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Lawrence Brown, Marilyn Brown, Joseph Sorenson, and Kathleen Sorenson, individuals v. The Division of Water Rights of the department of Natural Resources of the State of Utah Jerry D. Olds, in his capacity as the Utah State Engineer and James A. McIntyre, an individual : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

LAWRENCE BROWN, MARILYN BROWN, :
JOSEPH SORENSON, and KATHLEEN :
SORENSON, individuals, :

Plaintiffs/Appellants, :

v. :

THE DIVISION OF WATER RIGHTS of :
THE DEPARTMENT OF NATURAL :
RESOURCES of the STATE OF UTAH, :
JERRY D. OLDS, in his capacity as the Utah :
State Engineer, and JAMES A. McINTYRE, :
an individual, :

Defendants/Appellees. :

Supreme Court No. 20080995-SC
Court of Appeals No. 20070474-CA
District Court No. 060920127

(ORAL ARGUMENT REQUESTED)

On Petition for a Writ of Certiorari to the Utah Court of Appeals

REPLY BRIEF

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FILED
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INTRODUCTION

Granting standing based on the ephemeral “Butterfly Effect” would of course be improper. But this case is not about butterflies in Brazil affecting weather in Kansas. It is about one property owner building a bridge that may cause or contribute to flood-related damage on his neighbors’ properties. This Court’s jurisprudence strongly supports standing in cases like this involving a real risk of harm to person or property. A host of federal decisions – which McIntyre has declined to engage much less distinguish – likewise demonstrate that, even under the narrower constraints of Article III, standing would be appropriate here. The risks at issue in this case are real and present, not ephemeral. In fact, the precise event the Neighbors fear occurred only 25 years ago. (R. 5, 84.) Whether the Neighbors will ultimately prevail on the merits is unknowable and irrelevant at this stage. They have standing to bring their claims and deserve a fair opportunity to prove their case.

REPLY TO MCINTYRE’S STATEMENT OF FACTS

This is an appeal from a motion to dismiss where the allegations in the complaint are the undisputed operative facts. Accordingly, McIntyre properly “concedes the Neighbors’ statement of facts is correct.” Brief of Appellees (“Aplee. Br.”), at 6. But McIntyre also repeatedly challenges the well-pleaded averments in the complaint, invokes facts that are not in the record at all, and makes arguments as though this matter were decided on the merits below. The trial court did not hold an evidentiary hearing or make any factual findings. The dismissal was based solely on the pleadings and the attached documents.

McIntyre's factual additions are mainly arguments about the legal effects of various documents or facts. First, in an attempt to reframe the issue, McIntyre has recharacterized the permit issued by the Division. He asserts that the "Neighbors' statement that McIntyre obtained a permit from the Division to build a bridge is a misstatement" because (he argues) while the permit "was required operationally" it did not "of itself . . . allow the building of a bridge" but only the "temporary disturbance of Little Cottonwood Creek during construction of the bridge's abutments." Aplee. Br., at 6. The bridge itself, he says, is outside the creek's channels. This is contrary to the well-pleaded allegations in the Complaint. It is also wrong.

To clarify, there are two relevant documents in the record – the application and the permit itself. On August 21, 2006, McIntyre filed an application to Alter a Natural Stream Channel pursuant to Utah Code Ann. § 73-3-29(1). (R. 10-11.) The application was for a "project" McIntyre described simply as "Bridge across Little Cottonwood Creek." (R. 10.) "Little Cottonwood Creek" was listed as the "Watercourse to be altered." (*Id.*) The purpose of the "project" was stated as "Ingress and Egress to property on both sides of Little Cottonwood Creek." (*Id.*) Notably, McIntyre listed the Neighbors (the Browns and Sorensens) as "adjacent property owners . . . or other individuals who may be affected by this project." (R. 11.)

On October 11, 2006, the Division issued a "Stream Channel Alteration Permit Number 06-57-29SA to construct a bridge over Little Cottonwood Creek" (R. 38.) The permit imposes conditions on various construction-related activities. (*Id.*) The permit also saddles McIntyre with post-construction obligations. Most notably, it

requires that “[d]uring high water events, the bridge must be monitored to allow for debris passage.” (*Id.*) The permit further requires that, “[t]o avoid proliferation of bridge crossings,” McIntyre must consider “allowing others to utilize the bridge, provided they adequately compensate you for a portion of the cost of bridge construction and gain a legal right-of-way.” (*Id.*) Thus, the permit was both necessary for McIntyre to build the bridge and also continues to impose obligations on him with respect to the bridge’s operation.¹

McIntyre states that because the Neighbors do not allege ownership of property “adjoining” (*i.e.*, immediately connected to) Little Cottonwood Creek or on the first level flood plain, “flooding and erosion caused by the Creek would never directly impact Neighbors’ properties.” *Aplee. Br.*, at 7. This assertion improperly contradicts the alleged facts and is one of many examples where McIntyre tries to litigate the merits of the Neighbors’ case. The complaint alleges that inundation of “the first level flood plains on both sides of the stream in the vicinity of the bridge” will result in “significant erosion and damage to the [Neighbors] and other property owners adjacent to the bridge.” (R. 5-6.) Whether the Neighbors’ properties directly abut the flood plain is not addressed by the pleadings and is irrelevant. The Neighbors’ allegation is that flooding caused or exacerbated by McIntyre’s bridge could erode or undermine property upon which their own properties depend for physical support. (R. 5-6.) In its own review of the pleadings, the Court of Appeals recognized that the Neighbors had alleged a direct impact: “We

¹ Whether or not McIntyre is correct that the bridge’s “abutments are entirely upon property owned by McIntyre and lie outside the Creek’s channel” (*Aplee. Br.*, at 6) – perhaps an issue of fact for the merits – the fact remains that the permit continues to impose obligations on McIntyre in respect to his bridge.

acknowledge that the complaint does assert some actual facts suggesting that a flood or high water flows would cause harm to Plaintiffs' property. . . . Indeed, the engineer's report attached to the complaint shows a danger of possible damage to Plaintiffs' property if Little Cottonwood Creek's water flows reach the same levels that they did in 1984." Op., ¶ 14 (emphasis added).

McIntyre quotes a portion of the State Engineer's response to the Neighbors' request for reconsideration opining that "'the natural condition of the stream is not being affected by the construction of this bridge. No part of the structure is in the stream channel.'" Aplee. Br., at 7 (quoting R. 89). But the statement McIntyre quotes is incomplete, giving the false impression that the bridge will have no impact on the stream's capacity. The entire paragraph confirms that in the view of the State Engineer the bridge will alter the stream channel's hydraulics under certain circumstances:

This office concludes that the natural condition of the stream is not being affected by the construction of this bridge. No part of the structure is in the stream channel, so, consequently the channel hydraulics are not changed until the water level reaches the bottom of the bridge, which is located at elevation 4319. The FEMA flood map, effective September 21, 2001, indicates the 100-year flood elevation at this location is elevation 4318. We deem this to be a reasonable impact to the channel's capacity.

(R. 89 (emphasis added).) Whether this assessment is factually accurate and whether the State Engineer's conclusion that the impact on the stream is "reasonable" are contested issues pertaining to the merits of this action. In all events, it does not suggest the bridge will have no impact on the stream.

McIntyre notes that the Secor Report describes significant erosion that is already occurring "even without the bridge" and that "building the bridge only increases the

risk’” of further erosion. Aplee. Br., at 7-8 (quoting R. 25-26). That, of course, is precisely the Neighbors’ point: the bridge increases the risk of flooding and erosion in this highly sensitive area, which threatens their properties and wellbeing.

Lastly, McIntyre asserts that the now-constructed bridge has a “removable deck” and that “Secor’s opinion on [the damning effect of the bridge] requires an inference that McIntyre will fail to fulfill his duty to keep the bridge clear of debris or remove the deck.” Aplee. Br., at 8. The complaint contains no allegations or information about how easily or quickly – if at all – such a deck could be removed in the event of a flood. In argument before the trial court, McIntyre asserted – without citation to evidence – that the deck of the bridge “is designed to be placed on its footings with a crane and bolted in place” and thus could be removed “in an emergency” by lifting it “off the footings and set[ting] [it] to the side until the high water subsides” (R. 113-14.) At this early stage, there is nothing in the record about whether McIntyre has such a crane always available and whether it could be used quickly and effectively enough to avert flood damage. These unsupported assertions go to the merits of the case – especially to remedy issues. Ironically, though, the argument concedes that the bridge does indeed increase the risk of flooding, which is the very reason it has to be removable.

ARGUMENT

“McIntyre does not dispute [the] Neighbors’ extensive recitation of the underlying history and policy of Utah’s standing requirement in general.” Aplee. Br., at 19. That review showed that Utah standing law is primarily concerned with protecting the separation of powers by ensuring that the plaintiff has a “personal stake in the outcome

of the legal dispute”” rather than a generalized public grievance. Brief of Appellants (“Br. Apps.”), at 16-17 (quoting *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983)). McIntyre cannot claim that standing in this lawsuit between close neighbors implicates such concerns. Nor does he dispute that potential injury can give rise to standing or that increased risk itself can be a cognizable harm. *See* Aplee. Br., at 19, 27. The Neighbors demonstrated that federal courts often find standing in cases involving probabilistic injuries even when the probabilities are small. *See* Br. Apps, at 22-30. McIntyre does not disagree and makes no effort to defend the flawed federal-law analysis that was central to the decision below.

These serious concessions on the law leave McIntyre with little room to maneuver. He argues for the first time that, regardless of injury, the Neighbors’ claims are not redressable. He denies causation with an argument that attempts to finely parse and weigh the allegations, as if the issue had gone to trial rather than being decided on the pleadings. He claims that the Sorensens cannot be injured because flooding caused by the bridge would never physically reach their property, ignoring the fact that flood waters could directly undermine land on which the Sorensens’ property depends for support. And he makes the novel argument that his own willingness to remove the bridge deck in the event of high water should weigh heavily in the analysis. None of these arguments demonstrate lack of standing. Whatever their value as arguments on the merits, they have no place in the standing analysis.

I. THIS COURT AFFORDS NO DEFERENCE TO THE DECISION BELOW AND THE OPERATIVE FACTS ARE THOSE IN THE COMPLAINT.

At various points in his brief, McIntyre suggests that this Court owes deference to the decisions below. *See, e.g.,* Aplee. Br., at 20-21. That is incorrect. McIntyre raised the standing issue on a motion to dismiss and it was decided as such. Thus, the facts of this case are the allegations in the pleadings. *See* Br. Apps., at 15-16. At no time did the trial court make factual findings or determinations to which an appellate court might owe deference. Whether standing exists under an undisputed set of facts is a question of law reviewed for correctness on appeal. *See CME v. Tooele County*, 2009 UT 34, ¶ 12.² McIntyre suggests the trial court's denial of the Neighbors' motion for TRO during an *in camera* "hearing" is significant. *See* Aplee. Br., at 3. Not so. The trial court neither made nor was procedurally authorized to make factual findings in that setting. It merely denied the motion, and that denial is entitled to no weight on appeal.

McIntyre attempts to undermine the allegations in the complaint by claiming they are not supported by the attached exhibits. Aplee. Br., at 20-21. As the opening brief amply demonstrates, the two Secor Reports strongly support standing. *See* Br. Apps., at

² McIntyre relies on *Jones v. Barlow*, 2007 UT 20, ¶ 9, for his factual-deference argument (Aplee. Br., at 21), but the case actually supports the Neighbors' position. *Jones* involved a custody dispute between a biological mother and her former domestic partner. The trial court held an evidentiary hearing on various issues. On appeal, this Court limited its analysis to the former domestic partner's standing under the *in loco parentis* doctrine. Since that analysis turned on undisputed facts, obviating the need to inquire into facts determined in the evidentiary hearing, this Court's review gave no deference to the court below: "Because we confine our review to the district court's interpretation of the doctrine of *in loco parentis* and do not address its findings of fact or application of those facts to the law, the appropriate standard of review is correctness. We therefore grant no discretion to the district court." *Id.* As a pleadings case, the facts here are likewise undisputed and no deference is owed the lower courts.

8, 31-32. But there are two additional points. First, the Neighbors attached to the complaint both parties' submissions to the Division, which, although not required, was entirely appropriate under Utah Code Ann. § 63G-4-402(2)(a). They did not, however, adopt that record wholesale nor claim it as the entire proof of their case. Hence, the attachments are supportive and provide useful context for the pleadings, but they do not trump the pleadings. The trial court's review of the Division's decision is "by trial de novo" governed by the Rules of Civil Procedure and Rules of Evidence. *See id.* § 63G-4-402. The Neighbors have every right to develop and present additional evidence on issues like injury, causation, and appropriate remedies. Second, the Secor Reports themselves are only preliminary analyses. The report of September 18, 2006, recommends that "a complete engineering study be undertaken to evaluate these risks." R. 26; Add-32. The report of October 30, 2006 admitted to being based on the limited information available in McIntyre's own permit application "along with readily available data on the creek." R. 78. Again, the complaint references these reports as context for their allegations but does not adopt them as the only evidence to be presented in the case.

II. THE NEIGHBORS' CLAIMS ARE REDRESSABLE.

McIntyre contends that the Neighbors lack standing because their claims are not redressable. He argues that because he quickly built his bridge despite the pendency of this lawsuit, the permit is now essentially a nullity that cannot be reversed or modified, and thus his decision to construct the bridge is essentially unreviewable. In *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.* ("Sierra Club"), 2006 UT 74, ¶ 29, the permit had continuing relevance and thus could be challenged, but here (according to McIntyre)

the Neighbors have no relief because the permit has expired. *See* Aplee. Br., at 12-14.

This new argument fails for numerous reasons.

1. First and foremost, it is well established that “[s]tanding is determined as of the time the action is brought.” *CME*, 2009 UT 34, ¶ 8 (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005)); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992) (standing to be “assessed under the facts existing when the complaint is filed”). Contrary to McIntyre’s argument, the redressability analysis looks not to current facts but to the facts as they existed when the Neighbors first sued.

The Neighbors brought this action on December 15, 2006, shortly after the Division issued its final decision on November 17, 2006 denying their objection. (R. 1, 4, 89.) Among other things, the complaint sought *de novo* review of the Division’s decision issuing the permit, stay of the approval, an injunction against McIntyre restraining him “from constructing the bridge in the area in question,” and “such other and further legal and equitable relief as this Court deems appropriate under the circumstances.” (R. 6-8.) At the time, McIntyre had yet to construct his bridge, the permit as characterized by McIntyre was unquestionably operative, and the injury complained of was fully redressable by the relief sought. That is enough for standing.

2. At any rate, McIntyre’s redressability argument is premised on a mischaracterization of the permit. As related above, the permit application was for a “project” which McIntyre denominated as “Bridge across Little Cottonwood Creek” – not just for construction of the bridge. (R. 10.) The purpose of the “project” was not only to

build a bridge but to maintain it as a permanent structure providing “Ingress and Egress to property on both sides of Little Cottonwood Creek.” (*Id.*)

Completion of construction did not end the permit’s legal existence or relevance. To this day the permit imposes continuing obligations on McIntyre. In apparent response to concerns raised by the Neighbors, the State Engineer fashioned the permit to require McIntyre to monitor the bridge during high water periods to ensure that it does not trap debris and to consider allowing others to use the bridge so as to avoid construction of additional bridges. (R. 38, ¶ 3; *id.* ¶ 4.)

State statutes contemplate that permits like McIntyre’s may contain on-going obligations rather than merely authorizing a single construction event. Utah Code Ann. § 73-3-29(4)(c) states that “[t]he state engineer may approve the application [to relocate a natural stream channel or alter the beds and banks of a natural stream], in whole or in part, with any reasonable terms to protect vested water rights, any public recreational use, the natural stream environment, or aquatic wildlife.” Section 73-2-25(2) permits the State Engineer to bring an enforcement action if he finds that a person “violates an order issued under Section 73-3-29 regarding the alteration of the bed or bank of a natural stream channel.” Should McIntyre violate the conditions of the permit – say, by failing to monitor debris passage during high-water periods – there is no doubt the State Engineer could bring an enforcement action to compel compliance.

Thus, McIntyre’s description of the permit as a legal nullity that cannot be challenged is inaccurate. McIntyre’s bridge continues to exist and operate subject to the permit’s terms, similar to the power plant in *Sierra Club*. If the Neighbors prevail on the

merits of this action, the equitable relief the trial court may properly grant would include additional permit terms requiring McIntyre to take further measures to better mitigate flood risks. Even under McIntyre's mistaken view of redressability, the claims in the Neighbors' complaint are still redressable.

3. The Neighbors have challenged the permit as unlawful and have a right to *de novo* review of its issuance and terms. *See* Utah Code Ann. § 63G-4-402. If the permit is truly as narrow as McIntyre argues, then it was defective for that reason as well. If accurate, McIntyre's cramped description of the permit is yet another basis for challenging the Division's action rather than a reason for denying standing.

4. McIntyre's redressability argument is really a misnamed and undeveloped mootness argument. "But questions of standing and questions of mootness are distinct, and it is important to treat them separately." *Becker v. Federal Election Com'n*, 230 F.3d 381 (1st Cir. 2000). McIntyre raised a mootness argument below, but the Court of Appeals properly rejected it. The court reasoned:

Defendants argue on appeal that Plaintiffs' claim for injunctive relief is now moot because the bridge has already been built. Given our decision on the standing issue, we do not need to address this issue. Still, we recognize that Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction prior to the bridge's construction while McIntyre's Motion to Dismiss was being considered. Because Plaintiffs took active measures to prevent the construction of the bridge and because we have the authority to restore the status quo by ordering the bridge removed, Plaintiffs' appeal on that issue is not moot. *See Porter v. Lee*, 328 U.S. 246, 251, 66 S.Ct. 1096, 90 L.Ed. 1199 (1946) ("It has long been established that where a defendant with notice in an injunction proceeding completed the acts sought to be enjoined the court may by mandatory injunction restore the status quo.").

Op., ¶ 15 n.2.

The Court of Appeals' reasoning on this point was sound. Mootness arises when essentially no relief can be granted due to a change in circumstances during the litigation. "An issue on appeal is considered moot when the requested judicial relief cannot affect the rights of the litigants." *State v. Sims*, 881 P.2d 840, 841 (Utah 1994) (internal quotation marks omitted). This case is nowhere near moot. Because McIntyre had notice of this injunction action but proceeded to build his bridge anyway, on remand the trial court would have the authority to restore the status quo, as the United States Supreme Court stated in *Porter*, 328 U.S. at 251. *See also Columbus Board of Zoning Appeals v. Wetherald*, 605 N.E.2d 208, 210 (Ind. App. 1992) (party "proceeded to build [a restaurant] at his own peril prior to a final resolution" of land use issues).

Moreover, the Neighbors have requested relief beyond enjoining construction of the bridge or revoking the permit. To guard against unforeseen changes in the facts, they requested "such other and further legal and equitable relief as this Court deems appropriate under the circumstances." (R. at 8.) Rule 54(c)(1) allows the district court to grant appropriate relief "even if the party has not demanded such relief in his pleadings." And "equity cases afford courts discretion and latitude in fashioning equitable remedies." *Hughes v. Cafferty*, 2004 UT 22, ¶24. Courts may fashion injunctions appropriate to the circumstances. *See id.* ¶ 26 ("Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, and their adaptability to circumstances.") (internal quotation marks and brackets omitted).

Although the Neighbors view removal of the bridge as the most appropriate remedy, it is not the only possible remedy. After weighing the merits following further

factual development about the degree of risk involved and other matters, the trial court might enter a more limited injunction requiring McIntyre to remove the bridge deck during times of high-flood risk. It might order the bridge altered. It might order McIntyre to fund reinforcement of the escarpment so as to protect the Browns' property. This case remains a live controversy because the trial court may fashion these and other equitable remedies to protect the Neighbors' interests. "[I]n deciding a mootness issue, the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." *Northwest Env'tl. Defense Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (case not moot where plaintiffs asked court "to grant such other equitable relief as it deemed necessary"). The trial court on remand will have many avenues of effective relief to consider. This case is far from moot.³

5. Lastly, the approach McIntyre advocates is bad judicial policy. It would reward litigation delay tactics (such as frivolous standing challenges) designed to buy the defendant time to complete the challenged action. It would often preclude appellate courts from addressing lower-court decisions. The Legislature has provided for *de novo* review of orders of the State Engineer. *See* Utah Code Ann. §§ 63G-4-402 and 73-3-14. But such review would be meaningless if speedy action by the defendant could moot the challenge. In fine, McIntyre's approach would encourage hasty action on the ground and

³ The party claiming mootness bears a heavy burden. *See id.* at 1244 ("The burden of demonstrating mootness is a heavy one."). McIntyre's belated, two-page redressability argument does not satisfy that burden. *See State v. Bishop*, 753 P.2d 439, 450 (1988) ("A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which [a] party may dump the burden of argument and research.") (quotation marks and brackets omitted).

strategic delays in court, seriously undermining the authority and integrity of the judicial-review process established by the Legislature. It should be rejected.

III. THE NEIGHBORS HAVE ADEQUATELY PLEADED INJURY AND CAUSATION FOR PURPOSES OF STANDING.

McIntyre devotes the largest part of his brief to arguing that the Neighbors have failed to establish a “clear causal link” between the alleged injuries and the bridge. Aplee. Br., at 24; *see id.* at 15-19, 22-26. Faulting the Neighbors for “rely[ing] on their pleadings,” McIntyre maintains that the lower courts were not “obliged to accept [the complaint’s] conclusory allegations as true.” Aplee. Br., at 23. He contends that the plaintiffs in *Sierra Club* properly established by affidavit a causal link between their alleged injuries and the power plant, whereas here no such link is shown by the allegedly “speculative” allegations in the complaint. *See* Aplee. Br., at 23, 25-26.

McIntyre’s painstaking efforts to parse the facts and identify supposed evidentiary weaknesses in the Neighbors’ case betrays a fundamental confusion in his argument about the difference between the minimalist standing inquiry and the requirements of prevailing on the merits. Standing does not mean a party wins the case. It does not mean a party even has a decent claim. It means only that the party has a sufficiently “personal stake in the outcome of the legal dispute” to ensure “a concrete factual context conducive to a realistic appreciation of the consequences of judicial action,” as opposed to a “generalized grievance[] . . . more appropriately directed to the legislative and executive branches of the state government.” *Jenkins*, 675 P.2d at 1148-49 (quotation marks and citation omitted). That description easily fits the Neighbors. McIntyre himself listed the Neighbors as part of a small number of “adjacent property owners (immediately upstream

or downstream) or other individuals who may be affected by this project.” (R. 11.)

Nothing more was required in *Jenkins*, *Sierra Club*, or this Court’s recent decision in *CME*. Nothing more is necessary here.

A. The Neighbors Have Alleged an Adequate Causal Connection Between the Bridge and the Potential Injury.

McIntyre expends great effort arguing that the Neighbors have failed to show an adequate connection between the bridge and any potential injury. But “a plaintiff claiming standing under the traditional criteria does not need to prove causation to the same extent it will be required to prove it at trial.” *Sierra Club*, 2006 UT 74, ¶ 32. “This court rarely imposes a requirement that a party prove its alleged harm, or even causation, to establish standing.” *CME*, 2009 UT 34, ¶ 12. The issue here is whether the Neighbors “have alleged a plausible connection between their injuries” and the challenged action. *Sierra Club*, 2006 UT 74, ¶ 32. The hurdle is low. At the pleading stage plaintiffs can simply allege “that they could prove causation” if given the chance: “that is all that is required at this phase.” *Id.*

The “plausible connection” in this case is straightforward. The Neighbors are adjacent property owners who allege that the bridge will (1) adversely alter the natural stream environment and (2) increase the risk of flood-related damage to their properties. (R. 4-6.)

McIntyre makes no effort to explain why the allegation that the bridge will adversely affect the natural stream environment – an important statutory factor the State Engineer was required to consider in deciding whether to grant the permit (*see* Utah Code Ann. § 73-3-29(4)(a)(iv)) – is insufficient for standing. The Neighbors enjoy and benefit

from the beautiful natural stream environment adjacent to their homes. The statement of facts in the opening brief – which McIntyre “concedes . . . is correct” (Aplee. Br., at 6) – states that “[i]n the event of flooding caused or exacerbated by the bridge, the natural stream environment will be adversely affected or destroyed.” Br. Apps., at 7-8 (citing the complaint at R. 5). McIntyre does not dispute this point. This uncontested causal connection is alone sufficient for standing. *Cf. Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (impairment of enjoyment of aesthetics can give rise to standing).

McIntyre argues that the bridge would never cause harm to the Neighbors. That, of course, is his primary defense to this lawsuit. But that is not what the complaint says. The complaint alleges that “the bridge and [its] access ramps will alter the stream’s channel, and thereby diminish the natural channel’s ability to conduct high water flows, heighten the potential for damming, and thereby increase the risk of flooding in the surrounding areas.” (R. 5.) It alleges that if water “flows similar to those in 1984 are experienced in the stream channel (as altered by the construction of the approved bridge), the erosion could cause the stream banks to overflow and inundate the first level flood plains on both sides of the stream in the vicinity of the bridge. Such an event will cause significant erosion and damage to the Plaintiffs and other property owners adjacent to the bridge.” (R. 5-6 (emphasis added).)

McIntyre acknowledges that the Browns’ property is already suffering from settling but argues that the evidence is unclear whether additional erosion of the escarpment that provides direct lateral support to their property would directly cause further property damage. Aplee. Br., at 22. He contends that even a bridge-caused flood

that further erodes the escarpment may not “have any impact on Brown’s settling problem” and thus the causal link for standing is missing. *Id.*; *see also id.* at 23-24.

Such detailed merits arguments have no place in the standing inquiry. Indeed, not even the high-threshold standing analysis of the majority below ventured that far into the thicket of the merits. The majority “acknowledge[d] that the complaint does assert some actual facts suggesting that a flood or high water flows would cause harm to Plaintiffs’ property.” *Op.*, ¶ 14 (emphasis added). The majority’s concern was not causation but the fact that high-water events “are dictated by unknown weather patterns” that “may not occur as anticipated or indeed may not occur at all.” *Id.* ¶ 14 (quotation marks and citations omitted).

That said, the causal connection between the alleged risks created by the bridge and the injury to the Browns’ property is evident. The Browns’ property depends for lateral support on a steep slope (escarpment) near the stream. That slope is eroding. The Browns’ property is experiencing harmful subsidence, likely caused by that erosion. And McIntyre’s bridge increases the risk of flooding that would further erode the escarpment and hence further undermine the lateral support on which the Browns’ property depends. (*See R.* 66-67.) In short, McIntyre’s bridge could result in flooding that causes the Browns’ property to collapse. Nothing in this Court’s decisions remotely suggests that more detailed or particularized allegations or proof of causation are necessary merely to plead standing.⁴

⁴ McIntyre’s reliance on *York v. Unqualified Wash. County Elected Officials*, 714 P.2d 679 (Utah 1986), demonstrates the weakness of his argument. *Aplee Br.*, at 23. In classic *pro se* litigation, the plaintiff in *York* sued various elected officials accusing them

McIntyre spends an entire section of his brief arguing that the Sorensons lack standing because the complaint does not go into great detail about how a bridge-caused flood would affect their specific property. *Aplee Br.*, at 15-19. He faults the complaint's general allegations. *Id.* Yet standing doctrine does not require great particularity at the pleading stage. *Lujan*, 504 U.S. at 561 (“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice [to establish standing], for on a motion to dismiss, [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim.”). The Sorensons are among the “Plaintiffs” in this action and the complaint alleges that, on account of an increased risk of flooding, “construction of a bridge in this environmentally fragile area will result in irreparable harm and damage to the Plaintiffs and their property.” (R. 6.) That is enough to establish causation at the pleading stage.

The Secor Report (September 18, 2006) provides additional context. The Sorensons’ property abuts the first-level flood plain. (R. 69; *see also* R. 124.) Apart from that buffer, a steep “river terrace slope [partly owned by the Sorensons] is in direct

“of being unqualified to hold public office.” *Id.* at 679. He amorphously alleged “that his legal rights (and those of all others of similar circumstance) are at jeopardy and he will be adversely affected unless the court acts immediately to protect him from the ‘unlawful acts of certain . . . county elected officials.’” *Id.* at 680. But he never provided any clue about what rights were at issue nor “reference to any specific facts that show any jeopardy, adverse impact, or injury.” *Id.* Those were the types of “conclusory allegations” (*id.*) this Court rejected – not, contrary to McIntyre’s argument, because a complaint must have great factual detail to support each conclusion, but rather because the plaintiff in *York* failed to provide “any allegation or other indicia that [he], in fact, has a personal stake in this controversy.” *Id.* (emphasis added). “Absent allegation or showing of specific injury or adverse impact which is causally related to the alleged illegal activity, York does not meet the traditional standing test.” *Id.* A starker contrast with the Neighbors’ detailed allegations would be hard to imagine.

contact with the Creek's channel," is made of "primarily fine sand and silt," and "is quite unstable unless vegetated" (R. 66.) Hence flooding of the first-level flood plain could undermine the structural integrity of the Sorensens' erosion-prone abutting property. And McIntyre's bridge will increase the risk of flooding of the first-level flood plain.⁵

Despite McIntyre's lament, these are not "Butterfly Effect" arguments. *See* Aplee. Br., at 18-19, 30. The allegations in the complaint, reasonable inferences therefrom, and the additional context supplied by the attachments all establish an adequate and perfectly reasonable causal connection for standing purposes. Property does not exist suspended in midair. Each parcel is physically connected to another. Use of one property often affects the use and enjoyment of another, which is why land use laws exist. It takes no grand leap of logic, no implausible speculation, to conclude that flooding on McIntyre's property due to the bridge could cause injury to the Neighbors' properties. Causation is established for purposes of standing.

B. McIntyre's Reliance on *Sierra Club* Is Misplaced; *Sierra Club* and This Court's Recent Standing Decision in *CME* Strongly Affirm Standing in Potential Injury Cases Like This.

The Neighbors maintain that despite quoting the general *Sierra Club* standard, the majority below ignored the decision's specific application of that standard in the

⁵ The pleading record does not allege the exact locations of the Neighbors' property lines. If flood waters have the potential of eroding away any portion of the Sorensens' property – however minor the erosion – then both injury and causation would automatically be established for purposes of standing. This Court has never required such a tight causal connection for standing, nor should it. But even if that were the standard, dismissal in this case would still be premature given the allegations of direct causation in the complaint.

potential- injury context and instead applied a higher standing threshold than either *Sierra Club* or federal law requires. *See* Br. Apps, at 9-10, 19-30.

McIntyre disagrees. He contends that “the decision below was entirely consistent with the Court’s decision in *Sierra Club*” because this case is “significantly different.” Aplee. Br., at 25. The difference, he argues, is that in *Sierra Club* both the emissions from the plant and the “specific, distinct and palpable injuries that would happen to them from those emissions” clearly existed. *Id.* at 25-26. McIntyre emphasizes that the plaintiffs used the word “will” in their affidavits when asserting future harms (*e.g.*, “*the plant’s emissions will impair his health*”, *id.* at 26), suggesting that such statements provided a level of certainty absent here. *Id.* at 26. But the distinction is illusory. *Sierra Club* was a summary judgment case whereas this case was dismissed on the pleadings. Thus, here the complaint (rather than affidavits) provides the operative facts. Yet it too repeatedly uses the word “will” in connection with the key injury and causation allegations. *See, e.g.*, R. 4-5 (McIntyre’s bridge “will diminish the stream’s ability to conduct high water flows and thereby increase the risk and danger of flooding” that will adversely affect the “surrounding stream environment”); at 5 (bridge “will alter the stream’s channel, and thereby diminish the natural channel’s ability to conduct high water flows, heighten the potential for damming, and thereby increase the risk of flooding in the surrounding areas”); at 6 (“The construction of a bridge in this environmentally fragile area will result in irreparable harm and damage to the Plaintiffs and their property.”) (emphasis added). The controlling allegations here are no less direct than the affidavit statements in *Sierra Club*.

McIntyre dismisses these allegations as mere speculation, but the same could easily be said of the affidavits in *Sierra Club*. Notwithstanding use of the word “will” in their affidavits, the plaintiffs there could not truly know whether future emissions from the power plant would actually harm their health. This Court rejected the requirement that the plaintiffs allege special susceptibility to those particular emissions. *See Sierra Club*, 2006 UT 74, ¶ 29; Br. Apps., at 21. Standing arose from allegations of “potential harms” that were “particular to them,” not from a high statistical likelihood that the potential harms would actually occur. *Sierra Club*, 2006 UT 74, ¶¶ 24, 28. Indeed, standing in environmental litigation often rests on potential harms with minimal statistical probabilities and uncertain chains of causation. *See, e.g., Natural Resources Defense Council v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006) (1 in 200,000 risk of nonfatal skin cancer sufficient for standing in case challenging EPA rule).

The primary defect of the decision below is that it fails to recognize that potential harms to persons or property – including harms that are neither “imminent” nor “certainly impending” (Op., ¶¶ 15, 16) – can still give rise to standing. *See Sierra Club*, 2006 UT 74, ¶ 29 (“If the emissions from the proposed power plant have the potential to harm the health of those persons who live in the area, we see no reason why those residents must actually develop a health problem before they have standing.”).

This Court’s recent decision in *CME v. Tooele County*, 2009 UT 34, provides additional support for the Neighbors. CME sought approval from Tooele County to store low-level radioactive waste on its property but was denied. *Id.* ¶ 2. After CME sold a portion of its property to neighboring landowner EnergySolutions, the county granted

EnergySolutions the permit it had denied CME. CME sued, but by the time of the appeal it was unclear whether CME even owned an interest in the property. *Id.* ¶ 20.

EnergySolutions moved for summary judgment arguing that CME lacked standing, which the trial court granted, “holding that CME lacked standing to challenge the County’s decisions and that CME’s claims were moot.” *Id.* ¶ 6.

On appeal, this Court reversed in an analysis that rejects high-threshold approaches to standing. The Court first explained that “[s]tanding is determined as of the time the action is brought.” *Id.* ¶ 8 (quotation marks and citation omitted). It then reaffirmed the holding in *Sierra Club* that where a party has a personal stake in the outcome as opposed to a generalized interest, potential injury alone is a sufficient “adverse effect” for standing:

Recently this court described an adverse effect as an actual or potential injury that is “sufficiently particularized” to give a party a “personal stake in the outcome of the dispute.” *Sierra Club*, 2006 UT 74, ¶ 23. . . . Yet, if the injury complained of is a general injury to the community, the party does not have a personal stake in the dispute, and thus, has not shown that it is adversely affected. *Id.*

Id. ¶ 10; *see also id.* ¶ 13 (“potential harm to CME” sufficient for adverse impact; “To establish standing, an alleged harm can be actual or potential.”)

This Court also rebuffed the argument “that while CME alleged a particularized injury, it failed to prove the potential of such harm,” since “[i]n most cases, a party must only allege an adverse effect to gain standing.” *Id.* ¶ 11 (emphasis added). For important procedural and judicial economy reasons, the same applies to allegations of causation:

This court rarely imposes a requirement that a party prove its alleged harm, or even causation, to establish standing. *Sierra Club*, 2006 UT 74, ¶ 28 n. 3, ¶ 32. This makes sense because “[s]tanding questions arise early in

the litigation, usually before discovery and the introduction of the evidence”; and to require a significant level of proof “would be unduly burdensome” because it would require “litigants to invest the time and money in gathering the evidence necessary to prove their claim only to be denied standing.” *Id.* ¶ 32. Thus, “[g]enerally, the determination of whether a plaintiff has alleged a sufficient interest in order to satisfy the adverse impact part of the traditional test can be made on the face of the pleadings.” *Id.*, ¶ 28 n. 3. Only in rare cases is fact-finding required to assess a party’s interest in a case. *See id.* [I]n *Sierra Club*, we found it sufficient that the plaintiffs lived and participated in outdoor recreation near the site of the plant that the Air Quality Board approved, and determined that they need not undertake fact-finding to establish their interest. *Sierra Club*, 2006 UT 74, ¶¶ 22, 28

Id. ¶ 12 (emphasis added).

Further, the Court rejected EnergySolutions’ argument – analogous to McIntyre’s here – “that CME has not sufficiently shown that the potential harm it alleges was caused by the amendment of EnergySolutions’ conditional use permit.” *Id.* ¶ 13. The Court reiterated that “to gain standing a party is not required to prove its interest or causation – at least not to the extent required at trial.” *Id.* Evidence of past injury to neighboring property “is sufficient to establish a more than speculative potential of future harm to neighboring properties.” *Id.*

Sierra Club and *CME* demonstrate this Court’s firm resolve not to allow threshold questions of standing – which are designed simply to protect the separation of powers and limit lawsuits to real disputes between real people – to metastasize into the main focus of litigation. The wisdom of that approach is manifest here. This case is a prime example of the enormous waste of time and judicial and client resources that occurs when issues best resolved at the merits stage are instead transmogrified into questions of standing.

IV. MCINTYRE'S FUTURE ACTIONS CANNOT PRECLUDE STANDING.

Lastly, McIntyre makes much of his assertion that the bridge deck is removable. Aplee. Br., at 27-30. He claims that the risk the Neighbors allege is all the more remote because it assumes McIntyre will not perform his duty to remove the deck when necessary to prevent flooding. In his view, the Neighbors “lack standing because the increased risk stems not from the Bridge, but from an independent act or omission by McIntyre at some time in the indeterminate future.” Aplee. Br., at 27.

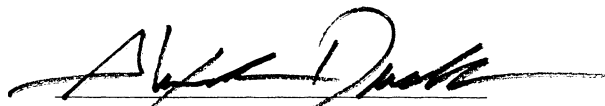
McIntyre's frank admission that any future failure by him “to remove the Bridge's removable deck” as water backs up would constitute “an independent act of sheer recklessness” is duly noted. *Id.* But it has no effect on the standing analysis. Nothing in the case law – certainly nothing McIntyre has cited – suggests that the Neighbors' standing to challenge the permit and the bridge should be contingent on speculations about what a defendant like McIntyre might or might not do in the future. Flash floods and high-water events in canyon streams are inevitable but by nature unpredictable. Will McIntyre never leave his home? Is he to sit on his crane 24/7 awaiting the next deluge? It would be odd indeed if a plaintiff's standing could be denied based on the assertion that the defendant himself was standing guard to make sure the threatened harm never occurred. That McIntyre intends to remove the bridge when he deems it necessary is irrelevant to whether the Neighbors have standing.

CONCLUSION

The Neighbors have standing under this Court's well-established jurisprudence. This Court should reverse the majority decision below and remand the case for further proceedings on the merits.

DATED this 13th day of July, 2009.

KIRTON & McCONKIE

A handwritten signature in black ink, appearing to read "Benson L. Hathaway, Jr.", with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2009, I mailed two true and correct copies of the **REPLY BRIEF**, postage prepaid, to the following:

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