discussed in any detail.

Since the present case also involves injunctive type relief and issues of wide public interest, the question to be determined is whether the New Mexico Gasoline Retailers "may be" inadequately represented. Since no existing party to the suit has an interest in retail gasoline sales, the New Mexico Gasoline Retailers almost certainly will be inadequately represented.

The New Mexico Gasoline Retailers may therefore intervene of right under Rule 24(a). Their application was timely, they have a sufficient interest in the transaction, their ability to protect that interest will be impaired if they are not allowed to intervene, and none of the existing parties can be counted on to adequately represent their interest.

## POINT II

The New Mexico Gasoline Retailers should also be allowed to intervene under Rule 24 (b)(2):

> (b) Upon timely application anyone may be permitted to intervene in an action; (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

> . . .In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In order to be permitted to intervene under Rule 24 (b), the applicant must make a timely application and must show that his claim or defense has a question of law or fact in common with the main action. It is for the court to consider whether his intervention will unduly delay or prejudice the adjudication.

According to the test in Speer v. Sierra County Commissioners, supra, as discussed in Point I, the New Mexico Gasoline Retailers' application is timely.

In discussing whether the application meets the other requirements of Rule 24(b), it is again necessary to look to federal decisions since there is no New Mexico law on point. Tom Fields, Ltd. v. Tigner, supra.

Again the federal courts have applied differing standards to different types of actions.

In General Motors Corp. v. Burns, supra,the court did not discuss specifically whether NADA had a claim or defense which had a question or law or fact in common with the main action. The court presumeably took it for granted that its prior discussion showed this to be the case. In any event, the court granted NADA's motion to intervene permissively merely remarking that "NADA has something to contribute to this lawsuit. . ." and that "its presence will not unduly complicate the case. . ." Id. at 406.

In Russo v. Kirby, 15 F.R.Serv. 2d 826 (E.D.N.Y. 1971) the court discussed intervention under Rule 24(b) more completely. In that case the Chamber of Commerce of the United States of America sought to intervene as a party defendant in order to present evidence that the payment of public welfare benefits to striking employees and their families tends to prolong strikes

and thereby violates the Constitution. In allowing the Chamber to do so, the court observed:

> . . .Although the Chamber was not aggrieved by defendant Kirby's denial of welfare benefits to strikers, and would not have been a proper original party to the action against Kirby, the Chamber has a sufficient interest in the outcome to justify discretionary intervention. . . .
>
> Most of defendant's contentions could be presented as amicus curiae in a 'Brandeis-type brief.' The court may, however, derive more benefit having the Chamber present its evidence, largely sociological and economic data, in a manner that will make it subject to cross-examination. Id. at 827.

Another case that is helpful is Natural Resources Defense Council, Inc. v. Tennessee Valley Authority, 15 F.R.Serv. 2d 1028 (S.D.N.Y. 1971). That case challenged the lawfulness of purchase by the TVA of strip-mined coal. In allowing the National Audubon Society, Inc. to intervene under Rule 24(b), the court noted:

> . . .A reading of Audubon's complaint reveals that it presents common questions of law and fact with the main action. Furthermore, Audubon demonstrates a long-standing interest in and familiarity with strip-mining, expertise that may be helpful in clarifying the facts and issues in this case. . . Id., at 1031-1032.

An analysis of these cases brings several problems with permissive intervention into sharper focus.

First, the applicant need not have such a great interest that he could have been a proper original party.

Second, the applicant need not have even a direct interest in the suit.

Third, the main consideration of the courts in whether to allow permissive intervention in suits of this type is whether the applicant will be able to contribute to the correct adjudication of the issues.

In the present case there is a common question of law or fact; the New Mexico Gasoline Retailers have a more substantial and direct interest than either NADA, the Chamber

of Commerce, or the Audubon Society; and the Gasoline Retailers can definitely aid in the correct and complete adjudication of the issues. Any suit that involves a topic which is as multifaceted as energy, should consider the concerns of all interested parties. Therefore, the New Mexico Gasoline Retailers should be allowed to intervene under Rule 24(a).

Coors, Singer, and Broullire
Attorneys at Law
1011 Simms Building
Albuquerque, New Mexico
87101

Robert H. Borkenhagen

I hereby certify that a copy of the foregoing was hand delivered to opposing council of record this 2d day of November, 1973.

Robert H. Borkenhagen

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

MICHAEL P. GRACE
and CORRINE GRACE,

Plaintiffs,

vs. No. 46933

OIL CONSERVATION COMMISSION,
I.R. TRUJILLO, CHAIRMAN,
ALES J. JARAMILLO, MEMBER,
A.L. PARKER, MEMBER and
SECRETARY OF COMMISSION

Defendants

# MEMORANDUM BRIEF IN SUPPORT OF INTERVENTION

# BY THE ALBUQUERQUE CONSUMER FEDERATION

Robert H. Borkenhagan
1011 Simms Building
Albuquerque, New Mexico 87101
Attorney for Intervener

POINT I

According to New Mexico Rules of Civil Procedure, Rule 24 (a) (2):

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Thus a party who wishes to intervene must make a timely application and show that (1) he has an interest in the property or transaction which is the subject of the action, (2) the disposition of the action may impair his ability to protect his interest, and (3) his interest may not be adequately represented by an existing party. 3B Moore, Federal Practice, ¶24.09-1[1].

The first question to be answered is whether the application to intervene is timely. There are only a few cases on this question in New Mexico, but they provide sufficient guidance to determine that this application is timely. In Tom Fields, Ltd. v. Tigner, 61 N.M. 382, 386, 301 P.2d 322 (1956), the New Mexico Supreme Court said that the timeliness of an application depends on the circumstances of each case. The Court enunciated a more specific test in Speer v. Sierra County Commissioners, 80 N.M. 741, 742, 461 P.2d 156 (1969). The Court indicated that intervention is timely in "those situations where the question in controversy is pending and has not been settled." It is clear that the application of the Albuquerque Consumer Federation is timely since the question in controversy has not yet been settled.

Second, the applicant for intervention must show that he

has an interest. Since there is no New Mexico law directly on point, a description of how the federal courts have dealt with this problem is appropriate since the Federal Rule is substantially identical to the New Mexico rule.

> The present rule covering interventions coming to us from the federal practice and procedure, we naturally turn to federal texts and decisions for clarification of the same. . . .Tom Fields, Ltd. v. Tigner, supra at 385-386.

The federal cases show that the level of interest that the applicant must show varies greatly with the type of litigation involved and there does not seem to be any general definition.

> We know of no concise yet comprehensive definition of what constitutes a litigable 'interest' for purpose of standing and intervention under Rule 24(a). . . .We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of law suits by involving as many apparently concerned persons as is compatible with efficiency and due process. Nuesse v. Camp, 385 F.2d 694 (C.A.D.C. 1967).

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The case which is most useful and most directly on point in the present context, however, is General Motors Corp. v. Burns, 50 F.R.D. 401 (D. Haw. 1970). In that suit General Motors was attempting to enjoin the enforcement of a Hawaii law which it alleged violated the Commerce Clause of the United States Constitution. The statute had to do with licensing automobile dealers. The Hawaii Automobile Dealers Association (HADA) and the National Automobile Dealers Association (NADA) attempted to intervene under Rule 24(a) and (b).

The district court held that HADA had sufficient interest to intervene of right because it had lobbied for the law in the state legislature and its members would be affected by the disposition of the suit.

The court denied NADA the right to intervene since only a few of its members were located in Hawaii where they would

be affected. NADA's interest in the constitutionality of the Hawaii law because of its sponsorship of similar legislation in other states was not sufficiently great to give it the right to intervene. The court did allow NADA the right to intervene under Rule 24(b), since their expertise would be helpful to the correct adjudication of the issues.

In the present case the Albuquerque Consumer Federation should be allowed to intervene of right under Rule 24(a) since they have a sufficient interest in the suit. Because the issues in this suit involve ramifications of broad public concern, the more liberal test should be applied. The members of the Albuquerque Consumer Federation will be affected by the outcome of the suit. Any change in the production of natural gas will have an immediate and direct effect on the supply and price of natural gas as well as of petroleum products such as gasoline. Any administrative or judicial decision with regard to the supply of natural gas should take into account the interests of all groups which will be affected.

If the supply of natural gas is curtailed, Albuquerque consumers will be affected in several ways.

First, if the supply of natural gas decreases, there will be increasing pressure for higher prices which will ultimately be passed on to the consumer.

Second, if the supply of natural gas becomes inadequate for all of its present uses or if the price rises sufficiently, businesses and consumers will have to substitute other fuels, notably petroleum products. The substitution itself will cost the consumer money. Also substitution of petroleum products aggravates an already bad situation.

The third point, then, is that a decrease in the natural gas supply will force some businesses or consumers to substitute

fuel oil or other petroleum products which are already in short supply. The private consumer will therefore have to pay higher prices for gasoline and will have a harder time obtaining gasoline since any increase in the production of fuel oil causes a corresponding decrease in the production of gasoline.

The Albuquerque Consumer Federation, then, has a definite interest in protecting the adequacy of natural gas production, both for its own sake, and for the sake of insuring adequate gasoline supplies. Any decision concerning the conservation of natural gas should take into account the interest of the consumer in an adequate supply of fuel.

The third thing that the applicant must show is that his ability to protect his interest will be impaired if he is not allowed to intervene. In their Comments to Rule 24(a) the Advisory Committee used the term "substantially affected" in defining the level of impairment to the ability to protect the applicant's interest that is necessary to allow intervention. 3B Moore, ¶24.01 [10].

In General Motors Corp. v. Burns, supra, the court held that HADA's ability to protect its interest would have been substantially affected since, if the law were declared unconstitutional, that would have ended the matter as far as HADA was concerned.

However, the court held that NADA's ability to protect its interest in sponsoring legislation nationwide would not be substantially affected by one more decision interpreting the Commerce Clause.

In the present case, the Albuquerque Consumer Federation would have no other way in which they could protect their interest in administrative and judicial decisions affecting oil and gas conservation, other than by intervention, either

in administrative hearings or in court proceedings subsequent to the hearings.

Fourth, the applicant must show his interest is not adequately represented by any of the existing parties. Here again, the test depends on the type of litigation involved. The strict test determines that the applicant is adequately represented if (1) there is no collusion between the parties; (2) the representing party has no interest adverse to the applicant; and (3) the representing party is not remiss in litigating the suit. If any of these elements is present, the applicant is not adequately represented. Levin v. Mississippi River Corp., 47 F.R.D. 294 (S.D.N.Y. 1969). This test, however, has generally been applied only in suits involving damages.

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Since the present case also involves injunctive type relief and issues of wide public interest, the question to

be determined is whether the Albuquerque Consumer Federation "may be" inadequately represented. Since no existing party to the suit has an interest in the consumer market for natural gas or gasoline, the Albuquerque Consumer Federation almost certainly will be inadequately represented.

The Albuquerque Consumer Federation may therefore intervene of right under Rule 24(a). Their application was timely, they have a sufficient interest in the transaction, their ability to protect that interest will be impaired if they are not allowed to intervene, and none of the existing parties can be counted on to adequately represent their interest.

## POINT II

The Albuquerque Consumer Federation should also be allowed to intervene under Rule 24(b)(2):

> (b) Upon timely application anyone may be permitted to intervene in an action; (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
> . . .In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In order to be permitted to intervene under Rule 24(b), the applicant must make a timely application and must show that his claim or defense has a question of law or fact in common with the main action. It is for the court to consider whether his intervention will unduly delay or prejudice the adjudication.

According to the test in Speer v. Sierra County Commissioners, supra, as discussed in Point I, the Albuquerque Consumer Federation's application is timely.

In discussing whether the application meets the other requirements of Rule 24(b), it is again necessary to look to federal decisions since there is no New Mexico law on point. Tom Fields, Ltd. v. Tigner, supra.

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> . . .Although the Chamber was not aggrieved by defendant Kirby's denial of welfare benefits to strikers, and would not have been a proper original party to the action against Kirby, the Chamber has a sufficient interest in the outcome to justify discretionary intervention. . .
> Most of defendant's contentions could be presented as amicus curiae in a 'Brandeis-type brief.' The court may, however, derive more benefit having the Chamber present its evidence, largely sociological and economic data, in a manner that will make it subject to cross-examination. Id at 827.

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the court noted:

> . . .A reading of Audubon's complaint reveals that it presents common questions of law and fact with the main action. Furthermore, Audubon demonstrates a long-standing interest in and familiarity with strip-mining, expertise that may be helpful in clarifying the facts and issues in this case. . . Id., at 1031-1032.

An analysis of these cases brings several problems with permissive intervention into sharper focus.

First, the applicant need not have such a great interest that he could have been a proper original party.

Second, the applicant need not have even a direct interest in the suit.

Third, the main consideration of the courts in whether to allow permissive intervention in suits of this type is whether the applicant will be able to contribute to the correct adjudication of the issues.

In the present case there is a common question of law or fact; the Albuquerque Consumer Federation have a more substantial and direct interest than either NADA, the Chamber of Commerce, or the Audubon Society; and the Federation can definitely aid in the correct and complete adjudication of the issues. Any suit that involves a topic which is as multifaceted as energy, should consider the concerns of all interested parties. Therefore, the Albuquerque Consumer Federation should be allowed to intervene under Rule 24(a).

Coors, Singer, and Broullire
Attorneys at Law
1011 Simms Building
Albuquerque, New Mexico
87101

Robert H. Borkenhagen

I hereby certify that a copy of the foregoing was hand delivered to opposing council of record this 2nd day of November, 1973.

Robert H. Borkenhagen

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

MICHAEL P. GRACE
and CORRINE GRACE,

Plaintiffs,

vs. No. 46933

OIL CONSERVATION COMMISSION,
I.R. TRUJILLO, CHAIRMAN,
ALES J. JARAMILLO, MEMBER,
A.L. PARKER, MEMBER and
SECRETARY OF COMMISSION

Defendants

# MEMORANDUM BRIEF IN SUPPORT OF INTERVENTION

# BY THE ALBUQUERQUE CONSUMER FEDERATION

Robert H. Borkenhagan
1011 Simms Building
Albuquerque, New Mexico 87101
Attorney for Intervener

## POINT I

According to New Mexico Rules of Civil Procedure, Rule 24 (a) (2):

> (a) Upon timely application anyone shall be permitted to intervene in an action:. . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (As amended 1969.)

Thus a party who wishes to intervene must make a timely application and show that (1) he has an interest in the property or transaction which is the subject of the action, (2) the disposition of the action may impair his ability to protect his interest, and (3) his interest may not be adequately represented by an existing party. 3B Moore, Federal Practice, ¶24.09-1[1].

The first question to be answered is whether the application to intervene is timely. There are only a few cases on this question in New Mexico, but they provide sufficient guidance to determine that this application is timely. In Tom Fields, Ltd. v. Tigner, 61 N.M. 382, 386, 301 P.2d 322 (1956), the New Mexico Supreme Court said that the timeliness of an application depends on the circumstances of each case. The Court enunciated a more specific test in Speer v. Sierra County Commissioners, 80 N.M. 741, 742, 461 P.2d 156 (1969). The Court indicated that intervention is timely in "those situations where the question in controversy is pending and has not been settled." It is clear that the application of the Albuquerque Consumer Federation is timely since the question in controversy has not yet been settled.

Second, the applicant for intervention must show that he

has an interest. Since there is no New Mexico law directly on point, a description of how the federal courts have dealt with this problem is appropriate since the Federal Rule is substantially identical to the New Mexico rule.

> The present rule covering interventions coming to us from the federal practice and procedure, we naturally turn to federal texts and decisions for clarification of the same. . . .Tom Fields, Ltd. v. Tigner, supra at 385-386.

The federal cases show that the level of interest that the applicant must show varies greatly with the type of litigation involved and there does not seem to be any general definition.

> We know of no concise yet comprehensive definition of what constitutes a litigable 'interest' for purpose of standing and intervention under Rule 24(a). . . .We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of law suits by involving as many apparently concerned persons as is compatible with efficiency and due process. Nuesse v. Camp, 385 F.2d 694 (C.A.D.C. 1967).

In litigation involving broad issues of public interest, the courts have interpreted the interest requirement liberally. For instance, in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967), a civil antitrust suit, the United States Supreme Court allowed intervention under Rule 24(a) by the State of California which applied to intervene to assure that competition would not be impaired in California; by California Edison which purchased large amounts of natural gas from El Paso and was also interested in retaining competition in California; and by Cascade Natural Gas Corp., a distributor which received its sole source of supply from the El Paso subsidiary which was being affected by the suit. Justice Douglas, writing for the Court, noted that "some elasticity was injected" into the Rule by the 1966 amendment. (The same amendment to Rule 24

occurred in New Mexico in 1969.) Justice Stewart and Justice Harlan dissented on the ground that private parties should not be allowed to intervene in government antitrust suits.

According to Moore, Cascade

> . . .represents an expanded application of 'interest' in holding a state, a customer, and a competitor have a sufficient interest to intervene in a government antitrust divestiture proceeding when that interest is inadequately represented. 3B Moore, ¶24.09-1[2].

In Nuesse v. Camp, supra, the Court of Appeals for the District of Columbia allowed a state banking commissioner to intervene of right in a suit by a state bank to enjoin the United States Comptroller of the Currency from authorizing a national bank to open a branch bank where the state law did not permit branch banking. The state banking commissioner would not have been allowed to intervene under the pre-1966 version of Rule 24(a).

The case which is most useful and most directly on point in the present context, however, is General Motors Corp. v. Burns, 50 F.R.D. 401 (D. Haw. 1970). In that suit General Motors was attempting to enjoin the enforcement of a Hawaii law which it alleged violated the Commerce Clause of the United States Constitution. The statute had to do with licensing automobile dealers. The Hawaii Automobile Dealers Association (HADA) and the National Automobile Dealers Association (NADA) attempted to intervene under Rule 24(a) and (b).

The district court held that HADA had sufficient interest to intervene of right because it had lobbied for the law in the state legislature and its members would be affected by the disposition of the suit.

The court denied NADA the right to intervene since only a few of its members were located in Hawaii where they would

be affected. NADA's interest in the constitutionality of the Hawaii law because of its sponsorship of similar legislation in other states was not sufficiently great to give it the right to intervene. The court did allow NADA the right to intervene under Rule 24(b), since their expertise would be helpful to the correct adjudication of the issues.

In the present case the Albuquerque Consumer Federation should be allowed to intervene of right under Rule 24(a) since they have a sufficient interest in the suit. Because the issues in this suit involve ramifications of broad public concern, the more liberal test should be applied. The members of the Albuquerque Consumer Federation will be affected by the outcome of the suit. Any change in the production of natural gas will have an immediate and direct effect on the supply and price of natural gas as well as of petroleum products such as gasoline. Any administrative or judicial decision with regard to the supply of natural gas should take into account the interests of all groups which will be affected.

If the supply of natural gas is curtailed, Albuquerque consumers will be affected in several ways.

First, if the supply of natural gas decreases, there will be increasing pressure for higher prices which will ultimately be passed on to the consumer.

Second, if the supply of natural gas becomes inadequate for all of its present uses or if the price rises sufficiently, businesses and consumers will have to substitute other fuels, notably petroleum products. The substitution itself will cost the consumer money. Also substitution of petroleum products aggravates an already bad situation.

The third point, then, is that a decrease in the natural gas supply will force some businesses or consumers to substitute

fuel oil or other petroleum products which are already in short supply. The private consumer will therefore have to pay higher prices for gasoline and will have a harder time obtaining gasoline since any increase in the production of fuel oil causes a corresponding decrease in the production of gasoline.

The Albuquerque Consumer Federation, then, has a definite interest in protecting the adequacy of natural gas production, both for its own sake, and for the sake of insuring adequate gasoline supplies. Any decision concerning the conservation of natural gas should take into account the interest of the consumer in an adequate supply of fuel.

The third thing that the applicant must show is that his ability to protect his interest will be impaired if he is not allowed to intervene. In their Comments to Rule 24(a) the Advisory Committee used the term "substantially affected" in defining the level of impairment to the ability to protect the applicant's interest that is necessary to allow intervention. 3B Moore, ¶24.01 [10].

In General Motors Corp. v. Burns, supra, the court held that HADA's ability to protect its interest would have been substantially affected since, if the law were declared unconstitutional, that would have ended the matter as far as HADA was concerned.

However, the court held that NADA's ability to protect its interest in sponsoring legislation nationwide would not be substantially affected by one more decision interpreting the Commerce Clause.

In the present case, the Albuquerque Consumer Federation would have no other way in which they could protect their interest in administrative and judicial decisions affecting oil and gas conservation, other than by intervention, either

in administrative hearings or in court proceedings subsequent to the hearings.

Fourth, the applicant must show his interest is not adequately represented by any of the existing parties. Here again, the test depends on the type of litigation involved. The strict test determines that the applicant is adequately represented if (1) there is no collusion between the parties; (2) the representing party has no interest adverse to the applicant; and (3) the representing party is not remiss in litigating the suit. If any of these elements is present, the applicant is not adequately represented. Levin v. Mississippi River Corp., 47 F.R.D. 294 (S.D.N.Y. 1969). This test, however, has generally been applied only in suits involving damages.

In General Motors Corp. v. Burns, supra at 404, the court said:

> In damage suits the financial stake of the parties in the outcome justifies a presumption that they will attack or defend vigorously and resourcefully. . . .
>
> In contrast to damage cases which adopt a strict test of adequate representation, there are a number of injunctive actions that adopt a liberal test thereon. (Footnote citing cases omitted.) These cases, if they refer to the wording of Rule 24(a) at all, stress the phrase in old Rule 24(a) that one may intervene if his representation "may be" inadequate. . . .

This "may be" test was the test applied in Nuesse v. Camp, supra; and Smuck v. Hobsen, 408 F.2d 175 (App.D.C. 1969); both of which involved injunctive type relief and dealt with issues of relatively great public import. This was also the test that was applied in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra, although the issue was not discussed in any detail.

Since the present case also involves injunctive type relief and issues of wide public interest, the question to

be determined is whether the Albuquerque Consumer Federation "may be" inadequately represented. Since no existing party to the suit has an interest in the consumer market for natural gas or gasoline, the Albuquerque Consumer Federation almost certainly will be inadequately represented.

The Albuquerque Consumer Federation may therefore intervene of right under Rule 24(a). Their application was timely, they have a sufficient interest in the transaction, their ability to protect that interest will be impaired if they are not allowed to intervene, and none of the existing parties can be counted on to adequately represent their interest.

## POINT II

The Albuquerque Consumer Federation should also be allowed to intervene under Rule 24(b)(2):

> (b) Upon timely application anyone may be permitted to intervene in an action; (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
> . . .In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In order to be permitted to intervene under Rule 24(b), the applicant must make a timely application and must show that his claim or defense has a question of law or fact in common with the main action. It is for the court to consider whether his intervention will unduly delay or prejudice the adjudication.

According to the test in Speer v. Sierra County Commissioners, supra, as discussed in Point I, the Albuquerque Consumer Federation's application is timely.

In discussing whether the application meets the other requirements of Rule 24(b), it is again necessary to look to federal decisions since there is no New Mexico law on point. Tom Fields, Ltd. v. Tigner, supra.

Again the federal courts have applied differing standards to different types of actions.

In General Motors Corp. v. Burns, supra, the court did not discuss specifically whether NADA had a claim or defense which had a question or law or fact in common with the main action. The court presumeably took it for granted that its prior discussion showed this to be the case. In any event, the court granted NADA's motion to intervene permissively merely remarking that "NADA has something to contribute to this lawsuit. . ." and that "its presence will not unduly complicate the case. . ." Id. at 406.

In Russo v. Kirby, 15 F.R.Serv. 2d 826 (E.D.N.Y. 1971) the court discussed intervention under Rule 24(b) more completely. In that case the Chamber of Commerce of the United States of America sought to intervene as a party defendant in order to present evidence that the payment of public welfare benefits to striking employees and their families tends to prolong strikes and thereby violates the Constitution. In allowing the Chamber to do so, the court observed:

> . . .Although the Chamber was not aggrieved by defendant Kirby's denial of welfare benefits to strikers, and would not have been a proper original party to the action against Kirby, the Chamber has a sufficient interest in the outcome to justify discretionary intervention. . .
> Most of defendant's contentions could be presented as amicus curiae in a 'Brandeis-type brief.' The court may, however, derive more benefit having the Chamber present its evidence, largely sociological and economic data, in a manner that will make it subject to cross-examination. Id at 827.

Another case that is helpful is Natural Resources Defense Council, Inc. v. Tennessee Valley Authority, 15 F.R.Serv. 2d 1028 (S.D.N.Y. 1971). That case challenged the lawfulness of purchase by the TVA of strip-mined coal. In allowing the National Audubon Society, Inc. to intervene under Rule 24(b),

the court noted:

> . . .A reading of Audubon's complaint reveals that it presents common questions of law and fact with the main action. Furthermore, Audubon demonstrates a long-standing interest in and familiarity with strip-mining, expertise that may be helpful in clarifying the facts and issues in this case. . . Id., at 1031-1032.

An analysis of these cases brings several problems with permissive intervention into sharper focus.

First, the applicant need not have such a great interest that he could have been a proper original party.

Second, the applicant need not have even a direct interest in the suit.

Third, the main consideration of the courts in whether to allow permissive intervention in suits of this type is whether the applicant will be able to contribute to the correct adjudication of the issues.

In the present case there is a common question of law or fact; the Albuquerque Consumer Federation have a more substantial and direct interest than either NADA, the Chamber of Commerce, or the Audubon Society; and the Federation can definitely aid in the correct and complete adjudication of the issues. Any suit that involves a topic which is as multifaceted as energy, should consider the concerns of all interested parties. Therefore, the Albuquerque Consumer Federation should be allowed to intervene under Rule 24(a).

Coors, Singer, and Broullire
Attorneys at Law
1011 Simms Building
Albuquerque, New Mexico
87101

Robert H. Borkenhagen

I hereby certify that a copy of the foregoing was hand delivered to opposing council of record this 2nd day of November, 1973.



Robert H. Borkenhagen

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

MICHAEL P. GRACE, and CORINNE GRACE

Plaintiffs,

-vs- No. 46933

Oil CONSERVATION COMMISSION,
I. R. TRUJILLO, Chairman,
Ales J. JARAMILLO, Member,
A. L. PARKER, Member and
Secretary of Commission,

Defendants.

MOTION TO INTERVENE

COMES NOW Harold Fry, hereinafter referred to as Movant and respectfully moves this Court for allowance to intervene in the above entitled cause, and in support thereof state

1. Movant is the executive director of the New Mexico Gasoline Retailers association, and as such will be directly effected and harmed by any Order of this Court issued in this cause allowing the Oil Conservation Commission's closing Order to become effective.

2. Movant is an indespensble party to the cause who's interest in the controversy is such that no final judgment can be entered without effecting the interests of Movant.

3. Movant is the Executive Director of a trade association who's direct property and economic interest are so situated that the disposition of this action may impair or impeed the members of the Associations' ability to protect that property and economic interest unless this interest is adequatley represented in this proceeding.

A copy of Movant's affidavit in which he seeks leave of this Court to intervene in this matter is hereto attached and marked Exhibit "A".

WHEREFORE, Movant seeks leave to intervene in the above captioned cause, and that he be granted leave to file a proper response therein, and for such other and further relief as to this Court may seem just and proper.

ROBERT H. BORKENHAGEN
Attorney for Movant
1011 Simms Building
Albuquerque, New Mexico 87101

VERIFICATION

STATE OF NEW MEXICO )
) ss.
COUNTY OF SANTA FE )

Harold Fry, having been first duly sworn according to law, upon oath, states:

That he is the Movant herein, and has read the foregoing pleading, knows the contents thereof, and all allegations therein contained are true and correct of personal knowledge, except those matters stated on information and belief, and those allegations are honestly believed by affiant.

HAROLD FRY, AFFIANT

Subscribed and sworn to before me this _____ day of _____, 1973.

Notary Public

My Commission Expires:

_____

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

MICHAEL P. GRACE, and CORINNE GRACE

Plaintiffs,

-vs- No. 46933

OIL CONSERVATION COMMISSION,
I. R. TRUJILLO, CHAIRMAN,
ALES J. JARAMILLO, MEMBER,
A. L. PARKER, MEMBER AND
SECRETARY OF COMMISSION,

Defendants.

## AFFIDAVIT

COMES NOW Harold Fry, Executive Director, of the New Mexico Gasoline Retailers Association, first being dully sworn, and states:

1. That he is the Executive Director of the New Mexico Gasoline Retailers, Association, a nonprofit organization dedicated to the protection of New Mexico retailer.

2. That the subject matter of this lawsuit is such that members of the Association are so situated that the disposition of this action may impair or impeed the Associations' members from protecting their property and economic interests which are directly related to the subject matter of this lawsuit.

3. That the interests of the Associations' members are not adequately represented by the existing parties.

4. Further, Affiant sayeth not.

HAROLD FRY, AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____ day of _____, 1973.

EXHIBIT A

FILED 10-19-73

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

MICHAEL P. GRACE, and CORRINE GRACE

Plaintiffs,

-vs- No. 46933

OIL CONSERVATION COMMISSION,
I. R. TRUJILLO, Chairman,
ALES J. JARAMILLO, Member,
A. L. PARKER, Member and
Secretary of Commission,

Defendants.

MOTION TO INTERVENE

COMES NOW CONNIE BORKENHAGEN, hereinafter referred to as Movant and respectfully moves this Court for allowance to intervene in the above entitled cause, and in support thereof states:

1. Movant is a member of the New Mexico consuming public and a member of the Board of Directors of the Albuquerque Consumer Federation, and as such will be directly effected and harmed by any order of this Court issued in this cause allowing the Oil Conservation Commission's closing order to become effective.

2. Movant is an indispensable party to the cause whose interest in the controversy is such that no final judgment can be entered without effecting the interests of Movant.

3. Movant is a member of the New Mexico consuming public and a member of the Board of Directors of the Albuquerque Consumer Federation whose economic interest are so situated that the disposition of this action may impair or impeed

Movant's ability to protect that economic interest unless this interest is adequately represented in this proceeding.

A copy of Movant's Affidavit in which she seeks leave of this Court to intervene in this matter is hereto attached and marked Exhibit "A".

WHEREFORE, Movant seeks leave to intervene in the above captioned cause, and that she be granted leave to file a rpoper response therein, and for such other and further relief as to this Court may seem just and proper.

/s/ Robert H. Borkenhagen
ROBERT H. BORKENHAGEN
Attorney for Movant
1011 Simms Building
Albuquerque, New Mexico 87102

V E R I F I C A T I O N

STATE OF NEW MEXICO )
) ss.
COUNTY OF BERNALILLO)

CONNIE BORKENHAGEN, having been first duly sworn according to law, upon oath, states:

That she is the Movant herein, and has read the foregoing pleading, knows the contents thereof, and all allegations therein contained are true and correct of personal knowledge, except those matters stated on information and belief, and those allegations are honestly believed by Affiant.

AFFIANT CONNIE BORKENHAGEN

SUBSCRIBED AND SWORN to before me this _____ day of October, 1973.

My Commission Expires: NOTARY PUBLIC

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

MICHAEL P. GRACE, and CORRINE Grace

Plaintiffs,

vs. No. 46933

OIL CONSERVATION COMMISSION,
I. R. TRUJILLO, Chairman,
Alex J. JARAMILLO, Member,
A. L. PARKER, Member and
Secretary of Commission,

Defendants.

A F F I D A V I T

STATE OF NEW MEXICO )
) ss.
COUNTY OF BERNALILLO )

COMES NOW Connie Borkenhagen, individually and as a member of the Board of Directors of the Albuquerque Consumer Federation, first being duly sworn, and states:

1. That she is a member of the consuming public of the State of New Mexico and that she is a member of the Board of Directors of the Albuquerque Consumer Federation. Withdrawn from Federation?

2. That the subject matter of this lawsuit is such that members of the New Mexico consuming public and members of the Albuquerque Consumer Federation are so situated that the disposition of this action may impair or impede the property and economic interest of the members of the New Mexico consuming public and members of the Albuquerque Consumer Federation unless their interest is allowed to be represented here. These interests of the consuming public are directly related to the subject matter of this lawsuit.

EXHIBIT A

3. That the interest of the consuming public of the State of New Mexico and the members of the Albuquerque Consumer Federation are not adequately represented by the existing parties.

4. FURTHER AFFIANT SAITH NOT.

CONNIE BORKENHAGEN

SUBSCRIBED AND SWORN to before me this 19th day of October, 1973.

Notary Public

My Commission Expires:

EXHIBIT 4

Frothingham v. Mellon — such a small interest in controversy — no standing.



SIERRA CLUB, Petitioner,
v
ROGERS C. B. MORTON, Individually, and as Secretary of the Interior of the United States, et al.

405 US 727, 31 L Ed 2d 636, 92 S Ct 1361

Argued November 17, 1971. Decided April 19, 1972.

**Decision:** Conservation club held without standing to challenge federal officials' allowing commercial exploitation of national game refuge, absent allegation that it or its members were adversely affected.

## SUMMARY

Alleging its "special interest in the conservation and sound maintenance of the national parks, games refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested," a conservation club brought suit against federal officials in the United States District Court for the Northern District of California, seeking declaratory and injunctive relief against the granting of approval or issuance of permits for commercial exploitation of Mineral King Valley, a national game refuge adjacent to Sequoia National Park. The District Court granted a preliminary injunction, but the United States Court of Appeals for the Ninth Circuit reversed (433 F2d 24).

On certiorari, the United States Supreme Court affirmed. In an opinion by **Stewart,** J., expressing the views of four members of the court, it was held that the club lacked standing to maintain the suit,

because it failed to allege that it or its members were adversely affected by the proposed action.

**Douglas,** J., dissented on the ground that environmental issues should be litigable in the name of the despoiled inanimate object where the injury is the subject of public outrage.

**Brennan,** J., dissented on the ground that organizations such as the conservation club should be allowed to litigate environmental issues.

**Blackmun,** J., dissented on the grounds that either (1) organizations such as the conservation club should be allowed to litigate environmental issues or (2) the District Court's judgment should be approved on condition that the club forthwith amend its complaint to meet the court's requirements for standing.

**Powell** and **Rehnquist,** JJ., did not participate.

## COUNSEL

Leland R. Selna, Jr., argued the cause for petitioner. With him on the briefs was Matthew P. Mitchell.

Solicitor General Griswold argued the cause for respondents. With him on the brief were Assistant Attorney General Kashiwa, Deputy Assistant Attorney General Kiechel, William Terry Bray, Edmund B. Clark, and Jacques B. Gelin.

Briefs of amici curiae urging reversal were filed by Anthony A. Lapham and Edward Lee Rogers for the Environmental Defense Fund; by George J. Alexander and Marcel B. Poché for the National Environmental Law Society; and by Bruce J. Terris and James W. Moorman for the Wilderness Society et al.

Briefs of amici cu
by E. Lewis Reid
County of Tulare; b
can National Cattle
ald R. Allen for the

[illegible] sought a determination that the House of Representatives lacked power to exclude him from the 90th Congress. The Supreme Court held that this question was not rendered non-justiciable by the political question doctrine. The Court said that the issue presented--namely, whether the House had power to exclude a member who met the requirements of age, citizenship, and residence contained in article 1, section 2--could be resolved by resort to the traditional judicial tools of textual and historical analysis. The issue did not require an exercise of non-judicial discretion, and resolving the issue would involve no breach of an explicit constitutional commitment of the question to another branch of government. Article 1, section 5 gives the House power to judge only whether elected members possess the specific qualifications set forth in article 1 itself. It does not give the house a judicially unreviewable power to set its own qualifications for membership.

5. Sierra Club v. Morton (No. 70-34, April 19, 1972)
Long-established conservationist organization's mere special interest in preserving national parks, forests, and game refuges does not give it standing to challenge approval by U.S. Forest Service and Department of Interior of ski resort use of national forest absent showing that it or its members are "adversely affected" or "aggrieved" within meaning of Administrative Procedure Act.

## CHAPTER III. STATE POWERS IN AREAS OF FEDERAL AUTHORITY

1. Dunbar-Stanley Studios, Inc. v. Alabama, 89 S. Ct. 757 (1969)
A North Carolina corporation sent its photographers to Alabama on a transient basis, developed its film in North Carolina, and sent the finished pictures back to Alabama. It sought a declaration that an Alabama tax on transient photographers was invalid. The Court ruled that the tax was on a local Alabama activity, was not an impermissible burden on interstate commerce, and did not discriminate against interstate commerce.

2. Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc. (Nos. 70-99 & 70-212, April 19, 1972).
Neither Indiana airport district's imposition of one dollar use and service charge for each passenger emplaning on commercial aircraft, for purpose of



TORTS
EE LTS
TRUS
WILL
ADM

Intervention question

L. I Howdy

before Dist Ct — argued:

1. too easy for intervention hereunder
2. proceeding involves 1 question
3. must show an interest and how not represented
4. intervention of so many parties encumbers the court and raises procedural problems

STANDING

The second rule for determining when the Supreme Court will go to the merits is that a litigant must have requisite "standing." Standing involves the litigant's relationship to the subject matter of the proceeding in question. This relationship must be sufficiently close to enable the Court to frame a particularized remedy for the litigant, a remedy which affects the litigant uniquely and in a way that differs substantially from the remedy's effect on citizens in general. Phrased differently, the Court must be able to do something "special" for the litigant; the litigant must be able to show that he is the person who will incur injury if the right he is asserting is invaded.

ALBUQUERQUE Consumer Fed (Connie Bakenhagen)

— based on energy shortage — stipulate that

— if individual — like MASS v. MELLON

(U.S.S.Ct. — found taxpayer ∄ standing to challenge gov't use of funds due to fact that paid taxes)

— Sierra Club v. Morton if for Consumer Fed:

— represent public interest — not enough need economic interest

— but site — see * 1365

1363 "to play seeking review must himself suffer injury." Rule 24

**SIERRA CLUB, Petitioner,**

**v.**

**Rogers C. B. MORTON, Individually, and as Secretary of the Interior of the United States, et al.**

**No. 70-34.**

Argued Nov. 17, 1971.

Decided April 19, 1972.

Action by membership corporation for declaratory judgment that construction of proposed ski resort and recreation area in national game refuge and forest would contravene federal laws and for preliminary and permanent injunctions restraining federal officials from approving or issuing permits for the project. The United States District Court for the Northern District of California granted a preliminary injunction and the defendants appealed. The United States Court of Appeals, Ninth Circuit, 433 F.2d 24, vacated the injunction and remanded the cause with directions, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that, in absence of allegation that corporation or its members would be affected in any of their activities or pastimes by the proposed project, the corporation, which claimed special interest in conservation of natural game refuges and forests, lacked standing under Administrative Procedure Act to maintain the action.

Affirmed.

Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Blackmun filed dissenting opinions.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision of the case.

(1) **Action ⇐13**

"Standing to sue" means that party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.

See publication Words and Phrases for other judicial constructions and definitions.

(2) **Action ⇐13**

Where party does not rely on any specific statute authorizing invocation of judicial process, question of his standing to sue depends upon whether he has alleged such a personal stake in the outcome of the controversy as to ensure that dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

(3) **Administrative Law and Procedure ⇐665**

Where Congress has authorized public officials to perform certain functions according to law and has provided by statute for judicial review of those actions under certain circumstances, inquiry as to standing must begin with determination of whether statute in question authorizes review at behest of the plaintiff.

4. **Constitutional Law ⇐55, 56**

Congress may not confer jurisdiction on federal courts to render advisory opinions, to entertain friendly suits or to resolve political questions, because suits of that character are inconsistent with judicial function under the Constitution, but where dispute is otherwise justiciable, question whether litigant is proper party to request an adjudication of particular issue is one within power of Congress to determine. U.S.C.A. Const. art. 3, § 1 et seq.

(5) **Administrative Law and Procedure ⇐668**

"Injury in fact" test for standing to sue under Administrative Procedure Act requires more than injury to cognizable interest and requires that party seeking review be himself among the injured. 5 U.S.C.A. § 702.

6. **Administrative Law and Procedure ⇐668**

Fact of economic injury is what gives a person standing to seek judicial

review under a statute authorizing review of federal agency action, but once review is properly invoked, that person may argue the public interest in support of his claim that agency has failed to comply with its statutory mandate.

**7. Administrative Law and Procedure ⇐665**

Organization may represent its injured members in proceeding for judicial review.

**8. Administrative Law and Procedure ⇐668**

Organization's mere interest in a problem, no matter how long standing 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 Administrative Procedure Act providing judicial review for person who suffers legal wrong because of agency action, or who is adversely affected or aggrieved by agency action. 5 U.S.C.A. § 702.

See publication Words and Phrases for other judicial constructions and definitions.

**9. Administrative Law and Procedure ⇐668**

Requirement that party seeking judicial review of administrative agency's action must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through judicial process, but serves as a rough attempt to put decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. 5 U.S.C.A. § 702.

**10. Administrative Law and Procedure ⇐665**

Organizations or individuals are not entitled to vindicate their own value preferences through judicial process.

**11. Administrative Law and Procedure ⇐668**

**Declaratory Judgment ⇐293**

In absence of allegation that membership corporation or its members would be affected in any of their activities or pastimes by proposed ski resort and recreation area in national game refuge and forest, the corporation, which claimed special interest in conservation of natural game refuges and forests, lacked standing under Administrative Procedure Act to maintain action for injunctive relief and declaratory judgment that the proposed development would contravene federal laws. 5 U.S.C.A. § 701 et seq., 702; 16 U.S.C.A. §§ 1, 43, 45c, 497, 688; Fed.Rules Civ.Proc. rule 15, 28 U.S.C.A.

*Syllabus**

Petitioner, a membership corporation with "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country," brought this suit for a declaratory judgment and an injunction restraining federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. Petitioner relies on § 10 of the Administrative Procedure Act, which accords judicial review to a "person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." On the theory that this was a "public" action involving questions as to the use of natural resources, petitioner did not allege that the challenged development would affect the club or its members in their activities or that they used Mineral King, but maintained that the project would adversely change the area's aesthetics and ecology. The District Court granted a preliminary injunction. The Court of Appeals reversed, holding that the club lacked standing, and had not shown irreparable injury. *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. In this case, where petitioner asserted no individualized harm to it or its members, it lacked standing to maintain the action. Pp. 1364–1369, 407 F.2d 24, affirmed.

Leland R. Selna, Jr., San Francisco, Cal., for petitioner.

Sol. Gen. Erwin N. Griswold, for respondents.

Mr. Justice STEWART delivered the opinion of the Court.

I

The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a National Game Refuge by special Act of Congress.[1] Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasi-wilderness area largely uncluttered by the products of civilization.

The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational development. Prompted by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort

1. Act of July 3, 19

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

ing, and had not shown irreparable injury. *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. In this case, where petitioner asserted no individualized harm to itself or its members, it lacked standing to maintain the action. Pp. 1364–1369, 433 F.2d 24, affirmed.

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I

The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a National Game Refuge by special Act of Congress.[1] Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasi-wilderness area largely uncluttered by the products of civilization.

The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational development. Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc., was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection with its preparation of a complete master plan for the resort.

The final Disney plan, approved by the Forest Service in January, 1969, outlines a $35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be constructed on 80 acres of the valley floor under a 30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, are to be constructed on the mountain slopes and in other parts of the valley under a revocable special use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed high-voltage power line needed to provide electricity for the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June of 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed development

1. Act of July 3, 1926, 44 Stat. 821, 16 U.S.C. § 688.

ontravene federal laws and regulations overning the preservation of national arks, forests, and game refuges,[2] and lso seeking preliminary and permanent njunctions restraining the federal offiials involved from granting their approval or issuing permits in connection ith the Mineral King project. The petitioner Sierra Club sued as a membership corporation with "a special interest n the conservation and sound maintenance of the national parks, game refges, and forests of the country," and nvoked the judicial review provisions f the Administrative Procedure Act, 5 .S.C. § 701 et seq.

After two days of hearings, the District Court granted the requested preminary injunction. It rejected the repondents' challenge to the Sierra Club's tanding to sue, and determined that the earing had raised questions "concernng possible excess of statutory authorty, sufficiently substantial and serious o justify a preliminary injunction. . . ." The respondents appealed, and he Court of Appeals for the Ninth Ciruit reversed. 433 F.2d 24. With respect to the petitioner's standing, the ourt noted that there was "no allegation n the complaint that members of the ierra Club would be affected by the acions of [the respondents] other than he fact that the actions are personally ispleasing or distasteful to them," *id.*, t 33, 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." *Id.*, at 30.

Alternatively, the Court of Appeals held that the Sierra Club had not made an adequate showing of irreparable injury and likelihood of success on the merits to justify issuance of a preliminary injunction. The court thus vacated the injunction. The Sierra Club filed a petition for a writ of certiorari which was granted, 401 U.S. 907, 91 S.Ct. 870, 27 L.Ed.2d 805, to review the questions of federal law presented.

II

[1–4] The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.[3]

The Sierra Club relies upon § 10 of the Administrative Procedure Act (APA), 80 Stat. 392, 5 U.S.C. § 702, 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."

Early decisions under this statute interpreted the language as adopting the various formulations of "legal interest" and "legal wrong" then prevailing as constitutional requirements of standing.[4] But, in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184, and Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192, decided the

As analyzed by the District Court, the complaint alleged violations of law falling into four categories. First, it claimed that the special use permit for construction of the resort exceeded the maximum acreage limitation placed upon such permits by 16 U.S.C. § 497, and that issuance of a "revocable" use permit was beyond the authority of the Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park in alleged violation of 16 U.S.C. § 1, and that it would destroy timber and other natural resources protected by 16 U.S.C. §§ 41 and 43. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that 16 U.S.C. § 45c requires specific congressional authorization of a permit for construction of a power transmission line within the limits of a national park.

3. Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246, or to entertain "friendly" suits, United States v. Johnson, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413, or to resolve "political questions," Luther v. Borden, 7 How. 1, 12 L.Ed. 581, because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue." Flast v. Cohen, 392 U.S. 83, 100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947, is one within the power of Congress to determine. Cf. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869; Flast v. Cohen, 392 U.S. 83, 120, 88 S.Ct. 1942, 1963, 20 L.Ed.2d 947 (Harlan, J., dissenting); Associated Industries of New York State v. Ickes, 2 Cir., 134 F.2d 694, 704. See generally Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816, 827 ff. (1969); Jaffe, The Citizen as Litigant in Public

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In *Data Processing*, the injury claimed by the petitioners consisted of harm to their competitive position in the computer servicing market through a ruling by the Comptroller of the Currency that national banks might perform data processing services for their customers. In *Barlow*, the petitioners were tenant farmers who claimed that certain regulations of the Secretary of Agriculture adversely affected their economic position vis-à-vis their landlords. These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review.[6] Thus, neither *Data Processing* nor *Barlow* addressed itself to the ques-

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4. See, e. g., Kansas City Power & Light Co. v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924, 932; Ove Gustavsson Contracting Co. v. Floete, 2 Cir., 278 F.2d 912, 914; Duba v. Schuetzle, 8 Cir., 303 F.2d 570, 574. The theory of a "legal interest" is expressed in its extreme form in Alabama Power Co. v. Ickes, 302 U.S. 464, 479–481, 58 S.Ct. 300, 303–304, 82 L.Ed. 374. See also Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137–139, 59 S.Ct. 366, 369–370, 83 L.Ed. 543.

5. In deciding this case we do not reach any questions concerning the meaning of the "zone of interests" test or its possible application to the facts here presented.

6. See, e. g., Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7, 88 S.Ct. 651, 655, 19 L.Ed.2d 787; Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 83, 78 S.Ct. 1063, 1067, 2 L.Ed.2d 1174; FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869.

tion, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared.[7] That question is presented in this case.

III

[5] The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any that would be significantly affected by the proposed actions of the respondents.[8]

7. No question of standing was raised in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136. The complaint in that case alleged that the organizational plaintiff represented members who were "residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area."

8. The only reference in the pleadings to the Sierra Club's interest in the dispute is contained in paragraph 3 of the complaint, which reads in its entirety as follows:
"Plaintiff Sierra Club is a non-profit corporation organized and operating under the laws of the State of California, with its principal place of business in San Francisco, California since 1892. Membership of the Club is approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay area. For many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similar interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears."
In an *amici curiae* brief filed in this Court by the Wilderness Society and others, it is asserted that the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes. These allegations were not contained in the pleadings, nor were they brought to the attention of the Court of Appeals. Moreover, the Sierra Club in its reply brief specifically declines to rely on its individualized interest, as a basis for standing. See n. 15, *infra*. Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure.



The Club apparently regarded any a legations of individualized injury as s perfluous, on the theory that this was "public" action involving questions as the use of natural resources, and th the Club's longstanding concern with a expertise in such matters were sufficie to give it standing as a "representati of the public."[9] This theory reflects misunderstanding of our cases involvi so-called "public actions" in the area administrative law.

The origin of the theory advanced the Sierra Club may be traced to a d tum in Scripps-Howard Radio, Inc. FCC, 316 U.S. 4, 62 S.Ct. 875, 86 L. 1229, in which the licensee of a ra station in Cincinnati, Ohio, sought a s of an order of the FCC allowing anot radio station in a nearby city to cha its frequency and increase its range. discussing its power to grant a stay, Court noted that "these private litig have standing only as representative the public interest." *Id.*, at 14, 62 S at 882. But that observation did describe the basis upon which the ap lant was allowed to obtain judicial view as a "person aggrieved" within meaning of the statute involved in case,[10] since Scripps-Howard was cle "aggrieved" by reason of the econ injury that it would suffer as a r of the Commission's action.[11] Court's statement was rather dire to the theory upon which Congress authorized judicial review of the mission's actions. That theory had

9. This approach to the question of stand was adopted by the Court of Appeals the Second Circuit in Citizens Commit for Hudson Valley v. Volpe, 425 F.2d 105:
"We hold, therefore, that the public in est in environmental resources—an in est created by statutes affecting the suance of this permit—is a legally tected interest affording these plaintiffs responsible representatives of the pul standing to obtain judicial review of a cy action alleged to be in contraventio that public interest."

10. The statute involved was § 402(b) of the Communications Act of 1934 Stat. 1064, 1093.

The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public." [9] This theory reflects a misunderstanding of our cases involving so-called "public actions" in the area of administrative law.

The origin of the theory advanced by the Sierra Club may be traced to a dictum in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229, in which the licensee of a radio station in Cincinnati, Ohio, sought a stay of an order of the FCC allowing another radio station in a nearby city to change its frequency and increase its range. In discussing its power to grant a stay, the Court noted that "these private litigants have standing only as representatives of the public interest." *Id.*, at 14, 62 S.Ct. at 882. But that observation did not describe the basis upon which the appellant was allowed to obtain judicial review as a "person aggrieved" within the meaning of the statute involved in that case,[10] since Scripps-Howard was clearly "aggrieved" by reason of the economic injury that it would suffer as a result of the Commission's action.[11] The Court's statement was rather directed to the theory upon which Congress had authorized judicial review of the Commission's actions. That theory had been described earlier in FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869, as follows:

> "Congress had some purpose in enacting section 402(b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal."

[6] Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.[12] It was in the latter sense that the "standing" of the appellant in *Scripps-Howard* existed only as a "representative of the public interest." It is in a similar sense that we have used the phrase "private attorney general" to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action. See *Data Processing, supra,* 397 U.S., at 154, 90 S.Ct., at 830.

The trend of cases arising under the APA and other statutes authorizing ju-

9. This approach to the question of standing was adopted by the Court of Appeals for the Second Circuit in Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 103:
"We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest."

10. The statute involved was § 402(b) (2) of the Communications Act of 1934, 48 Stat. 1064, 1093.

11. This much is clear from the *Scripps-Howard* Court's citation of FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869, in which the basis for standing was the competitive injury that the appellee would have suffered by the licensing of another radio station in its listening area.

12. The distinction between standing to initiate a review proceeding, and standing to assert the rights of the public or of third persons once the proceeding is properly initiated, is discussed in 3 Davis, Administrative Law Treatise, §§ 22.05–22.07 (1958).

dicial review of federal agency action has been towards recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and towards discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review.[13] We noted this development with approval in *Data Processing, supra,* at 154, 90 S.Ct., at 830, in saying that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury.

[7, 8] Some courts have indicated a willingness to take this latter step by conferring standing upon organizations that have demonstrated "an organizational interest in the problem" of environmental or consumer protection. Environmental Defense Fund, Inc. v. Hardin, 138 U.S.App.D.C. 391, 428 F.2d 1093, 1097.[14] It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, *e. g.*, NAACP v. Button, 371 U.S. 415, 428, 83 S. 328, 335, 9 L.Ed.2d 405. But a m "interest in a problem," no matter h longstanding the interest and no matt how qualified the organization is in ev uating the problem, is not sufficient itself to render the organization "a versely affected" or "aggrieved" with the meaning of the APA. The Sier Club is a large and long-established or ganization, with an historic commitmen to the cause of protecting our Nation natural heritage from man's depred tions. But if a "special interest" in thi subject were enough to entitle the Sierr Club to commence this litigation, ther would appear to be no objective basis up on which to disallow a suit by any othe bona fide "special interest" organization however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

[9, 10] The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process.[15] It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.[16] The principle that the Sierra Club would have us establish in this case would do just that.

[11] As we conclude that the Cour of Appeals was correct in its holdin that the Sierra Club lacked standing t maintain this action, we do not reac any other questions presented in the pe tition, and we intimate no view on th merits of the complaint. The judgmer is

Affirmed.

13. See, *e. g.*, Environmental Defense Fund, Inc. v. Hardin, 138 U.S.App.D.C. 391, 428 F.2d 1093, 1097 (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Office of Communication of United Church of Christ v. FCC, 123 U.S.App.D.C. 328, 359 F.2d 994, 1005 (interest of television viewers in the programming of a local station licensed by the FCC); Scenic Hudson Preservation Conf. v. FPC, 2 Cir., 354 F.2d 608, 615–616 (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); Reade v. Ewing, 2 Cir., 205 F.2d 630, 631–632 (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); Crowther v. Seaborg, D.C., 312 F.Supp. 1205, 1212 (interest in health and safety of persons residing near the site of a proposed atomic blast).

14. See Citizens Committee for Hudson Valley v. Volpe, n. 8, *supra*; Environmental Defense Fund, Inc. v. Corps of Engineers, D.C., 325 F.Supp. 728, 734–736; Izaak Walton League of America v. St. Clair, D.C., 313 F.Supp. 1312, 1317. See also Scenic Hudson Preservation Conf. v. FPC, *supra*, 354 F.2d at 616:

"In order to ensure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, 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 § 313(b) [of the Federal Power Act]."

In most, if not all of these cases, at least one party to the proceeding did assert an individualized injury either to himself or, in the case of an organization, to its members.

15. In its reply brief, after noting the fact that it might have chosen to assert individualized injury to itself or to its members as a basis for standing, the Sierra Club states:

"The Government seeks to create a 'heads I win, tails you lose' situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap."

The short answer to this contention is that the "trap" does not exist. The 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 genera public in support of his claims for equita ble relief. See n. 12 and accompanying text, *supra*.

16. Every school boy may be familiar wit de Tocqueville's famous observation, writ ten in the 1830's, that "Scarcely an political question arises in the Unite States that is not resolved, sooner or late into a judicial question." 1 Democracy i America 280 (Alfred A. Knopf, 1945 Less familiar, however, is de Tocqueville further observation that judicial review

through the judicial process.[15] It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.[16] The principle that the Sierra Club would have us establish in this case would do just that.

[11] As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other questions presented in the petition, and we intimate no view on the merits of the complaint. The judgment is

Affirmed.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, dissenting.

I share the views of my Brother BLACKMUN and would reverse the judgment below.

The critical question of "standing" [1] would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be dispoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing?

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16. Every school boy may be familiar with de Tocqueville's famous observation, written in the 1830's, that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 Democracy in America 280 (Alfred A. Knopf, 1945). Less familiar, however, is de Tocqueville's further observation that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.

"It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis for a prosecution." *Id.*, at 102.

1. See generally Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). See also Mr. Justice Brennan's concurring opinion in Barlow v. Collins, *supra*, 397 U.S., at 167, 90 S.Ct., at 838. The issue of statutory standing aside, no doubt exists that "injury in fact" to "aesthetic" and "conservational" interests is here sufficienty threatened to satisfy the case or controversy clause. Association of Data Processing Service Organizations, Inc. v. Camp, *supra*, 397 U.S., at 1564, 90 S.Ct., at 830.

Toward Legal Rights for Natural Objects, 45 S.Cal.L.Rev. 450 (1972). This suit would therefore be more properly labeled as Mineral King v. Morton.

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes.[2] The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases.[3] The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.[4]

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

I do not know Mineral King. I have never seen it nor travelled it, though I have seen articles describing its proposed "development"[5] notably Hano, Protec-

2. *In rem* actions brought to adjudicate libellants' interests in vessels are well known in admiralty. Gilmore & Black, The Law of Admiralty 31 (1957). But admiralty also permits a salvage action to be brought in the name of the rescuing vessel. The Camanche, 75 U.S. (8 Wall.) 448, 476, 19 L.Ed. 397 (1869). And, in collision litigation, the first-libelled ship may counterclaim in its own name. The Gylfe v. The Trujillo, 209 F.2d 386 (CA2 1954). Our case law has personified vessels: "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron. . . . In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed. . . . She acquires a personality of her own." Tucker v. Alexandroff, 183 U.S. 424, 438, 22 S.Ct. 195, 201, 46 L.Ed. 264.

3. At common law, an office holder, such as a priest or the King, and his successors constituted, a corporation sole, a legal entity distinct from the personality which managed it. Rights and duties were deemed to adhere to this device rather than to the office holder in order to provide continuity after the latter retired. The notion is occasionally revived by American courts. *E. g.*, Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927), discussed in Note, 12 Minn.L.Rev. 295 (1928), and in Note, 26 Mich.L.Rev. 545 (1928); see generally 1 Fletcher Cyclopedia Corporation, §§ 50–53; P. Potter, Law of Corporation 27 (1881).

4. Early jurists considered the conventional corporation to be a highly artificial entity. Lord Coke opined that a corporation's creation "rests only in intendment and consideration of the law." The Case of Suttons Hospital, 77 Eng.Rep. 937, 973 (K.B.1613). Mr. Chief Justice Marshall added that the device is "an artificial being, invisible, intangible, and existing only in contemplation of law." Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636, 4 L.Ed. 629 (1819). Today suits in the names of corporations are taken for granted.

5. Although in the past Mineral King Valley has annually supplied about 70,000 visitor-days of simpler and more rustic forms of recreation—hiking, camping and skiing (without lifts)—the Forest Service in 1949 and again in 1965 invited developers to submit proposals to "improve" the Valley for resort use. Walt Disney Productions won the competition and transformed the Service's idea into a mammoth project 10 times its originally proposed dimensions. For example, while the Forest Service prospectus called for an investment of at least $3 million and a sleeping capacity of at least 100, Disney will spend $35.3 million and will bed down 3300 persons by 1978. Disney also plans a nine-level parking structure with two supplemental lots for automobiles, 10 restaurants and 20 ski lifts. The Service's annual license revenue is hitched to Disney's profits. Under Disneys' projections, the Valley will be forced to accommodate a tourist population twice as dense as that in Yosemite Valley on a busy day. And, although Disney has bought up much of the private land near the project, another commercial firm plans to transform an adjoining 160-acre parcel into a "piggyback" resort complex, further adding to the volume of human activity the Valley must endure. See generally: Note, Mineral King Valley: Who Shall Watch the Watchman?, 25 Rutgers L.Rev. 103, 107 (1970); That's Gold in Those Hills, 206 The Nation 260 (1968). For a general critique of mass recreation enclave in national forests see Christian Science Monitor, Nov. 22, 1965, at 5, col. 1. Michael Frome cautions that the national forests are "fragile" and "deteriorate rapidly with excessive recreation use" because "(t)he trampling effect alone eliminates vegatative growth, creating erosion and water runoff problems. The concentration of people, particularly in horse pa-



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Mineral King is doubtless like othe wonders of the Sierra Nevada such a Tuolumne Meadows and the John Mu Trail. Those who hike it, fish it, hu it, camp in it, or frequent it, or visit merely to sit in solitude and wonde ment are legitimate spokesmen for whether they may be a few or man Those who have that intimate relati with the inanimate object about to injured, polluted, or otherwise despoil are its legitimate spokesmen.

The Solicitor General, whose views this subject are in the Appendix to th opinion, takes a wholly different a proach. He considers the problem terms of "government by the Judiciary With all respect, the problem is to ma certain that the inanimate objects, whi are the very core of America's beau

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Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, or frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be a few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of "government by the Judiciary." With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub.L. 91–90, 83 Stat. 852, 42 U.S.C. § 4321, et seq., and guidelines for agency action have been provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed.Reg. 7724.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.[6]

Yosemite Valley on a busy day. And, although Disney has bought up much of the private land near the project, another commercial firm plans to transform an adjoining 160-acre parcel into a "piggyback" resort complex, further adding to the volume of human activity the Valley must endure. See generally: Note, Mineral King Valley: Who Shall Watch the Watchman?, 25 Rutgers L.Rev. 103, 107 (1970); Thar's Gold in Those Hills, 206 The Nation 260 (1968). For a general critique of mass recreation enclaves in national forests see Christian Science Monitor, Nov. 22, 1965, at 5, col. 1, Michael Frome cautions that the national forests are "fragile" and "deteriorate rapidly with excessive recreation use" because "(t)he trampling effect alone eliminates vegatative growth, creating erosion and water runoff problems. The concentration of people, particularly in horse parties, on excessively steep slopes that follow old Indian or cattle routes, has torn up the landscape of the High Sierras in California and sent tons of wilderness soil washing downstream each year." M. Frome, The Forest Service 69 (1971).

6. The federal budget annually includes about $75 million for underwriting about 1,500 advisory committees attached to various regulatory agencies. These groups are almost exclusively composed of industry representatives appointed by the President or by Cabinet members. Although public members may be on these committees, they are rarely asked to serve. Senator Lee Metcalf warns: "Industry advisory committees exist inside most important federal agencies, and even have offices in some. Legally, their function is purely as kibitzer, but in practice many have become internal lobbies—printing in-

As early as 1894, Attorney General Olney predicted that regulatory agencies might become "industry-minded," as illustrated by his forecast concerning the Interstate Commerce Commission:

> "The Commission is or can be made of great use to the railroads. It satisfies the public clamor for supervision of the railroads, at the same time that supervision is almost entirely nominal. Moreover, the older the Commission gets to be, the more likely it is to take a business and railroad view of things." M. Josephson, The Politicos 526 (1938).

Years later a court of appeals observed, "the recurring question which has plagued public regulation of industry [is] whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is supposed to protect." Moss v. CAB, 139 U.S.App.D.C. 150, 430 F.2d 891, 893 (1970). See also Office of Communication of United Church of Christ v. FCC, 123 U.S.App.D.C. 328, 359 F.2d 994, 1003–1004; Udall v. FPC, 387 U.S. 428, 87 S.Ct. 1712, 18 L.Ed.2d 869; Calvert Cliffs' Coordinating Committee, Inc. v. AEC, D.C.Cir., 449 F.2d 1109; Environmental Defense Fund, Inc. v. Ruckelshaus, 142 U.S.App.D.C. 74, 439 F.2d 584; Environmental Defense Fund, Inc. v. United States Dept. of HEW, 138 U.S.App.D.C. 381, 428 F.2d 1083; Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620. But see Jaffe, The Federal Regulatory Agencies In a Perspective: Administrative Limitation In A Political Setting, 11 Bos. C. I. & C. Rev. 565 (1970) (labels "industry-mindedness" as "devil" theory).

The Forest Service—one of the federal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests.[7]

dustry handouts in the Government Printing Office with taxpayers' money, and even influencing policies. Industry committees perform the dual function of stopping government from finding out about corporations while at the same time helping corporations get inside information about what government is doing. Sometimes, the same company that sits on an advisory council that obstructs or turns down a government questionnaire is precisely the company which is withholding information the government needs in order to enforce a law." Metcalf, The Vested Oracles: How Industry Regulates Government, 3 The Washington Monthly 45 (1971). For proceedings conducted by Senator Metcalf exposing these relationships, see Hearings on S. 3067 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 2d Sess. (1970); Hearings on S. 1737, S. 1964 and S. 2064 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92d Cong., 1st Sess. (1971).

The web spun about administrative agencies by industry representatives does not depend, of course, solely upon advisory committees for effectiveness. See Elman, Administrative Reform of the Federal Trade Commission, 59 Geo.L.J. 777, 788 (1971); Johnson, A New Fidelity to the Regulatory Ideal, 59 Geo.L.J. 869, 874, 906 (1971); R. Berkman & K. Viscusi, Damming The West, The Ralph Nader Study Group Report On The Bureau of Reclamation 155 (1971); R. Fellmeth, The Interstate Commerce Omission, Ralph Nader Study Group on the Interstate Commerce Commission and Transportation 15–39 and *passim* (1970); J. Turner, The Chemical Feast, The Ralph Nader Study Group on Food Protection and the Food and Drug Administration *passim* (1970); Mussel, The Regulatory Process, 26 Law and Contemporary Problems 181, 189 (1961); J. Landis, Report on Regulatory Agencies to the President-Elect 13, 69 (1960).

7. The Forest Reserve Act of 1897, 30 Stat. 34, 16 U.S.C. § 551, imposed upon the Secretary of the Interior the duty to "preserve the [national] forests . . . from destruction" by regulating their "occupancy and use." In 1905 these duties and powers were transferred to the Forest Service created within the Department of Agriculture by the Act of Feb. 1, 1905, 33 Stat. 628, 16 U.S.C. § 472. The phrase "occupancy and use" has been the cornerstone for the concept of "multi-



Note 7—Continued

ple use" of national forests, that is, the policy that uses other than logging were also to be taken into consideration in managing our 154 national forests. This policy was made more explicit by the 1960 Multiple Use and Sustained Yield Act, 74 Stat. 215, 16 U.S.C. § 528, which provides that competing considerations should include outdoor recreation, range, timber, watershed, wildlife and fish purposes. The Forest Service, influenced by powerful logging interests, has, however, paid only lip service to its multiple use mandate and has auctioned away millions of timberland acres without considering environmental or conservational interests. The importance of national forests to the construction and logging industries results from the type of lumber grown therein which is well suited to builders' needs. For example, Western acreage produces douglas fir (structural support) and ponderosa pine (plywood lamination). In order to preserve the total acreage and so-called "maturity" of timber, the annual size of a Forest Service harvest is supposedly equated with expected yearly reforestation. Nonetheless, yearly cuts have increased from 5.6 billion board feet in 1950 to 13.74 billion in 1971. Forestry professionals challenge the Service's explanation that this 240% harvest increase is not really overcutting but instead has resulted from its improved management of timberlands. "Improved management" answer the critics is only a euphemism for exaggerated regrowth forecasts by the Service. N.Y. Times, Nov. 15, 1971, at 48, col. 1. Recent rises in lumber prices have caused a new round of industry pressure to auction more federally owned timber. See Wagner, Resources Report/Lumbermen, conservationists head for new battle over government timber, 3 Nat.J. 657 (1971).

Aside from the issue of how much timber should be cut annually, another crucial question is *how* lumber should be harvested. Despite much criticism the Forest Service had adhered to a policy of permitting logging companies to "clearcut" tracts of auctioned acreage. "Clearcutting," somewhat analogous to strip mining, is the indiscriminate and complete shaving from the earth of all trees—regardless of size or age—often across hundreds of contiguous acres.

Of clearcutting Senator Gale McGee, a leading antagonist of Forest Service policy, complains: "The Forest Service's management policies are wreaking havoc with the environment. Soil is eroding, reforestation is neglected, if not ignored streams are silting, and clearcutting re

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Senator Jennings Randolph offers a similar criticism of the leveling by lumber companies of large portions of the Monongahela National Forest in West Virginia. *Id.*, 9. *See also* 116 Cong.Rec. 36971 (1970) (reprinted speech of Sen. Jennings Randolph concerning Forest Service policy in Monongahela National Forest). To investigate similar controversy surrounding the Service's management of the Bitterroot National Forest in Montana, Senator Lee Metcalf recently asked forestry professionals at the University of Montana to study local harvesting practices. The faculty group concluded that public dissatisfaction had arisen from the Forest Service's "overriding concern for sawtimber production" and its "insensitivity to the related forest uses . . . and the public interest in environmental values." S.Doc. 91-115, 91st Cong., 2d Sess., 14 (1970). See also Behan, Timber Mining: Accusation or Prospect? 77 American Forests 4 (1971) (additional comments of faculty participant); Reich, The Public and the Nation's Forests, 50 Cal.L.Rev. 381-400 (1962).

Former Secretary of the Interior Walter Hickel similarly faulted clearcutting as excusable only as a money-saving harvesting practice for large lumber corporations. W. Hickel, Who Owns America? 130 (1971). See also Risser, the U.S. Forest Service; Smokey's Strip Miners, 3 The Washington Monthly 16 (1971). And at least one Forest Service study team shares some of these criticisms of clearcutting. U.S. Dept. of Agriculture, Forest Management in Wyoming 12 (1971). See also Public Land Law Review Comm'n, Report to the President and to the Congress 44 (1970); Chapman, Effects of Logging upon Fish Resources of the West Coast, 60 J. of For. 533 (1962).

A third category of criticism results from the Service's huge backlog of delayed reforestation projects. It is true that Congress has underfunded replanting programs of the Service but it is also true that the Service and lumber companies have regularly ensured that Congress fully fund budgets requested for the Forest Service's "timber sales and management." Frome, The Environment and Timber Resources, What's Ahead for Our Public Lands? 24 (A. Pyles ed. 1970).

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.[8]

Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life[9] which it represents will stand before the court—the pileated woodpecker as well as the coyote and

8. Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians *ad litem*, executors, conservators, receivers, or counsel for indigents.

The values that ride on decisions such as the present one are often not appreciated even by the so-called experts.

"A teaspoon of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth. For example, molds have existed on earth for about 2 billion years. But only in this century did we unlock the secret of the penicillins, tetracyclines, and other antibiotics from the lowly molds, and thus fashion the most powerful and effective medicines ever discovered by man. Medical scientists still wince at the thought that we might have inadvertently wiped out the rhesus monkey, medically, the most important research animal on earth. And who knows what revelations might lie in the cells of the blackback gorilla nesting in his eyrie this moment in the Virunga Mountains of Rwanda? And what might we have learned from the European lion, the first species formally noted (in 80 A.D.) as extinct by the Romans?

"When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time." 13 Conserv. 4 (Nov. 1971).

Aldo Leopold wrote in Round River (1953) p. 147:

"In Germany there is a mountain called the Spessart. Its south slope bears the most magnificent oaks in the world. American cabinetmakers, when they want the last word in quality, use Spessart oak. The north slope, which should be better, bears an indifferent stand of Scotch pine. Why? Both slopes are part of the same state forest; both have been managed with equally scrupulous care for two centuries. Why the difference?

"Kick up the litter under the oaks and you will see that the leaves rot almost as fast as they fall. Under the pines, though, the needles pile up as a thick duff; decay is much slower. Why? Because in the Middle Ages the south slope was preserved as a deer forest by a hunting bishop; the north slope was pastured, plowed, and cut by settlers, just as we do with our woodlots in Wisconsin and Iowa today. Only after this period of abuse something happened to the microscopic flora and fauna of the soil. The number of species was greatly reduced, *i. e.*, the digestive apparatus of the soil lost some of its parts. Two centuries of conservation have not sufficed to restore these losses. It required the modern microscope, and a century of research in soil science, to discover the existence of these 'small cogs and wheels' which determine harmony or disharmony between men and land in the Spessart."

9. Senator Cranston has introduced a bill to establish a 35,000 acre Pupfish National Monument to honor the pupfish which are one inch long and are useless to man. S. 2141, 92d Cong., 1st Sess. The pupfish are too small to eat and unfit for a home aquarium. But as Michael Frome has said:

"Still, I agree with Senator Cranston that saving the pupfish would symbolize



bear, the lemmings as well as the tr in the streams. Those inarticulate m bers of the ecological group can speak. But those people who have frequented the place as to know its ues and wonders will be able to speak the entire ecological community.

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"As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from the complaint here, its interest would be widely affected, and that 'it would be aggrieved,' by the acts of the defendant, has standing to raise legal questions in court.

"But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies we have in our governmental system? Are there not many questions which must be decided by courts? Why should not the courts decide any question which any citizen wants to raise? As the tenor of my argument indicates, this raises, I think, a true question, perhaps a somewhat novel question, in the separation of powers. . . .

"Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. In litigable cases, the courts have great authority. But the Founders also intended that the Congress should have wide powers, and that the executive branch should have wide powers. All these officers have great responsibilities. They are no less sworn than are the members of this Court to uphold the Constitution of the United States.

"This, I submit, is what really lies behind the standing doctrine, embodied in those cryptic words 'case' and 'controversy' in Article III of the Constitution. Analytically, one could have a system of government in which every legal question arising in the course of government would be decided by the courts. It would not be, I submit, a good system. More important, it is not the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years.

"Over the past 20 or 25 years there has been a great shift in the decision of legal questions in our governmental operations into the courts. This has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

"I have already mentioned the most ancient of all, case or controversy, which was early relied on to prevent the presentation of feigned issues to the court. But there are many other doctrines, which I cannot go into in detail: reviewability, justiciability, sovereign immunity, mootness in various aspects, statutes of limitations and laches, jurisdictional amount, real party in interest and various questions in relation to joinder. Un-

al Monument to honor the pupfish which are one inch long and are useless to man. S. 2141, 92d Cong., 1st Sess. They are too small to eat and unfit for a home aquarium. But as Michael Frome has said:

"Still, I agree with Senator Cranston that saving the pupfish would symbolize our appreciation of diversity in God's tired old biosphere, the qualities which hold it together and the interaction of life forms. When fishermen rise up united to save the pupfish they can save the world as well." Field & Stream, December 1971, p. 74.

der all of these headings, limitations which previously existed to minimize the number of questions decided in courts have broken down in varying degrees. I might also mention the explosive development of class actions which has thrown more and more issues into the courts. . . .

"If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the court before the administrator sworn to uphold the law, can take any action. I'm not sure that this is good for the government. I'm not sure that it is good for the courts. I do find myself more and more sure that it is not the kind of allocation of governmental power in our tripartite constitutional system that was contemplated by the Founders. . . .

"I do not suggest that administrators can act at their whim and without any check at all. On the contrary, in this area they are subject to continuous check by the Congress. Congress can stop this development any time it wants to."

Mr. Justice BRENNAN, dissenting.

I agree that the Sierra Club has standing for the reasons stated by my Brother BLACKMUN in Alternative No. 2 of his dissent. I therefore would reach the merits. Since the Court does not do so, however, I simply note agreement with my Brother BLACKMUN that the merits are substantial.

Mr. Justice BLACKMUN, dissenting.

The Court's opinion is a practical one espousing and adhering to traditional notions of standing as somewhat modernized by Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); and Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content.

But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a widening, growing and disturbing problem, that of the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be 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 and do not prove to be entirely adequate for new issues?

The ultimate result of the Court's decision today, I fear, and sadly so, is that the 35.3-million-dollar complex, over 10 times greater than the Forest Service's suggested minimum, will now hastily proceed to completion; that serious opposition to it will recede in discouragement; and that Mineral King, the "area of great natural beauty nestled in the Sierra Nevada Mountains," to use the Court's words, will become defaced, at least in part, and, like so many other areas, will cease to be "uncluttered by the products of civilization."

I believe this will come about because: (1) The District Court, although it accepted standing for the Sierra Club and granted preliminary injunctive relief, was reversed by the Court of Appeals, and this Court now upholds that reversal. (2) With the reversal, interim relief by the District Court is now out of the question and a permanent injunction becomes most unlikely. (3) The Sierra Club may not choose to amend its complaint or, if it does desire to do so, may not, at this late date, be granted permission. (4) The ever-present pressure to get the project underway will mount. (5) Once underway, any prospect of bringing it to a halt will grow dim. Reasons, most of them economic, for not stopping the project will have a tendency to multiply. And the irreparable harm will be largely inflicted in the earlier stages of construction and development.



Rather than pursue the course Court has chosen to take by its af ance of the judgment of the Cou Appeals, I would adopt one of two natives:

1. I would reverse that judg and, instead, approve the judgme the District Court which recog standing in the Sierra Club and gr preliminary relief. I would be w to do this on condition that the S Club forthwith amend its compla meet the specifications the Court scribes for standing. If Sierra fails or refuses to take that step, it; the case will then collapse. Bu does amend, the merits will be befo trial court once again. As the C footnote 2, p. 1364, so clearly revea issues on the merits are substanti deserve resolution. They assay ground. They are crucial to the of Mineral King. They raise imp ramifications for the quality c country's public land manag They pose the propriety of the "du mit" device as a means of avoidi 80-acre "recreation and resort" tion imposed by Congress in 16 § 497, an issue that apparently has been litigated, and is clearly subs in light of the congressional exp of the limitation in 1956 arguably teeth into the old, unrealistic fi limitation. In fact, they conce propriety of the 80-acre permit and the consistency of the entire mous development with the st purposes of the Sequoia Game N of which the Valley is a part. context of this particular develo substantial questions are raised the use of National Park area for purposes for a new high speed ro a 66,000-volt power line to serve t plex. Lack of compliance with e administrative regulations is charged. These issues are not or perfunctory.

2. Alternatively, I would per imaginative expansion of our tra

Rather than pursue the course the Court has chosen to take by its affirmance of the judgment of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgment and, instead, approve the judgment of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the specifications the Court prescribes for standing. If Sierra Club fails or refuses to take that step, so be it; the case will then collapse. But if it does amend, the merits will be before the trial court once again. As the Court's footnote 2, p. 1364, so clearly reveals, the issues on the merits are substantial and deserve resolution. They assay new ground. They are crucial to the future of Mineral King. They raise important ramifications for the quality of the country's public land management. They pose the propriety of the "dual permit" device as a means of avoiding the 80-acre "recreation and resort" limitation imposed by Congress in 16 U.S.C. § 497, an issue that apparently has never been litigated, and is clearly substantial in light of the congressional expansion of the limitation in 1956 arguably to put teeth into the old, unrealistic five-acre limitation. In fact, they concern the propriety of the 80-acre permit itself and the consistency of the entire, enormous development with the statutory purposes of the Sequoia Game Refuge, of which the Valley is a part. In the context of this particular development, substantial questions are raised about the use of National Park area for Disney purposes for a new high speed road and a 66,000-volt power line to serve the complex. Lack of compliance with existing administrative regulations is also charged. These issues are not shallow or perfunctory.

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. It is no more progressive than was the decision in *Data Processing* itself. It need only recognize the interest of one who has a provable, sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. Who would have suspected 20 years ago that the concepts of standing enunciated in *Data Processing* and *Barlow* would be the measure for today? And Mr. Justice DOUGLAS, in his eloquent opinion, has imaginatively suggested another means and one, in its own way, with obvious, appropriate and self-imposed limitations as to standing. As I read what he has written, he makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance of adverseriness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts.

I make two passing references:

1. The first relates to the Disney figures presented to us. The complex, the Court notes, will accommodate 14,000 visitors *a day* (3,100 overnight; some 800 employees; 10 restaurants; 20 ski lifts). The State of California has proposed to build a new road from Hammond to Mineral King. That road, to the extent of 9.2 miles, is to traverse Sierra National Park. It will have only two lanes, with occasional passing areas, but it will be capable, it is said, of accommodating 700–800 vehicles per hour and a peak of 1,200 per hour. We are

told that the State has agreed not to seek any further improvement in road access through the park.

If we assume that the 14,000 daily visitors come by automobile (rather than by helicopter or bus or other known or unknown means) and that each visiting automobile carries four passengers (an assumption, I am sure, that is far too optimistic), those 14,000 visitors will move in 3,500 vehicles. If we confine their movement (as I think we properly may for this mountain area) to 12 hours out of the daily 24, the 3,500 automobiles will pass any given point on the two-lane road at the rate of about 300 per hour. This amounts to five vehicles per minute, or an average of one every 12 seconds. This frequency is further increased to one every six seconds when the necessary return traffic along that same two-lane road is considered. And this does not include service vehicles and employees' cars. Is this the way we perpetuate the wilderness and its beauty, solitude and quiet?

2. The second relates to the fairly obvious fact that any resident of the Mineral King area—the real "user"—is an unlikely adversary for this Disney-governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically. His fishing or camping or guiding or handyman or general outdoor prowess perhaps will find an early and ready market among the visitors. But that glow of anticipation will be short-lived at best. If he is a true lover of the wilderness—as is likely, or he would not be near Mineral King in the first place—it will not be long before he yearns for the good old days when masses of people—that 14,000 influx per day—and their thus far uncontrollable waste were unknown to Mineral King.

Do we need any further indication and proof that all this means that the area will no longer be one "of great natural beauty" and one "uncluttered by the products of civilization?" Are we to be rendered helpless to consider and evaluate allegations and challenges of this kind because of procedural limitations rooted in traditional concepts of standing? I suspect that this may be the result of today's holding. As the Court points out, p. 1367, other federal tribunals have not felt themselves so confined.[1] I would join those progressive holdings.

The Court chooses to conclude its opinion with a foot note reference to De Tocqueville. In this environmental context I personally prefer the older and particularly pertinent observation and warning of John Donne.[2]

1. Environmental Defense Fund, Inc. v. Hardin, 138 U.S.App.D.C. 391, 428 F. 1093, 1096–1097 (1970); Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 101–105 (CA2 1970), cert. denied, Parker v. Citizens Committee for Hudson Valley, 400 U.S. 949, 91 S.Ct. 237, 27 L.Ed.2d 256; Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615–617 (CA2 1965); Izaak Walton League of America v. St. Clair, 313 F.Supp. 1312, 1316–1317 (D.Minn.1970); Environmental Defense Fund, Inc. v. Corps of Engineers, 324 F.Supp. 878, 879–880 (D.C.D.C. 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F.Supp. 728, 734–736 (E.D.Ark.1971); Sierra Club v. Hardin, 325 F.Supp. 99, 107–112 (D. Alas.1971); Upper Pecos Association v. Stans, 328 F.Supp. 332, 333–334 (D.N. Mex.1971); Cape May County Chapter, Inc., Izaak Walton League of America v. Macchia, 329 F.Supp. 504, 510–514 (D. N.J.1971).

See National Automatic Laundry & Cleaning Council v. Shultz, 143 U.S.App. D.C. 274, 443 F.2d 689, 693–694 (1971); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 234–235 (CA4 1971); Environmental Defense Fund, Inc. v. United States Dept. of HEW, 138 U.S.App.D.C. 381, 428 F. 2d 1083, 1085 n. 2 (C.A.D.C.1970); Honchok v. Hardin, 326 F.Supp. 988, 991 (D. Md.1971).

2. "No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminishes me, because I am involved in Mankinde: And therefore never send to know for whom the bell tolls; it tolls for thee." Devotions XVII.



**State of NEBRASKA, Plaintiff,**
**v.**
**State of IOWA.**
**No. 17, Orig.**

Argued March 29, 1972.
Decided April 24, 1972.

Original action by Nebraska agai Iowa for construction and enforcem of the Iowa-Nebraska Boundary Co pact of 1943. On exceptions to report special master, the Supreme Court, Justice Brennan, held that word "ced as used in provision of compact recit that each state cedes to the other relinquishes jurisdiction over all la located within Compact boundary of other was properly interpreted as scribing all areas formed before C pact date, regardless of their loca with reference to the original bound whose "titles, mortgages and o liens," were, at date of Compact, "g in" the ceding state. The Court fur held that Iowa would not be enjo from further prosecution of cer pending state cases in absence of sh ing that Iowa would not adhere to nouncements of decree.

Decree accordingly.

1. Courts ⇐304

United States Supreme Court original jurisdiction of action bro by Nebraska against Iowa for cons tion and enforcement of the Iowa braska Boundary Compact of Acts Iowa, 50th Gen.Assem. c. Laws Neb.1943, c. 130; Act Jul 1943, 57 Stat. 494; 28 U.S.C.A. § U.S.C.A.Const. art. 3, § 2.

2. States ⇐13

Word "cedes", as used in pro of Iowa-Nebraska Boundary Compa 1943 reciting that each state ced the other and relinquishes jurisd over all lands located within Co boundary of the other was proper terpreted as describing all areas f