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Through a Glass Darkly: The Law of Standing to Challenge Governmental Action in New Mexico or All You Wanted to Know About Standing and Were Afraid to Ask

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THROUGH A GLASS DARKLY: THE LAW OF STANDING TO CHALLENGE GOVERNMENTAL ACTION IN NEW MEXICO

or

ALL YOU WANTED TO KNOW ABOUT STANDING AND WERE AFRAID TO ASK

ALBERT E. UTTON†

The U.S. Supreme Court has characterized the federal law of standing as a "complicated specialty of federal jurisdiction."1 Kenneth Culp Davis says the federal law of standing "is so cluttered and confused that almost every proposition has some exception. . . ."2 and pungently adds it "has long been too complex."3 One can safely say the same of New Mexico. The New Mexico law of standing is complicated and confusing. Neither courts nor lawyers are able confidently to negotiate its erratic currents. Likewise the law of standing in New Mexico "has long been too complex."

The federal law of standing has recently been considerably clarified by three landmark cases—two relating to standing to challenge governmental actions other than public expenditures, and the third completing the standing spectrum by relating to challenges to public expenditures. With this comprehensive revision of the federal law of standing, now is an appropriate juncture for evaluating the New Mexico law of standing with a view to anticipating and suggesting the course of its future development and hopefully its clarification and simplification.

CHALLENGES TO GOVERNMENT ACTIONS OTHER THAN PUBLIC EXPENDITURES

The difficulties federal courts have had in formulating the law of standing is illustrated particularly well in those cases in which the one seeking standing was an economically injured competitor. The formulation was expressed in the seminal case of Tennessee Electric Power Co. v. T.V.A.,4 that one is without standing unless "the right invaded is a legal right. . . ." This led courts to decide at the preliminary standing stage the question of whether legal rights were invaded. The case of Asso. of Data Processing Service Organization v.

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Camp5 liberalized the federal law of standing by expressly overruling Tennessee Electric and changing the judicial inquiry from "were legal rights invaded" to "whether the interest sought to be protected ... is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."6 This much more preliminary language focuses on the threshold nature of the standing decision and leaves the decision of whether the plaintiff was in fact unlawfully injured or a legal right in fact invaded to be decided after argument on the merits. As the Supreme Court said in overruling Tennessee Electric, "the 'legal interest' test goes to the merits. The question of standing is different."7

The New Mexico phraseology has been an almost direct copy of that of Tennessee Electric v. T.V.A. The New Mexico Court in Ruidoso State Bank v. Brumlow8 said, "The true test is whether appellant's legal rights have been invaded ..."9 thus often leading the New Mexico courts, just as the federal courts, to decide the merits of the case when it decided the threshold question of standing involving economic competitors. The Data Processing case has improved the federal law of standing, whereas New Mexico is left with the federally overruled Tennessee Electric language.

In developing the New Mexico law of standing in view of the Data Processing decision, there are at least four possible alternative positions from which the New Mexico court might select:

1. It might uphold the "legal right" formulation of Ruidoso State Bank and thereby maintain the status quo;10
2. It might, with some liberal interpretation of precedents, take the position that the New Mexico law is congruent with the Data Processing standards or at least not inconsistent with them and thereby simply refine the New Mexico phraseology to conform with that of Data Processing;
3. The New Mexico court could follow the U.S. Supreme Court's example and expressly overrule the Ruidoso State Bank "legal right" test and adopt the Data Processing standards;
4. It could overrule Ruidoso State Bank, but rather than adopt the Data Processing standards verbatim, could establish an improved formulation avoiding some of the complexities of the Data Processing standard which hindsight has revealed.

This fourth alternative is the course this paper will propose with

6. Id. at 153.
7. Id.
9. Id. at 381, 467 P.2d at 397.
10. This, with all deference, is not a status one should quo about.
the object of developing a single, simplified standard for determining standing in cases seeking to challenge governmental actions other than public expenditures.

SIMILARITY BETWEEN NEW MEXICO AND DATA PROCESSING

There is support for concluding that there is congruence in a general way between the New Mexico law of standing and the requirements established by Data Processing. Data Processing established a twofold test: Is there "injury in fact, economic or otherwise" to the complainant, and, is the interest sought to be protected by the complainant "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."1

A survey of the New Mexico decisions reveals some similarity between the New Mexico requirements for standing to challenge governmental actions other than public expenditures and the Data Processing requirements although, assuredly, there are cases which do not seem to fit and others which require considerable elasticity in the translation process.

A. New Mexico: Injury in Fact, Economic or Otherwise

The general rule in New Mexico echoes the first Data Processing criterion. In most cases to have standing a New Mexico complainant must have a direct personal interest—he must be personally injured in fact. Although the courts in New Mexico have had as much trouble as those in other jurisdictions in attempting to fashion a coherent theory of standing, the requirement of injury in fact has stood robustly firm. The cases establish that a person will not have standing just because he is a citizen, or a resident, or a taxpayer, or a property owner, or a competitor, or a public officer, or a combination of all of these. The complainant must demonstrate as well that he has been injured in fact, economically or otherwise.

For example, in Kuhn v. Burroughs12 the plaintiffs as citizens and taxpayers brought suit against the State, alleging that the Bureau of Revenue which was collecting sales tax for the City of Albuquerque was charging the maximum amount allowed by law for the expense of administration without regard to the actual cost of administration. The court denied standing saying, "In order to bring an action the plaintiffs must have an interest in the subject matter of the suit which gives them standing to sue...."13 and citing Asplund v.

13. Id. at 63, 342 P.2d at 1087.
Hannett quoted as saying, "a taxpayer does not have a sufficient interest or standing to bring suit against the state." In State ex rel. Overton v. New Mexico State Tax Commission, the Los Alamos county assessor sought, by a declaratory judgment, to challenge the constitutionality of the veterans' real and personal property tax exemption statute. He was denied standing because "a public officer as such does not have an interest as would entitle him to question the constitutionality of a statute." In Overton II, the court denied standing for a writ of mandamus because the plaintiff "pleads no facts which show an injury ..." and to use plaintiff's words, he was not saved "from the legal status of an officious do-gooder with no standing to sue."

In Griggs v. Bd. of County Commissioners of Colfax County, the plaintiffs were denied standing to challenge a resolution of the board relating to a bond issue because they were "men who profess ... no prospective loss or injury of the bonds being issued."

In Gallegos v. Conroy, although the court rather fully discussed the merits of the case, it did not allow the plaintiff to enjoin the building of a "Y" in the highway passing through Los Lunas which he alleged would lead to confusion of traffic and danger to vehicles and life because he pleaded no facts "indicating the manner in which he would be damaged."

In Stoval v. Vesely, taxpayers and citizens were denied standing to enjoin the sale of certain public lands because they had no personal stake in the action—they were "complete strangers" to the governmental action.

In Tomlin v. Town of Las Cruces, a tourist camp owner attempted to enjoin the rerouting of Highway 80 which he alleged would "injuriously affect the public in very materially increasing the distance to be travelled ..., and in introducing four sharp turns

14. 31 N.M. 641, 249 P. 1074 (1926).
17. Id. at 616, 462 P.2d at 616.
19. Id. at 783, 461 P.2d at 916.
20. Id. at 783, 461 P.2d at 916.
22. Id. at 105, 41 P.2d at 279.
23. 38 N.M. 154, 29 P.2d 334 (1934).
24. Id. at 155, 29 P.2d at 335.
25. 38 N.M. 415, 34 P.2d 862 (1934).
26. Id. at 419, 34 P.2d at 865.
27. 38 N.M. 247, 31 P.2d 258 (1934).
instead of a straight road. . . .” 28 Again, standing was denied because a private individual to have standing must suffer some injury which “is distinct from that of the public.” 29

This requirement of injury in fact meets the case or controversy requirement that Article III of the U.S. Constitution imposed on the federal courts. The New Mexico cases speak of the necessity of a “direct interest, pecuniary or otherwise.” 30 Thus, as was said in *Flast v. Cohen*, “the emphasis . . . is on . . . a personal stake in the outcome of the controversy.” 31 This personal stake goes to assure there will be “that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions,” 32 the principal concern here being that the question is framed so as to be “capable of judicial resolution.” 33

So New Mexico like the federal rule requires personal injury in fact. The injury, however, may be slight as in the case of *Johnson v. Greiner* 34 where the plaintiff successfully gained access to the courts to challenge a 25 cent tax he paid to the Chaves County Clerk for filing a chattel mortgage. And so it should be. As James Madison said regarding an establishment of religion question, “The same authority which can force a citizen to contribute three pence only of his property for the support of only one establishment may force him to conform to any other establishment in all cases whatever.” 35

B. New Mexico: Zone of Interests to be Protected

The second half of the federal formulation grants standing where there has been injury in fact “if the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute as constitutional guarantee in question.” 36

In a general way it might be suggested that the New Mexico decisions are compatible with the second prong of *Data Processing*, if one makes a liberal translation of the New Mexico language into the federal formulation. Also, one must add the important caveat that the second *Data Processing* standard is complex, and is an open

28. Id. at 248, 31 P.2d at 259.
29. Id. at 250, 31 P.2d at 260.
33. Davis, supra note 2, at 607.
34. 44 N.M. 230, 101 P.2d 183 (1940).
invitation to disagree over what interests were intended to be “protected or regulated” by the relevant statutory or constitutional provision.\textsuperscript{37} Because of this “litigation prone” complexity of the second half of Data Processing, this paper will later argue that New Mexico in clarifying its law of standing should resist taking the half-way step of Data Processing. Nonetheless, it might be argued that there is some general compatibility between the second half of Data Processing and the more recent formulations of the New Mexico court that have arisen in cases in which economic competitors sought standing to challenge governmental action.

In attempting to fashion a single doctrine for determining standing to challenge governmental actions other than public expenditures, the situation of the economically injured competitor has presented the courts with a special case. The courts have become entangled in the seemingly reasonable proposition that since one has no right to be free from competition, a competitor has no standing to challenge a governmental decision; for example the licensing of a competitor, which injures the complainant economically. For example, Tennessee Electric, the leading case until overruled, said one is not entitled to standing unless “the right invaded is a legal right . . .”\textsuperscript{38} Since competition is legal, then new competition does not invade a legal right. What could be more logical? The problem is that the formulation is too general. The correct statement should be “lawful” competition is legal and no one has a right to be free from “lawful” competition; but the very lawfulness of the competition often is the issue which the person seeking standing wants the courts to resolve. Competition in general is lawful, but if the government agency, for example, acted unlawfully in granting a license to a competitor, then the competition is unlawful. However, if the courts deny standing because competition in general is lawful, it decides the merits of the case without hearing argument on whether in fact this particular competition is lawful.

Data Processing has expressly overruled this “legal right” test of Tennessee Electric for federal standing. New Mexico meanwhile still seems to be caught in the embrace of the Tennessee Electric “legal right” approach. The court in the Ruidoso State Bank and Hubbard cases recently reiterated the Tennessee Electric type formulation in saying, “The true test is whether the appellant’s legal rights have been invaded . . .,” and went on to say, “One whose only injury will result from lawful competition suffers no legal wrong.”\textsuperscript{39}

\begin{itemize}
    \item \textsuperscript{37} Davis, \textit{supra} note 3, at 462.
    \item \textsuperscript{38} 306 U.S. 118, 137-38 (1939).
    \item \textsuperscript{39} Hubbard Broadcasting, Inc. v. City of Albuquerque, 82 N.M. 164, 165, 477 P.2d 602, 603 (1970).
\end{itemize}
However, the use of the phrase "lawful competition" may hold out some hope for the future because reason would indicate that the court's position should not be interpreted to stand for the proposition that because the complainant's injury is financial he has no standing to challenge "unlawful" competition. Otherwise one would have to ask if this person who is in fact injured cannot challenge unlawful governmental action, who then can?

In addition, if the very thing the complainant is challenging in the lawfulness of governmental action, to deny standing by saying the action complained of is lawful is to decide the case on the merits without allowing argument on the merits. If the action complained of is arguably unlawful, then a complaining party who is injured in fact should be allowed to argue the merits before the court and not have access to judicial determination barred at the threshold of the courthouse.

After evaluating the recent decisions of the New Mexico court, it must be concluded that the formulation that "one whose only injury will result from lawful competition suffers no legal wrong," although it sounds acceptable enough, goes too far and says too much. It leads the court into deciding the central question of the lawfulness of governmental action at the preliminary standing stage and subtly but insidiously may lead the courts to view less seriously injury which is caused by economic competition.

Such seems to be the case in New Mexico; the New Mexico court seems to look the other way at the first whiff of economic competition. With almost pavlovian certainty, it has steadfastly denied standing if the injury was caused by business competition—in Green v. Town of Gallup, it was held that "financial loss to plaintiff . . . was not alone ground . . . ." for standing. In Ruidoso State Bank the court said, "[W]e [have] held that profits or commercial advantages . . . were too elusive and uncertain . . . to maintain mandamus proceedings. . . ." In that same case the court elaborated by saying: "One enjoying an advantage over his competitors has been held to have no standing to seek review of an administrative order which destroys this advantage." In Hubbard Broadcasting, Inc. v. City of Albuquerque the court appears to have almost summarily dismissed the thought of granting standing once the word competi-

40. However, there is some awkward language in Tomlin v. Town of Las Cruces: "It is not enough that plaintiffs establish that defendant committed a wrong . . . A violation of some positive legal right of plaintiffs must be shown." 38 N.M. 247, 250, 31 P.2d 258, 260 (1934).
41. 46 N.M. 71, 75, 120 P.2d 619, 621 (1941).
42. 81 N.M. 379, 381, 467 P.2d 395, 397 (1970).
43. Id. at 380, 467 P.2d at 396.
44. 82 N.M. 164, 477 P.2d 602 (1970) (emphasis added).
tion was uttered. The court rhetorically raises the question, “Does Hubbard have standing to maintain this action?” and then responds confidently and firmly, “This question is answered in the negative for the following reasons. Hubbard contends and admits that the main issues here are competition with a rival business, economic loss of revenue and resulting profits, loss of good will, and ‘ghosting.’ Such contentions are without merit. . . .” One can only reflect on the irony of the court explicitly deciding on the merits while denying the opportunity to the complainants to argue the merits and the opportunity to hear those arguments itself. In this case Hubbard sought a declaratory judgment that the city did not have authority to grant a franchise to use city streets for a cable television system. The court denied the plaintiff standing saying competition is lawful when the very lawfulness of the competition was what the plaintiff sought to argue on its merits. The court summarily stated that “cable television per se is not illegal.” In so doing, it allowed itself to be confused by a muddled piece of analysis. It said, “Whether or not the City of Albuquerque acted ultra vires is a question quite apart and distinct from whether GenCoE is a lawful competitor.” The court went on to say, “Cable television is not per se illegal. . . .” No one would seriously argue that it is per se illegal, just as operating a dry cleaning plant is not per se illegal; but if a dry cleaning establishment does not have a properly issued license it cannot be operating legally. Therefore, just because cable T.V. is not per se illegal does not answer the question of whether GenCoE was legally authorized to operate its business. This question is one which should have been decided on its merits after appropriate argument. It is not a question which should have been peremptorily dismissed on the threshold decision on standing, and in fact at the trial level, Judge Larazolo did hear the question on its merits and decided that GenCoE was not legally authorized to operate in Albuquerque.

It might be possible to suggest that the actual language of the New Mexico economic competition cases is such that by liberal interpretation the results and criteria of Data Processing could be attained without expressly overruling extant precedents, thereby escaping the shackles of the Tennessee Electric legacy. 4 5 6

45. Id. at 165, 477 P.2d 603.
46. Id. at 166, 477 P.2d 604.
47. However, in the interest of clarifying and simplifying the New Mexico law of standing, it would be desirable for the New Mexico court to expressly rearticulate the criteria for standing, and in so doing it should improve on Data Processing in light of experience by avoiding the complexities of the second of the two Data Processing requirements as this paper will later argue. See Davis, supra note 3, at 455, who demonstrates how the Supreme Court itself was immediately confused by its own standards.
Data Processing requires injury in fact, and that the interest sought to be protected be arguably within the zone of interests to be protected by some statute or constitutional guarantee. The language of New Mexico cases relating to economic competition is not absolutely inconsistent with this approach. In Ruidoso State Bank the court said, “an aggrieved party... is one having an interest recognized by law... [one might read “within the zone of interests to be protected”] which is injuriously affected [read “injured in fact”].”

Later the court said, “The true test is whether appellant’s legal rights have been invaded, not merely whether he has suffered any actual pecuniary loss. . . .” As in Data Processing mere pecuniary loss (“injury in fact”) is not enough by itself; in addition the interest to be protected (legal rights invaded) must arguably be within the zone intended to be protected or regulated by law (statutory or constitutional).

So the line of inquiry followed by the courts in competition cases could perhaps be interpreted as being consistent with the two-pronged approach of Data Processing. The fact that economic competition is involved need not and should not ipso facto mean a negative answer to the question of standing. Thus, a rather elastic interpretation could perhaps be used to reform the New Mexico standing law, but it would be better for the New Mexico courts to clearly rephrase the New Mexico law of standing.

Also, the Hubbard case did in fact explicitly consider the Data Processing criteria for determining standing; whether the result reached in the particular case was correct or incorrect, Hubbard has the potential for being cited as precedent for the adoption of the Data Processing criteria in determining questions of standing in New Mexico. The court, in discussing Data Processing, said the U.S. Supreme Court found a statutory provision in Data Processing which “created a protectable zone of interest sufficient for standing pur-

48. See discussion at note 42 supra.
49. Id.
50. There is also some helpful language in Harriet v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958). In that case, the complainants sought to enjoin the consolidation of certain school districts in Socorro County and were granted standing. The court used language which is similar to that of Data Processing. The court upon “a careful reading” of the declaratory judgment act found that “an injured party has standing to sue under a declaratory judgment act on any genuine question involving the constitutionality or construction of a statute.” (Emphasis added.) Id. at 387, 320 P.2d at 741 (1958). Thus, the court required first a showing of injury in fact and second its phrase “genuine question” is reminiscent of the Data Processing “arguably within the zone of protected interests.” The “genuine question” language requires that at the threshold point of standing the complainant convince the court that his complaint is not capricious but is arguably serious enough to be heard on the merits. Thus by using language that reflects the threshold nature of the standing decision it avoids the finality of the Ruidoso language.
poses..." but "the ordinances before this court do not present a comparable situation," i.e., the interests the plaintiffs sought to protect were not arguably within the zone of interests intended to be protected by the ordinances.

Whether one agrees with this conclusion or not is not the point. What could be important is that the court at least purported to follow the line of inquiry laid down in Data Processing, even if not very vigorously. 52

Thus, it might be asserted that, as in Data Processing, the New Mexico court imposes two requirements for standing—injury in fact plus the invasion of a legal interest. There is an important difference, however, that makes the Data Processing language far superior to that in Ruidoso State Bank—the use of the simple word "arguably." Data Processing focuses on the preliminary nature of the standing determination by asking whether the interest is "arguably within the zone of interest" rather than "were legal rights invaded" in fact. This latter determination is one which should be made after full argument on the merits rather than at the threshold standing stage and the "legal rights" language is too much a copy of the discredited language of Tennessee Electric with its patina of interpretation. As the U.S. Supreme Court in Data Processing said, the existence or non-existence of a "legal interest" or "legal right" (to use the Ruidoso language) "is a matter quite distinct from the problem of standing." 53

52. In fairness, it must be said that the court does not appear to have made a very serious effort in following the "zone of interests" inquiry. It gave no more than a paragraph to its analysis and dismissed the whole inquiry in a one-sentence conclusion. Its interest seemed to lie elsewhere, and once the fact that competition and economic injury were "admitted," its decision seemed a foregone conclusion. It had little heart for any analysis of whether the relevant law arguably established a zone of interests intended to be protected. Even the question of what was the relevant law was not explained. The court assumed that the ordinances were the relevant laws to examine to see if they created a zone of protected interests within which the plaintiff could bring himself; this is a questionable assumption on the part of the court. It is much more likely that the proper focus of inquiry should have been the city charter or perhaps relevant enabling legislation which would relate to the critical question of whether the city acted ultra vires, or, alternately, the most obvious legislation which should have been considered in the light of Data Processing was the statute cited to the court by the plaintiffs—the New Mexico Declaratory Judgment Statute [N.M. Stat. Ann. § 22-6-1 (1953)] which, on its face explicitly grants standing to "any interested party."

53. See discussion at note 7 supra. The court in Ruidoso was echoing the language of Asplund v. Hannett, 31 N.M. 641, 249 P. 1074 (1926), where the court said, "The injury must consist...in the invasion of some right of the complaining party..." Id. at 651. The individual to have standing "must have legal equitable rights to be protected." Id. at 664. It should be noted that in Associated Industries the plaintiffs had a direct personal interest as consumers of coal challenging orders increasing the price of coal. For further discussion, see K. Davis, Administrative Law Text 428 (3d ed. 1972).
PRIVATE ATTORNEYS GENERAL AND JUDICIAL DISCRETION

Although at this juncture it can perhaps be suggested that there is some similarity between New Mexico case law and the Data Processing decision, there is another factor operating in New Mexico—judicial discretion. The New Mexico court in its discretion will grant standing quite apart from the requirements enumerated in Ruidoso State Bank, if it thinks the question important enough. The court has consistently resisted the idea of a “private attorney general” which would give private individuals standing to enforce or “to vindicate to the public interest” as the U.S. Supreme Court said in Associated Industries v. Ikes. In that case the court said persons authorized under the relevant statute to vindicate the public interest are, so to speak, private attorneys general. New Mexico decisions have generally required a direct personal interest, i.e., injury in fact to the one seeking standing consistent with Data Processing.

In Tomlin v. Town of Las Cruces, the court held that a private individual must suffer “some injury . . . which . . . is distinct from that of the public . . . the injury . . . must consist in the invasion of some right of the complaining party.” In Padilla v. Franklin, the court said the complainant must have a “direct interest different from the public as a whole.” In other words, the general rule is no private attorneys general; there must be a “direct personal interest.”

However, if the New Mexico court considers the question important enough, it will in the exercise of its discretion grant standing to a private citizen to vindicate the public interest. The 1968 case of State ex rel. Castillo v. N.M. State Tax Commission and the 1965 case of State ex rel. Gomez v. Campbell are the landmark decisions establishing this concept. There are a number of earlier cases which play a role in this development, and the case of Hutchison v. Gonzales is one of the key earlier decisions. The plaintiff, a

54. 134 F.2d 694 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943).
55. 38 N.M. 247, 249, 31 P. 258, 260 (1934).
56. 70 N.M. 243, 244, 372 P.2d 820, 84 (1962). The similarity of the approach and language of the New Mexico court is striking. In a decision in which the petitioner, a doctor, sought to challenge a decision not to change a public poster about diptheria vaccination, the Conseil d’Etat denied standing because a petitioner “... who has based his petition on his position as a citizen and could not in the circumstances rely on any other interest, does not show that he has a direct personal interest in having the challenged act set aside.” B. Schwartz, French Administrative Law and the Common Law World 181 (1954) My thanks to Tom Stribling, The University of New Mexico School of Law, for this comparison.
57. 79 N.M. 357, 443 P.2d 850 (1968). The French position again parallels the New Mexico law. Although the Conseil d’Etat denies standing unless the plaintiff suffers a direct personal injury, it has nonetheless granted standing if thought the action would serve the public good. Schwartz, supra note 56, at 180.
58. 75 N.M. 86, 400 P.2d 956 (1965).
59. 41 N.M. 474, 71 P.2d 140 (1937).
citizen, resident and qualified elector, sought by an original writ of mandamus to compel the Secretary of State to publish proposed constitutional amendments as required by Article 19 of the New Mexico Constitution. The court had no hesitation when it said, "Believing as we do that the plaintiff is a person 'beneficially interested' in his own behalf and that the cause of action which he asserts is of common or general interest . . ." he has standing.

In a landowner or taxpayer case in which the routing of a highway or the assessment of taxes was challenged, the plaintiff would have been called an intermeddling stranger. The court probably would have refused to hear the case and paraphrased the language of Asplund v. Hannett by saying, "It does not appear that the plaintiff will be affected in any other manner than any other qualified elector of the state." However, Hutchison was an original proceeding in mandamus, and the court granted standing under the rules governing the court's original jurisdiction in quo warranto and mandamus against state officers and agencies. The court took note of the rule that in such cases it should decline jurisdiction in "cases brought at the instance of a private suitor" except where the case is "publici juris; that is a case which affects sovereignty of the state . . . or the liberties of its people."

The court went on to quote an earlier case that, "it is the general rule that mandamus may be issued to enforce the performance of a public duty by public officers, upon application of any citizen whose rights are affected in common with those of the public. Such person is 'beneficially interested' in the enforcement of the laws." It thus appears that mandamus requirements for standing would be diametrically opposite to those in other cases. In mandamus proceedings standing would be given to enforce public rights if those rights were affected "in common with those of the public" whereas in other proceedings, such as where injunctive relief was sought, standing would not be granted if the applicant was affected in common with the public in general. It might then have been suggested that a "public action" brought by a private party was only possible in mandamus or quo warranto proceedings.

However, in 1965 in the case of State ex rel. Gomez v. Campbell, the court reviewed both the Hutchison decision, which was a mandamus proceeding and Asplund v. Hannett in which an in-

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60. Id. at 494, 71 P.2d 140 (1937).
61. Id. at 492, 71 P.2d at 151.
62. Id.
63. 75 N.M. 86, 400 P.2d 956 (1956).
64. 31 N.M. 641, 149 P. 1074 (1926).
junction was sought, and relied on both in determining that the plaintiffs were without standing. In spite of finding that the plaintiffs had no standing, the court went on to hear and decide the case. The court explicitly exercised its "absolute discretion" to decide a question "of great public interest" because "we would be remiss in our duty to the public, as well as to the relators, if we did not decide the basic question." The court allowed the relators to vindicate the public interest even though the court concluded that the relators did not have standing as of right. The court made it clear that it can exercise its discretion to hear a case on its merits where the complainant is without standing whether it be an original mandamus proceeding or a request for an injunction if it is a question of "great public importance." The relators in this original mandamus action sought to require the governor and eleven state agencies to return their offices to the capitol city of Santa Fe.

In the 1968 case of Castillo v. N.M. State Tax Commission, the court granted standing in an original mandamus action without weighing the long-established requirements for standing because "this case involves a question of such unusually great public interest that we feel called upon to exercise the discretion vested in us to determine the issue." The plaintiff, a taxpayer and owner-operator of an apartment complex, in behalf of himself and other similarly situated ad valorem taxpayers, sought to compel the defendant to provide a uniform assessment percentage ratio for use in all counties for ad valorem taxes. The plaintiff had asked the Attorney General to bring the action, but the Attorney General declined. The court thus gave standing to a taxpayer in the face of a long line of cases, including the leader of them all, Asplund v. Hannett, which specifically deny standing to taxpayers qua taxpayers. But the court was granting standing because the question was one of "great public interest," not because the plaintiff was a taxpayer. The court in exercising its discretion said, "In doing so, we are not unmindful of, nor do we in any sense overrule, our many decisions in which we refused to permit a taxpayer to raise constitutional questions against state officials."

In the Castillo case the court noted that it has been "suggested that a distinction should be made between the original jurisdiction of

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65. State ex rel. Gomex v. Campbell, 75 N.M. 86, 92, 400 P.2d at 960.
66. Id.
67. 79 N.M. 357, 359, 443 P.2d 850, 852 (1968).
68. Id. The court here did not distinguish between cases where the taxpayer was challenging the expenditure of public funds as was the case in Asplund v. Hannett which will be discussed later and cases where a taxpayer was challenging a tax assessment scheme.
the Supreme Court [mandamus] and the jurisdiction of a district court where injunction was sought. The court carefully used the words “suggested” and “should” rather than “there is a distinction”; the court quite clearly granted standing without making such a distinction between its original jurisdiction and district court jurisdiction, simply because it believed the case involved a question of great public importance.

The court was wise in not making a distinction for, as Professor Jaffee says, “relief should not depend on whether the required relief is an order to act (mandamus) or an order to refrain from action (injunction). Where both remedies are available, it is merely elegantia juris which dictates the appropriate form.

There is no indication that the New Mexico court is restricted exercising its “absolute discretion” to grant standing to proceedings involving its original jurisdiction. It consciously avoided placing such a limitation on itself in the Castillo opinion, and in fact has exercised or allowed the exercise of discretion in similar cases discussed below.

In 1934 in Crabtree v. Board of County Commissioners, the court implicitly exercised its discretion and allowed a taxpayer to challenge the sale of land even though there was no indication that he had a direct personal interest.

In this case a taxpayer filed suit to cancel the sale of land for $68,000 in a compromise sale of land by the State Tax Commission in which $125,000 had been offered but rejected. The court, without discussing standing, granted it to the taxpayer in spite of his not having a direct, personal interest. In other words, they apparently in their discretion felt the case was important enough to grant standing to what in fact was a “private attorney general” to “vindicate the public interest.” Another interesting decision is the 1952 case of Miller v. Cooper. There several taxpayers sought to prevent religious instruction in the Lindrith public schools. The court did not discuss standing but granted access to the court. In so doing they appear to have implicitly concluded it was a question of “public interest” and exercised their discretion accordingly. Perhaps the court did not directly discuss standing because the shadow of Asplund v. Hannett lurked in the back of the court’s mind, and rather than confront it and wrestle with trying to distinguish it, they chose simply to ignore it. Now that a viable theory has emerged from the Castillo and Campbell cases, perhaps the court can more openly

69. Id.
71. 38 N.M. 233, 31 P.2d 249 (1934).
72. 56 N.M. 355, 244 P.2d 520 (1952).
73. 31 N.M. 641, 249 P. 1074 (1926).
exercise its discretion in questions it considers to be important and candidly give it reasons for doing so.

In a number of cases in which the complainant has sought to enforce the New Mexico Constitution the New Mexico court has, without calling the complainant a private attorney general, granted him standing to vindicate the public interest even though he had not been personally injured in fact.

In 1936 in Baca v. Ortiz,74 one James Baca was allowed to enjoin the County Clerk of Santa Fe County from carrying out the “absentee ballot” laws. He successfully claimed that the absentee ballot was contrary to Section 1 of Article 7 of the New Mexico Constitution which provided that a person to be a qualified voter must have “resided in New Mexico twelve months.” The court neither raised nor discussed the question of standing.

The year following Baca v. Ortiz, in another electoral question, the court granted standing in mandamus proceedings to the plaintiff in the Hutchison case.

In State ex rel. Gomez v. Campbell, the court exercised its discretion even though it noted that unlike Hutchison, “There is no question in this case relating to the elective franchise. . . .”75 They thus made quite clear that their concept of important questions was not limited to electoral cases, and that the exercise of their discretion to grant standing to private attorneys general would range far wider as defined by the public interest. This case did in fact involve “a problem of constitutional construction.”76

The Asplund v. Hannett decision states there is not “an individual right to prevent violation of the constitution.”77 This has troubled the court, and its reasoning sometimes in distinguishing Asplund to grant standing in a case it felt to be important has been something less than an example of clarity.78

But with the Castillo and Campbell cases the court firmly established that although a private party may not have standing to enforce the constitution as a matter of right, it may in its discretion grant standing to private individuals to vindicate the public interest in cases raising questions which are of sufficient “public interest.”79

74. 40 N.M. 435, 61 P.2d 320 (1936).
75. 75 N.M. 86, 91, 400 P.2d 956, 959 (1965).
76. Id.
77. 31 N.M. 641, 645, 249 P. 1074 (1926).
78. In Shipley v. Smith, the court reflects the general confusion when it says: “It appears . . . the trial judge . . . was misled” by what the court said in Asplund. But the court itself seems no more certain of the meaning of Asplund when in the very next paragraph it somewhat tentatively deduces that “it appears that we did not decide that . . . .” 45 N.M. 23, 25, 107 P.2d 1050, 1051 (1940).
This position is quite clearly compatible with *Asplund v. Hannett* which quoted an earlier decision with approval: "It is not the duty of this court... or any other court... [to grant standing] except when the question is presented by a litigant claiming to be adversely affected...." This is simply another way of saying that one who is not personally injured in fact is not entitled to standing as of right to enforce the Constitution. The court, although not obligated, may in its discretion grant standing if it determines the question is sufficiently significant.

**PUBLIC REPRESENTATION IN ENVIRONMENTAL LITIGATION**

Recent federal decisions in which environmental groups attempted to challenge governmental actions raise the question of how the standing issue would be decided in such cases in New Mexico.

In *Scenic Hudson Preservation Society Conference v. F.P.C.*, the Conference, an unincorporated conservation association, asked the court to set aside an order of the F.P.C. granting a permit to erect a power plant on the grounds that the F.P.C. had not satisfied its statutory duty to consider the impact of the power plant on the environment. The court held that the Conference had standing, saying, "Those who by their activities and conduct have exhibited a special interest in such areas must be in the class of 'aggrieved parties'" under the statute. The court also observed that Scenic Hudson had an economic interest in that one of the members of the Conference, the New York-New Jersey Trail Conference, had 17 miles of trail which would be flooded by the project.

In *Citizens to Preserve Overton Park v. Volpe* standing was granted to the citizen group seeking to prevent construction of a highway through a park. In *Sierra Club v. Morton*, the U.S. Supreme Court affirmed the Ninth Circuit in denying standing to enjoin the Departments of Agriculture and Interior from "taking any action whatsoever toward implementing..." a development plan which would allow private developers to construct a commercial recreational area in a government-owned national forest and game

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81. 354 F.2d 608 (2d Cir. 1965).
82. *Id.* at 616.
85. *See also Alameda Conservation Ass’n v. California*, 437 F.2d 1087 (9th Cir. 1971).
refuge adjoining Sequoia National Park. The government had given preliminary approval to a plan submitted by Walt Disney Productions.

Disney's proposal includes a village incorporating major hotels and lodges for over 3,000 overnight guests, ten restaurants, a chapel, theater, general store, five story parking facility, hospital and sewage treatment facilities. Other facilities would include power plants, and associated installations, swimming and ice skating facilities, twenty ski lifts, a cog assisted railroad, avalanche dams and stream control features, and a development scheme which would require "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations and the grooming and manicuring of most slopes."

The Supreme Court emphasized that the Sierra Club failed to allege individualized injury and observed that "nowhere in the pleadings . . . did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected. . . ." The Court went on to observe that, "Certainly [the Sierra Club] has an 'interest' in the sense that the proposed course of action . . . does not please its officers. . . . [However] We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense. . . ." The Court distinguished between litigants whose aesthetic appreciation is directly affected and an organization which seeks to protect aesthetic and recreational values all over the nation, but which does not assert that any of its members are directly affected by the governmental action. If the pleadings of the Sierra Club had asserted a more direct personal interest in fact of its local California members, rather than an abstract national interest in recreational areas, it would seem the result might have been different.

The New Mexico requirement of a "direct personal interest" indicates that the New Mexico court would follow the Sierra Club decision and deny standing to a representative organization which asserts only an abstract interest in the challenged action. However, if the Club could show that some of its members actually used the area in New Mexico the New Mexico requirement of a direct personal interest would be satisfied even though the interest injured might be small as was the 25 cent fee in Johnson v. Greiner, or was esthetic rather than economic. The economic interest of flooded trails in

86. Id. at 7.
87. 92 S. Ct. 1361, 1366 (1972).
88. Sierra Club v. Hickel, 433 F.2d 24, 30 (9th Cir. 1970).
89. 44 N.M. 230, 101 P.2d 183 (1940).
Scenic Hudson likewise would be a direct personal interest and would satisfy that aspect of New Mexico's standing requirements.

Thus, in New Mexico the requirement of a direct personal interest would deny standing where the public representative has no more than an abstract interest, unless the court determines that the question is one of great public interest and exercises its discretionary power to grant standing. Also, the New Mexico requirement of an invasion of a legal right is less predictable and in some situations might pose an obstacle to standing in environmental litigations.

The question of what criteria are to be used to determine who is qualified to represent the public interest inevitably will be a contested issue. In Scenic Hudson the court said, "Those who by their activities and conduct have exhibited a special interest in such areas . . ." were qualified.

The Supreme Court in Sierra Club v. Morton adds that "it is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. But a 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 qualify the organization for standing.

TAXPAYER SUITS CHALLENGING EXPENDITURES OF FUNDS

The federal law formerly was very restrictive and has now been significantly liberalized in challenges of public expenditures. Under the 1923 case of Frothingham v. Mellon, the federal courts turned a cold shoulder on attempts by federal taxpayers to challenge expenditures of public funds. In that case the court held that the taxpayer did not have standing because he did not have enough personal interest since the effect of a federal expenditure on a federal taxpayer was de minimus—in the court's words, "comparatively minute and indeterminable."

The federal law of standing has now been broadened significantly by Flast v. Cohen which held that a federal taxpayer does have standing to challenge a federal expenditure if he brings his claim under a specific constitutional limitation on "the congressional taxing and spending power." In Flast seven plaintiffs successfully

90. See discussion at note 58 supra.
91. 354 F.2d 608, 616 (2d Cir. 1965).
92. 92 S.Ct. 1361, 1368 (1972).
93. 262 U.S. 447 (1923).
94. Id. at 487.
95. 392 U.S. 83 (1968).
96. See Davis, supra note 2, at 601.
sought standing "solely on their status as federal taxpayers" to challenge the expenditure of federal funds for religious schools in contravention of the first amendment. State courts have long been fairly liberal in giving taxpayers standing to challenge state expenditures, but New Mexico, contrary to most, has rebuffed taxpayers seeking to challenge public expenditures of state funds.

Again the granddaddy of New Mexico decisions on standing, *Asplund v. Hannett*, looms large. In that case the court denied standing to a taxpayer attempting to prevent expenditures from a public fund established to build irrigation reservoirs. The *Asplund* court unequivocally expressed itself: "Not having found any legal or logical principle to support a taxpayer's suit to enjoin the expenditure of state funds, we are constrained to hold that he has no right in this state." The court in the *Castillo* case, decided after *Cohen v. Flast*, specifically stated, "nor do we in any sense overrule" *Asplund* in spite of their recognition that "the trend, and probably the weight of authority... generally permit taxpayer suits as is exemplified by... *Flast*. In *Asplund v. Hannett* the New Mexico court sounded much like the U.S. Supreme Court in *Frothingham v. Mellon*. The court was just not convinced that the alleged injury was anything but *de minimus*, even assuming the expenditure would result in increased taxes. The New Mexico Supreme Court said, "Though... he [the taxpayer] contributes to the expense of government... in the form of taxes... it is not satisfactorily shown that he will be in any way affected in his property by the proposed expenditures."

It should be noted that in the very case in which the court went out of its way to say we do not in "any sense overrule" *Asplund* it also "exercised the discretion visited in us" to grant standing because the question was of such "unusually great importance." How-

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98. See Jaffee, supra note 70, at 471.
99. "Only two states—New York and New Mexico—squarely prohibit" such actions. *Id.*
100. The *Asplund* court specifically noted that taxpayers have standing in New Mexico to challenge expenditure of municipal funds: "Whatever the merits of this doctrine... we consider the taxpayer's right, as against municipal authorities, settled in this jurisdiction." *Asplund v. Hannett*, 31 N.M. 611, 651 (1926). But they saw this only as an exception to the rule as enunciated by the court regarding state funds. An exception which they said with a slight note of derision "is perhaps better supported by practical considerations than on principle." *Id.* at 664.
102. *Id.* at 359, 443 P.2d 852.
103. 262 U.S. 447 (1923).
104. 31 N.M. 641, 650-51, 249 P. 1074, 1077 (1926).
See also *Womack v. Regents of The University of New Mexico*, 82 N.M. 460, 483 P.2d 934 (1970).
ever, it in turn should be noted that *Castillo* did not involve a public expenditure; rather it concerned a taxpayer attempting to compel the State Tax Commission to establish a uniform tax assessment ratio.

One may pose the question of what the court would do if a *Cohen v. Flast* situation arises in New Mexico in the future. Will the court slavishly follow *Asplund*? Will it follow *Flast*? Or will it follow *Castillo*? In spite of the court’s using absolute language in *Asplund* saying that a citizen has no “right to prevent the violation of the constitution”106 the question at issue did not involve a preferred right of the Bill of Rights107 or even a provision of the main body of the constitution. It concerned the enabling legislation passed by Congress and made a part of the New Mexico Constitution when New Mexico became a state.108 Therefore, one has good reason to doubt the monolithic character of the *Asplund* decision. If the question raised were one of racial discrimination or of interference with freedom of speech, religion or privacy, there is little doubt that the court would follow *Castillo*,109 and in its discretion grant standing because of the importance of the question.

Would the court go a step further and follow *Flast* by granting standing as of right to challenge a public expenditure under specific constitutional limitations on the power to tax and spend?

The New Mexico position in view of *Castillo* is both broader and narrower than *Flast*. It is narrower than *Flast* in that, where the challenge is based on a constitutional claim, standing is still a matter of judicial discretion and not of right. On the other hand, *Castillo* is broader than *Flast* in that standing can be granted in the court’s discretion even if a constitutional claim is not made. The question need only be one of public importance. Therefore, in our hypothetical, there is no doubt that the New Mexico court would and should grant standing. Should the court overrule *Asplund* and bring New Mexico law into conformity with *Flast*? This question is speculative at best; it will depend on how liberally the court exercises its discretionary powers. Based on the assumption that the New Mexico

106. 31 N.M. 641, 645, 249 P. 1074, 1075 (1926).
109. Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952), lends support, although it was not framed in terms of stopping a particular public expenditure. In this case, the courts granted access to a group of taxpayers seeking to bar permanently the teaching of religion in public schools. Constitutional questions involving separation of church and state are important questions, the court thought so, and undoubtedly would in a *Flast* situation as well.
court will consider substantial constitutional challenges to be important questions and grant standing, it would appear that the New Mexico taxpayer under *Castillo* is in a better position to make legitimate challenges of public expenditures of state funds than the federal taxpayer is under *Flast*.

**EVALUATION OF NEW MEXICO LAW OF STANDING**

The then Judge Burger once said, "The concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding." Against this standard, how does one assess the New Mexico position? Is it practical and functional, or does it unduly prevent those who have "a genuine and legitimate interest" from challenging government actions?

In the appraisal of the New Mexico law of standing, there needs to be some clarification which would make it both more practical and functional, but there are credits as well as debits on the New Mexico balance sheet.

**A. Standing to challenge governmental actions other than those of public expenditures of state funds:**

The New Mexico law, particularly in the case of economic competitors, still appears tied to the pre-*Data Processing* language of *Tennessee Electric*. *Data Processing* might be adopted without expressly overruling New Mexico precedents; a liberal reading of the New Mexico precedents might argue that the New Mexico law is at least not inconsistent with *Data Processing* and the court in *Hubbard* did make a tentative movement toward adopting *Data Processing*. However, it would be much better for the court to expressly and clearly free itself from the *Tennessee Electric* language as expressed in *Ruidoso State Bank*.

On balance the New Mexico law in this area is inadequate; it unduly prevents those who have "a genuine and legitimate interest" from challenging governmental actions other than public expenditures; but on the plus side, the power of the court to exercise its discretion to grant standing "to vindicate the public interest" in cases of "general and common interest" as enunciated in the *Castillo* and *Campbell* cases ameliorates the New Mexico situation.

**B. Taxpayer Challenges to Expenditures of State Funds:**

*Asplund v. Hannett* looms large here in not recognizing standing in

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these cases. However, the Castillo doctrine which permits the court to exercise its discretion to grant standing in important cases has the potential for being superior to the federal Flast v. Cohen position in that standing can be granted not only where specific constitutional provisions limiting the spending power are at issue, but also where any other important question (constitutional or nonconstitutional) is involved.

However, there is still room for improvement. Simple justice requires that those who are injured by unlawful governmental action should be allowed to seek judicial remedy: “Justice is enhanced in that those who are hurt in fact are not barred by lack of standing from having their cases decided on the merits,”111 and it is hard to disagree with Professor Davis’ straightforward suggestion that “the law should presume that every taxpayer is adversely affected by an illegal public expenditure.”112

The best rule would grant standing to taxpayers if they could persuade the court that a particular public disbursement was arguably illegal. Then the case could be properly decided on its merits. This requirement of an arguable claim at the threshold stage would be both “practical and functional” in preventing the disruption of the processes of government by the perfidious taxpayer with a capricious claim, while at the same time allowing standing when the public has a “genuine and legitimate interest.” No one would seem to have a more genuine and legitimate interest in public expenditures than a taxpayer.

New Mexico already allows taxpayers such standing to challenge local governmental expenditures,113 and the reported cases bear witness to the fact that the courts have not been inundated by taxpayer suits, nor is there any indication that the wheels of local government have been unduly inhibited.

We are told that “only two states—New York and New Mexico—squarely prohibit”114 taxpayer standing to challenge state expenditures. Again, experience in other states would indicate that neither the halls of justice nor the machinery of government are likely to be overly burdened by allowing taxpayers to challenge illegal state expenditures.115 New Mexico should join the great majority of the states in allowing such suits. Justice and public confidence in government would both be served.

111. Davis, supra note 2, at 618.
112. Id.
113. See discussion at note 100 supra.
At this juncture in the development of the law of standing in New Mexico when it is possible to say that there might be at least some general compatibility between the New Mexico and *Data Processing* positions, it is appropriate to question whether we should adopt the formulation of *Data Processing*. There is appeal in following *Data Processing* because it could potentially open the doors to standing in many economic competition cases such as the *Hubbard* and *Ruidoso State Bank* cases where the New Mexico court has been shackled by inadequate doctrines. It would be a gain to carry forward and build on the tentative step taken toward *Data Processing* by the New Mexico court in the *Hubbard* decision. However, it would be much better if the court did not take to its bosom the exact language of *Data Processing*. Instead the opportunity should be grasped to embrace a less complicated approach. The inquiry into standing should focus on two things: (1) the question of whether the party was injured in fact, or imminently threatened with injury by governmental action, economically or otherwise, and (2) the question of whether the governmental action causing or threatening the injury was arguably contrary to law or equity.

This borrows directly from *Data Processing* and New Mexico precedent on the first requirement, but avoids the pitfalls of the complex, confusing and litigation-prone language of the second *Data Processing* requirement. The crux question in standing determinations is who has "a genuine and legitimate interest" in participating in the proceedings. Certainly one who is injured, or imminently threatened with injury by governmental action, economically or otherwise, has a "genuine interest." For it to be legitimate for standing purposes, the party should also persuade the court that the action causing the injury is arguably unlawful. Who has a more "genuine" interest than the one injured by the governmental action? Yet even one who is injured should not be allowed to hold up government action unless he can reasonably argue that the action is contrary to law or equity in that, for example, the agency has followed incorrect procedures, acted *ultra vires*, contrary to statutory or constitutional strictures, or equitable or common law principles.

Otherwise, anyone who disagreed with the rerouting of a highway or discontinuance of a bus line could fetter the power of public officials to act. Surely it is reasonable to require that the person seeking standing not only demonstrate that he has suffered or is imminently threatened with some injury, but also that the govern-
mental act causing the injury was arguably contrary to law. The word "arguably" is borrowed from *Data Processing* and indicates the threshold nature of the standing decision. Whether in fact the governmental action was contrary to law is the question which should be determined after argument on the merits.

In the competition cases simple injury such as loss of profits would not be enough, but if such economic injury is threatened or caused by governmental action which is arguably contrary to law, then the person so injured should have standing. This approach requires a direct personal interest on the part of the complainant, satisfying the case or controversy consideration and avoids capricious claims by forcing the complainant to persuade the court at an initial stage that he has an arguable position.

If a person injured by arguably unlawful government action does not have standing to raise the question in the courts, who does? As the federal court in the federal contract case of *Scanwell Laboratories v. Shaffer*116 said, "If there is arbitrary, capricious action ... who is going to complain about it, if not the party denied a contract as a result of alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits. . . ."117 The idea of the courts acting as guardians of the law is fundamental to our legal system and administrative process. It goes to the very foundation of checks and balances. This approach involves a subtle but important change from focusing on the interest protected to focusing on the alleged unlawful governmental action in standing inquiries. This would provide "a very healthy" posture in standing determinations.

This approach not only is healthier from the checks and balances point of view, but avoids the complexities of the second of the *Data Processing* criteria which Davis calls "cumbersome, inconvenient and artificial."118 Davis persuasively demonstrates that the second leg of *Data Processing* does not bear close scrutiny. This second requirement provides that, in addition to injury in fact, the interest of the one who is injured must be "arguably within the zone of interests to be protected by the statute or constitutional guarantee in question." This formulation would restrict the interests "to be protected" to those expressed in statutory or constitutional provisions, and would exclude the traditional function of judges fashioning new tools to meet changing conditions and needs through the common law development of new doctrines, principles, new rights and remedies.

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117. Id. at 866.
Davis uses *American School of Magnetic Healing v. McAnnulty* as an illustration. The Postmaster General issued a fraud order against the school. The court granted the school access to the court to challenge the governmental action and accepted its contention that it was not engaging in fraud. The court spoke of "irreparable harm" and acted on principles of equity to protect the school, not on protection to be found in a zone of interests in a statute since "the statute said nothing directly or indirectly about interests 'to be protected'... of course, it did not provide that one not engaging in fraud was 'to be regulated.'"120

The second part of this test dealing with whether the interest is within the zone "to be regulated" also raises unnecessary and undesirable impediments to standing. For example, if the State Highway Commission imposed dry cleaning standards upon Corrales, Rapido Dry Cleaners, surely the owner of Rapido should have standing to challenge the Highway Commission's action. However, a thorough search of the New Mexico Constitution and the New Mexico Statutes Annotated would nowhere reveal that Rapido was "to be regulated" by the Highway Commission, and therefore should have standing to challenge the restrictions based on the zone of interests formula.121 The potential of the second of the *Data Processing* criteria for this sort of litigation generating confusion is great. As Davis succinctly says: "Complexities about standing are barriers to justice."122

Under the criteria proposed here the court need only determine whether Rapido was injured in fact or imminently threatened with injury, and whether the Highway Commission's action was arguably unlawful. Since the action was (to say the least) arguably not authorized either by statute or constitution, they seemingly were not acting within their authorized powers, and Rapido should clearly have standing to challenge the governmental action.

The result might be different but the approach would be the same in the *Hubbard* case; the court would simply inquire whether Hubbard was in fact injured or imminently threatened with injury by the governmental act, and secondly whether Hubbard reasonably demonstrated that those acts were arguably unlawful; did the city of Albuquerque act within its powers, or did it follow lawful procedures?

In contract cases in which it might be alleged that the government

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120. Davis, *supra* note 3, at 459.
121. For a thorough discussion, see Davis, *supra* note 3, at 458.
agency, contrary to lawful procedures, chooses a bidder other than the lowest bidder, who has a more “genuine and legitimate” interest than the unrequited lowest bidder? Yet, under the Data Processing criteria, one might not without considerable stretching of the statutory language find that the interest of the lowest bidders was within a zone of interests “to be protected or to be regulated.” The prime concern of this type of situation will be to protect the interests of the public, but who will have enough of a direct personal interest to have standing if not the directly interested lowest bidder? Under the simpler proposed test, the court can straightforwardly direct its attention to whether the allegation by the economically injured unsuccessful bidder that the government action was unlawful is a reasonably arguable contention.

This allows the court to immediately get to the central question of such challenges by persons injured or threatened with injury by government actions—did the action of the government arguably violate the law? Surely this would be a “practical and functional” approach and in Judge Burger’s words limit standing to “those with a genuine and legitimate interest.”

Scanwell Laboratories v. Shaffer1 2 3 was in fact a case in which a non-successful bidder was allowed standing to challenge the decision of the Federal Aviation Authority on the basis that it was contrary to the relevant regulations. The court went directly to the important question—the lawfulness of the governmental action. In so doing it put its finger on the essence of the public interest in such cases: “If there is arbitrary and capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action. . . .” 4

The court here grasped an important insight which has not often been perceived in standing cases—there is an important public interest in correcting public action which is contrary to the law. And what could be a more “practical, functional” way to vindicate the public interest than by granting standing to someone with a “direct personal interest”—someone with a “genuine and legitimate interest,” a person either injured in fact or imminently threatened with injury by governmental action?

Another facet of the second criterion of Data Processing is the difficulty in determining legislative intent. Did the legislature intend the particular interest “to be protected” or “to be regulated?” Exercises in unearthing ambiguous legislative intent are almost always

123. 424 F.2d 859 (D.C. Cir. 1970).
124. Id. at 866. For a complete discussion, see Davis, supra note 3, at 462.
difficult at best; this is particularly so in New Mexico where we do not have the benefit of a legislative record. Rather than attempting the quest for legislative intent regarding the zone of interests to be protected or regulated, it would be much simpler to focus directly on the basic question of the clarity of the legality of the contested governmental action.

A further but important point is that the source of law to which the court may look is much too restricted under the second of the Data Processing criteria. The court should look not only to statutory and constitutional law, but also to equity and the common law. As Davis asks, "Is not the question of who should have access to the courts more likely to be answered satisfactorily if a court is free to decide on the basis of what it deems to be the needs of justice?" The ordinary processes of common law development should not be stifled in the critical threshold determination of standing. The scope of the courts to flexibly respond to new needs and conditions in the constructive development of common law and equity should not be discouraged.

In Scanwell Laboratories the court's decision was wisely based on its judgment of the "arbitrary or capricious" action of the contracting official, not the language of the statute. In American School of Magnetic Healing, the court rightly looked to equity and the court's own judgment of "irreparable damage" on the specific facts before it, not to a statute which did not anticipate the particular situation. Under the proposed standards for standing, the court could look to the entire spectrum of law and equity in deciding whether the governmental action in question was "arguably contrary to the law or equity."

It seems that we in New Mexico, as well as those elsewhere, have been seeing as if through a glass darkly for years. We have not perceived as clearly as we might that not only the injured party, but also the public, has an interest in preventing public action contrary to the law. What could be more "practical and functional" than giving the party injured by the governmental action, the one with a "genuine and legitimate" interest, standing to vindicate the public interest. In so doing two birds are hit with the same stone; the "direct personal interest" of the complainant, and the interest of the public in a government under law are both vindicated, all without flooding the courts.

The New Mexico law of standing has still not fully matured. The

125. Davis, supra note 3, at 465.
array of decided cases does not present a sufficiently integrated set of principles upon which to make the critical decision of standing. In developing the law of standing, the courts have been working toward an adequate formulation of principles, but have not yet been able to satisfactorily articulate a formula that is simple, yet does not inundate the courts; one that is predictable yet does not inhibit the exercise of judicial judgment on a case-by-case basis. What is needed is a straightforward doctrine which is "practical and functional," and "insures that only those with a genuine interest can participate in a proceeding," and which does not unreasonably inhibit judicial discretion.

The approach suggested here would do that, and in so doing would not be radically out of harmony with the main thrust of New Mexico decisions to date. However, it would be best for the court to expressly and clearly free itself from some of the inadequate language of earlier cases such as that found in *Ruidoso State Bank*. The adoption of this formulation would be a natural outgrowth of development over the years of the New Mexico law of standing on a case-by-case basis. The law of standing would be simplified and justice would be better served.

A short statement of the New Mexico law of standing would read as follows:

**A. Challenges to Governmental Actions Other Than Public Expenditures**

To have standing the following must be satisfied:

The complainant must be one who either is injured in fact or imminently threatened, economically or otherwise, by the governmental action in question; and the governmental action causing or threatening to cause the injury must be arguably contrary to law or equity.

Of course the legislature may expressly deny standing to challenge governmental action. For example the legislature may for policy reasons want to exclude judicial intervention in some situations where speedy settlements or decisions are necessary, and it generally has the power to do so.

The burden to prove the injury in fact or imminently threatened injury would be on the plaintiff or petitioner, as would the burden to reasonably persuade the court that the governmental action is arguably contrary to law. The burden would be on the defendant to show a legislative intent to deny standing in particular situations.

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129. See Davis, supra note 53, at 438.
However, in cases "of great public importance" the court in the exercise of its discretion may additionally grant standing to persons who may not have been directly or personally injured, but whom the court considers appropriate to vindicate the public interest.

B. Taxpayer Challenges of Public Expenditures of State Funds

A taxpayer has standing to challenge expenditures of state funds only upon a showing that the expenditure in question is arguably unlawful.

Such an approach would considerably clear the dark glass through which we have perceived the New Mexico law of standing.