Plaintiffs' Brief in the *Project Rulison* Case

By

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PLAINTIFFS' BRIEF IN THE *PROJECT RULISON* CASE*

[Persuading courts to transform into remedies academic theories for legal protection of the environment is ultimately the task of the practicing attorney: "The problems facing this lawyer can be formidable. The law may be a new, unfamiliar and technical statute. Again, it may be a vast collection of miscellaneous, unfamiliar precedents. Worst of all it may be non-existent . . . ."[1]

The *Project Rulison*[2] brief deals with certain threshold issues encountered in environmental law practice. It is not an attempt at a balanced, scholarly consideration of the issues. It is rather the effort of the attorney responsible for winning or losing at the trial level. Although the *Project Rulison* case was by no means an unmitigated victory for plaintiffs,[3] the brief may still be counted an outstanding success: for the first time, the Atomic Energy Commission was forced to stand trial on the issue of radiation safety standards, a matter traditionally considered within its exclusive discretion:

> The first, and perhaps the greatest hurdle in a suit with the federal government is the motion to dismiss for lack of jurisdiction.

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* The following brief was prepared under the direction of Mr. Victor John Yannacone, Jr., of Patchogue, New York, a member of the Environmental Law Section of the American Trial Lawyers Association. On the brief with Mr. Yannacone, as research assistant, was Mr. Stephen G. Davison of Yale Law School.

1 Moorman, Outline for the Practicing Environmental Lawyer 2, presented to the Conference on Law and the Environment, Sept. 11-12, 1969, in Warrenton, Virginia.

2 Project Rulison is a joint experiment sponsored by the Atomic Energy Commission (AEC), the Department of Interior and Austral Oil Company, Inc. (Austral). The program manager is CER Geonuclear Corporation (CER). Rulison is a part of the Plowshare Program of the AEC, which is designed to develop peaceful use of nuclear explosive technology. The specific purpose of the project is to study the economic and technical feasibility of nuclear stimulation of the low permeability gas bearing Mesaverde sandstone formation in the Rulison Field of Colorado. "Nuclear stimulation" is the detonation of a nuclear device in the formation which will create a cavity and attendant fracture system that will stimulate the production of natural gas from the formation. The Mesaverde formation, because of its low permeability, does not produce natural gas in commercial quantities, although it does contain a significant gas reserve. Crowther v. Seaborg, Civil No. C-1712 (D. Colo., March 16, 1970), at 3.

3 The original action to enjoin Project Rulison, brought by the American Civil Liberties Union (ACLU), was summarily dismissed by the district court. Following the dismissal, a second action was brought on behalf of the Colorado Open Spaces Coordinating Council (COSC). Although the court refused to enjoin the nuclear blast, a preliminary restraining order was entered prohibiting the release of the radioactive gases trapped underground following the blast. The ACLU action was then revived and consolidated with the COSC action. Ultimately, however, the district court allowed the release of the gas. Crowther v. Seaborg, Civil No. C-1712 (D. Colo., March 16, 1970).

> Because the government puts so much of its litigation effort into such motions, he who defeats one may consider himself to have won a major victory. In fact, establishing the right of the citizen to sue to protect the environment by defeating such motions is of the first priority. Precedents in the field are trophies to be sought after.[4]

The Editors.]

PLAINTIFFS' BRIEF

UNITED STATES DISTRICT COURT
for the
DISTRICT OF COLORADO

COLORADO OPEN SPACE COORDINATING COUNCIL, on behalf of all those entitled to the protection of their health and safety and of the health and safety of those generations yet unborn, from the hazards of ionizing radiation resulting from the distribution of radioactive materials through the permanent biogeochemical cycles of the biosphere as a result of the defendants' conduct of *Project Rulison*, and on behalf of all those entitled to the full benefit, use, and enjoyment of the national natural resource treasures of the State of Colorado without degradation resulting from contamination with radioactive material released as a result of the defendants' conduct of *Project Rulison*, and all others similarly situated,

Plaintiffs,

—against—

AUSTRAL OIL COMPANY, INCORPORATED
and
CER GEONUCLEAR CORPORATION,

Defendants

U.S. ATOMIC ENERGY COMMISSION,
BUREAU OF MINES, U.S. DEPARTMENT OF INTERIOR, and
LOS ALAMOS SCIENTIFIC LABORATORY,

as their several interests may appear.

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[4] Moorman, *supra* note 1, at 9. In Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970), the Court indicates by way of dicta that it looks favorably upon the trend towards judicial protection of environmental interests:

> [T]he Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1964 ed., Supp. IV). That interest, at times, may reflect "aesthetic, conservational, and recreational" as well as economic values. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616; *Office of Communication of United Church of Christ v. FCC*, . . . 359 F.2d 994, 1000-06. . . . We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioner relies here.

Id. at 153-54.

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POINT 1

Actions of the Atomic Energy Commission are subject to judicial review under the provisions of the Administrative Procedure Act.

The Atomic Energy Commission was established under the Atomic Energy Act of 1946, ch. 724, § 2, 60 Stat. 756 (1946), *as amended* 42 U.S.C. § 2031 (1964). The original bill provided for "Government control over atomic energy and for Government programs of information, production, research, and development." S. REP. No. 1211, 79th Cong., 2d Sess. 9 (1946). The Atomic Energy Commission was to be "responsible for administering domestic controls over atomic energy, for carrying on production, research and . . . development." *Id.* at 11. There was to be "an absolute Government monopoly of production of fissionable materials," and the Commission was to be "the exclusive producer of atomic weapons." *Id.* at 14, 19. However, the private sector, under supervision of the Commission, was to be allowed to participate in industrial research in the field of atomic energy, and in the ownership, mining, and refining of source materials from which fissionable materials are produced. *Id.* at 15, 18. The Commission was empowered to license the manufacture and use of atomic energy devices, but only after the prior approval of Congress, since "devices utilizing atomic energy, if

widely used, would so multiply potential hazards to national health and safety that even careful Government regulation would fail to provide adequate safeguards." *Id.* at 21. The Act, however, did "not permit the Commission to license the use of devices which produce fissionable material in the course of utilizing atomic energy." *Id.*

Section 12 (a) (2) of the 1946 Act gave the Commission the authority to "[e]stablish safety and health regulations for the possession and use of fissionable and byproduct materials to minimize the danger from explosion, radioactivity, and other harmful or toxic effects incident to the presence of such materials." S. REP. No. 1211, 79th Cong., 2d Sess. 28 (1946).

Section 14 of the Atomic Energy Act of 1946 clearly provided for judicial review of any agency action under the Act pursuant to the Administrative Procedure Act:

> SEC. 14. (a) [S]ection 10 of [the Administrative Procedure] Act [presently codified as 5 U.S.C. §§ 701-06 (Supp. IV, 1969)] (relating to judicial review) shall be applicable, upon the enactment of this Act, to any agency action under the authority of this Act . . . .
>
> (b) Except as provided in subsection (a), no provision of this Act shall be held to supersede or modify the provisions of the Administrative Procedure Act.
>
> (c) As used in this section the terms "agency action" and "agency" shall have the same meaning as is assigned to such terms in the Administrative Procedure Act.

Atomic Energy Act of 1946, ch. 724, § 14, 60 Stat. 772 (1946), *as amended* 42 U.S.C. § 2231 (1964).

This provision, which did not appear in the Senate version of the bill, was recommended as an amendment to the Senate version of the bill, S. 1717, 79th Cong., 2d Sess. (1946), in the House report. H.R. REP. No. 2478, 79th Cong., 2d Sess. 2-3 (1946). The House report stated that the proposed amendment

> affirms the provision of the Administrative Procedure Act, which provides that it will apply to legislation subsequently enacted. It is provided, however, that section 10 of the Administrative Procedure Act, relating to judicial review, for the purposes of this legislation shall take effect immediately.

Id. at 13.

The conference report, which was accepted by both the Senate and the House, adopted House amendment 41, stating:

> This amendment provides that section 10 of the Administrative Procedure Act should be applicable with respect to agency actions of the Commission immediately upon the enactment of this act

> and provided that this act should not be held to supersede or modify the Administrative Procedure Act.

92 CONG. REC. 10192 (1946).

The Atomic Energy Act of 1946 clearly placed a strong emphasis on the government's duty to protect the health and safety of the public. Furthermore, the Act specifically provided judicial review under the Administrative Procedure Act of all agency action by the Atomic Energy Commission.

Section 14 of the Atomic Energy Act of 1946, ch. 724, 60 Stat. 772 (1946), relating to judicial review was amended by the Atomic Energy Act of 1954. 42 U.S.C. § 2231 (1964). The amendment to section 14 was originally proposed by the Joint Committee on Atomic Energy, in the following form, to supplant section 14:

> "SEC. 181. GENERAL.—The provisions of the Administrative Procedure Act shall apply to 'agency action' of the Commission, as that term is defined in the Administrative Procedure Act. In determining whether an act of the Commission would be an 'agency action,' the fact that the national security and the common defense require the act, or facts essential to that act to be kept secret shall not be considered. For 'agency action' which can be made public, the full regular administrative procedures shall be followed. For 'agency action' which cannot be undertaken in public, the Commission shall provide by regulation for identical procedures except that they shall not be public. Upon application, the Commission shall grant a hearing to any party materially interested in any 'agency action.'"

S. REP. No. 1699, 83d Cong., 2d Sess. 82 (1954); H.R. REP. No. 2181, 83d Cong., 2d Sess. 82 (1954).

Though the House and Senate reports on the proposed amendment to chapter 16, of which section 181 was a part, stated that "[t]his chapter describes the procedures and conditions for issuing licenses under the bill," the report further stated that

> Section 181 makes the provisions of the Administrative Procedures [*sic*] Act applicable to all agency actions of the Commission. Where publication of data involved in agency action is contrary to the national security and common defense, then identical secret procedures are required to be set up within the Commission. The Commission is required to grant a hearing to any party materially interested in any agency action.

S. REP. No. 1699, 83d Cong., 2d Sess. 28 (1954); H.R. REP. No. 2181, 83d Cong., 2d Sess. 28 (1954).

The Atomic Energy Act of 1954 was intended to permit the Com-

mission to license private industry to "possess and use special nuclear material," "to own reactors intended to produce and utilize such materials," and to participate in "atomic power development"; the report also envisioned "teamwork between Government and industry," with the Act aimed "at encouraging flourishing research and development programs under both Government and private auspices." S. REP. No. 1699, 83d Cong., 2d Sess. 9 (1954); H.R. REP. No. 2181, 83 Cong., 2d Sess. 9 (1954). The report indicated that "private participation in power development need not bring with it attendant hazards to the health and safety of the American people." S. REP. No. 1699, 83d Cong., 2d Sess. 3 (1954); H.R. REP. No. 2181, 83d Cong., 2d Sess. 3 (1954).

Proposed amendments to section 182 set up procedures and safeguards for the issuance of licenses and construction permits by the Commission to operate production and utilization facilities. S. REP. No. 1699, 83d Cong., 2d Sess. 82-84 (1954); H.R. REP. No. 2181, 83d Cong., 2d Sess. 82-84 (1954). Section 189 proposed amendments dealt with judicial review relating to licenses or construction permits.

> "SEC. 189. JUDICIAL REVIEW.—*Any final order granting, denying, suspending, revoking, modifying, or rescinding any license or construction permit, or application to transfer control, or any final order issuing or modifying rules and regulations dealing with the activities of licensees entered in any 'agency action' of the Commission shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the scope of judicial review and other remedies provided by section 10 of the Administrative Procedure Act.*"

S. REP. No. 1699, 83d Cong., 2d Sess. 85 (1954); H.R. REP. No. 2181, 83d Cong., 2d Sess. 85 (1954) (emphasis in original).

The House and Senate reports stated that "[s]ection 189 provides for judicial review of a final order of the commission entered in certain agency actions. The review is provided by the act establishing judicial review for the actions of other regulatory agencies." S. REP. No. 1699, 83d Cong., 2d Sess. 29 (1954); H.R. REP. No. 2181, 83d Cong., 2d Sess. 29 (1954).

During the debates on the bill in the Senate, Senator Anderson of New Mexico showed concern that section 181 might be read so as to deny the public the right to participation in the formation of non-"licensing" contracts and arrangements between the Atomic Energy Commission and private industry. (New Mexico's Senator Anderson, a member of the Joint Committee on Atomic Energy addressed his remarks to Iowa's Senator Hickenlooper, Vice-Chairman of the Joint

Committee on Atomic Energy and the sponsor of the Atomic Energy Act of 1954 in the Senate:)

> Mr. ANDERSON. [I]f I may pass on to section 102, it reads:
>
> "Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103."
>
> The language of the provision sounded all right, and probably is all right, but it does suggest that, once the Commission makes its findings, it can issue licenses to produce nuclear power. What is to stop the granting of dozens of licenses thereafter? The minimum requirement should be that the Commission should hold hearings and let the public know what the Commission plans to do.
>
> Mr. HICKENLOOPER. I wonder whether the Senator from New Mexico does not feel that sufficient protection is afforded in section [182-b].
>
> . . . .
>
> "b. The Commission shall not issue any license for a utilization or production facility for the generation of commercial power under section 103, until it has given notice in writing to such regulatory agency as may have jurisdiction over the rates and services of the proposed activity, and until it has published notice of such application once each week for 4 consecutive weeks in the Federal Register, and until 4 weeks after the last notice."
>
> Mr. ANDERSON. Mr. President, I may say to the Senator from Iowa that when in committee we discussed this language, I thought it was sufficient. I still think it ought to be sufficient. But I do not find myself able to tie the Administrative Procedure Act to this requirement of the bill.
>
> To return to section 181 and the portion on page 85 reading—
>
> "Upon application, the Commission shall grant a hearing to any party materially interested in any 'agency action' "—
>
> Let me say I think it is important to tell who may be interested, and therefore the widest publicity is necessary. For example, if the Commission were going to grant a franchise to enable someone to establish a new plant inside the Chicago area, there might be many persons who would be interested, but they would not know that the matter was under consideration. I am trying to say that the people who are interested will not be reached unless they are given notice. I say again to the Senator from Iowa that nothing in the section may need changing. I am merely stating that, upon a second reading, some doubts arise, and I wonder what the section actually provides.

100 CONG. REC. 10484-85 (1954).

Senator Anderson thus feared that the rights of the public to

hearings and judicial review under the Administrative Procedure Act might be held limited solely to the area of licensing.

Two days later, on July 16, 1954, Senator Hickenlooper, the sponsor of the bill in the Senate, offered amendments to proposed sections 181 and 189.

> The PRESIDING OFFICER. The amendment offered by the Senator from Iowa will be stated.
>
> The LEGISLATIVE CLERK. On page 91, line 4, it is proposed to amend section 182 to read as follows:
>
> "SEC. 189. Hearings and judicial review:
>
> a. In any proceedings under this act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceedings for the issuance of modification of rules and regulations dealing with the activities of licensees, and in any proceeding brought under the provisions of section 152, and in any proceeding for the payment of compensation, an award or royalties under section 156, 186(c) or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.
>
> b. Any final order entered in any proceeding of the kind specified in subsection a. above entered in an 'agency action' of the Commission shall be subject to judicial review in the manner prescribed in the act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended."
>
> Mr. HICKENLOOPER. Mr. President, this section reincorporates the provisions for hearings formerly made part of section 181 but clearly specifies the types of Commission activities in which a hearing is to be required. The purpose of this revision is to specify clearly the circumstances in which hearings are to be held. The section also reincorporates the former provisions of section 189 dealing with judicial review. There is a slight change in wording merely to clarify the intent of Congress with respect to the extent of the applicability of the act of December 29, 1950, and the applicability of the section 10 of the Administrative Procedure Act.
>
> I state that this is a procedural operation, and does not go to the fundamentals of the so-called cross-patenting provision, or any provision of that kind.
>
> Mr. PASTORE. Mr. President, will the Senator yield?
>
> Mr. HICKENLOOPER. I yield.
>
> Mr. PASTORE. As a matter of fact, referring to the bill S. 3690, as reported by the committee, at page 84, under chapter 16, "Judicial Review and Administrative Procedure," and extending to page 85, in line 11, the bill refers to "agency action." That

wording was thought to be too broad, broader than it was intended to make it. The amendment limits the provision to hearings on licenses in which a review shall take place.

Mr. HICKENLOOPER. The Senator from Rhode Island is correct. This is a corrective amendment which clarifies the situation.

The PRESIDING OFFICER (Mr. CRIPPA in the chair). The question is on agreeing to the amendement offered by the Senator from Iowa [Mr. HICKENLOOPER].

The amendment was agreed to.

Mr. HICKENLOOPER. Mr. President, I call up my amendment 7-14-54-G.

The PRESIDING OFFICER. The Secretary will state the amendment.

Mr. HICKENLOOPER. Mr. President, if there is no objection, I ask that the amendment be not read. I shall give a short explanation of the intent of the amendment.

The PRESIDING OFFICER. Without objection, the amendment will be printed in the RECORD at this point.

The amendment offered by Mr. HICKENLOOPER is as follows:

On page 84, amend § 181 to read as follows:

"SEC. 181. General: The provisions of the Administrative Procedure Act (Public Law 404, 79th Cong., approved June 11, 1946) shall apply to all agency action taken under this act, and the terms 'agency' and 'agency action' shall have the meaning specified in the Administrative Procedure Act: *Provided, however,* That in the case of agency proceedings or actions which involve restricted data or defense information, the Commission shall provide by regulation for such parallel procedures as will effectively safeguard and prevent disclosure of restricted data or defense information to unauthorized persons with minimum impairment of the procedural rights which would be available if restricted data or defense information were not involved."

Mr. HICKENLOOPER. Mr. President, the change in section 181 relating to the Administrative Procedure Act is to provide the Commission with a little more flexibility in dealing with procedures than was provided in this section in the bill. This proposal requires the Commission, where restricted data and defense information are concerned, to establish parallel procedures to those regularly employed. But the procedures are such as to protect against the wrongful dissemination of restricted data and defense information while at the same time preserving as many of the normal procedures as is possible. The section in the bill required the Commission to have identical but secret proceedings.

I move the adoption of the amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Iowa [Mr. HICKENLOOPER].

The amendment was agreed to.

100 CONG. REC. 10685-86 (1954).

The remarks by Senator Pastore, a member of the Joint Committee on Atomic Energy, in relation to the words "agency action," clearly show that Senator Hickenlooper, the sponsor of the bill in the Senate and the Vice-Chairman of the Joint Committee on Atomic Energy, and Senator Pastore, also a member of the Joint Committee, understood the term "agency action" to encompass more than "licensing." The fact that revised amended section 189 refers specifically to judicial review of licensing proceedings, particularly under the Administrative Procedure Act, does not raise a presumption either for or against judicial review of other types of agency action. The revised amended section 181, referring as it does to "all agency action," and in light of the understanding of the sponsors of the bill as to the broad scope of the term "agency action," clearly indicates that the Administrative Procedure Act is intended to apply to all and any actions by the Atomic Energy Commission under the Atomic Energy Act. There is no basis for finding that judicial review is confined to licensing proceedings, for that would read out of revised amended section 181 the section of the Administrative Procedure Act dealing with the right of judicial review. 5 U.S.C. § 702 (Supp. IV, 1969). Neither is there any legislative history to support a holding that all of the provisions of the Administrative Procedure Act, except section 702, apply to all agency action by the Atomic Energy Commission, but that section 702 was to apply only to licensing. To so hold would not be a " 'hospitable' interpretation" of the Administrative Procedure Act or of 42 U.S.C. § 2231 (1964); neither would it be a holding based upon a clear and convincing legislative intent to deny judicial review as required by the holding in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). Such a holding would be contrary to the Administrative Procedure Act: "[Any s]ubsequent statute may not be held to supersede or modify . . . chapter 7 . . . except to the extent that it does so expressly." 5 U.S.C. § 559 (Supp. IV, 1969).

Later remarks by Senator Hickenlooper indicate that the full protection of the Administrative Procedure Act is to extend to the public as far as the activities of the Atomic Energy Commission:

> Mr. HICKENLOOPER. Mr. President, in response to the suggestions made by the Senator from Minnesota [Mr. HUMPHREY], I wish to state that, in all my experience during the past 10 years, I have never observed a bill which protects as well as this bill does those who are interested in obtaining licenses. The most profound and exhaustive protection is provided. So the Senator from Minnesota need not have any fear whatsoever that the bill will fore-

> close the rights of anyone, either in connection with hearings or in any other connection. That subject was treated with meticulous care by the committee. I do not mean to discuss it now; I do not wish to trespass on the time of the Senator from Alabama, who now has the floor.
>
> However, I can not permit the insertion in the RECORD, without contradiction by me, of statements that the bill will foreclose anyone in connection with any rights in respect to licensing or in respect to any other matters dealt with or affected by the various provisions of the bill. Under the bill there will be the fullest rights in connection with the hearings, under the Administrative Procedure Act and under the functioning of the Commission.

100 CONG. REC. 10731 (1954).

These statements by Senator Hickenlooper, the sponsor of the amendment that is now 42 U.S.C. § 2231 (1964), raise a strong presumption in favor of the right of judicial review by members of the public of agency action similar to that in question.

In addition to the above statement by Senator Hickenlooper and the emphasis by the House and Senate report upon the public health and safety, numerous Senators stated, throughout the debates on the bill, that Congress should be careful in protecting the taxpayers' $12 billion investment in atomic energy from being given away to private industry. This comment of Senator Anderson is typical of the concern for the public interest underlying the debate on the 1954 amendments to the Atomic Energy Act:

> It seems to me that in dealing with a matter in which the people of the United States have already invested $12 billion, and which can easily change the course of industrial history in the entire Nation in a very few years, it might be worthwhile for the Senate to spend a little bit of time upon the bill.

100 CONG. REC. 10376 (1954). *See also id.* at 10483 (remarks of Senator Anderson); *id.* at 10555 (remarks of Senator Pastore); *id.* at 11591 (remarks of Senator Kerr); *id.* at 11781, 11782 (remarks of Senators Humphrey and Sparkman); *id.* at 11786 (remarks of Senator Sparkman); *id.* at 11908 (remarks of Senator Lehman); *id.* at 11950 (remarks of Senator Mansfield); *id.* at 12171 (remarks of Senator Morse).

Representative Cole of New York, the Chairman of the Joint Committee on Atomic Energy and a sponsor of the bill in the House of Representatives, introduced revised amended section 181, the same as introduced in the Senate by Senator Hickenlooper, as a "committee amendment." *Id.* at 11746-47. The amendment was accepted by the House. *Id.* at 11747. The conference report, which adopted revised

amended section 181, was accepted by the House and the Senate without debate on section 181. *Id.* at 14603, 14606, 14863.

There is no clear and convincing legislative intent that judicial review of agency action by the Atomic Energy Commission was to be limited to licensing. The legislative history of 5 U.S.C. § 2231 (1964), even when viewed most favorably to the defendants, is at best ambiguous. There was no debate as to the revised amended section 181, and Senator Hickenlooper's remarks at 100 CONG. REC. 10731 (1954) support the presumption that the plaintiffs have a fundamental right to judicial review of the actions of the Atomic Energy Commission here in question.

POINT 2

The plaintiffs have sufficient standing to sue under the Administrative Procedure Act.

Plaintiff Richard T. Crowther

Plaintiff Crowther, as a property owner who would sustain property damage from the unsafe release of radioactive material into the atmosphere and as a human being whose body would suffer damage from exposure to ionizing radiation is a "person suffering legal wrong because of agency action," and "is entitled to judicial review thereof."

"Legal wrong," as the term is used in 5 U.S.C. § 702 (Supp. IV, 1969), "is the invasion of a legally protected right." Pennsylvania R.R. v. Dillon, 335 F.2d 292, 294 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964).

Plaintiff Crowther would certainly suffer a legal wrong if his property or body was contaminated by radioactive materials.

Plaintiff Crowther is a person "adversely affected or aggrieved" within the meaning of a "relevant statute," the Atomic Energy Act, because the statute is designed to protect his health and safety (42 U.S.C. §§ 2012(d), 2012(e), 2012(i), 2013(d), 2051(d) (1964); *see* legislative history, *supra*), and he has alleged that that interest in health and safety is not being adequately protected.

"[A]ny person attempting to assert an interest, personal to him, which the 'relevant statute' was specifically designed to protect, and which he claims is not being protected, [is] 'adversely affected or aggrieved' within the meaning of that statute." Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 933 n.26 (2d Cir. 1968).

Plaintiff Colorado Open Space
Coordinating Council, Inc. (COSC)

Plaintiff COSC, as a non-profit, public service corporation whose purposes include the preservation of the environment and protection of human beings from pollution, is a person "adversely affected or aggrieved" within the meaning of the Atomic Energy Act and Administrative Procedure Act. Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Sierra Club v. Volpe, — F. Supp. — (N.D. Cal. 1969); Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969); Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968); Road Review League, Town of Bedford v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967); International Chem. Workers v. Planters Mfg. Co., 259 F. Supp. 365 (N.D. Miss. 1966). The court in *International Chemical Workers* stated:

> [R]ecent court decisions have recognized the standing of group plaintiffs as a "person aggrieved" where the group, *qua* group, has an interest in the outcome of the administrative agency's determination although it might, incidentally, represent broader community interests as well.

259 F. Supp. at 367.

A non-profit, civic organization representing citizens who were to be displaced by a proposed urban redevelopment project had standing as "persons aggrieved" under the Administrative Procedure Act to seek judicial review of agency action allegedly disregarding these citizens' interests, though the "relevant statute," the National Housing Act, did not specifically provide for judicial review. The court stated that

> neither economic injury nor a specific individual legal right are necessary adjuncts to standing. A plaintiff need only demonstrate that he is an appropriate person to question the agency's alleged failure to protect a value specifically recognized by federal law as "in the public interest"; he may then invoke judicial scrutinization of the agency's performance in protecting—or in failing to protect—that specific value. He has standing to ask whether the agency action is violative of the public interest.
>
> . . . .
>
> The Administrative Procedure Act (5 U.S.C. § 702) entitled a person who is "aggrieved by agency action within the meaning of a relevant statute" to obtain judicial review of that action. . . . [A] party must be considered "aggrieved" if, by his conduct and activities, he has demonstrated "special interest" in the values

> recognized and protected by the relevant statute. . . . The plaintiff . . . [a]ssociation is certainly an adequate and appropriate representative of those citizens' interests. If the public interest in these values is to be protected, the voices of those most dramatically affected by disregard of the values must be heard. If the residents in the project site have no standing to raise these issues "in the public interest," then, for all practical purposes, no one has standing, and the Secretary's determinations would be virtually immune from judicial review. . . . [S]uch result would neither be consistent with the presumption of judicial review by the Administrative Procedure Act, 5 U.S.C. § 704, nor specifically authorized by the National Housing Act.

The court concluded that

> the provisions of the National Housing Act recognizing and protecting the values of rehabilitation, relocation and integrated local planning manifest a congressional intent that non-profit civic organizations representing the citizens who will be displaced by the proposed project are to be considered "aggrieved" by agency action allegedly disregarding their interests.

Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809, 826-27, 828 (E.D. Pa. 1968).

The Court of Appeals for the District of Columbia, in the *Nashville I-40 Steering Committee* case, held that an unincorporated civic association had standing in a suit against state officials to enjoin construction of an interstate highway where jurisdiction was invoked under 28 U.S.C. §§ 1331(a), 1343(3) (1964), and 42 U.S.C. §§ 1981, 1982, 1983, 2000(d) (1964).

In *Scenic Hudson*, an unincorporated association, consisting of a number of non-profit, conservationist organizations, was held to have standing as an "aggrieved party," within the meaning of section 313(b) of the Federal Power Act, 16 U.S.C. § 825(l)(b) (1964), which provides that "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order . . . ." The action was brought to set aside an FPC order licensing a hydroelectric project on the Hudson River on the grounds that the Commission had failed to properly weigh environmental factors and had not compiled a record sufficient to support its decision.

In issuing a license, the Federal Power Commission is given the following guidelines:

> **§ 803. Conditions of license generally.**
>
> All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:

> (a) [t]hat the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes . . . .

16 U.S.C. § 803 (1964).

In *Scenic Hudson* the court stated that the phrase "recreational purposes"

> undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites. . . . In licensing a project, it is the duty of the Federal Power Commission properly to weigh each factor.

Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 614 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

> In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.

Id. at 616.

In *Road Review League, Town of Bedford v. Boyd*, a civic organization of Bedford residents and a non-profit association concerned with community problems, primarily involving the location of highways, were held to be "aggrieved" by agency action within the meaning of the Administrative Procedure Act in an action to enjoin the approval of the route of a federally aided interstate highway by the Secretary of Transportation.

> The Administrative Procedure Act (5 U.S.C. § 702) entitles a person who is "aggrieved by agency action within the meaning of a relevant statute," to obtain judicial review of that action. The "relevant statute" in this instance is the Federal Highways Act. . . . A project, among other things, is "to conform to the particular needs of each locality." (23 U.S.C. § 109(a)). See also 23 U.S.C. § 134. The Act declares it to be the national policy that "in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites." (23 U.S.C. § 138). Regulations adopted by the Secretary under the Act provide that:
>
> "The conservation and development of natural resources, the

> advancement of economic and social values, and the promotion of desirable land utilization, as well as the existing and potential highway traffic and other pertinent criteria are to be considered when selecting highways to be added to a Federal-aid system . . . . 23 C.F.R. § 1.6(c)."
>
> I have concluded that these provisions are sufficient, under the principle of *Scenic Hudson,* to manifest a congressional intent that towns, local civic organizations, and conservation groups are to be considered "aggrieved" by agency action which allegedly has disregarded their interests. I see no reason why the word "aggrieved" should have a different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act. See 3 Davis, Administrative Law § 22.05 at 225 (1958). The "relevant statute," i.e., the Federal Highways Act contains language which seems even stronger than that of the Federal Power Act, as far as local and conservation interests are concerned. I appreciate that, speaking strictly, *Scenic Hudson* can be distinguished from the present case on the ground that *Scenic Hudson* involved an appeal from an administrative decision in a proceeding to which appellants were already parties, whereas here, plaintiffs have brought an independent action. Plaintiffs were not previously parties in a formal sense to any administrative proceeding, although as a practical matter they participated actively in attempting to secure an administrative determination favorable to their interest. My decision here can be thought to involve an extension of the *Scenic Hudson* doctrine. If so, it is an extension which I believe to be warranted by the rationale of that decision.

Road Review League, Town of Bedford v. Boyd, 270 F. Supp. 650, 660-61 (S.D.N.Y. 1967).

In *Citizens Committee for the Hudson Valley v. Volpe,* an unincorporated association of citizens who resided in the area involved, and the Sierra Club, a non-profit conservation corporation organized in California with various chapters throughout the United States, were held to have standing in a suit to enjoin the Secretary of the Army, the Chief of the Corps of Engineers, and the Secretary of Transportation from issuing permits to the New York State Department of Transportation for the construction of causeways and dikes in conjunction with the building of a state-financed highway.

The court held that the Administrative Procedure Act justified the court's jurisdiction, even though there was "no separate statutory authority which grants jurisdiction to the district courts to have a decision of the Secretary of the Army reviewed."

The court stated:

> [T]he Supreme Court has implemented what appears to be a

> presumption in favor of a finding of jurisdiction under the Administrative Procedure Act. In Abbott Laboratories v. Gardner, 387 U.S. 136 . . . (1967), it was held that the courts should restrict access to judicial review "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent . . . ." 387 U.S. at 141 . . . , citing Rusk v. Cort, 369 U.S. 367 . . . (1962). See also Powelton Civic Home Own. Ass'n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968).
>
> A 1966 decision in this circuit held that the Administrative Procedure Act constituted an affirmative grant of jurisdiction with respect to the review of federal administrative actions. Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966). Judge McLean in Road Review League, Town of Bedford v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967), followed the reasoning of *Cappadora* and referred to the Administrative Procedure Act as a "jurisdictional statute." 270 F. Supp. at 659.
>
> . . . .
>
> Since the presumption in favor of jurisdiction has not been rebutted by a clear and convincing presentation of an opposite legislative intent, we hold that this court has the necessary jurisdiction to rule on the dispute under the Administrative Procedure Act.

Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083, 1090-91 (S.D.N.Y. 1969).

The court then held that all of the plaintiffs had standing necessary to maintain the action. "The standing problem becomes more acute with the Sierra Club and the Citizens Committee as they admittedly have no personal economic claim to assert. Rather they are 'aggrieved' by the alleged destruction of the natural resources of the river." *Id.* at 1092.

The court then analyzed the *Scenic Hudson* case, noting that the unincorporated association of non-profit conservation organizations in *Scenic Hudson*, like the Sierra Club and the Citizens Committee, "had no direct economic interest in the controversy. Yet, they were found to be 'aggrieved parties' because the Federal Power Act was held to create a public interest in the scenic, historical, and recreational values of the area."*Id.* The court also reviewed the *Road Review* case, and concluded:

> The rule, therefore, is that if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.
>
> In the instant case the Department of Transportation Act

> manifests the same congressional concern. One of the regulations under which the Corps of Engineers issued the permit, 33 C.F.R. § 209.330 [209, 120(d)(1)], calls for the consideration of the effects of the permit on fish, recreation, pollution, and natural resources as well as navigation.

Id. at 1092-93.

> Public Law 89-605, 80 Stat. 847 (1966) states that the Hudson River basin contains resources of "immense economic, natural, scenic, historic and recreation value to all the citizens of the United States . . . ."

Id. at 1093 n.12.

> Therefore, under the guidelines of *Scenic Hudson* and *Road Review* both the Sierra Club and the Citizens Committee have the requisite standing to maintain these actions.

Id. at 1093.

In *Sierra Club v. Volpe*, the Sierra Club, as a non-profit California corporation, was held to have standing in an action for a preliminary and permanent injunction against the Chief of the Forest Service and the Secretary of Agriculture to enjoin the issuance of permits to a private hotel-resort in a national forest-national game refuge, and against the Secretary of the Interior and the Chief of the National Park Service to enjoin the issuance of permits for a road and electrical transmission line right-of-way through a national park to connect to the resort area.

The court, after noting that the defendants had probably violated their statutory authority in issuing the permits, stated:

> Defendants contend that plaintiffs have no standing to sue because they have nothing more than a general interest in common with all citizens and cannot show that any private, substantive legally protected interest of theirs is being directly invaded within the meaning of such cases as Associated v. Ickes, 134 F.2d 694 (2d Cir. 1943); Anti-Fascist v. McGrath, 341 U.S. 123, 140-41, 151-52 (1951); Perkins v. Lukens, 310 U.S. 113, 125 (1940); Associated v. Camp, 406 F.2d 837, 838 (8th Cir. 1969).
>
> We are of the opinion, however, that plaintiff, Sierra Club, a non-profit California corporation, organized and existing for the purposes described in its complaint (Par. 3), may be held to be sufficiently aggrieved to have standing as a plaintiff herein.

Sierra Club v. Volpe, —— F. Supp. —— (N.D. Cal. 1969).

The plaintiff is an organization interested in the protection of natural and scenic resources and in the protection of human beings

from injury from pollution. Radionuclides are certainly to be considered atmospheric pollutants and are inherently dangerous materials.

The Atomic Energy Act of 1954 is a statute that encompasses these areas. 42 U.S.C. §§ 2012, 2013, 2051(d) (1964). The legislative history of those sections indicates that Congress "had the problem of safety uppermost in mind" in the promulgation of the Atomic Energy Act. Power Reactor Development Co. v. IUE, 367 U.S. 396, 414 (1961). The protection of the health and safety envisioned by Congress is protection from the hazards of radiation:

> The history of the 1954 legislation reveals that the Congress, in thinking of the public's health and safety, had in mind . . . the special hazards of radioactivity. . . . "The special problem of safety in the atomic field is the consequence of the hazards, created by potentially harmful radiations attendant upon atomic energy operations."

New Hampshire v. AEC, 406 F.2d 170, 174 (1st Cir.), *cert. denied*, 395 U.S. 962 (1969).

The court then concluded that

> in enacting the Atomic Energy Acts of 1946 and 1954, in overseeing its administration, and in considering amendments, the Congress has viewed the responsibility of the Commission as being confined to scrutiny of the protection against hazards from radiation.

Id. at 175.

Further, the Atomic Energy Commission's own statements as to the definition of "safety," a definition that is entitled to "great deference" and is clearly reasonable, Udall v. Tallman, 380 U.S. 1, 16 (1965), include environmental damage as one consideration.

> A nuclear device can be detonated safely when it is ascertained that the detonation can be accomplished . . . without unacceptable damage to the ecological system and natural and man-made structures.

Defendants' exhibit, *Effects Evaluation for Project Rulison*, Foreword, June 1969.

> The Commission takes every reasonable precaution to insure that the tests . . . cause no material damage . . . to the ecology . . . .

Defendants' exhibit, *Safety to Underground Nuclear Testing* 1, April 1969.

Plaintiff also has an interest in preventing pollution of the air and water. The Atomic Energy Commission is subject to the Water Pollution Control Act, 33 U.S.C. § 466(h) (Supp. IV, 1969), relating

to water pollution by federal agencies; to the Air Quality Control Act of 1967, 42 U.S.C. §§ 1857(b), 1857f(a) (Supp. IV, 1969); and to Exec. Order No. 11,282, 3 C.F.R. § 419 (1969), 42 U.S.C. § 1857f (Supp. IV, 1969), relating to air pollution by federal agencies. *Cf.* New Hampshire v. AEC, 406 F.2d 170, 175-76 (1st Cir.), *cert. denied*, 395 U.S. 962 (1969).

POINT 3

The scope of review of agency action is governed by 5 U.S.C. § 706 (Supp. IV, 1969):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights;
>
> . . . .
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The "hospitable interpretation" of the Administrative Procedure Act required by Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), "applies not only where a specific statute is claimed to preclude judicial review, but also where it is invoked as delimiting the scope of judicial review." Phillips Petroleum Co. v. Brenner, 383 F.2d 514, 517-18 n.8 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968).

> The mere fact that the acts of the Secretary . . . required the exercise of discretion and judgment on his part, does not preclude judicial review of his action. To be sure, if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. But that is a different rule from the rule of total non-reviewability. The Administrative Procedure Act (Section 10) forbids judicial review only where statutes "preclude" such review or where agency action is "by law committed to agency discretion." . . . [T]he Secretary would have us stretch the second prohibitory clause far beyond its

> meaning. He says that there can be no review where agency action "involves" discretion or judgment. Obviously the statute does not mean that; almost every agency action "involves" an element of discretion or judgment.

Homovich v. Chapman, 191 F.2d 761, 764 (D.C. Cir. 1951) (footnote omitted).

> [A]ction by an administrative agency, although a matter of discretion to considerable extent, is not wholly immune from judicial examination and . . . is reviewable under the Administrative Procedure Act for abuse of discretion . . . .

Western Addition Community Organization v. Weaver, 294 F. Supp. 433, 442 (N.D. Cal. 1968).

The legislative history of the Administrative Procedure Act clearly reveals that Congress intended that this court follow the holdings of *Homovich* and *Western Addition Community Organization*:

> A proper regard for the whole reach of the Administrative Procedure Act and its long legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision. This language was used to assure that judicial review would not be contrived where it was plain that none was intended, and where the action under inquiry was one wholly within the right of the agency to grant or refuse, allow or deny, with no statutory or similar standard established upon which to base its action. But the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U.S.C.A. § 1001(f), upon the basis of administrative expertise are precisely the matters which Congress in this important legislation intended should be under, not exempt from, the Administrative Procedure Act.

Amarillo-Borger Express v. United States, 138 F. Supp. 411, 418 (N.D. Tex. 1956), *vacated as moot*, 352 U.S. 1028 (1957). *See also* Overseas Media Corp. v. McNamara, 385 F.2d 308, 316-17 n.14 (D.C. Cir. 1967).

The following references to the legislative history of the Administrative Procedure Act are found on the pages indicated in ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. No. 248, 79th Cong., 2d Sess. (1946) [hereinafter cited as S. DOC.]:

> SEC. 10. JUDICIAL REVIEW—*Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.*
>
> Very rarely do statutes withhold judicial review. It has never

> been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.
>
> The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record.

REPORT OF THE COMMITTEE ON THE JUDICIARY, S. REP. No. 752, 79th Cong., 1st Sess. (1945), in S. Doc. 212 (emphasis in original).

> This section [10] requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings.
>
> . . . The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review . . . a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.
>
> Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein.

HOUSE COMMITTEE ON THE JUDICIARY, H.R. REP. No. 1980, 79th Cong., 2d Sess. (1946), in S. Doc. 275.

The following exchange took place in the Senate during presentation of the bill by its sponsor Senator McCarran:

Mr. DONNELL. I should like to ask the distinguished Senator a question. § 10 of the bill recites in part that—

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does not have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action as taken by the agency?

Mr. McCARRAN. Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

. . . .

Mr. DONNELL. But the mere fact that a statute may vest discretion in any agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

Mr. McCARRAN. It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.

S. Doc. 310-11.

A federal court has a clear duty and constitutional obligation to review and set aside agency action that exceeds the agency's statutory authority.

> The authority of an administrative agency is delineated by terms of the statutory grant. The responsibility for construing the statutory authority rests with the judiciary. Hence, an inquiry to determine if the agency has exceeded its statutory power is a constitutional obligation of the courts.

Elgin, J. & E. Ry. v. Benj. Harris & Co., 245 F. Supp. 467, 472 (N.D. Ill. 1965).

This court has the duty to hold unlawful and set aside agency

> action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by substantial evidence.

Chamber of Commerce v. United States, 276 F. Supp. 301, 305 (D.N.D. 1967).

The Administrative Procedure Act did not confer any powers of immunity upon federal agencies; rather, the purpose of the Act was to strictly confine the agency's actions:

> Senator McCarran, the author of the bill which became the Administrative Procedure Act, on the floor of the Senate explained that the bill conferred no administrative powers, but provided definitions of, and limitations upon, administrative action, to be interpreted and applied by the agencies in the first instance, but to be enforced by the courts in the final analysis.

Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 863 (4th Cir. 1961).

In reviewing the actions of an administrative agency, there is no aura of sanctity surrounding the agency's action simply because that agency's action involves expertise:

> While it is true that courts, as a gen[e]ral rule, pay great deference to administrative decisions they do so only for certain compelling reasons.

Chemical Bank New York Trust Co. v. Steamship Westhampton, 358 F.2d 574, 586 (4th Cir. 1965), *cert. denied*, 385 U.S. 921 (1966).

> The weight given a decision of an administrative agency "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 . . . (1944) (Jackson, J.).

Id. at 586 n.11.

> The [Interstate Commerce] Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates. . . . But Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits.

East Tex. Motor Freight Lines, Inc. v. Frozen Food Express, 351 U.S. 49, 54 (1956).

The administrative agency, in order to properly exercise its statutory authority and powers, particularly where the health and safety

of the public is at stake, has an affirmative duty to protect the public interest in the best manner possible:

> [T]he right of the public must receive active and affirmative protection at the hands of the Commission.
>
> . . . The Commission has an affirmative duty to inquire into and consider all relevant facts.

Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

> [T]he duty imposed upon the [Federal Power] Commission . . . is . . . to give proper consideration to logical alternatives which might serve the public interest *better* than any of the projects outlined in the applications.

Northern Natural Gas Co. v. FPC, 399 F.2d 953, 973 (D.C. Cir. 1968) (emphasis in original).

> The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest" . . . .

Udall v. FPC, 387 U.S. 428, 450 (1967).

> [T]he Secretary must base his decisions on a complete record expressing the views of all recognized interests . . . .

Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809, 832 (E.D. Pa. 1968).

Administrative action must be judged on the ground on which the record discloses that the action was based, and, where the decision of the administrative agency is explicitly based upon the applicability of certain principles, its validity must likewise be judged on that basis. Mississippi River Fuel Corp. v. FPC, 163 F.2d 433, 449 (D.C. Cir. 1947).

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. . . .
>
> . . . If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action . . . .

SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947).

> [P]resumptions declared by administrative agencies are not binding on the courts.

Porter v. Fleishman, 71 F. Supp. 33, 35 (D. Ore. 1947).

> [F]indings of an administrative body are not binding upon . . . this Court . . . .

Montgomery Ward & Co. v. Northern Pac. Terminal Co., 128 F. Supp. 475, 504 (D. Ore. 1953).

> It is only when a statute requires, that a court must accept findings of fact of an administrative body.

Id. at 505 n.58.

> Courts ought not to have to speculate as to the basis for an administrative agency's conclusion.

Northeast Airlines, Inc. v. CAB, 331 F.2d 579, 586 (1st Cir. 1964). *See also* National Trailer Convoy, Inc v. United States, 293 F. Supp. 634, 637 (N.D. Okla. 1968); Saginaw Tranfer Co. v. United States, 275 F. Supp. 585, 588 (E.D. Mich. 1967); Pre-Fab Transit Co. v. United States, 262 F. Supp. 1009, 1011 (S.D. Ill. 1967).

Though a court should not substitute its judgment for that of the agency, it can compel the proper exercise of statutory authority by the agency: " '[I]f we cannot guarantee the 'right' decisions, we can perhaps insure that more decisions are made by the right processes.' " Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809, 832 (E.D. Pa. 1968), *quoting* Reich, *The Law of the Planned Society*, 75 YALE L. J. 1227, 1251 (1966).

POINT 4

The doctrine of sovereign immunity may no longer be raised by a federal administrative agency, even in the absence of a statute waiving such alleged immunity.

The general doctrine of the immunity of the United States from suit without consent of Congress is a rule conceived by the federal judiciary. There is no basis for this rule either in the Constitution itself or in any specific statute of Congress, but rather sovereign immunity is a rule adopted by the United States Supreme Court.

Apparently the first assertion of the sovereign immunity of the federal government was the following dictum by Chief Justice John Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821): "The universally received opinion is, that no suit can be commenced

or prosecuted against the United States; that the Judiciary Act does not authorize such suits."

Cohens v. Virginia had been preceded by Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), dealing with the immunity of a state from suit by a citizen of another state, in which several opinions traced the development of sovereign immunity in England. Although the eleventh amendment speedily overruled the holding in *Chisholm*, it was not before a thorough discussion of sovereignty. Justice Wilson specifically stated that the term "sovereign" was "unknown" to the Constitution of the United States:

> [T]he term *sovereign* has for its correlative, *subject*. In this sense, the term can receive no application; for it has no object in the Constitution of the *United States*. Under that Constitution there are *citizens*, but *no subjects*. . . .
>
> . . . [T]he people . . . of the *United States* . . . have reserved the Supreme Power in their own hands; and on that Supreme Power, have made the [government] *dependent*, instead of being sovereign . . . .

Id. at 456-57 (emphasis in original).

Justice Wilson also traced the establishment of despotic governments to the doctrine of sovereignty:

> Even in almost every nation, which has been denominated *free*, the *state* has assumed a supercilious pre-eminence above the *people*, who have *formed* it: Hence the haughty notions of *state independence, state sovereignty* and *state supremacy*. In *despotic* Governments, the *Government* has usurped, in a similar manner, both upon the *state* and the *people*: Hence all arbitrary doctrines and pretensions concerning the Supreme, absolute, and incontrolable [*sic*], power of *Government*. In *each, man* is degraded from the *prime* rank, which he ought to hold in human affairs . . . .

Id. at 461 (emphasis in original).

Justice Wilson also indicated that in England the sovereignty had been described as being in Parliament, with the people ignored; to Wilson this was a description of a despotic government:

> Another instance, equally strong, but still more astonishing, is drawn from the *British* Government, as described by Sir *William Blackstone* and his followers. As described by him and them, the *British* is a despotic Government. It is a Government without a people. In that Government, as so described, the *sovereignty* is possessed by the Parliament: In the Parliament, therefore, the supreme and absolute authority is vested: In the Parliament resides that incontrollable and despotic power, which, in all Governments, must reside somewhere. The constituent parts of the Parliament are

> the *King's* Majesty, the Lord's Spiritual, the Lord's Temporal, and the Commons. The *King* and these three Estates together form the great corporation or body politic of the *Kingdom*. All these sentiments are found; the last expressions are found *verbatim* in the commentaries upon the laws of *England*. The *Parliament* form the great *body politic* of *England*! *What*, then, or *where*, are the PEOPLE? *Nothing*! *No where*! They are not so much as even the "baseless fabric of a vision!" From legal contemplation they totally disappear! Am I not warranted in saying, that, if this is a just description; a Government, so and justly so described, is a despotic Government?

Id. at 462 (emphasis in original).

Chief Justice Jay also recognized the people of the United States, not the federal government, as the sovereign:

> From the crown of *Great Britain*, the sovereignty of their country passed to the people of it . . . . [T]he people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plentitude of it, they declared with becoming dignity, "We the *people* of the *United States*, do ordain and establish this Constitution." Here we see the people acting as sovereigns of the whole country . . . .
>
> . . . [T]he sovereignty of the nation is [in] the people of the nation . . . .

Id. at 470-71 (emphasis in original).

Chief Justice Jay noted that in England the doctrine of sovereignty was based on feudal principles that considered the prince as sovereign and the people as his subjects. These feudal principles contemplated the sovereign

> as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities and privileges; it is easy to perceive that such a sovereign could not be amenable to a Court of Justice, or subjected to judicial controul and actual constraint. It was of necessity, therefore, that suability, became incompatible with such sovereignty. Besides, the *Prince* having all the Executive powers, the judgment of the Courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the *Prince* and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are *sovereigns without subjects* . . . and have none

> to govern but *themselves*; the citizens of *America* are equal as fellow citizens, and as joint tenants in the sovereignty.
>
> . . . Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In *Europe* the sovereignty is generally ascribed to the *Prince*; here it resides with the people . . . . Their *Princes* have *personal* powers, dignities, and pre-eminences, our rulers have none but *official*; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

Id. at 471-72 (emphasis in original).

Jay left as a question whether the United States could be sued by an individual citizen if there was a controversy between them. *Id.* at 478. He stated that, since section 2 of Article III of the Constitution extended the judicial power to controversies to which the United States was a party, then an argument "that the *United States* may be sued by any citizen between whom and them there may be a *controversy* . . . appears to me to be fair reasoning . . . ." *Id.* Jay was worried, however, that in actions against the United States, the executive power of the federal government could not be called to support the court's proceedings and judgments. Because Jay was not assured that "the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens," and because the issue was collateral and incidental to the case, Jay formally, though not impliedly, left the question unanswered. *Id.*

It is clear, however, that the majority of the court, just five years after the adoption of the Constitution of the United States, rejected the idea of the United States as sovereign—and necessarily the rule of sovereign immunity from suit—because "suability became incompatible with such sovereignty." *Id.* at 471. The people were the sovereign, not the United States government.

However, after the adoption of the principle that the United States could not be sued without its consent in *Cohens v. Virginia*, reiterated in United States v. Clarke, 33 U.S. (8 Pet.) 436, 444 (1834), the Supreme Court stated that this principle was drawn from the common law doctrine of the sovereign as immune from suit. In *The Siren*, the Court, however, rested the doctrine on grounds of newly invented public policy considerations:

> It is a familar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger

> which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit, is therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.

The Siren, 74 U.S. (7 Wall.) 152, 153-54 (1868).

In 1882 the Supreme Court of the United States reviewed the reasons underlying the judicially created doctrine of sovereign immunity:

> In order to decide whether the inference is justified from what is conceded, it is necessary to ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround this exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors; and while it is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country, except where his consent had been given on petition of right, it is a matter of great uncertainty whether prior to that time he was not suable in his own courts and in his kingly character as other persons were. We have the authority of Chief Baron Comyns, 1 Digest, 132, Action, C. 1, and 6 Digest, 67, Prerogative; and of the Mirror of Justices, chap. 1, sect. 3 and chap. 5, sect. 1, that such was the law; and of Bracton and Lord Holt, that the King never was suable of common right. It is certain, however, that after the establishment of the petition of right about that time as the appropriate manner of seeking relief where the ascertainment of the parties' rights required a suit against the King, no attempt has been made to sue the King in any court except as allowed on such petition.
>
> It is believed that this petition of right, as it has been practiced and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the King in legal controversies among themselves. "If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights." *United States v. O'Keefe*, 11 Wall. 178.
>
> There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation,

or to any of the States which compose it. There is vested in no officer or body the authority to consent that the State shall be sued except in the law-making power, which may give such consent on the terms it may choose to impose. *The Davis,* 10 Wall. 15. Congress has created a court in which it has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.

What were the reasons which forbid that the King should be sued in his own court, and how do they apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's court. No such reason exists in our government, as process runs in the name of the President, and may be served on the Attorney-General as was done in *Chisholm v. Georgia,* 2 Dall. 419. Nor can it be said that the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment.

Mr. Justice Gray, of the Supreme Court of Massachusetts, in an able and learned opinion which exhausts the sources of information on this subject, says: "The broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury." *Briggs & Another v. Light Boats,* 11 Allen (Mass.), 157. As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.

It is obvious that in our system of jurisprudence the principle is as applicable to each of the States as it is to the United States, except in those cases where by the Constitution a State of the Union may be sued in this court. *Railroad Company v. Tennessee,* 101 U.S. 337; *Railroad Company v. Alabama,* id. 832.

That the doctrine met with a doubtful reception in the early history of this court may be seen from the opinions of two of its justices in the case of *Chisholm v. Georgia,* where Mr. Justice Wilson, a member of the convention which framed the Constitution, after a learned examination of the laws of England and other states and kingdoms, sums up the result by saying: "We see nothing

against, but much in favor of, the jurisdiction of this court over the State of Georgia, a party to this cause." Mr. Chief Justice Jay also considered the question as affected by the difference between a republican State like ours and a personal sovereign, and held that there is no reason why a state should not be sued, though doubting whether the United States would be subject to the same rule.

The first recognition of the general doctrine by this court is to be found in the case of *Cohens v. Virginia*, 6 Wheat. 264.

The terms in which Mr. Chief Justice Marshall there gives assent to the principle does not add much to its force. "The counsel for the defendant," he says, "has laid down the general proposition that a sovereign independent State is not suable except by its own consent." This general proposition, he adds, will not be controverted.

And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine. *United States v. Clarke*, 8 Pet. 436; *United States v. McLemore*, 4 How. 286; *Hill v. United States*, 9 id. 386; *Nations v. Johnson*, 24 id. 195; *The Siren*, 7 Wall. 152; *The Davis*, 10 id. 15.

On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit.

But little weight can be given to the decisions of the English courts on this branch of the subject, for two reasons:—

1. In all cases where the title to property came into controversy between the crown and a subject, whether held in right of the person who was king or as representative of the nation, the petition of right presented a judicial remedy,—a remedy which this court, on full examination in a case which required it, held to be practical and efficient. There has been, therefore, no necessity for suing the officers or servants of the King who held possession of such property, when the issue could be made with the King himself as defendant.

2. Another reason of much greater weight is found in the vast difference in the essential character of the two governments as regards the source and the depositaries of power.

Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives; it remains true to-day that the monarch is looked upon

> with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure-garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government.
>
> It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.
>
> Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.

United States v. Lee, 106 U.S. 196, 205-09 (1882).

Thus the Supreme Court in *Lee* rejected the policy grounds upon which the court had based the sovereign immunity doctrine in *The Siren* and in fact did not apply the doctrine of sovereign immunity. Nevertheless the doctrine of sovereign immunity lives on, often justified by the reasons rejected in *Lee*. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

The Supreme Court had rejected, prior to *Lee*, the contention that the doctrine of sovereign immunity could rest on the maxim of English law that the King could do no wrong:

> It is not easy to see how the . . . proposition can have any place in our system of government.
>
> We have no king to whom it can be applied. The President, in the exercise of the executive functions, bears a nearer resemblance to the limited monarch of the English government than any other branch of our government, and is the only *individual* to whom it could possibly have any relation. It cannot apply to him, because the Constitution admits that he may do wrong, and has provided, by the proceeding of impeachment, for his trial for wrong-doing, and his removal from office if found guilty. None of the eminent counsel who defended President Johnson on his impeachment trial asserted that by law he was incapable of doing wrong, or that, if done, it could not, as in the case of the king,

> be imputed to him, but must be laid to the charge of the ministers who advised him.
>
> It is to be observed that the English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached; or, if the wrong amounts to a crime, they may be indicted and tried at law for the offense.
>
> We do not understand that either in reference to the government of the United States, or of the several States, or of any of their officers, the English maxim has an existence in this country.

Langford v. United States, 101 U.S. 341, 343 (1879).

> There is some evidence that the original meaning of the pre-sixteenth century maxim—that the king can do no wrong—was merely that the king was not privileged to do wrong. (Borchard, *Governmental Responsibility in Tort*, 34 Yale L.J. 1, 2; Ehrlich, Proceedings Against the Crown, (1216-1377) at pp. 42, 127 [Oxford Studies in Social and Legal History, vol. VI (1921)].)

Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 214 n.1, 359 P.2d 457, 458 n.1, 11 Cal. Rptr. 89, 90 n.1 (1961).

Yet the Supreme Court later held that the doctrine of sovereign immunity was based on the grounds that "the authority that makes the law is itself superior to it" (*The Western Maid*, 257 U.S. 419, 432 (1922)), and that "there can be no legal right as against the authority that makes the law on which the right depends" (Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)). These opinions, written by Justice Holmes, have been roundly criticized for logical inconsistency and for reliance on English authorities.

The period of restriction of the doctrine of sovereign immunity evidenced by *Lee* was not to last, as the Holmes opinion in *Kawananakoa* and *The Western Maid* have resulted in the strictest doctrine of sovereign immunity to date. *See* Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

The doctrine of sovereign immunity, originally justified by the Supreme Court as an inherited concept from the English common law, is now justified solely on the grounds of policy.

> The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants.

United States v. Shaw, 309 U.S. 495, 501 (1940).

> The principle of immunity from litigation assures the . . . nation from unanticipated intervention in the processes of government . . . . The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent . . . .

Great Northern Ins. Co. v. Read, 322 U.S. 47, 53-54 (1944).

The Supreme Court in 1950 in effect overturned Holmes's rationale, holding that

> While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown.

Feres v. United States, 340 U.S. 135, 139 (1950) (footnotes omitted).

The principle of *Chisholm v. Georgia* and *United States v. Lee*—that the people are the sovereign—has never been repudiated. The Supreme Court has instead created a legal fiction in the doctrine of sovereign immunity.

While the doctrine of sovereign immunity is that the United States cannot be sued without the consent of Congress, and at the time of *United States v. Lee* the Supreme Court looked only to the named party defendant in determining whether the United States was being sued, today "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58 (1963).

The decree is considered to operate against the United States if the relief sought would require the expenditure of public funds, or entail the tranfer of lands held in the public domain, or if it would restrain the government from acting or require it to act. Dugan v. Rank, 372 U.S. 609, 621-22 (1963); Land v. Dollar, 330 U.S. 731, 738 (1947).

The doctrine of sovereign immunity does not apply where the officer or agent of the United States is acting beyond his statutory powers or, though acting within the scope of his statutory authority, the powers themselves or the manner in which they are exercised are constitutionally void. Dugan v. Rank, 372 U.S. 609, 621-22 (1963). Where such actions are alleged, "the United States is not an indispensable party where, although the officer acts under a valid statute, he actually exceeded the authority with which the statute invested him." Farrell v. Moomau, 85 F. Supp. 125, 126 (N.D. Cal. 1949).

See also Work v. Louisiana, 269 U.S. 250, 254 (1925). "[The] exemption of the United States from suit does not protect its officers acting without or in excess of their authority." Garvey v. Freeman, 263 F. Supp. 573, 577 (D. Colo. 1967).

A suit to enjoin acts of an officer of the United States exceeding his statutory authority is not a suit against the United States nor a suit to interfere with property of the United States. Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 F. 72, 78 (8th Cir. 1914).

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . . His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949).

> Sovereign immunity does not prevent a suit against a federal officer who is acting in excess of his authority. . . . Since the decision in United States v. Lee, 106 U.S. 196, . . . the traditional remedy of a person aggrieved by governmental action . . . has been a suit against the government officer responsible for that action and such suits have been permitted when the officers have exceeded their statutory powers.

Pan American Petroleum Corp. v. Pierson, 284 F.2d 649, 651-52 (10th Cir. 1960).

> As to actions beyond the statutory limitation, such actions of the officer are considered individual, not sovereign, on the theory that the actions are *ultra vires* and, therefore, specific relief may be obtained.

Doehla Greeting Cards v. Summerfield, 227 F.2d 44, 46 (D.C. Cir. 1955).

> The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. . . .
>
> . . . The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.

Philadelphia Co. v. Stimson, 223 U.S. 605, 619-20 (1912).

The United States Government "does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." Keifer & Keifer v. RFC, 306 U.S. 381, 388

(1939). It does not matter "that the agent is a corporation rather than a single man." Sloan Shipyards Corp. v. United States Fleet Corp., 258 U.S. 549, 567 (1922).

Determination of the court's jurisdiction is dependent upon the exceeding of statutory or constitutional authority by the officers and agency of the government herein involved. Such determination can be made only upon a full determination of the merits:

> Where a plaintiff asserts in his complaint that an officer of the Government is acting without power and that therefore his acts are invalid, the court, in determining the preliminary jurisdictional question whether or not the United States is a necessary party, is confronted with a problem arising out of the fact that the determination of that question involves passing upon the very question involved in the merits. . . .
>
> The courts solve this problem by accepting at their face value, for jurisdictional purpose, the assertions of the complainant of want of power in the officer . . . and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties.

West Coast Exploration Co. v. McKay, 213 F.2d 582, 592-93 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954).

> [I]f it appears from the allegations of the complaint, excluding conclusions of law and unwarranted inferences of fact, that the officer named as defendant is acting beyond his delegated power or if the authority purporting to confer power on him to act is unconstitutional or otherwise invalid then the action will lie. The officer is not then validly performing the will of his sovereign.

Ogden River Water Users Ass'n v. Weber Basin Water Conservancy, 238 F.2d 936, 941 (10th Cir. 1956).

The doctrine of sovereign immunity from suit, a fiction created by the federal judiciary, is today based upon the desirability of leaving the government—the sovereign—unfettered from accomplishing its business. But the people are the sovereign under the Constitution of the United States; the officers of the government "are the agents of the people." Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 472 (1793). "The government of the Union . . . is emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819).

The decision in *The Siren*, supporting the doctrine of sovereign immunity, clearly indicates that the reason to leave the federal govern-

ment unfettered in accomplishing its business is because "the public service would be hindered and the public safety endangered." 74 U.S. (7 Wall.) at 154.

Where the plaintiff is asserting the "public service" and "public safety" in a suit against an agency and officers of the government, he is in effect asserting the rights of the true sovereign—the people. To apply the doctine of sovereign immunity in such a situation is to apply a rule without reason—in fact to apply the rule contrary to the reasons that underlie it. To apply the judicially conceived doctrine of sovereign immunity would be a perversion of justice, not to say illogical.

As Cardozo said: "[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or . . . the social welfare, there should be less hesitation in frank avowal and full abandonment." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921). And in the words of Chief Justice Warren Burger: " 'If it doesn't make good sense, how can it make good law?' " Duscha, *Chief Justice Burger Asks: "If It Doesn't Make Good Sense, How Can It Make Good Law?,"* N.Y. Times, Oct. 5, 1969, § 6 (Magazine), at 140.

Numerous courts, including the Supreme Court, have expressed opposition to the doctrine of sovereign immunity, but the fiction of the doctrine is reaffirmed and occasionally strengthened.

> [I]t is a mere rule of convenience in a jurisprudence revolving about a democratic constitutional form of government. It has a valuable place of public importance in that jurisprudence. But it should not be permitted to thwart fundamental principles of greater importance.

Sawyer v. Dollar, 190 F.2d 623, 645 (D.C. Cir. 1951), *vacated as moot*, 344 U.S. 806 (1952).

The adherents of sovereign immunity urge that the courts should allow any change in the doctrine of sovereign immunity to come only from the Congress. They further urge that the courts should not act to abolish sovereign immunity in a certain area because Congress has passed legislation waiving sovereign immunity in certain areas.

> It has been urged by the adherents of the sovereign immunity rule that the principle has become so firmly fixed that any change must come from the legislature. In previous decisions . . . this court concurred in this reasoning. Upon reconsideration we realize that the doctrine of sovereign immunity was originally judicially created. We are now convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack.

Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 393, 381 P.2d 107, 113 (1963); *see* Hargrove v. Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957); Williams v. Detroit, 364 Mich. 231, 284, 111 N.W.2d 1, 16-17 (1961) (concurring opinion); Holytz v. Milwaukee, 17 Wis. 2d 26, 37, 115 N.W.2d 618, 623 (1962); *cf.* National City Bank v. Republic of China, 348 U.S. 356 (1955).

> Defendant would have us say that because the Legislature has removed governmental immunity in these areas we are powerless to remove it in others. We read the statutes as meaning only what they say: that in the areas indicated there shall be no governmental immunity. They leave to the court whether it should adhere to its own rule of immunity in other areas.

Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 218-19, 359 P.2d 457, 461, 11 Cal. Rptr. 89, 93 (1961).

By abolishing the rule of sovereign immunity, if only in suits where plaintiff asserts the public interest, rather than a right particular to himself, the court need not worry about opening the doors of the federal courts to a deluge and flood of suits. The rules on availability and scope of review operate satisfactorily to prevent the courts from going too far into the administration of the agencies. Davis, *Sovereign Immunity in Suits against Officers for Relief other than Damages*, 40 CORNELL L.Q. 3, 4 (1954). The rules as to case or controversy, exhaustion of administrative remedies, and other jurisdictional requirements, as well as the cost of litigation, will similarly prevent a deluge of law suits if the doctrine of sovereign immunity is so limited. Block, *Suits against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1081 (1946).

The judicial creation of the doctrine of sovereign immunity is an unconstitutional limitation of the judicial power in violation of Article III, sections 1 and 2 of the Constitution of the United States. Unlike the rules as to standing and cases or controversies, which the federal courts can limit and define according to Article III, section 2, there is no source in the Constitution by which the federal courts can impose the doctrine of sovereign immunity. To the extent that the doctrine is based on the United States Government as sovereign, the doctrine of sovereign immunity violates the constitutional interpretation of the people as sovereign as stated by Justice Wilson and Chief Justice Jay in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

The doctrine of sovereign immunity is also an unconstitutional infringement on the standing of individual citizens, under the ninth and tenth amendments of the United States Constitution, to contest

the validity of governmental activities. Flast v. Cohen, 392 U.S. 83, 129 n.18 (1968) (Harlan, J., dissenting); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470 (1793); Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 573 n.3 (D.D.C.), *aff'd*, 343 U.S. 579 (1952).

POINT 5

In those actions where the right of judicial review is available under the Administrative Procedure Act, sovereign immunity is waived.

> This express authorization of judicial review in this case [under the Administrative Procedure Act] disposes of the argument that the suit is in substance one against the United States where the United States has not given its consent to be sued. The United States has consented to this review. The fact that the United States has some interest in the controversy does not provide an exception to the grant of a right of review.

Adams v. Witmer, 271 F.2d 29, 34 (9th Cir. 1958).

> We are of the opinion that the reasons given by the trial court for lack of jurisdiction are not sound. Title 5 U.S.C. Sec. 1009 [presently codified as 5 U.S.C. §§ 701-06 (Supp. IV, 1969)] expressly provides for review of administrative or agency action at the instance of "any person suffering legal wrong" because of such action "or adversely affected or aggrieved by such action" subject to certain exceptions stated in that section. Instead of reaching a conclusion that the action was "in effect one brought against the United States without its consent," the court should have made inquiry whether the action was one authorized by the section referred to above. If so, the necessary consent of the United States will be found to exist.

Mulry v. Driver, 366 F.2d 544, 547 (9th Cir. 1966).

In Brennan v. Udall, 251 F. Supp. 12 (D. Colo. 1966), the appellant owned 160 acres of land which was in 1917 patented to one Baxter, reserving to the United States "all the nitrate, oil, and gas in the lands," as required by 30 U.S.C. §§ 121-23 (1964). Brennan and Humble Oil Company, holder of an option to purchase the land, petitioned the Director of Land Management for a decision that oil shale was not included in the patent. The Director, with the approval of the Secretary of the Interior, held that oil shale was included in the patent. Appellant filed suit against the Secretary of the Interior, challenging his decision. Jurisdiction was alleged under the Administrative Procedure Act. The District Court (Doyle, J.) held:

> [T]he Administrative Procedure Act authorizes bringing of the suit and the granting of the relief demanded . . . .
>
> The defendant maintains that this suit is one that seeks to quiet title and as such is an unconsented suit against the sovereign. . . .
>
> Cases relied on by defendant in support of his position that this Court lacks jurisdiction do not involve the issue of excess of administrative authority, but rather concern only challenges to the correctness of a decision committed by law to administrative discretion.

251 F. Supp. at 14.

The Court of Appeals for the Tenth Circuit affirmed:

> At the outset, the Secretary [of the Interior] challenges the jurisdiction of the court because the relief sought seeks to diminish the title of the United States in the lands, consequently it is a necessary party and has not consented to be sued. We agree with the trial court that the decision of the Secretary of the Interior adversely affects Brennan's title to the land in question and is reviewable under the Administrative Procedure Act. 5 U.S.C. § 1009, (now §§ 701-706).

Brennan v. Udall, 379 F.2d 803, 805 (10th Cir. 1967).

A position that the doctrine of sovereign immunity may be interjected, even where the right of judicial review under the Administrative Procedure Act is authorized, would clearly be inconsistent with Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), where the Supreme Court of the United States held that *only* upon a showing of clear and convincing evidence of contrary legislative intention should the courts restrict access to judicial review under the Administrative Procedure Act.

For it must be remembered that Congress intended to extend the scope of judicial review through passage of the Administrative Procedure Act.

> Contemporary discussion and debate clearly demonstrate that one of the main objectives of the Administrative Procedure Act was to extend the right of judicial review. One of its purposes was to enlarge the authority of the courts to check illegal and arbitrary administrative action. The courts stand between the citizens and administrative officers. . . . [The Administrative Procedure Act] broadened the scope of judicial review and it enlarged the class of persons who were given standing to invoke the judicial process.

American President Lines v. Federal Maritime Bd., 112 F. Supp. 346, 349 (D.D.C. 1953).

The purpose of section 1009 has been stated to be to extend

> the right of judicial review and to enlarge the authority of courts to check illegal and arbitrary administrative action.

DiCostanzo v. Willard, 165 F. Supp. 533, 538 (E.D.N.Y. 1958).

> [The] purpose [of the Administrative Procedure Act] was to remove obstacles to judicial review of agency action under subsequently enacted statutes . . . .

Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955).

CONCLUSION[5]

WHEREFORE, the Plaintiffs demand judgement of the defendants:

DECLARING

The rights of the people of the State of Colorado to the protection of their personal health and safety and the health and safety of those generations yet unborn from the hazards of ionizing radiation resulting from the distribution of radioactive materials through the Colorado Regional Ecosystem as a result of *Project Rulison.*

The rights of the people of the State of Colorado to the full benefit, use, and enjoyment of the national natural resource treasures of the State of Colorado without degradation resulting from contamination with radioactive material released by *Project Rulison.*

The rights of the people of the State of Colorado to a full disclosure by the defendants of the facts, if any, supporting the claims that:

> Safety of the public is a prime consideration of all Project Rulison participants. All factors that affect safety will be investigated thoroughly, reviewed by a panel of safety consultants, and evaluated on the basis of the knowledge gained from the extensive experience of previous nuclear detonations.
>
> AEC experience with more than 270 underground nuclear detonations indicates that escape of radioactivity into the atmosphere is highly unlikely to result from Project Rulison.
>
> Ground motion has been carefully calculated and no significant damage is predicted.
>
> Ground waters in the Rulison site area have been evaluated by numerous engineers and scientists, who are convinced that there will be no contamination of the ground water.
>
> Extensive operational safety measures have been undertaken to protect the public.

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[5] The Conclusion is taken from the COSC complaint in the *Project Rulison* case.

RESTRAINING

the defendants, jointly or severally, individually or in concert with others from any act which will result in the contamination of the permanent biological, geological, and chemical cycles of the Biosphere with radioactive material or the release of any ionizing radiation into the environment.

RESTRAINING

the defendants from proceeding with the detonation of any nuclear bomb in the State of Colorado, until such time as the defendants have shown good cause supported by substantial evidence that such detonation of a nuclear bomb will not cause contamination of the permanent biogeochemical cycles of the Biosphere with radioactive materials, and that such detonation of a nuclear bomb will not release any ionizing radiation into the environment.

TOGETHER

with such other and further relief shall seem just and proper to the Court under the circumstances.