

2000

Mark Graham v. Utah Air Quality Board : Reply Brief

Utah Court of Appeals

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**IN THE COURT OF APPEALS
OF
THE STATE OF UTAH**

MARK GRAHAM,	:	
Petitioner,	:	Case No. 2000 0042
vs.	:	
UTAH AIR QUALITY BOARD,	:	Priority No. 14
Respondent	:	

**REPLY BRIEF OF PETITIONER
MARK GRAHAM**

AN APPEAL FROM A FINAL ORDER OF
THE UTAH AIR QUALITY BOARD
(Case Below No. 9903004)

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FILED
Utah Court of Appeals

OCT 17 2000

Paulette Stagg
Clerk of the Court

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MARK GRAHAM**

**AN APPEAL FROM A FINAL ORDER OF
THE UTAH AIR QUALITY BOARD
(Case Below No. 9903004)**

Appellant, Mark Graham by and through counsel of record, submits the following REPLY Brief of Appellant in further support of his petition for review of a decision by the Utah Air Quality Board (the "Air Board") to deny him the right to intervene in formal proceeding to resolve a notice of violation ("NOV") issued against Wasatch Energy Systems ("WES"), a dioxin-emitting facility in Mr. Graham's neighborhood:

STATUTORY PROVISIONS

Utah Code Ann. §63-46b-9 (1996):

- (1) Any person not a party may file a signed, written petition to intervene in a formal adjudicative proceeding with the agency. The person who wishes to intervene shall mail a copy of the petition to each party. The petition shall include:
 - (a) the agency's file number or other reference number;
 - (b) the name of the proceeding;
 - (c) a statement of facts demonstrating that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law; and
 - (d) a statement of the relief that the petitioner seeks from the agency.
- (2) The presiding officer shall grant a petition for intervention if he [sic] determines that:
 - (a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and
 - (b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

STATEMENT OF FACTS

In late August 2000, essentially a year after he filed a petition to intervene in the WES Matter,¹ Mr. Graham moved from the State of Utah. This fact does not alter the present inquiry. Standing, and by analogy, intervention, is determined at the time the litigation is commenced. *For example*, Society of Professional Journalists v. Bullock, 743 P.2d 1166 (Utah 1987) (where case moot, although capable of repetition, plaintiffs did not “lose” standing); Friends of the Earth v. Laidlaw Environmental Services, ___ U.S. ___, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000) (standing determined at the time the complaint was filed). Therefore, the determination before this Court remains whether Mr. Graham had the right to intervene in the WES matter on September 15, 1999, the time he filed his petition.

As the Utah Supreme Court has made clear, standing is determined at the time a case is filed. Thus, in Bullock, the Court determined that the Society of Professional Journalists could challenge a district court order closing a competency proceeding to the public and sealing a related transcript and memorandum on the basis of the “capable of repetition by

¹ In the Matter of: Davis Country Solid Waste Management and Energy Recovery Special Service District d/b/a Wasatch Energy Systems (No. 99030004)

evading review” doctrine. Bullock at 1169 (in cases involving pretrial proceedings, that there will not be sufficient time for appellate court to intervene justifies an exception to the mootness doctrine). The Court did this even though the competency proceeding had concluded. Therefore, to address the Society’s challenge, the Court clearly had found that the Society had standing at the time the case was filed – before the competency proceeding had concluded. Indeed, if standing were not fixed at the time of the commencement of action, no exception to the mootness doctrine could exist – otherwise, plaintiff would always “lose” standing when she “lost” her case to mootness and the Court would lose jurisdiction over the case. *See also Laidlaw*, ___ U.S. ___, 120 S.Ct. 693, 708-09, 145 L.Ed. 2d 610, 632 (the “capable of repetition, yet evading review” exception to mootness could not exist if standing were not fixed at the commencement of litigation).

By analogy, the facts establishing whether Mr. Graham had the right to intervene in the WES matter were fixed as of September 1999. As a result, all the allegations regarding his substantial legal interests in the WES matter remain fixed and are not dependent on where he now lives.²

² In addition, Mr. Graham states that, if granted intervention, he will participate in the administrative proceeding. In the alternative, Families Against Incinerator Risk, which brought a federal case jointly with Mr. Graham to challenge the WES Incinerator’s illegal emissions under the Clean Air Act and of which Mr. Graham is a member, would substitute itself for Mr. Graham during the proceeding.

Finally, to refuse to address this matter on the basis of Mr. Graham's relocation would be to reward the Air Board for its delay tactics and its frustration of justice. Already, one year has passed since Mr. Graham petitioned it for the right to intervene in the WES matter. During this period, the Air Board has filed **two** motions, each of which delayed Mr. Graham's petition for review and each of which was rejected soundly by this Court.

However, the Air Board's own attempts to delay this petition for review should not serve as the basis for a dismissal of the action. As the Utah Supreme Court has determined, it could not give an agency incentives to cut off a petition to intervene. Millard County v. Utah State Tax Commission, 823 P.2d 459, 461 (Utah 1991). Thus, in determining whether a settlement would moot a petition to intervene, the Court reasoned that

[t]o allow a settlement between parties to moot an extant appeal concerning intervention of right might well provide incentives for settlement that would run contrary to the interests of justice.

Id. at 461, *quoting* Federal Deposit Insurance Corp. v. Jennings, 816 F.2d 1488, 1491 (10th Cir. 1987). Similarly, this Court should not allow the Air Board to "circumvent the statutory right of intervention" by delaying Mr. Graham's petition for review with repeated motions made without basis. Id. at 462. To do otherwise would allow the Air Board to "deal with such

motions [to intervene] in a fashion that undermines the purpose of the statutory scheme for intervention.” Id.³

In sum, that Mr. Graham has left Utah does not alter the present inquiry – whether Mr. Graham established the basis to intervene in the WES matter as of September 15, 1999. Intervention is established at the time the petition is made. In the present case, as further established below, because Mr. Graham so clearly had a right to intervene in the WES matter when he made his petition, he is entitled to a determination of that right.

RESPONSE TO AIR BOARD’S STATEMENT OF FACTS

The focus of the Air Board’s statement of facts illustrates quite clearly its misapplication of the standard for intervention. Hoping to justify its denial of Mr. Graham’s petition to intervene, the Air Board centers on two aspects of the record it believes to be telling: 1) that Mr. Graham failed to allege facts to show that emissions from the WES Incinerator affected his health and the environment; and, 2) that Mr. Graham failed to demonstrate

³ In addition, under Cache County v. Property Tax Division of Utah State Tax Commission, 922 P.2d 758, 766 (Utah 1996), Utah Courts will resolve a theoretically moot issue “due to its continuing controversy.” Because under the Air Board’s current policy toward intervention no member of public could intervene in a formal adjudication before the Board, the issue before this Court is of continuing controversy and should therefore be addressed squarely.

that his interests in the WES matter were somehow different than those of the general public. Importantly, the Air Board's characterization of the facts is misguided for two reasons. First, Mr. Graham did allege facts sufficient to show that his "legal interests" would be "substantially affected by the formal adjudicative proceeding," Utah Code Ann. §63-46b-9, and he specifically need **not** show harm to his health and the environment. Second, although Mr. Graham is **not** required to do so, he did distinguish his interest in the WES matter from that of the general public.

The gist of the Air Board's attack on the adequacy of the facts establishing Mr. Graham's right to intervene seems to be based on the mistaken belief that he must satisfy the "injury in fact" prong of the federal standing requirement. Initially, of course, as Mr. Graham repeats throughout his opening brief, the proper inquiry in this matter must be whether he meets the Utah statutory requirement for **intervention**, not standing. Moreover, to the extent that the federal standing inquiry is instructive, Mr. Graham has shown conclusively in his opening brief that he qualifies under every prong of the three-part "or" test relevant to determining standing under Article V of the Utah Constitution. *See* Brief of Petitioner at 28 – 37. Finally, even if it were instructive to the present task, an examination of the federal "injury in fact" test concludes that Mr. Graham has met this requirement.

For example, several federal courts that have recognized that breathing polluted air is sufficient to confer standing under the Clean Air Act. Natural Resources Defense Council v. Environmental Protection Agency, 507 F.2d 905, 910 (9th Cir. 1974) (finding no doubt that plaintiff will suffer injury if compelled to breathe air less pure than that mandated by the Clean Air Act); Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp., 207 F.3d 789, 792 (5th Cir. 2000) (holding that plaintiffs exposed to sulfurous odors while in the home, yard, or driving through town have suffered injury in fact). Additionally, federal courts have ruled that living in close proximity to air pollution is, in itself, sufficient to confer standing under the Clean Air Act. Sierra Club v. Ruckelshaus, 602 F.Supp. 892 (N.D.CA 1984) (declaration that member lived in close proximity to specific facilities that emit radionuclides more than adequately illustrates threat of injury for establishing standing).

Generally, as the United States Supreme Court recently held, “environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” Laidlaw, ___ U.S. at ___, 120 S.Ct. at 705, 145 L.Ed. 2d at 628, *quoting* Sierra Club v. Morton, 405 U.S. 727, 735 (1972). Indeed, the Supreme

Court explicitly rejected the notion that to establish standing, plaintiffs must show injury to the environment. *Id.*, ___ U.S. at ___, 120 S.Ct. at 704, 145 L.Ed. 2d at 627. Rather, plaintiffs need only show injury to themselves – and this injury need not be in the form of verified health risks. *Id.* Thus, in the highly relevant context of allegations of excessive discharges of water pollution, *Laidlaw* found standing based on affiants’ assertions that their “reasonable concerns about the effects of th[ese] discharges, directly affected those affiants’ recreational, aesthetic, and economic interests.” *Id.*, ___ U.S. at ___, 120 S.Ct. at 705, 145 L.Ed. 2d at 629.

Applying this analysis to the present case, Mr. Graham has plainly established injury in fact. He stated that he lived in very close proximity of WES and was thereby exposed to the Incinerator’s (allegedly) excessive emission of dioxin/furan. Furthermore, as in *Ruckelshaus*, simply by virtue of living near the Incinerator, Mr. Graham is exposed to and injured by the relevant pollution. Finally, as plaintiffs in *Laidlaw*, Mr. Graham stated that his reasonable concerns regarding the WES Incinerator emissions – that they adversely impact his health, his garden produce and the ecosystem of the Great Salt Lake – likewise directly affected his aesthetic and recreational sensibilities. *For example*, Record at 7, ¶ 4 (“I am concerned about the effect of air emission from the incinerator on the air quality and on my

health”); ¶ 10 (“I feel the garbage incinerator facility and its air emission threaten the Great Salt Lake. I love the Great Salt Lake, and watch birds on the Lake, which is an important feeding ground for millions of migratory birds of many varieties”).

Mr. Graham’s injuries are also “fairly traceable” to WES and its Incinerator. Mr. Graham has alleged, and the Board did not contest, that “air emissions from the [WES] facility are carried by the wind . . . to my house and garden, and to Layton and to the Great Salt Lake.” Record at 7, ¶ 6. Again, as in Ruckelshaus, that dioxin/furans are invisible and do not have an odor, like radionuclides, does not prevent Mr. Graham from tracing his injury to the Incinerator.

With regard to its second misunderstanding – that Mr. Graham must prove that his interests are somehow different from those of the general public – the Air Board is also off track. Again, the Air Board is applying the wrong test to the present inquiry. Under the statutory provision, Mr. Graham is entitled to intervene where he alleges that his “legal interests” would be “substantially affected by the formal adjudicative proceeding.” Utah Code Ann. §63-46b-9. Plainly, the statute mentions nothing about requiring petitioners to establish that their legal interests are unique or that their legal interests are affected in a unique way that distinguishes them from

the general public. Moreover, to the extent that it is informative to the present inquiry, Utah's standing inquiry provides for standing exactly in the circumstances where the plaintiff's interests are identical to those of the general public. Terracor v. Utah Board of State Lands & Forestry, 716 P.2d 796, 799 (Utah 1986) (if plaintiff does not meet the first criterion, he or she has standing "if no one else has a greater interest in the outcome of the case and the issues are unlikely to be raised at all unless that particular plaintiff has standing to raise the issue"); *see*, Brief of Petitioner at 32-34. Even assuming that Mr. Graham's interests are the same as the general public's as the Air Board suggests, no other petitioner has a greater interest than he does. Thus, under Terracor, Mr. Graham has standing based on the interests he alleged to the Air Board in his petition to intervene. Finally, Mr. Graham's interests are readily distinguished from those of the general public – *inter alia*, Mr. Graham lives and eats produce from a garden located 2.5 miles from the incinerator.

In sum, the Air Board's statement of facts exposes its misunderstanding of the inquiry relevant to determining when a petitioner has the right to intervene. The Air Board's characterization of the facts also reveals its mistaken notions of what qualifies as the basis for standing under Utah and federal constitutional law.

Finally, in its statement of facts, the Air Board fails to point out that, because it did not contest Mr. Graham's assertions or otherwise consider evidence that counters his statements, the Board must take Mr. Graham's allegations as true. This is because, as the Air Board oft repeats, this is an on the record case, and the Board did not consider any evidence that counters Mr. Graham's assertions. Rather, the approach the Board adopted was one that was based on accepting Mr. Graham's allegations as true, while still denying him the right to intervene. Because the alleged facts establish Mr. Graham's right to intervene, the Air Board's denial of that right is an erroneous interpretation of the law and should be overturned.

ARGUMENT

The Air Board's argument does nothing to alter the conclusion that Mr. Graham is entitled to intervene in the WES matter. As established in his opening brief, Mr. Graham is entitled to intervene because he adequately alleged that his "legal interests" were "substantially affected by the formal adjudicative proceeding". Utah Code Ann. §63-46b-9.

As he previously argued, Mr. Graham is exactly the type of intervenor the legislature anticipated should be involved in the Board's formal adjudication. As already argued, the Board's reasoning otherwise –

particularly that Mr. Graham separate his interests from those of the public – is flawed. First, Utah Code Ann. §63-46b-9(2) says nothing about comparing Mr. Graham’s affected interests to the interests of anyone else and no such comparison is valid. An intervenor need not distinguish her or his interest from that of the general public.

Second, even under the standards used by the Board, Mr. Graham qualifies for intervention – his interest in the matter is different and more substantially affected than the interest of the general public. As Mr. Graham made clear, he lives but 2 ½ miles from the facility and is therefore “more” impacted by WES’s excessive emissions than all members of the public who live and/or spend less time further away from the Incinerator. Record at 7. Mr. Graham not only lives and breathes the air 2.5 miles from the WES facility, but he also eats vegetables, fruit, and herbs that he grows in his backyard garden 2.5 miles from the facility. Record at 7. Again, Mr. Graham has alleged an interest that he does not necessarily share with the general public.

Furthermore, as stated in his affidavit, Mr. Graham watches and appreciates birds on the Great Salt Lake and its tributary streams, important feeding grounds and rest stops for millions of migratory and resident birds. Record at 7. Again, Mr. Graham has distinguished his interests from the

general public. This is particularly true if all of Mr. Graham's allegations are taken in concert – the location of his home, his garden and his concern regarding the fate of the Great Salt Lake birds. There are few, if any, individuals in Utah that share all of these interests with Mr. Graham.⁴

The Air Board's arguments that Mr. Graham does not have standing to participate in the WES matter are also unpersuasive and do nothing to undermine the soundness of Mr. Graham's qualifications for standing as presented in his opening brief. See Brief of Petitioner at 28 – 37. As Mr. Graham already established, Utah's doctrine of standing is expansive and is not limited by the "case and controversy" requirement of Article III of the United States Constitution. Terracor v. Utah Board of State Lands & Forestry, 716 P.2d 796, 798 (Utah 1986).

To this end, the Utah Supreme Court has set forth three standards for determining whether a litigant has standing. See Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983). Importantly, **if any** of these conditions are met, the litigant **must be allowed** access to the courts. Id. First, plaintiff has standing if she or he can demonstrate "some distinct and palpable injury that

⁴ The Air Board seems to imply that Mr. Graham must be the "best" intervenor. But this is an impossible (and unconstitutional) test. Someone who lived 100 feet from the Incinerator and never left home may not be the best intervenor if someone else lives 50 feet from the Incinerator and never leaves home.

gives him [or her] a personal stake in the outcome of the legal dispute.”

Terracor, 716 P.2d at 799 (quoting Jenkins v. Swan, 675 P.2d at 1150).

Second, if the plaintiff does not meet the first criterion, he or she has standing “if no one else has a greater interest in the outcome of the case and the issues are unlikely to be raised at all unless that particular plaintiff has standing to raise the issue.” Terracor, 716 P.2d at 799. Third, a plaintiff who meets neither of the above criteria nonetheless has standing “if the issues are unique and of such great importance that they ought to be decided in furtherance of the public interest”. Id.

As he has already shown, on the basis of his allegations to the Air Board, Mr. Graham has standing to participate in the WES matter under each of these standards. As he alleged, Mr. Graham suffered distinct and palpable injury from WES’s emissions. At the very least, Mr. Graham adequately alleged that his reasonable concerns regarding the effect of the Incinerator emission on him, his garden and the Great Salt Lake adversely impacted his aesthetic and recreational sensibilities.

Moreover, it would be difficult to find a plaintiff who had a greater interest in the WES matter given the cumulative effect of the location of his home, the exposure of this garden and his concern with and sensitivity for the Great Salt Lake ecosystem. Indeed, the Air Board completely failed to

suggest an individual or type of individual who had more of an interest in the WES matter than Mr. Graham. The Air Board also failed to note how the issues relative to a property owner living near the Incinerator would be addressed should Mr. Graham and his ilk be denied intervention (or standing).

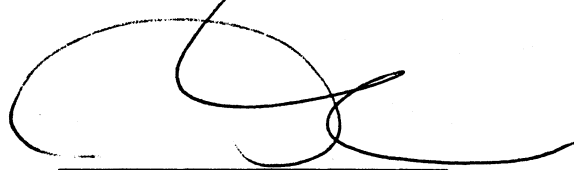
Finally, Mr. Graham raises unique issues of great public importance. The polluting of the heavily populated Wasatch Front and the critical Great Salt Lake ecosystem with deadly carcinogens and the failure of the Air Board to protect the public health and environment is certainly a matter of great public importance.

CONCLUSION

Thus, under the standard for intervention and for standing, Mr. Graham is entitled to participate in open government and agency-decision making in the manner the Utah Legislature intended when it provided for intervention in formal agency adjudications. For this reason, the Air Board's

decision to deny Mr. Graham's petition to intervene should be overturned,
and Mr. Graham's petition should be granted.

RESPECTFULLY SUBMITTED, this 16th day of October 2000.



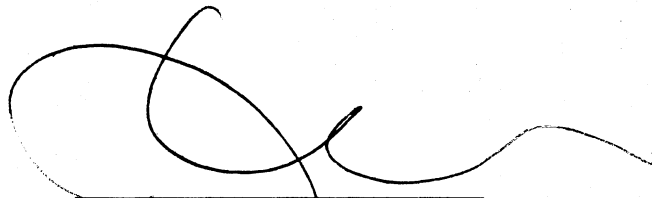
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CERTIFICATE OF MAILING

I hereby certify that on the 16th day of October 2000, I mailed a copy
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