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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 : Brief of Appellant

Utah Court of Appeals  
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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**

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## INTRODUCTION

This appeal involves the legal standard for standing. Plaintiffs/Appellants Lawrence Brown, Marilyn Brown, Joseph Sorenson, and Kathleen Sorenson (“Plaintiffs”) and Defendant/Appellee James A. McIntyre (“McIntyre”) are neighbors residing in an area adjacent to the Little Cottonwood Creek in Murray, Utah. McIntyre desired to build a bridge across Little Cottonwood Creek. On August 21, 2006, McIntyre submitted an application to Defendant/Appellee Division of Water Rights of the Utah State Department of Natural Resources (the “Division”) to obtain a permit. Plaintiffs opposed the application because the bridge will cause significant damage to their properties in times of high water flow. Nevertheless, the Division granted the permit. Plaintiffs then filed suit in the Third District Court against McIntyre and the Division challenging the Division’s decision and seeking injunctive relief.

McIntyre filed a motion to dismiss for lack of standing. The district court granted the motion on the ground that Plaintiffs’ alleged property injuries are only potential since they have yet to occur and may not occur in the future. The court stated that “[i]f, down the road,<sup>1</sup> construction of the bridge starts these possible events in action, Plaintiffs would then have standing to assert their claims.” *See* Addendum (“Add.”), at 5, n.1 (district court decision).

This ruling is incorrect as a matter of law. It is well established that even the risk of injury is sufficient for standing purposes and that a party facing such risk need not wait until the harm actually occurs before taking legal action. *See, e.g., Utah Chapter of the*

*Sierra Club v. Utah Air Quality Bd.* (“*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.”) (emphasis added). The trial court’s ruling should be reversed and the case remanded for further proceedings on the merits.

### **STATEMENT OF JURISDICTION**

This Court’s jurisdiction arises under Utah Code Ann. § 78-2a-3(2)(j).

### **ISSUE PRESENTED**

**Whether persons facing potential injury to their properties and homes from a neighbor’s actions have standing to sue to stop the injury before it occurs or rather must wait until their properties are actually damaged.**

Standard of Review. As set forth more fully below, “[w]hether a plaintiff has standing is a question of law” and this Court “accord[s] no deference to the ruling of the trial court.” *Stocks v. United States Fid. & Guar. Co.*, 2000 UT App 139, ¶ 9 (internal quotation marks omitted).

Preservation. This issue was the subject of McIntyre’s Motion to Dismiss, which Plaintiffs opposed. (R. 125-35.)

### **DETERMINATIVE LEGAL PROVISIONS**

Utah Code Ann. § 73-3-14 provides that “any person aggrieved by an order of the state engineer may obtain judicial review.” Whether a person is “aggrieved” under this provision is governed by the traditional standing requirements in the decisions of the Utah Supreme Court.



## **STATEMENT OF THE CASE**

### **A. Nature of the Case.**

McIntyre applied to the Division for a permit to build a bridge across Little Cottonwood Creek. Over Plaintiffs' objection, the Division granted the application. Plaintiffs filed suit in the Third District Court challenging the Division's decision and seeking injunctive relief. The district court granted McIntyre's motion to dismiss the action for lack of standing. Plaintiffs appeal.

### **B. Course of Proceedings and Decision Below.**

On August 21, 2006, McIntyre filed an application with the Division to construct a bridge across Little Cottonwood Creek. (R. 3, 10-12.) On September 20, 2006, in response to the application, Plaintiffs submitted an Objection to McIntyre's Application. (R. 3, 14-18.) The Division approved the Application on October 11, 2006. (R. 3, 38-39.) On October 31, 2006, in accordance with the requirements of Utah Code Ann. § 63-46b-13 and Utah Admin. Code § R655-6-17, Plaintiffs submitted a request for reconsideration of the Division's approval. (R. 4, 41-44.) The Division denied the request for reconsideration on November 17, 2006. (R. 4, 89.)

On December 15, 2006, Plaintiffs filed a Petition for Judicial Review of Informal Administrative Proceedings and Agency Action and Complaint for Injunctive Relief ("Complaint") in the Third District Court challenging the Division's action. (R. 1.) The Complaint named the Division, the State Engineer, and McIntyre as defendants. On January 8, 2007, McIntyre filed a Memorandum in Support of Motion to Dismiss claiming Plaintiffs lacked standing. (R. 112.) On January 29, 2007, McIntyre filed the

actual Motion to Dismiss. (R. 143.) On January 24, 2007, Plaintiffs filed a Memorandum in Opposition to Defendant McIntyre's Motion to Dismiss. (R. 125.) The Court heard oral arguments on April 16, 2007.

On April 20, 2007, the Court issued a Memorandum Decision granting McIntyre's motion to dismiss. (R. 214-18; *see also* Add. at 1-5.) On May 14, 2007, the Court entered an order dismissing all claims, including against the Division, based on its finding that Plaintiffs lacked standing. (R. 220-21; *see also* Add. at 7-8.) On June 11, 2007, Plaintiffs filed a timely notice of appeal. (R. 236, 239.)

### **C. Statement of Facts.**

Plaintiffs' Complaint alleges the following well-pleaded facts: Plaintiffs reside in Murray, Utah along Little Cottonwood Creek. (R. 2-3.) Their neighbor, McIntyre, seeks to build a bridge across the Creek. (R. 3.) The bridge would span an environmentally fragile area which is and has been the site of significant flooding as recently as 1984. (R. 3.) The bridge will diminish the stream's ability to conduct high water flows and thereby increase the risk and danger of flooding, unnecessarily and adversely affecting the surrounding environment. (R. 4-5.) Specifically, construction of the bridge and the associated access ramps will alter the channel of the stream and thereby (1) diminish the natural channel's ability to conduct high water flows, (2) heighten the potential for damming, and thus (3) increase the risk of flooding and the damage caused by flooding in the surrounding areas, including the area where Plaintiffs reside. (R. 5.)

The proposed location of the bridge is already in an area of high flood risk. (R. 5.) The approved bridge, if constructed, increases the already high flood risk and danger to

Plaintiffs and other surrounding properties and landowners. (R. 5.) In the event flooding occurs due in whole or in part to the construction of the bridge, the natural stream environment will be adversely affected and potentially destroyed by the invading flood waters. (R. 5.)

As set forth in the Complaint, Plaintiffs hired an engineering firm, Secor International (“Secor”), to analyze the potential effects of the construction of the bridge in its proposed location. (R. 5.) The Secor Report, which was attached to the Complaint, demonstrates that the approved bridge design provides for a one-foot clearance over a high water mark of 526 cubic feet per second. (R. 5-6.) However, water flows have previously exceeded the one-foot clearance level of the proposed bridge. On June 1, 1984, the flow through Little Cottonwood Creek exceeded 70% of the design water height flow (a water depth of 6.58 feet, or a water flow of 898 cubic feet per second). Such water levels would flow over, and significantly increase the stress on, the bridge as approved. (R. 5-6.) The Secor Report also demonstrates that if flows similar to those in 1984 occur in the stream channel (as altered by the construction of the approved bridge), the bridge 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 Plaintiffs’ properties and to the properties of other neighbors adjacent to the bridge. (R. 5-6.)

Even if an alternative bridge design were considered, the risk of damage to Plaintiffs’ properties would persist. (R. 6.) The Secor Report considers raising the deck of the proposed bridge to 7.5 feet (6.5 feet to address the 1984 water flows plus one

additional foot of clearance). (R. 6.) The access ramps on both sides of the deck would also have to be raised to meet the adjusted deck height. (R. 6.) Although such a design change would accommodate increased water flow, the adjusted access ramps could create a dam for debris caught on the bridge. (R. 6.) Because the bridge deck would be at a higher elevation than the surrounding stream banks, water dammed-up by debris caught on the deck and access ramps could quickly rise above the stream banks and flood onto the surrounding first-level floodplains. (R. 6.)

There has already been subsidence of Plaintiffs' properties in areas close to Little Cottonwood Creek. (R. 6.) Foundation and settling cracks have already appeared in Plaintiffs' homes as a result of the subsidence. (R. 6.) Plaintiffs allege and maintain that if construction of the bridge goes forward, irreparable harm to their homes and properties will result. (R. 6.)

### **SUMMARY OF THE ARGUMENT**

The law of standing exists to ensure that a plaintiff has a personal stake in the litigation, as opposed to a general or ideological grievance best addressed through the political branches. Standing requirements establish a minimal threshold that weeds out those who lack a concrete interest in the case. But standing analysis is not intended to determine the merits of a plaintiff's claim. Under established Utah law, a party has standing if it (1) asserts that it has been or will be adversely impacted by the challenged actions, (2) alleges a causal connection between the injury, the challenged actions, and the relief requested in the lawsuit, and (3) seeks relief that is substantially likely to redress the alleged injury. *Sierra Club*, 2006 UT 74, ¶ 29.

Plaintiffs readily meet these requirements. As alleged in the Complaint, McIntyre's proposed bridge directly endangers not generalized interests but Plaintiffs' homes and properties. There is a close causal relationship between those potential injuries, Defendants' actions, and the injunctive relief Plaintiffs seek. And the injunctive relief sought would redress the threatened injury.

The district court rejected this straightforward analysis because the physical damage to Plaintiffs' properties has not yet occurred. This was error on two grounds. First, the Utah Supreme Court has expressly held that even "potential" harm can give rise to standing. *Id.* Second, the potential for injury or an increased risk of injury is itself a current injury sufficient to support standing.

None of which is to say that Plaintiffs will ultimately prevail on the merits. The legal merit of Plaintiffs' action is not at issue here. The only issue is whether Plaintiffs have alleged a sufficient stake in the outcome to satisfy the relatively low threshold for standing. They plainly have.

## **ARGUMENT**

### **PLAINTIFFS ARE AGGRIEVED PARTIES WHO HAVE STANDING TO BRING THIS ACTION.**

#### **A. General Standing Principles.**

"Unlike the federal system, the judicial power of the state of Utah is not constitutionally restricted by the language of Article III of the United States Constitution requiring 'cases' and 'controversies,' since no similar requirement exists in the Utah Constitution." *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983). Nevertheless, Utah

courts require that a plaintiff have a “personal stake” in the outcome of the litigation. *Id.* This requirement “is intended to confine the courts to a role consistent with the separation of powers, and to limit the jurisdiction of the courts to those disputes which are most efficiently and effectively resolved through the judicial process.” *Id.* Adverse parties with a personal stake in the outcome ensure that the court has “a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Id.* (internal quotation marks and citation omitted). “It is generally insufficient,” therefore, “for a plaintiff to assert only a general interest he shares in common with members of the public at large.” *Id.* at 1148. Such “generalized grievances . . . are more appropriately directed to the legislative and executive branches of the state government.” *Id.*

To assure that a plaintiff challenging the Division’s approval of an application has a personal stake in the outcome, Utah law limits appeals to those who are “aggrieved” by an agency decision. *See* Utah Code Ann. § 73-3-14 (“any person aggrieved by an order of the state engineer may obtain judicial review”). Whether a party is aggrieved involves the same analysis as the “traditional standing requirement that a plaintiff show particularized injury.” *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 1130. The Utah Supreme Court has established three elements to this determination:

First, the party must assert that it has been or will be adversely affected by the challenged actions. Second, the party must allege a causal relationship between the injury to the party, the challenged actions, and the relief requested. Third, the relief requested must be substantially likely to redress the injury claimed. If the party can satisfy these three criteria, the party has standing to pursue its claims before the courts of this state.

*Sierra Club*, 2006 UT 74, ¶ 19 (internal quotation marks and citations omitted).

As shown more fully below, Plaintiffs have alleged a particularized injury and have a personal stake in the outcome of this litigation. They have not asserted a generalized grievance and are not trying to use the courts to wage a “political or ideological dispute[] about the performance of government.” *Sierra Club*, 2006 UT 74, ¶ 17. Nor are they “roving environmental ombudsm[e]n seeking to right environmental wrongs wherever [t]he[y] find them,” but rather are “real person[s] who own[] real home[s] . . . in close proximity” to Little Cottonwood Creek and the proposed bridge. *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149, 157 (4th Cir. 2000). There should be no concern here about the adjudication of this case infringing on the proper role of any branch of government.

**B. Standard of Review.**

As noted, “[w]hether a plaintiff has standing is a question of law” and this Court “accord[s] no deference to the ruling of the trial court.” *Stocks v. United States Fid. & Guar. Co.*, 2000 UT App 139, ¶ 9 (internal quotation marks omitted). Additionally, this case was dismissed on the pleadings under Rule 12(b)(6). (R. 252 at 12-13.) On a motion to dismiss, the court must presume true all well-pleaded facts in the complaint. *St. Benedict’s Dev. Co. v. St. Benedict’s Hospital*, 811 P.2d 194, 196 (Utah 1991).<sup>1</sup> This is so even for the threshold issue of standing. “For purposes of ruling on a motion to

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<sup>1</sup> The court may also consider the materials that were attached to the complaint. See *Oakwood Village, LLC v. Albertson’s Inc.*, 2004 UT 101, ¶ 10 (“The rules are clear that documents attached to a complaint are incorporated into the pleadings for purposes of judicial notice and are fair game for this court to consider in addition to the complaint’s averments.”).

dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Thus, although it is the plaintiff’s burden to demonstrate standing, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss, [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).<sup>2</sup> It is enough at the pleading stage, for example, for the plaintiffs to “allege[] that they could prove causation” – an element of standing – if given the chance: “that is all that is required at this phase.” *Sierra Club*, 2006 UT 74, ¶ 32. Otherwise, a full investigation of causation on a motion to dismiss “would, in many cases, supplant the trial process on the merits of the underlying claim.” *Id.* And it “would be unduly burdensome for litigants to invest the time and money in gathering the evidence necessary to prove their claim only to be denied standing.” *Id.*

Here, the matter was decided on the pleadings, so this Court must accept as true the material allegations in the Complaint and construe them and all reasonable inferences therefrom in favor of Plaintiffs.

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<sup>2</sup> The plaintiff’s burden increases “with the manner and degree of evidence required at the successive stages of the litigation,” so that in opposition to a motion for summary judgment, for example, a plaintiff could no longer rely on the pleadings. *Lujan*, 504 U.S. at 561. But even at the summary judgment stage, a plaintiff only has to establish that there is a genuine issue of material fact as to whether standing exists. *See Central Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002) (citing *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998)).



**C. The Complaint Establishes Plaintiffs' Standing.**

**1. Plaintiffs have alleged and will prove personalized injuries.**

McIntyre's primary argument, and the ruling of the district court, was that Plaintiffs are not "aggrieved" parties because their injuries are only "potential." But this ignores the fact, well-recognized by the Utah Supreme Court and courts around the country, that the potential for injury and increased risk of injury are sufficient to establish standing.

The Utah Supreme Court made this principle clear in *Sierra Club*, 2006 UT 74. In that case, the Sierra Club sought judicial review after the Executive Secretary of the Division of Air Quality granted a permit to the Sevier Power Company to construct a coal-fired power plant near the Colorado Plateau, an area known for its "stunning geography and outdoor recreational sites." *Id.* ¶ 2. To support its standing, the Sierra Club submitted affidavits from three of its members. The first, Mr. Cass, was a videographer who had filmed and produced documentaries on the Colorado Plateau. He alleged that the plant would emit pollutants that would impair visibility and affect his livelihood, and also that the plant would decrease the value of his property and impair his health. *Id.* ¶ 4. The second, Ms. Roberts, alleged that the plant would emit pollutants that would contaminate the soil and damage the crops of her nearby farm, and also that the emissions would affect her health. *Id.* ¶ 5. The third, Mr. Cherry, expressed "general concerns about the adverse health effects and the inversions" the plant would cause. *Id.* ¶ 6.

The Court held that Mr. Cass and Ms. Roberts had alleged sufficient facts to confer standing, but not Mr. Cherry. “Mr. Cass and Ms. Roberts have met the adverse effects requirement because they either live or recreate, or both, near the site of the plant and have alleged injuries particular to them, rather than expressing generalized concerns about the plant’s impact on the public at large.” *Id.* ¶ 28. In contrast, Mr. Cherry had alleged only a generalized concern. “Expressions of concern, without a claim of actual or potential injury to the party, are too generalized to qualify as a distinct and palpable injury under the traditional criteria.” *Id.* ¶ 27 (emphasis added).

In short, Mr. Cass’s and Ms. Robert’s specific concerns about potential health risks were sufficient to confer standing – even before the harm actually developed. “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.” *Id.* ¶ 29 (emphasis added).

The Complaint alleges specific potential harms to Plaintiffs’ properties. Plaintiffs attached to their Complaint hydrological engineering reports from the engineering firm of Secor International, Inc. (R. 64-87.) While Plaintiffs have not had the opportunity to conduct discovery and to perform extensive engineering evaluations regarding the impact of the proposed bridge, the Secor Report establishes the following:

Building the proposed bridge . . . could create a channel constriction – a point in the channel which would, under high flow conditions, provid[e] an opportunity for typical debris, vegetation/trees, rocks, and any other urban materials to catch, backing up water. If the stream flow is backed up, inundation of the 1st level flood plane on both sides of the stream channel is at significant risk.

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The Brown Residence is located on the river terrace, directly above the escarpment along the west side of the Creek. With the instabilities observed in and around the escarpment, as well as the settlement cracks, further erosion at the escarpment may increase the risks for significant property damage. As proposed, construction of the bridge could increase the potential for further escarpment erosion and therefore, increase the potential for significant property damage or worse.

(R. 64 [emphasis added].)

Currently, a steep, exposed hill, devoid of plant growth, grass or any foliation lies directly to the east between the Browns' home and the Creek, which escarpment provides lateral support to the Browns' home. Over time, erosion has worn away the steep exposed hill exposing alluvial soils at its base to the ever-running flow of the creek.

(R. 25.) That escarpment is the west bank of the creek, just down grade from the proposed bridge.

McIntyre has argued that the alleged potential damage is not a "particularized claim of damage to the Plaintiffs" because the property where the escarpment sits is owned by another neighbor that is not a party to this suit. (R. 117.) However, erosion to the west bank escarpment has already caused significant settlement and signs of collapse on the Browns' property and in their home. As explained by Secor, accelerated erosion resulting from flooding on the first-level flood plane caused by the flow restriction of the proposed bridge will result in additional settlement, collapse, and ultimately the destruction of the Browns' property.

The Sorenson property is also situated above and adjacent to property lying directly in the first level flood plain. Damage to that property will undermine the lateral

support to the Sorenson property. In sum, a flood on the first-level flood plane will impair the integrity of the ground supporting Plaintiffs' homes.

Simply put, the construction of the bridge has the potential of causing significant damage to Plaintiffs' properties. Flooding of the first-level flood plane will cause further erosion of the escarpment, increasing the potential "for significant property damage or worse." (R. 64.) This is true with respect to the property owned by the Sorensens and the property owned by the Browns.

These allegations, in and of themselves, are enough to establish standing. Plaintiffs "have alleged injuries that are particular to them, rather than expressing generalized concerns about the [bridge's] impact on the public at large." *Sierra Club*, 2006 UT 74, ¶ 28. They have not, in contrast to Mr. Cherry in *Sierra Club*, alleged merely generalized concerns about the effect of the bridge on the environment at large. Plaintiffs' injuries are particularized and they plainly have a personal stake in the outcome of this litigation. To be sure, the ultimate injuries are only potential injuries. But the Utah Supreme Court in *Sierra Club* held that potential injuries are sufficient to confer standing. Moreover, as Plaintiffs will now show, it is well accepted that potential injury or increased risk of injury is itself an injury for standing purposes.

**2. The potential for injury and increased risk of injury are sufficient to support standing.**

Potential injury and the increased risk of injury are themselves current injuries. In construing the more restrictive federal standing requirements, "[t]he Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III

standing requirements.” *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149, 160 (4th Cir. 2000) (citing cases); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996) (“That the injury is cast in terms of future impairment rather than past impairment is of no moment.”). “Courts have . . . left no doubt that threatened injury . . . is by itself injury in fact,” the Fourth Circuit said in a case involving potential environmental injury. *Friends of the Earth, Inc.*, 204 F.3d at 160. “Threats or increased risk thus constitutes cognizable harm.” *Id.* Such threats, the court added, are “probabilistic. And yet other circuits have had no trouble understanding the injurious nature of risk itself.” *Id.* The Ninth Circuit has likewise stated, “[T]hreatened injury constitutes injury in fact.” *Central Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

Courts have also recognized that the potential likelihood of the injury does not have to be great to confer standing. In *Village of Elk Grove Village v. Evans*, 997 F.2d 328 (7th Cir. 1993), the Village brought suit to enjoin the Corps of Engineers from granting a permit for construction of a radio tower in the floodplain of a creek near the village. The Village asserted that the creek was “flood-prone” and that the radio tower would increase the risk of flooding by limiting the creek’s drainage area. The court held this was a legally cognizable injury. “The injury is of course probabilistic, but even a small probability of injury is sufficient to create a case or controversy – to take a suit out of the category of the hypothetical – provided, of course that the relief sought would, if granted, reduce the probability.” *Id.* at 329 (emphasis added) (citing *Pennell v. San Jose*, 485 U.S. 1 (1988), and *Bryant v. Yellen*, 447 U.S. 352 (1980)).

In *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996), the plaintiffs sued the Forest Service asserting that a logging plan approved over an alternative supported by the plaintiffs would not clear enough dead timber and thus would increase the risk of wildfires, which would affect their use of the area for hiking and camping. The difference in the plans was minor. The Forest Service selected a logging plan that reduced potential wildfire fuels by 5.4%, rather than the plaintiffs' preferred plan, which reduced them by 14.2%. "The district court was unimpressed by the difference" between the proposed alternatives, "branding a claim of increased wildfire risk as 'mere speculation.'" *Id.* at 1234. The D.C. Circuit disagreed, noting that the increase in risk required for standing may be inversely proportional to the degree of potential harm:

Of course for a probabilistic event such as a wildfire, almost any act (other than, say, deliberate setting of a fire) merely affects probabilities, but we do not understand the customary rejection of "speculative" causal links as ruling out all probabilistic injuries. The more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing. . . . [T]he potential destruction of fire is so severe that relatively modest increments in risk should qualify for standing.

*Id.*

Additionally, "the fact that the potential injury would be the result of a chain of events need not destroy the standing claim." 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.40[7][a] (3d ed.) (citing *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992)).

It is also important to recognize that proving the increased risk of injury goes to the merits of the claim and should not be addressed as a matter of standing. By dismissing this case on the pleadings, the district court cut short the very process by which Plaintiffs would prove the significance of the risk caused by the bridge. In *Sutton v. St. Jude Medical S.C. Inc.*, 419 F.3d 568 (6th Cir. 2005), the plaintiff brought suit on behalf of a class of “as-of-yet uninjured” individuals alleging that a medical device implanted during bypass surgery increased the risk for aortic bypass stenosis. *Id.* at 570. The trial court said the alleged injury was “purely hypothetical” and thus denied standing. The Sixth Circuit reversed: “[C]ourts have long recognized that an increased risk of harm, which the plaintiff alleges, is an injury-in-fact.” *Id.* at 573-74 (quoting *In re Propulsid Prod. Liability Litigation*, 208 F.R.D. 133, 139 (E.D. La. 2002)). The court then held that it was improper to require the plaintiff to show as part of the standing inquiry how significant the increased risk may be. “[T]o require a plaintiff to so clearly demonstrate her injury in order to confer standing is to prematurely evaluate the merits of her claims.” *Id.* at 575.<sup>3</sup> The court in *Sutton* also recognized the value of allowing a plaintiff to address a problem before the injury occurs. “[T]here is something to be said for disease prevention, as opposed to disease treatment. Waiting for a plaintiff to suffer

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<sup>3</sup> The Utah Supreme Court has recognized that the merits inquiry is separate from the standing inquiry, and that it is neither “necessary [n]or appropriate for us to consider the merits of the petitioners’ claim in deciding whether they have standing.” *Society of Professional Journalists, Utah Chapter v. Bullock*, 743 P.2d 1166, 1170 n.3 (Utah 1987); see also *Warth v. Seldin*, 422 U.S. 490 (1975) (although standing may exist in certain cases based solely on a statute creating a legal right, the invasion of which creates standing, “standing in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal”).

physical injury before allowing any redress whatsoever is both overly harsh and economically inefficient.” *Id.*

Moreover, because the risk of injury is itself an injury for standing purposes, inevitability and immediacy of the ultimate injury are not prerequisites to standing. In *Dimarzo v. Cahill*, 575 F.2d 15 (1st Cir. 1978), the court held that inmates concerned about the risk of fire at the prison had standing. The defendant, the court said, “inaptly construes the requirement of injury as requiring proof that the inmates inevitably will suffer physical injury or death from fire before they have standing to challenge the hazardous fire conditions . . . existing at [the prison]. . . . One need not wait for the conflagration before concluding that a real and present threat exists.” *Id.* at 18; *see also Sutton*, 419 F.3d at 572 (plaintiff is not required to show “immediacy” of the injury to have standing).

That risk of future harm is itself a concrete injury is plain to see. Risk of future damage to one’s property can decrease the current value of the property, increase the costs of insurance, and create costs to ameliorate the risk. It simply cannot be the case that Plaintiffs must wait for the ultimate injury to occur before they can sue. This Court should not ignore “the injurious nature of risk itself.” *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149, 160 (4th Cir. 2000).

To hold otherwise would leave plaintiffs who suffer real harm from the mere risk of injury without any redress. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), a group of plaintiffs sued over the approval for construction of a nuclear power plant. Part of their alleged injuries was the risk of a



nuclear accident. In rejecting the assertion that the claim was not ripe because “no nuclear accident has yet occurred,” the Supreme Court held that the legal issues were sufficiently concrete to be ready for decision. Importantly, the Court recognized that “delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees – relief that would be forthcoming if they were to prevail . . . .” *Id.* at 82 (emphasis added). A nuclear meltdown does not have to occur before a plaintiff can sue. This case does not involve a potential nuclear meltdown, but to Plaintiffs – who are prepared to prove that the proposed bridge poses a real threat to their homes – the threatened injury is very significant indeed.

At the hearing on McIntyre’s Motion to Dismiss, the following exchange took place between the trial court and McIntyre:

THE COURT: Assuming I grant your motion to dismiss and then the worse fears are realized that you put the bridge in, it’s causing stoppage. You cannot clear it out. It’s caused the erosion, and it’s caused the erosion to the effect of the Brown[s] and the Sorenson[s] are directly aggrieved on it, what happens at that point.

\*\*\*\*

MR. MCINTYRE: I think they have, at that point, the right to – they’re not precluded from a right to file an action for injunction. But what does it have to do with the state’s engineer – engineer’s decision to put – or allow the bridge to be put in.

\*\*\*\*

THE COURT: Yeah. But what I’m saying is, that it would be two separate issues in my mind. That if the worse fears are realized –

MR. MCINTYRE: Right.

THE COURT: -- after you[’re] dismissed out of the case, then they’re not barred by filing another lawsuit asking that bridge to be removed?

MR. MCINTYRE: Oh, absolutely not. Why would it be?

THE COURT: Okay.

(R. 252 at 12-13.)

If this colloquy accurately stated the law, then potential plaintiffs would have to sit back and wait for the worst case scenario before they could sue to protect themselves. Fortunately, as Plaintiffs have demonstrated, that is not the law. Plaintiffs have alleged a particularized injury and should therefore be permitted to move forward to try and prove their claims on the merits.

### **3. The Complaint alleges causation.**

In *Sierra Club*, the Utah Supreme Court had little difficulty in finding that the plaintiffs had sufficiently alleged causation. “Because the Executive Secretary [was] responsible for denying or granting permits for the construction and operation of the plant,” the Court reasoned, “his decision to grant the order is directly connected to the construction and operation of the plant and to any resulting harms.” *Sierra Club*, 2006 UT 74, ¶ 32. And “[r]ather than raising general allegations that the mere presence of a coal-fired power plant will cause the alleged harms, the affidavits point to specific aspects of the plant that will cause specific harms.” *Id.* The Court recognized that although the plaintiffs had not offered proof of their allegations but rather had alleged a “plausible connection between their injuries and the order authorizing the plant,” they nevertheless had “alleged that they could prove causation, and that is all that is required

at this phase.” *Id.* (emphasis added). To require proof of causation at the pleading stage would “supplant the trial process on the merits of the underlying claim.” *Id.*

This analysis applies equally here. Plaintiffs’ injuries are directly caused by the Division’s approval of the permit to build the proposed bridge. And Plaintiffs have pointed to specific aspects of the bridge that will cause specific harms.

**4. The relief Plaintiffs seek would redress their injuries.**

As to whether the injuries alleged by the plaintiffs in *Sierra Club* were redressable, the Utah Supreme Court explained:

[T]he Board has the power to redress the [plaintiffs’] injuries. Through the *Sierra Club*, the [plaintiffs] have requested that the Board declare the air emissions permit illegal, revoke the order, and remand the matter to the Division of Air Quality for further analysis. Because the Board is the only party with the authority to grant this relief, it has the power to redress the *Sierra Club*’s injury by declaring the permit illegal or at least referring the permit to the Division of Air Quality for further analysis to ensure that the Executive Secretary’s order authorizing the plant’s operation complies with state and federal law.

*Id.* ¶ 33.

The analysis is the same here. The Division has the authority to revoke the permit granted to McIntyre. Doing so would immediately redress the injuries Plaintiffs have alleged. Those injuries – the potential harm and increased risk caused by the bridge – are directly tied to the approval and construction of the bridge.

### CONCLUSION

The district court erred when it ruled that Plaintiffs lack standing to bring this action. This Court should reverse the district court's order of dismissal and remand the case for further proceedings on the merits.

### REQUEST FOR ORAL ARGUMENT

Plaintiffs hereby request oral argument because it will materially assist this Court in resolving the issues in this case.

DATED this 20<sup>th</sup> day of December, 2007.

KIRTON & McCONKIE



Benson L. Hathaway, Jr.

Alexander Dushku

Peter C. Schofield

Justin W Starr

*Attorneys for Appellants/Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of December, 2007, I mailed two true and correct copies of the **BRIEF OF APPELLANTS**, postage prepaid, to the following:

James A. McIntyre, Esq.  
3838 S. West Temple, Ste 3  
Salt Lake City, UT 84115  
*Pro se Defendant/Appellee*

Julie I. Valdes  
Richard K. Rathbun  
Norman K. Johnson  
Assistant Attorneys General

Mark. L. Shurtleff  
Utah Attorney General  
P.O. Box 140855  
Salt Lake City, UT 84114-0855  
*Attorneys for State Defendants/Appellees*

  
\_\_\_\_\_

## **ADDENDUM**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LAWRENCE BROWN, MARILYN BROWN,  
JOSEPH SORENSON AND KATHLEEN  
SOERSON, individuals,

Plaintiffs/Petitioners,

vs.

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

Defendants/Respondents.

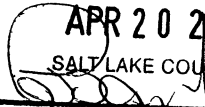
MEMORANDUM DECISION

Case No. 060920127

Honorable GLENN K. IWASAKI

April 16, 2007

**FILED DISTRICT COURT**  
Third Judicial District

APR 20 2007  
SALT LAKE COUNTY  
By  Deputy Clerk

The above-entitled matter comes before the Court pursuant to Defendant James A. McIntyre's Motion to Dismiss. The Court heard oral argument with respect to the motion on April 16, 2007. Following the hearing, the matter was taken under advisement.

The Court having considered the motion and memoranda and for the good cause shown, hereby enters the following ruling.

Plaintiffs and Defendant James A. McIntyre ("McIntyre") all reside in an area adjacent to Little Cottonwood Creek located in Murray, Utah. McIntyre desires to construct a bridge from one side of Little Cottonwood Creek to the other. On August 21, 2006, McIntyre submitted an application with the Division of Water Rights of the Utah State Department of Natural Resources

("the Division") for the construction of the bridge. Plaintiffs opposed the construction before the Division arguing such would cause significant damage to their property. The Division ultimately granted McIntyre's application for a Stream Channel Alteration Permit and Plaintiffs initiated this action.

In support of his motion McIntyre asserts Plaintiffs are not aggrieved persons and have no standing to seek judicial review of the administrative agency's action. Indeed, asserts McIntyre, unlike the process by which comments are accepted from persons who may be interested in a project, the right to seek judicial review is limited to those individuals who can "show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute." *Wash. County Water Conservancy Dist. v. Morgan*, 2003 UT 58 ¶ 20 (quoting *Nat'l Parks & Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 913 (Utah 1993)). In the instant, argues McIntyre, Plaintiffs only argue that significant damage and injury to their property will result.

While McIntyre admits that the Secor Report, attached to the Complaint, does note some erosion problems for the escarpment on the creek's west bank, this is irrelevant, argues Defendant, as that escarpment property does not belong to Plaintiffs or McIntyre, but to Jan Glines-Calder. Further, asserts McIntyre,



that damage has nothing to do with the bridge, but rather, the fact that the western side of the bank has not been armored.

Additionally, argues McIntyre, as to their claim for injunctive relief, such should be dismissed as Plaintiffs have failed to allege facts necessary to support their claim. Specifically, asserts McIntyre, Plaintiffs have only alleged that there is evidence of subsidence and cracking and that has occurred without the bridge. Moreover, contends McIntyre, he agrees that if the bridge causes damage to Plaintiffs' property he may be liable, accordingly, the harm is not irreparable.

Further, argues McIntyre, Plaintiffs have failed to describe a particular injury they will suffer, how an injunction would not be adverse to public interest, or that they have a substantial likelihood of prevailing on the merits.

Plaintiffs oppose the motion arguing, as set forth in the case of *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989), any "person aggrieved," not just a water user or person whose property lies on the banks of a creek, may seek review of State Engineer action pursuant to a proposed change application. See *Id.* at 498.

Like the plaintiffs in *Bonham*, assert Plaintiffs, they have alleged that significant damage to their property will result from the construction of the proposed bridge. Moreover, contend Plaintiffs, the engineering reports attached as exhibits to


Plaintiff's Complaint plainly set forth the potential damage that Plaintiffs may incur should the proposed bridge be constructed.

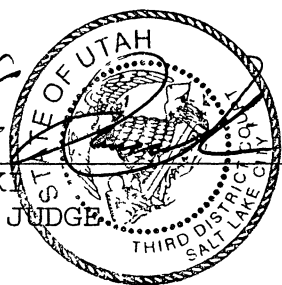
With respect to McIntyre's arguments regarding injunctive relief, Plaintiffs assert they do not at this time seek either a Temporary Restraining Order or a Preliminary Injunction. Rather, assert Plaintiffs, they request that the Court grant permanent injunctive relief as a remedy due to the damage that will be sustained should the proposed bridge be constructed. Through the course of this proceeding, contend Plaintiffs, they will demonstrate their entitlement to equitable relief in the form of a permanent injunction, as the potential damages they will suffer if the bridge is constructed will be irreparable and legal remedies are inadequate.

To establish standing under the statute, a person must demonstrate they have suffered or would suffer a distinct and palpable injury that gives rise to a personal stake in the outcome. In the instant then, the Court must ask how far should is the "would suffer" be stretched? Indeed, while the engineering reports do indicate that "[i]f the stream flow is backed up, inundation of the 1<sup>st</sup> level flood plane on both sides of the stream channel is at significant risk," and further that, "construction of the bridge could increase the potential for further escarpment erosion and therefore, increase the potential

for significant property damage or worse," the question is, does this establish standing? While the report set outs potential problems that could occur if certain events come to fruition, the Court is persuaded such requires great speculation to find it demonstrates an outcome which "would" occur. Accordingly, dismissal as requested is appropriate and, consequently, granted.<sup>1</sup>

DATED this 20 day of April, 2007.

  
GLENN K. IWASAKI  
DISTRICT COURT JUDGE



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<sup>1</sup>If, down the road construction of the bridge starts these possible events in action, Plaintiffs would then have standing to assert their claims.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060920127 by the method and on the date specified.

METHOD	NAME
Mail	JAMES A MCINTYRE Defendant 3838 SOUTH WEST TEMPLE SUITE 3 SLC, UT 84115
Mail	BENSON L HATHAWAY JR Attorney PLA 60 E SOUTH TEMPLE STE 1800 POB 45120 SALT LAKE CITY UT 84145-0120
Mail	JULIE I VALDES Attorney DEF 1594 W N TEMPLE STE 300 POB 140855 SALT LAKE CITY UT 84114-0855

Dated this 20 day of April, 2007.

  
\_\_\_\_\_  
Deputy Court Clerk

Benson L. Hathaway, Jr. (Bar No. 4219)

Loyal C. Hulme (Bar No. 7554)

Peter C. Schofield (Bar No. 9447)

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*Attorneys for Petitioners/Plaintiffs*

**FILED DISTRICT COURT**  
Third Judicial District

**MAY 14 2007**

SALT LAKE COUNTY

By [Signature] Deputy Clerk

---

**IN THE THIRD JUDICIAL DISTRICT COURT,**

**SALT LAKE COUNTY, STATE OF UTAH**

---

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

Petitioners/Plaintiffs,

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,

Respondents/Defendants.

**ORDER OF DISMISSAL**

Judge: Glenn K. Iwasaki

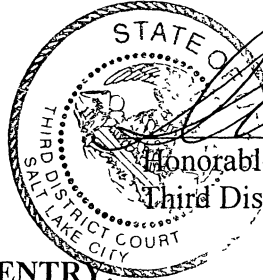
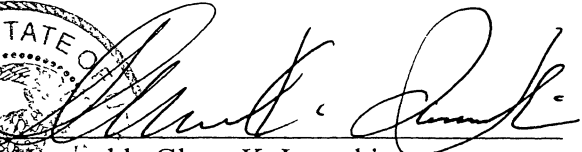
Civil No. 060920127

Based upon the Memorandum Decision issued by the Court on April 20, 2007, granting Defendant James A. McIntyre's Motion to Dismiss Petitioners' Petition and Complaint, and based upon the Court's finding that Petitioners/Plaintiffs lack standing in this matter, it is hereby

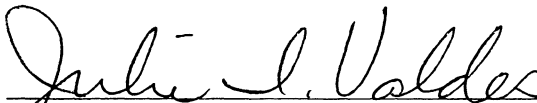
**ORDERED ADJUDGED AND DECREED** that this action, including all claims alleged herein, is hereby dismissed.

DATED this 14 day of May, 2007.

**BY THE COURT:**

   
Honorable Glenn K. Iwasaki  
Third District Court Judge

**APPROVED AS TO FORM AND FOR ENTRY:**

  
Julie I. Valdes  
Assistant Attorney General  
Mark L. Shurtleff  
Utah Attorney General  
1594 West North Temple, Suite 300  
Salt Lake City, UT 84116  
*Attorneys for the State of Utah State Engineer*

\_\_\_\_\_  
James A. McIntyre  
3838 South West Temple, Suite 3  
Salt Lake City, Utah 84115  
*Defendant Pro Se*

**CERTIFICATE OF SERVICE**


I hereby certify that on this 10<sup>th</sup> day of May 2007, a true and correct copy of the foregoing **ORDER OF DISMISSAL** was served on the following by the method indicated below:

James A. McIntyre  
3838 South West Temple, Suite 3  
Salt Lake City, Utah 84115

( ) U.S. Mail, Postage Prepaid  
(☒) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile

Julie I. Valdes  
Richard K. Rathbun  
Norman K. Johnson  
Assistant Attorneys General  
Mark L. Shurtleff  
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( ) U.S. Mail, Postage Prepaid  
(☒) Hand Delivered  
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\_\_\_\_\_