

2007

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 : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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.

Court of Appeals No. 20070474
District Court No. 060920127

(ORAL ARGUMENT REQUESTED)

**On Appeal from an Order of Dismissal by the Third Judicial District,
The Honorable Glenn K. Iwasaki**

BRIEF OF APPELLEES

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**FILED
UTAH APPELLATE COURTS**

CCR 21 2008

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FEB 21 2008

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

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OF NATURAL RESOURCES of the
STATE OF UTAH, JERRY D.
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Defendants/Appellees.

ERRATA

Court of Appeals No. 20070474
District Court No. 060920127

COMES NOW Sarah E. Viola, counsel for Appellees and hereby notifies the Court that Utah Code Ann. §78-2a-3(2)(j) has been repealed and reenacted as Utah Code Ann. §78A-4-103(2)(j).

DATED this 21 day of February, 2008.



James A. McIntyre,
Sarah E. Viola

TABLE OF AUTHORITIES

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INTRODUCTION

Little Cottonwood Creek flows through property which McIntyre and his wife own. The parcel consists of about three acres (roughly two acres east of the creek and one to the west). McIntyre wanted a bridge to connect the two sides of his property and building a bridge requires a permit from the State Engineer. Once granted, a permit allows the applicant one year to complete the alteration of the natural stream's bed and banks to the extent necessary to build the bridge. Once expired, work must be complete and any further or new alteration (such as stream disturbance for bridge removal), may only be allowed by a subsequent permit.

McIntyre made application and the State Engineer notified all interested parties including the Browns and Sorensens, ("Appellants") of the application and invited them to comment. They did so, protesting to the Application. The permit was granted on October 11, 2006, after which Appellants requested State Engineer reconsideration, which was granted. They commented further, but again the permit was granted. McIntyre began construction of the bridge after receiving the Permit in October 2006 because, as the permit states, it would expire on Oct. 11, 2007(Appendix A.) McIntyre wanted the bridge built and the permitted disturbance completed, before high water.

On December 15, 2006 Appellants filed a complaint in District Court before

Judge Iwasaki, seeking two things and two things only, to wit:

- Appellants sought a reversal of the State Engineers approval of McIntyre's permit application granted on October 11, 2006, which would expire on October 11, 2007; and,
- They sought a preliminary and permanent injunction to enjoin and restrain McIntyre from constructing a bridge. They chose not to seek an emergency TRO at that time.

McIntyre moved to dismiss, arguing that unlike the application process where interested parties were allowed to comment, to appeal the decision Appellants must be "persons aggrieved" by the decision to have standing to appeal in the District Court. During briefing of McIntyre's motion construction openly and obviously proceeded without Appellants seeking to enjoin it. Oral argument was then scheduled for April 16, 2007.

On March 23, 2007, five months after the permit was issued, Appellants sought an emergency temporary restraining order and preliminary injunction to halt the construction of the bridge. (R. 159 - 211.) An "on record" hearing was held in chambers on that day and the Temporary Restraining Order and a preliminary injunction restraining further construction were denied. Appellants did not seek an appeal from that ruling and the bridge was soon completed.

On April 16, 2007 the trial court heard McIntyre's motion to dismiss for lack

of standing. Relying to some extent on the proffers of March 23rd, Judge Iwasaki ruled Appellants lacked standing and dismissed the case.

The bridge was finished before the permit expired on October 11, 2007. McIntyre believes, *inter alia*, it is procedurally and practically meaningless to remand to the trial court for consideration of an expired permit or to enjoin the *construction* of a bridge when construction is finished.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(j) (2001).

ISSUE PRESENTED

Whether the Appellants were “person[s] aggrieved” under Utah Code Ann. §73-3-14(1)(a) (1987), and thus had standing to appeal the granting of a stream alteration permit to McIntyre by the State Engineer. Appellants incorrectly state the standard of review. It is a mixed question of law and fact. *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶13 (standing would generally be considered a "mixed question" because it involves the application of a legal standard to a particularized set of facts. Citing, *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373 (Utah 1997).

STATEMENT OF THE CASE

Appellant has correctly stated the nature of the case and the decision below.

STATEMENT OF FACTS

McIntyre concedes the statement of facts set forth by Appellants except to add the following:

- 1 Appellants fail to allege that either Appellant owns property adjoining the west bank of Little Cottonwood Creek, or property on the first level flood plain. Thus, flooding and erosion caused by Little Cottonwood Creek would not be to Appellants' property. (R. 1-8, 28 & 69.)
- 2 The permit in question was issued by the State Engineer on October 11, 2006 and expired last year on October 11, 2007. (Appendix A.)
- 3 The Secor report upon which Appellants rely, when fairly read, does not state that the construction of McIntyres' bridge will cause harm, but rather **even without the bridge** the west bank of the creek and the escarpment area are at "significant risk of further erosion and potential property damage. Building the bridge only increases the risk..." (R. 26 under the subheading "recommendations".)
- 4 The second Secor report also suggests that the decking of the bridge may cause floating debris to be caught at times of extreme flooding, but fails to note that the bridge design itself allows for the deck to be lifted off during greater than normal spring flooding. (R. 65-68.)
- 5 Although the minute entry reflects that an "on record" TRO hearing was

held on March 23, 2007, no transcript was ordered or is available. (R. 212.)

6 Judge Iwasaki relied upon the facts adduced at the March 23, 2007 hearing during the April 16, 2007 hearing which is at issue here. (R. 252, T. P. 3, lines 9 -18.)

SUMMARY OF THE ARGUMENT

First, the remedy Appellants seek - reconsideration and revocation of the Permit - cannot redress the alleged injury. The bridge has been built. The Permit, which is essentially a building permit, much like one issued to build a house, has expired. Therefore, even if this Court remands this case to the trial court and Appellants establish standing, there is nothing left to review. The permit had a time limit in which to complete construction and the construction has been completed. Nothing in Appellants' complaint, the law, or the Permit itself requires the bridge to be dismantled upon expiration of the permit, even if it could be re-examined by the State Engineer.

Also, Appellants simply are not in harms way and cannot establish they were aggrieved parties who were entitled to appeal to the District Court; nor does their complaint itself make that claim. Whether one is an "aggrieved party" under the statute is governed by the traditional standing requirements. However, under Utah's standing test all three factors must be met. Here, the factual allegations of Appellants' 38 paragraph complaint do not meet the test.

Appellant's complaint fails to allege that the Sorensens or Browns have or will suffer any particularized injury. Both Sorensens and Browns are unable to allege that they have been or will be injured because the bridge was built.

Unlike the affiants in *Sierra Club*, 2006 UT 74, here, there is no claim that if the bridge is built, necessarily Appellants will be flooded or will suffer erosion, but rather that building the bridge may increase the risk of erosion to an escarpment (which is owned by a third party) when either the stream flow is abnormally high or is dammed by McIntyre's bridge. If the escarpment is eroded then Appellant Brown may suffer exacerbation of their existing settling problem. However, Appellant's own experts are unable to causally connect Brown's settling to escarpment erosion.

Moreover, no paragraph of Appellants' complaint suggests a plausible connection between the McIntyre bridge and any harm to the Appellants. At most, an attachment to the complaint, the Secor report commissioned by Appellants, states that the entire west bank and the escarpment area are already at significant risk of erosion without the bridge. The bridge only potentially increases the risk. But neither of the Appellants own the escarpment property which Secor suggests as being at risk of erosion, nor for that matter does McIntyre. Only McIntyre and his neighbor Calder own any property on the West bank in the potential flood plain. The sole particularized injury either appellant

can point to is settlement of Brown's property which the Secor report suggests needs further study to causally understand. (R. at 26, recommendations.)

Finally, the Appellants acknowledged that they had made a calculated choice not to seek temporary or preliminary injunctive relief at the outset and to rely upon permanent injunctive relief should the bridge be constructed. (R. 132.) It is unclear from Appellants' complaint how a permanent injunction once a bridge is constructed could ever be issued to enjoin construction.

ARGUMENT

I. APPELLANTS ARE NOT AGGRIEVED PARTIES AND ARE UNABLE TO MEET THE TRADITIONAL STANDING REQUIREMENTS.

Appellants correctly set forth the analysis necessary to determine whether a party has standing.

The first step in the inquiry will be directed to the traditional criteria of the plaintiff's personal stake in the controversy. One who is adversely affected by governmental actions has standing under this criterion. One who is not adversely affected has no standing. A mere allegation of an adverse impact is not sufficient. There must also be some causal relationship alleged between the injury to the plaintiff, the governmental actions and the relief requested. Because standing questions are usually raised prior to the introduction of any evidence, we will necessarily be required to make a judgment whether proof of such a causal relationship is difficult or impossible and whether the relief requested is substantially likely to redress the injury claimed.

Jenkins v. Swan, 675 P.2d 1145, 1150 (1983). An examination of Appellants' Complaint in the Court below reveals its deficiency.

A. APPELLANTS HAVE FAILED TO ALLEGE A DISTINCT AND PALPABLE INJURY.

McIntyre concedes that for motion to dismiss purposes, all the factual allegations of Appellants' complaint are taken as true. However, although the exhibits attached to the complaint are considered to be a part of the complaint, they may not be used to supply necessary allegations.

While an exhibit may be considered as a part of a pleading to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments, and the content of the exhibit is not to be taken as part of the allegations of the pleading itself. (Citations omitted)

Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983) (overruled on other grounds - attorney fees).

Standing is a material averment and necessary to the decision of the Court below – it may not be supplied from the exhibits. To establish standing and, therefore, be “aggrieved” under the statute, a plaintiff must “show that he *has or would suffer* a distinct and palpable injury that gives rise to a *personal stake* in the outcome.” *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶17 (quoting *Nat'l Parks & Conservation Ass'n v. State Board*, 869 P.2d 909, 913 (Utah 1993) emphases added; additional citations omitted).

1. The Sorensons do not have standing because they have not alleged or demonstrated even possible injury.

In the case of the Sorensons, the Appellants' complaint does not allege any particularized injury which might befall them because the Permit issued or

McIntyre built a bridge. They simply claim “me too” to suppositional injury to the Browns. Joseph Sorenson is named once as a party, Kathleen Sorenson is named once as a party and Sorensens are named in the paragraph describing the location of the bridge. (Complaint ¶¶ 3, 4, 12.) As is indicated in the Secor Report, neither of the Appellants live in the first level flood plan as does McIntyre, thus neither are in danger of flooding. Nothing in the complaint reasonably suggests how Sorenson’s might be harmed. At best in the complaint, the Sorensens give “mere allegation of an adverse impact” and there is no “causal relationship alleged between the injury to Plaintiff, the governmental actions and the relief requested.” *Jenkins*, at 1150.

Importantly in Appellants’ response to McIntyre’s motion to dismiss they failed to inform the court below of the nature of the damage which might befall their property if McIntyre were to construct a bridge. (R. 129.) Appellants simply relied upon the allegations of their complaint. The allegations of paragraph 30 state that construction of a bridge will result in irreparable harm and damage to plaintiffs and their property, but fail to particularize how. (R. 6.) Even though the court below was obliged to accept as true the factual allegations of Plaintiffs’ complaint, it was not required to accept Plaintiffs’ conclusions, nor was it required to supplement those allegations with the attachments.

2. The Browns' past and continuing subsidence is not an "injury" for standing purposes.

In Browns' case, the allegations of the complaint are likewise deficient. They claim that erosion of the escarpment may cause a loss of lateral support. However, it is only by referring to the attachments (the expert report) that one can discover any particulars. Most importantly, their expert report concludes that bank has been eroding since it became dry land¹. Browns built their house atop the escarpment anyway. That escarpment's only lateral support derives solely from property which no party to this action owns.

Appellants' expert suggested that the escarpment (owned by a third party) needs to be armored regardless of whether a bridge is built, yet the worst floods in recorded history did not cause the escarpment to collapse. The Court below expressed concern about the amount of speculation to counsel for appellants:

"How far do I stretch the would suffer[sic]er, cause that seems to be the speculative aspect of it. If we reach the 1984 level - if, you know to that extent. They would possibly suffer this injury. How far do I stretch that so it stays within reality rather than speculation?"

(R.252, T. P. 7, lines 9-14.)

With that factual background the court below concluded that there was an insufficient factual allegation of damage and nexus. The trial court simply refused to speculate in order to afford Appellants' standing. (R. 252, p. 7, lines 8-14.)

¹ R. 24 (Likely that happened thousands of years ago.)

B. THE APPELLANTS FAILED TO ALLEGE A PLAUSIBLE CAUSATION OF INJURY.

The Appellants also failed to establish any causal connection between the stream alteration permit and increased injury to property. *Sierra Club*, at ¶32, requires such an allegation. The permit itself requires that once constructed the bridge abutments shall not encroach upon the stream bed or banks or decrease the stream carrying capacity.

The Secor report annexed to Appellants complaint speculates that the bridge may not be built according to plan or that floating debris might be caught by the bridge deck and a damming effect caused by the bridge deck; however, it fails to explain how any damming effect caused by a bridge several hundred feet upstream would do more than simply cause flooding on the first level flood plain (on only McIntyre's property) which would return to the creek well upstream of the Calder escarpment (which may or may not provide Brown lateral support). Nothing in Appellants' complaint describes a necessary cause and effect relationship between an injury Browns' claim they may suffer and McIntyre's construction.

Nor does the Secor report address why McIntyre, when faced with such flooding of his own home and property, would simply sit by idly. The bridge design provides for a removable deck which could be lifted off its supports in the reverse of the manner in which it was placed on them. In short, nothing in Appellants' complaint describes a necessary cause and effect relationship between

an injury Browns' claim they may suffer and the Permit or McIntyre's construction.

C. REDRESSABILITY AND MOOTNESS.

Appellants are asking this Court to reverse the decision of Judge Iwasaki and send the case back to him for a trial on the merits. Those merits would be whether a permit, which has expired on its face, should have been issued in the first place.

Appellants rely on the analysis used in *Sierra Club*, 2006 UT 74, to argue that the relief sought would redress Appellants injuries. However, this case is unquestionably distinguishable from *Sierra Club*, 2006 UT 74. The permit issued in *Sierra Club*, 2006 UT 74, was an operational permit required for use of the plant's operation. Here, there exists no permit required for McIntyre to use the bridge. Rather, the permit is akin to a building permit, allowing for the creek environment to be disturbed during construction. The law requires that to construct a bridge over a stream, an applicant must first have a permit – but there is no similar requirement to use a bridge. The law further requires the State Engineer to set a time limit on construction, Utah Code Ann. §73-3-10(5) (1997). The time limit of the permit has expired.

Appellants have failed to demonstrate that denying the stream alteration permit at this juncture will redress their suppositional injury of increased property

subsidence. Appellants did suggest in response to McIntyre's suggestion of mootness and motion to dismiss that the mere filing of a complaint was sufficient to put McIntyre on notice that he might have to remove the bridge if the court ultimately determined that the Permit was improvidently granted and they were under no obligation to press forward with seeking injunctive relief. McIntyre was unable to find support for Appellants view and none was cited in the response.

Notably, the Appellants never sought any relief requiring the dismantling of the bridge. That issue was never before Judge Iwasaki, nor can it be here. Rather it is an issue for a different case, should Appellants chose to bring it. In a somewhat ironic twist, removal of the bridge would require another application for a different stream alteration permit.

II. APPELLANTS HAVE FAILED TO MARSHAL THE EVIDENCE.

To an extent, Appellants attack the evidentiary bases upon which Judge Iwasaki made his ruling. As such, they are required to marshal the evidence that would support the particularized set of facts to which he applied the legal standard and then show that he erred in finding those particular facts. This requires Appellants to “marshal all the evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact.” *Save Our Schs v. Bd. of Educ.*, 2005 UT 55, ¶10 (citations omitted).

Appellants have not done so.

Appellants requested a transcript of only the April 16, 2007 hearing (R. 248.) However, it is clear that Judge Iwasaki also relied upon evidence adduced at the TRO hearing held on March 23, 2007 in order to make his decision (R. 252, p. 3, lines 9-18.) The TRO hearing was held at the Appellants' behest and was "on record."

Appellants, however, failed to order that transcript and because it was not ordered the record is unclear².

Appellants have the burden of ordering the transcript and marshaling the evidence. *Eggett v. Wasatch Energy Corp.*, 201 UT. App. 226, ¶¶41-43. To the extent that Judge Iwasaki applied the legal standard for standing to a particularized set of facts, some of which were adduced at the March 23, hearing, Appellants have failed to marshal the evidence supporting his decision. While it is conceded that it is difficult to marshal without a transcript of the March 23, 2007 hearing, the burden was on the Appellants and it cannot be said that they fulfilled that obligation.


CONCLUSION

Judge Iwasaki's decision should be affirmed because Appellants' claims are

² The minute entry reflects that the hearing was "on record" however, it was reputedly held in chambers so a transcript may not be available.

moot, they did not have standing and they have failed to marshal the evidence that supported his decision.

Dated this 19 day of February, 2008.



James A. McIntyre,
Sarah E. Viola

X \Clients\McIntyre ads Brown\McIntyre s replybrief FINAL.wpd


CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of February, 2008, I mailed two true and correct copies of the **BRIEF OF APPELLEES**, postage prepaid, to the following:

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Justin W. Starr (Bar No. 10708)
Attorneys for Plaintiffs/Appellants



ADDENDUM



JON M. HUNTSMAN, JR.
Governor

GARY K. HERBERT
Lieutenant Governor

State of Utah
DEPARTMENT OF NATURAL RESOURCES
Division of Water Rights

MICHAEL R. STYLER
Executive Director

JEREMY D. OLDS
State Engineer/Division Director

October 11, 2006

RECEIVED

OCT 12 2006

Jim McIntyre
558 East 5600 South
Murray, UT 84107

KIRTON & McCONKIE

RE: Stream Channel Alteration Permit Number 06-57-29SA to construct a bridge over Little Cottonwood Creek at 558 East 5600 South in Salt Lake County.
EXPIRATION DATE: October 11, 2007

Your application to Alter a Natural Stream Channel Number 06-57-29SA is hereby approved pursuant to the requirements of Section 73-3-29 of the Utah Code Annotated, 1953. This approval also constitutes compliance with Section 404 (e) of the Clean Water Act (33 USC 1344) pursuant to General Permit 040 issued to the State of Utah by the U.S. Army Corps of Engineers on October 15, 1987, and amended May 4, 2004.

1. The expiration date of this approved application is October 11, 2007. The expiration date may be extended, at the State Engineer's discretion, by submitting a written request outlining the need for the extension and the reasons for the delay in completing the proposed stream alteration.
2. A copy of this approved permit must be kept onsite at any time the work under this approved permit is in progress.
3. During high water events, the bridge must be monitored to allow for debris passage.
4. To avoid proliferation of bridge crossings, this office will require your consideration in 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.
5. Excavated material and construction debris may not be wasted in any stream channel or placed in flowing waters, this will include material such as grease, oil, joint coating, or any other possible pollutant. Excess materials must be wasted at an upland site well away from any channel. Construction materials, bedding material, excavated material, etc. may not be stockpiled in riparian or channel areas.
6. Machinery must be properly cleaned and fueled offsite prior to construction.
7. Equipment should work from the top of the bank or from the channel to minimize disturbance to the riparian area and to protect the banks. Heavy equipment should avoid crossing and/or disturbing wetlands.

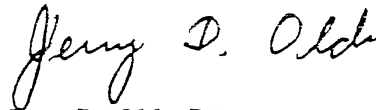
Page 3
06-57-28SA
October 11, 2006

This Decision is subject to the provisions of Rule R655-6 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953 as amended, which provide for filing either a Request for Reconsideration with the State Engineer, or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this decision. However, a Request for Reconsideration is not a prerequisite for a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

If you have any questions or need further clarification, please contact Roddy Pirouznia at 801-538-7435.

7375

Sincerely,

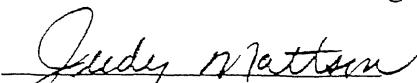


Jerry D. Olds, P.E.
State Engineer

JDO/rp/jm

Enclosure

This permit was mailed on Oct 11 2006 to the addressee and the following:

By: 
Judy Mattson, Secretary

pc: Corps of Engineers
John Mann - Regional Engineer
Dave Ruiter - EPA
Carolyn Wright - Dept. of Natural Resources
Ashley Green - Wildlife Resources
Chris Springer - Salt Lake County
MCM Engineering
Calvin S. Johnson
Lawrence & Marilyn Brown
Gregory & Susan Hansen
Joseph & Kathleen Sorenson
Kirtan & McConkie