

December 2019

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### Recommended Citation

Jerry A. Yaap, *Standing to Challenge Administrative Action*, 16 Wyo. L.J. 296 (1962)  
Available at: <https://scholarship.law.uwyo.edu/wlj/vol16/iss3/9>

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# STANDING TO CHALLENGE ADMINISTRATIVE ACTION

## INTRODUCTION

The question of who has standing to challenge administrative action overlaps, to a certain extent, the availability of various methods of challenge. For the sake of brevity the methods of challenge are not herein discussed and the assumption is made that certain methods of challenge, in addition to review by the courts are available.<sup>1</sup> Based upon this assumption the scope of this article is standing to challenge under the available methods.

## STANDING TO SEEK JUDICIAL REVIEW

*Who* has standing to challenge administrative action? Statutory authorization to appeal from a decision of an agency is the most common method provided by the Wyoming Legislature for challenging administrative action. Indeed, except for certain isolated instances, this is the only method expressly sanctioned by the Legislature. Since Wyoming has no Administrative Procedure Act, the provisions for appeal are scattered intermittently throughout the statutes with no correlation among procedure for review except as might have fortuitously occurred by usage of similar language in establishing the various agencies.

Common statutory language which is used to denote standing to challenge is "any person aggrieved,"<sup>2</sup> "any person interested,"<sup>3</sup> "any person aggrieved and affected,"<sup>4</sup> and "any person dissatisfied,"<sup>5</sup> may appeal from the decision of the agency. Who is any person aggrieved or interested? Wyoming case law on this subject is conspicuous by its almost total absence. Apparently the only case dealing directly with the interpretation of these words is dictum in *Kelley v. Rhoads*<sup>6</sup> decided by the Supreme Court of Wyoming in 1897. This case involved an action by a taxpayer against the county assessor to recover taxes alleged to have been illegally collected. The court stated:

Now in regard to hearing and opportunity for review, it is further provided . . . that any person aggrieved by any proceedings

1. See R. Anderson, *Reviewability and Forms of Proceedings for Review*, 16 Wyo. L.J. 308 (1962). For a comprehensive discussion of federal law on standing to challenge, see Davis, § Administrative Law Treatise, ch. 22 (1958).
2. Wyo. Stat. § 39-29 (1957), Board of Equalization; Wyo. Stat. § 30-225 (b) (1957), Oil and Gas Commission; Wyo. Stat. §§ 41-193 and 41-216 (1957), Board of Control; Wyo. Stat. § 36-27 (1957), Land Commission; Wyo. Stat. § 26-98 (1957), Insurance Commission; Wyo. Stat. § 11-249 (D) (1957), Soil Conservation Board; Wyo. Stat. § 15-626 (1957), Zoning Board; and Wyo. Stat. § 9-303 (1957), Retirement Board.
3. Wyo. Stat. § 10-39 (1957), Aeronautics Commission; Wyo. Stat. § 30-57 (1957), Inspector of Mines; Wyo. Stat. § 37-45 (1957), Public Service Commission.
4. Wyo. Stat. § 35-15 (1957), Board of Health.
5. Wyo. Stat. § 17-106 (1957), Decision of Secretary of State under Blue Sky Laws.
6. 7 Wyo. 237, 51 Pac. 593 (1897). The case came up again in an action by the taxpayer to recover the taxes paid. The court held that the state tax did not interfere with interstate commerce. *Kelley v. Rhoads*, 9 Wyo. 352, 63 Pac. 935 (1901). The United States Supreme Court reversed on the ground that the property was exempt from state tax under the Commerce Clause of the United States Constitution. *Kelley v. Rhoads*, 188 U.S. 1 (1902).

. . . may apply to the Board of County Commissioners . . . to have the assessment equalized or corrected in any just particular. . . We perceive no reason why that regulation was not open to any person in the situation of plaintiff, or any one whose property had been taxed by the assessor . . . after the annual assessment.

The inference may be drawn from this language that "any person aggrieved" is at least a person whose pecuniary interest is directly affected by the appropriate tax statute.

A pecuniary interest was held sufficient to give plaintiff standing to challenge in *Cary v. Planning Board of Revere*.<sup>7</sup> Plaintiff sought to review a determination, by the Planning Board, that approval of defendant's construction plan under the subdivision control law was not required and to enjoin defendant's business construction on property adjacent to that on which plaintiff held an outstanding and unpaid mortgage. The court stated that the mortgagee had a pecuniary interest which was affected by the determination appealed from because the proposed construction would cause the mortgaged property to depreciate and plaintiff was therefore a "person aggrieved" within the meaning of the statute.

The question of who has standing to challenge necessarily depends upon the nature of the interest that must be affected in order to have standing which interest is customarily discussed in terms of "deprivation of a legal right" and "adversely affected in fact."

On the basis of the two preceding cases the proper criterion would appear to be whether or not the person challenging the action was adversely affected in fact. This criterion requires that the plaintiff suffer in fact even though his legal rights are not violated.<sup>8</sup> In contrast any person who is deprived of a legal right<sup>9</sup> always has standing to challenge administrative action.<sup>10</sup>

An example distinguishing these criteria is whether or not competitors have standing to challenge administrative action that adversely affects their competitive interests. New Jersey appears to champion the liberal view by application of the adversely affected in fact standard. In *Walker v. Borough of Stanhope*<sup>11</sup> the court held that potential loss of business by a retailer of house trailers, whose sales lot was located four miles from the Borough of Stanhope, was a direct enough interest to give him standing to challenge an ordinance licensing and regulating trailer camps, even though he was neither a citizen nor a taxpayer of the borough. Plaintiff had standing to challenge administrative action regulating the use of trailer homes although there clearly was no deprivation of a legal right.

7. 335 Mass. 740, 139 N.E.2d 920 (1957).

8. However it will be seen that in certain instances plaintiff is not permitted to challenge even though he does suffer in fact.

9. A legal right may generally be defined as a right protected by common law or statute.

10. See 3 Davis, *Administrative Law* § 22.04.

11. 23 N.J. 657, 130 A.2d 372 (1957).

Here again pecuniary injury was sufficient to allow plaintiff standing.

The "legal right" standards was applied by the Supreme Judicial Court of Massachusetts in *Circle Lounge and Grille v. Board of Appeal of Boston*.<sup>12</sup> In this case action was brought under a "person aggrieved" statute by a restaurant operator in a business district seeking to enjoin an order permitting a variance to a restaurant in an adjacent area. The court held that plaintiff was not a person aggrieved within the meaning of the statute because "commonly a person aggrieved is one whose rights have been infringed." The court reasoned that although plaintiff's business would suffer to some extent by the establishment of another restaurant that: "injury from business competition has generally been considered *damnum abseque injuria*."

The Massachusetts view was reiterated by the Court of Appeals of Maryland in *Kreatchmen v. Ramsburg*.<sup>13</sup> The court relied heavily upon *Circle Lounge*<sup>14</sup> (supra) in reaching the decision that competitive interest was not sufficient to grant standing to challenge.

The Model State Act<sup>15</sup> provides that "Any person aggrieved by a final decision in a contested case is entitled to judicial review under this Act." Thus the Model State Act does not attempt to define "any person aggrieved" but leaves this decision criterion to the common law of the particular state.

Clearly the preferable view would appear to be the more liberal test of whether the person challenging the action is adversely affected in fact. In determining whether the particular person is adversely affected in fact the court should seek the underlying purpose of the statute and determine whether or not the challenger is within the class of persons for whose benefit the statute was enacted. If so he should be entitled to standing to challenge the administrative action regardless of whether or not petitioner's legal right is involved.

#### STANDING TO CHALLENGE ADMINISTRATIVE RULES

The Model State Act<sup>16</sup> authorizes the declaratory judgment to be used to challenge the validity or applicability of administrative rules, but only if petitioner is deprived of a legal right or privilege. The rule making function of an agency generally speaking is analogous to the legislative enactment of a statute and the adjudicative function of an agency is similar to a court's decision of a case.<sup>17</sup> There are, however, other areas

12. 324 Mass. 430, 86 N.E.2d 920 (1949). See also *Ahern v. Baker*, \_\_\_ Colo. \_\_\_, 366 P.2d 366 (1961), denying writ of mandamus because the one bringing the action must show a clear *legal right* to demand the performance of a certain act as well as a clear *legal duty* on the part of the officer to do the thing demanded.

13. 224 Md. 209, 167 A.2d 345 (1961).

14. See note 12, supra.

15. Revised Model State Administrative Procedure Act (Fourth Draft), § 15.

16. *Id.* note 15, § 7.

17. This definition is imperfect because the converse may be true and therefore is intended to provide only a very broad classification.

of administrative action that are neither rule making nor adjudication that raise problems as to standing to challenge. Broadly speaking, a rule prescribes or interprets law and policy for certain classes of persons in contrast to adjudication which determines the rights, duties and privileges of specified parties.

Rules are generally classified as "interpretative" or "legislative."<sup>18</sup> Professor Davis defines a legislative rule as:

the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body.

Professor Davis states, however, that a legislative rule may also be promulgated upon an implied or unclear grant of power, and that such rule is as binding upon the courts as a statute if it is (1) within the granted power, (2) issued pursuant to proper authority, and (3) reasonable. An interpretative rule issued by an administrative agency while not binding upon the courts by reason of its authority does constitute a body of experience and informed judgment to which the courts may refer for guidance. The degree of weight given to an interpretative rule may depend upon whether the court or the administrator is the expert in the particular subject, whether the statute has been reenacted to support the commonly applied fiction that reenactment is an implied legislative approval of administrative interpretations which may give the rule the force of law,<sup>19</sup> and whether the statute has been constructed contemporaneously with its enactment which may also give it force of law.

Statutory provision for challenge of rules in Wyoming is almost nonexistent.<sup>20</sup> The Model State Act provides that *any interested person* may petition the agency requesting the promulgation, amendment or repeal of agency rules.<sup>21</sup> The validity of any rule may be determined by declaratory judgment in the district court when it appears that the rule, or its threatened application, interferes with or impairs the *legal rights* or *privileges* of the petitioner.<sup>22</sup> Any interested person may petition an agency for a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it and such ruling may be reviewed by the district court.<sup>23</sup> Thus, under the Model State Act the promulgation, amendment, repeal, application and validity of any rule may be challenged providing the challenger has sufficient interest in the subject matter.

The Wyoming Oil and Gas Commission Act<sup>24</sup> contains language

18. See 1 Davis, Administrative Law § 22.04.

19. This criterion is principally applied to Treasury Regulations in the area of Federal Income Tax.

20. An exception to this statement is the Oil and Gas Commission Act considered infra.

21. See note 15, § 6.

22. See note 15, supra.

23. See note 15, § 7.

24. Wyo. Stat. § 30-216 through § 30-238, Title 23, ch. 6 (1957), creating and regulating the Oil and Gas Commission.

similar to the Model State Act. This Act was promulgated and enacted in 1951 which is indicative that the language adopted may have been derived from better sources than some of the older statutes.

Although the Oil and Gas Commission Act does not specifically mention the words "declaratory judgment," any person adversely affected by and dissatisfied with any rule issued by the Commission may bring a civil action to test the validity of the rule within 90 days of promulgation thereof and may secure an injunction and other appropriate relief including all rights to appeal.<sup>25</sup>

Unfortunately the vast majority of the agency statutes in Wyoming provide no such procedure or safeguards to interested persons, and reform in this area is badly needed. If and when reform is undertaken in this area, the Oil and Gas Commission Act merits study along with the Model State Act and other sources of information.

#### CHALLENGE ABSENT STATUTORY AUTHORITY

The preceding discussion is based upon the assumption that statutory authorization to challenge is available.<sup>25a</sup> However, absent statutory provision for challenge an individual may effectively challenge administrative action by other means.

Even though express provisions for challenge are sporadic in the agency statutes, the Uniform Declaratory Judgment Act has been in effect in Wyoming since 1923.<sup>26</sup> Under this Act:

Any person . . . whose rights, status, or other legal relations are affected by a statute (or) municipal ordinance . . . may have determined any question of construction or validity arising . . . thereunder and obtain a declaration of rights, status or other legal relations thereunder.<sup>27</sup>

In other jurisdictions<sup>28</sup> the declaratory judgment has been used to challenge agency rules as not lying within the authority of the statute conferring the power upon the agency, or if within the authority conferred by statute, to challenge the constitutionality of the statute, thus providing an indirect method of challenging such rules. Since Wyoming has adopted the Declaratory Judgment Act any person affected by agency rules may probably invoke this remedy where no other remedy has been provided.<sup>29</sup>

Another effective method of challenging governmental action is the taxpayer suit.<sup>30</sup> The taxpayer suit is brought on behalf of the plaintiff and for the benefit of all taxpayers of the particular class (e.g., state or

25. Wyo. Stat. § 30-225 (a) (1957).

25a. By statutory authorization it is meant authorization included in the appropriate agency statute.

26. Wyo. Stat. § 1-1049 through § 1-1064, Title 1, ch. 38 (1957).

27. Wyo. Stat. § 1-1052 (1957).

28. *Preisler v. Doherty*, 364 Mo. 596, 265 S.W.2d 404 (1954); *Magenheim v. Board of Education*, — Mo. —, 347 S.W.2d 409 (1961).

29. See R. Anderson, *op. cit. supra* note 1.

30. For an excellent discussion of taxpayer suits, see Comment, 69 *Yale L.J.* 895.

municipality). The sole function of the taxpayers suit appears to be to challenge governmental action that would otherwise go unchallenged in the courts because of the lack of standing and a public expenditure may or may not be involved.

The right of a taxpayer to bring action on behalf of himself and for the benefit of all taxpayers in the state of Wyoming, to enjoin the Secretary from certifying a question adopted by the state legislature to the county clerks at the next general election, was upheld in *Spriggs v. Clark*.<sup>31</sup> The plaintiff asserted the unconstitutionality of the resolution and the consequent illegal use and expenditure of public funds in election expense if the question was so certified. The defendant argued that courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political and involve no civil or property rights and that for this reason the plaintiff did not possess sufficient interest in the cause to warrant institution of the suit. Therefore, he said the plaintiff's interest, if any, was trifling and there was no special or irreparable injury to his civil or property rights. The court stated:

However, there seem to be well considered cases which recognize an exception to the general rule just mentioned, where an election would be quite without authority of law and would be void, thereby causing unnecessary and improper expense. In such events it is declared that a taxpayer or other person who will be injured thereby is entitled to an injunction.

The court clearly upheld the right of the plaintiff taxpayer to bring the action before considering the constitutional issue.<sup>32</sup>

In *Stratton v. City of Riverton*,<sup>33</sup> plaintiffs as taxpayers and residents brought action against the city and its officers to enjoin construction of a through street across the city park. The court held that where the land had been dedicated as a public park without reservation for use of the public, the city was properly enjoined from constructing a through road or street for public use across the public park. On appeal the city asserted that plaintiffs had not standing or right to maintain the action. The court disposed of this contention by stating:

Both plaintiffs are residents and taxpayers of Riverton. One has his residence across the street from the park; the other resides about four blocks away. As such residents and taxpayers they were qualified to bring the action. It was not necessary to prove special damage.

A taxpayer brought suit in *Sump v. City of Sheridan*<sup>34</sup> to enjoin the city from spending money for the purportedly unlawful purpose of control-

31. 45 Wyo. 62, 14 P.2d 667 (1932). See also *Bourne v. Cole*, 53 Wyo. 31, 77 P.2d 617 (1938), upholding taxpayer action to enjoin the Secretary of State from performance of a purportedly illegal contract authorized by the legislature.

32. Judgment was subsequently rendered for the defendant on the ground that the resolution was constitutional.

33. 74 Wyo. 379, 287 P.2d 627 (1955).

34. --- Wyo. ---, 358 P.2d 637 (1951), rehearing denied, --- Wyo. ---, 359 P.2d 1008 (1961).

ling floods. The Supreme Court upheld the decision of the trial court in granting a motion to dismiss on the ground that the complaint did not state a claim upon which relief could be granted. The decision rested solely upon the legality of the defendants spending and no question was raised in the opinion as to the standing of the taxpayer to sue.

Very recently a group of twelve electors were permitted to challenge administrative action on no more of a showing than they were being denied access to the public domain, including a national forest as the result of the County Commissioners failure to cause certain obstructions to be removed from a country road.<sup>34a</sup>

Thus the Supreme Court of Wyoming has upheld actions on both the state and municipal level to enjoin both public expenditures and non-fiscal matters. On this basis it would appear that the Supreme Court would follow decisions from such states as New York, Oregon and Washington in upholding the rights of an individual to challenge on behalf of the general public on other matters, although there are no cases bearing directly on this point.

The New York Court, in *Kuhn v. Curran*,<sup>35</sup> overlooked the question of standing because they felt that the issue was of unusual importance to the public and then proceeded to consider the merits of the constitutional issue presented. The court also upheld the standing of a "resident and citizen," in *People ex rel. Pumpyansky v. Keating*,<sup>36</sup> to challenge the validity of a license even though he made no claim to a special interest. The Supreme Court of Wyoming reached the same conclusion, that it was not necessary to allege or prove special damages in *Stratton v. City of Riverton*.<sup>37</sup>

Plaintiff taxpayers brought action to enjoin the School District from supplying textbooks without charge to parochial schools in *Dickman v. School District No. 62C, Oregon City*.<sup>38</sup> Although defendants challenged the plaintiffs standing to raise any constitutional issue other than violation of the due process clause, the Oregon Court held that the defendants failure to raise the issue by pleading constituted a waiver.<sup>39</sup>

The view of permitting taxpayers to bring action against governmental officials as applied by the more liberal courts, of which Wyoming appears to be one, provides an efficient control over governmental action by the private citizen which may be used to protect his interests as well as that of the general public. The liberal attitude of the Wyoming Court is reflected

34a. Board of County Commissioners of Fremont County v. State, 369 P.2d 537 (Wyo. 1962).

35. 294 N.Y. 207, 61 N.E.2d 513 (1945).

36. 168 N.Y. 390, 61 N.E. 637 (1901).

37. See note 33, supra. Contra, *Kaplan v. Bowker*, 333 Mass. 455, 131 N.E.2d 372 (1956).

38. — Ore. —, 366 P.2d 533 (1961).

39. Washington also permits taxpayers to challenge administrative action but a demand by a taxpayer upon the proper public official to take appropriate action is a condition precedent to the maintenance of such action. *State ex rel. Lemon v. Langlie*, 45 Wash. Repts.2d, 273 P.2d 464 (1954).



by a very recent decision in which the court granted mandamus at the request of twelve electors who brought action on behalf of themselves and others similarly situated to require the Board of County Commissioners to remove obstructions from a public road.<sup>40</sup> Insofar as appears, the plaintiffs were not necessarily taxpayers, their individual legal rights were not affected and they had no pecuniary interest in keeping the particular road (which provided access to the public domain including a national forest) open.

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40. Board of County Commissioners of County of Fremont v. State, --- Wyo. ---, 369 P.2d 537 (1962).