

2008

Lawrence Brown, Marilyn Brown, Joseph Sorenson, Kathleen Sorenson v. The Division of Water Rights, The Department of Natural Resources, State of Utah, Jerry D. Olds, James A. McIntyre : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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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. :

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

(ORAL ARGUMENT REQUESTED)

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On a Writ of Certiorari to the Utah Court of Appeals

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MAY 05 2009

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## **PRELIMINARY STATEMENT**

This case arises out of a challenge to an informal adjudicative proceeding. Utah Code Ann. § 73-3-15 allows dismissal of a suit challenging an informal adjudicative proceeding for failure to prosecute the suit to final judgment within certain time periods. Where an appeal has been taken, the statute provides a three-year time period. Plaintiffs/appellants filed this action on December 15, 2006. Although plaintiffs/appellants do not believe the limitations in § 73-3-15 apply in a case involving an erroneous dismissal for lack of standing, out of an abundance of caution they nevertheless respectfully request that these proceedings be expedited so that, if the decision below is reversed, the case can be remanded to the district court in time to conclude trial and obtain a final judgment before December 15, 2009.

## **INTRODUCTION**

This appeal involves the legal requirements for standing in potential injury cases. The Browns, Sorensons, and McIntyre are neighbors living adjacent to Little Cottonwood Creek in Murray, Utah. McIntyre submitted an application to the State Division of Water Rights for a permit to build a bridge across the creek. The Browns and Sorensons (hereafter the “Neighbors”) opposed the application because the bridge would create a substantial risk of flooding and serious damage to their properties in times of high water flow. The Division granted the permit

anyway. The Neighbors then filed suit in the Third District Court against McIntyre and the Division challenging the decision and seeking injunctive relief.

McIntyre filed a motion to dismiss for lack of standing which the district court granted because, the court held, the Neighbors' alleged property injuries are only potential harms that have yet to occur and may not occur in the future. The court stated that "[i]f, down the road<sub>[,]</sub> construction of the bridge starts these possible [flooding] events in action, Plaintiffs would then have standing to assert their claims." *See* Addendum ("Add."), at 5, n.1 (memorandum decision). Until then, the district court held, the Neighbors lack standing. A divided panel of the Court of Appeals affirmed, holding that the Neighbors' complaint failed to supply proof that harm was impending or certain.

The majority decision below should be reversed because it misstates Utah law and sets an improperly high threshold for standing in cases involving potential injury to property. It is well established that risk of significant injury is sufficient for standing and that a party facing such risk need not wait until the harm actually occurs before seeking legal protection. *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). Granting standing

to those who face a real risk of harm to their properties from a neighbor's actions is fully consistent with the separation-of-powers concerns animating this Court's standing jurisprudence. By contrast, the rule established below – requiring a property owner to wait until the threatened harm becomes imminent or certain – is without precedent in Utah law and makes little practical sense; indeed, it would dramatically skew the law in favor of compensating completed harms over preventing them in the first place.

The Neighbors ask nothing more than an opportunity to protect their properties and homes by proving their claims in the ordinary course of litigation. The majority decision below improperly denied them that opportunity.

### **STATEMENT OF JURISDICTION**

This Court's jurisdiction arises under Utah Code Ann. §§ 78A-3-102(3) and (5).

### **ISSUES PRESENTED**

This Court's order of March 18, 2009 granted the Neighbors' petition for a writ of certiorari on the following issue:

**“Whether the majority of the panel of the court of appeals erred in affirming the district court's dismissal based on lack of standing.”**

This issue turns on two subsidiary issues:

1. Whether persons facing potentially serious harm to their properties and homes from a nearby property owner's actions have standing to sue to stop the harm before it occurs or whether, as the decision below holds, they must wait until the harm actually occurs or is imminent.

2. Whether allegations in a complaint that a nearby property owner's actions create a significant risk of serious property damage are sufficient to survive a motion to dismiss for lack of standing.

Standard of Review. Whether a plaintiff has standing under an undisputed set of facts is a question of law. The decision below affirming the trial court's dismissal of the complaint for lack of standing is reviewed for correctness on appeal. *See Sierra Club*, 2006 UT 74, ¶ 15; *see also Stocks v. United States Fid. & Guar. Co.*, 2000 UT App 139, ¶ 9.

Preservation. These issues was the subject of McIntyre's Motion to Dismiss, which the Neighbors opposed (R. 125-35), and of the decision below.

### **REPORT OF THE DECISION BELOW**

The decision of the Court of Appeals is reported at 195 P.3d 933, 2008 UT App 353. The slip opinion ("Op.") is contained in the Addendum. *See Add.* at 10.

## **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” is governed by traditional standing requirements. *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶¶ 11, 16.

## **STATEMENT OF THE CASE**

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

Plaintiffs/appellants Lawrence and Marilyn Brown and Joseph and Kathleen Sorenson (the “Neighbors”) brought this action in Third District Court against defendants/appellees State Engineer and Division of Water Rights of the Utah State Department of Natural Resources (collectively the “Division”) and real-party-in-interest James A. McIntyre (“McIntyre”) challenging the granting of a permit to build a bridge. A majority of a panel of the Court of Appeals affirmed the district court’s dismissal for lack of standing. This Court granted the Neighbors’ petition for a writ of certiorari on the standing issue.

### **B. Course of Proceedings.**

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, the Neighbors 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, pursuant to Utah Code Ann. § 63-46b-13 and Utah Admin. Code § R655-6-17, the Neighbors filed a request for reconsideration (R. 4, 41-44), which the Division denied on November 17, 2006 (R. 4, 89).

On December 15, 2006, the Neighbors filed their “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; *see also* Add. at 22 (complaint).) The complaint named the Division and McIntyre as defendants. On January 29, 2007, McIntyre filed a Motion to Dismiss claiming the Neighbors lacked standing (R. 112, 143), which the Neighbors opposed (R. 125).

On March 22, 2007, the Neighbors learned that McIntyre had commenced construction activities on the bridge. (R. 166.) The next day, March 23, 2007, the Neighbors filed a Motion for Temporary Restraining Order and Preliminary Injunction (R. 159), which the district court denied after an informal *in camera* hearing that same day (R. 212). The court made no findings of fact or conclusions of law. (*Id.*)

On April 20, 2007, the district court issued a Memorandum Decision granting McIntyre’s motion to dismiss. (R. 214-18.) On May 14, 2007, the district court entered an order dismissing all claims based on its ruling that the Neighbors lacked standing. (R. 220-21; *see* Add. at 7 (memorandum decision and order).)

The Neighbors filed a timely appeal. (R. 236, 239.) On October 2, 2008, a divided panel of the Court of Appeals affirmed the district court's ruling, Associate Presiding Judge William A. Thorne, Jr. dissenting. (*See Add.* at 10.) On March 18, 2009, this Court granted the Neighbors' petition for a writ of certiorari.

**C. Statement of Facts.**

Allegations in the Complaint. The Neighbors' complaint alleges the following well-pleaded facts, which are assumed true in this appeal from the grant of a motion to dismiss. *Haymond v. Bonneville Billing & Collections, Inc.*, 2004 UT 27, ¶ 5.

The Neighbors reside in Murray, Utah along Little Cottonwood Creek. (R. 2-3.) Their neighbor, McIntyre, obtained a permit from the Division to build – and eventually did build – a bridge across the creek. (R. 3.) The bridge spans an environmentally fragile area that has already experienced significant flooding and has a high risk of future flooding. (R. 3, 5.)

The bridge increases the existing flood risk and danger to the Neighbors' properties and those of nearby landowners. (R. 5.) Specifically, the bridge and 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 flood-related damage in the area where the Neighbors live. (R. 4-5.) In the event of flooding caused or



exacerbated by the bridge, the natural stream environment will be adversely affected or destroyed. (R. 5.)

The Neighbors hired an engineering firm, Secor International (“Secor”), to analyze the potential effects of building the bridge in its current location. (R. 5, 91.) The Secor Report of October 30, 2009, which was attached to the complaint, finds 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, 97; Add. at 40.) Water flows have previously exceeded the bridge’s one-foot clearance level. For example, on June 1, 1984, the flow through the creek would have exceeded the bridge’s height by 70%, with a water depth of 6.58 feet and water flow of 898 cubic feet per second. Such water levels would flow over and significantly increase the stress on the bridge as approved and now built. (*Id.*)

The Secor Report also finds that if flows like those in 1984 occur in the stream channel as altered by the bridge, the bridge could have a damming effect that causes the stream banks to overflow and inundate the first-level flood plains on both sides of the stream, causing significant erosion and damage to the Neighbors’ properties. (*Id.*) Because of the fragility of the land near the creek, there has already been subsidence of the Neighbors’ properties, which has caused foundation and settling cracks in their homes. (R. 6.) The Neighbors allege that the bridge will result in irreparable harm to their homes and properties. (*Id.*)

Subsequent Construction of the Bridge. On March 22, 2007, despite ongoing litigation in the district court, McIntyre began building his bridge. As noted, the district court denied the Neighbors' motion for TRO. (R. 159, 212.) The bridge has since been completed and the alleged risks are now literally set in concrete. *See Op.*, ¶ 15 n.2.

**D. The Majority Opinion and Dissent Below.**

A divided panel of the Court of Appeals (Judge Judith M. Billings writing for the majority) affirmed the ruling of the district court and held that the Neighbors lack standing to bring their claims. The majority recited the “traditional test” for standing, which “requires a plaintiff to show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute.” *Op.*, ¶ 6 (quoting *Washington County Water Conservancy Dist.*, 2003 UT, ¶ 20) (citations and internal quotation marks omitted). In determining whether the Neighbors had made such a showing, the majority focused exclusively on the first part of the three-part inquiry in *Sierra Club*, namely, whether the party has “assert[ed] that it has been or will be adversely affected by the [challenged] actions.” *Sierra Club*, 2006 UT 74, ¶ 19 (citations and internal quotation marks omitted); *Op.*, ¶ 7. Drawing from federal standing cases, the majority then reformulated this test as an examination of “whether Plaintiffs’ interests are ‘(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.’” *Op.*, ¶ 8 (quoting

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted)).

The majority agreed that the Neighbors have alleged a particularized interest satisfying the first requirement. It noted that the Neighbors “own property along Little Cottonwood Creek where McIntyre has built his bridge” and thus that “[t]heir property is at risk if there is significant flooding of Little Cottonwood Creek.” *Id.* ¶ 9.

As to whether the Neighbors’ interests are “actual or imminent,” the majority acknowledged the established rule “that threatened rather than actual injury can satisfy . . . standing requirements.” *Op.*, ¶ 10 (citations and quotation marks omitted). But ignoring *Sierra Club*’s analysis of this issue, the majority instead relied on federal civil rights cases for the notion that standing in potential-injury cases requires “an individualized showing that there is a very significant possibility that the future harm will ensue.” *Op.*, ¶ 10 (quoting *Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir. 1990)) (internal quotation marks omitted; emphasis omitted).

Reviewing the pleadings, the majority held that “[the] allegations [in the complaint] do not rise to the level of demonstrating an actual or imminent injury to Plaintiffs.” *Op.*, ¶ 13. The majority faulted the Neighbors because, rather than providing concrete proof, the complaint alleged “simply conclusory statements that

the bridge will alter Little Cottonwood Creek's natural stream flow and that Plaintiffs will suffer harm if a flood occurs.” *Id.* The problem, the majority said, was that “[t]he complaint simply provides the Plaintiffs’ opinions regarding their fears and concerns of a potential future harm.” *Id.*

We acknowledge that the complaint does assert some actual facts suggesting that a flood or high water flows would cause harm to Plaintiffs’ property. . . . Indeed, the engineer’s report attached to the complaint shows a danger of possible damage to Plaintiffs’ property if Little Cottonwood Creek’s water flows reach the same levels that they did in 1984. However, the potential dangers are contingent on key, unknown events – an increased water flow or a flood – which are dictated by unknown weather patterns. Essentially, Plaintiffs’ injury depends on “contingent future events that may not occur as anticipated or indeed may not occur at all.”

*Id.* ¶ 14 (citations omitted).

The majority found the Neighbors’ complaint deficient for “not ma[king] any other allegations or offer[ing] any other evidence that a similar flood is immediate or at least certainly impending” and for not alleging “what work was done to Little Cottonwood Creek after the 1984 flood to prevent future flooding in the area.” *Id.* ¶ 15 (citation and internal quotation marks omitted). And despite acknowledging that allegations in a complaint must be deemed true on a motion to dismiss, “with any inferences drawn in favor of the plaintiffs’ claims” (*id.* ¶ 5), the majority found the Neighbors’ allegations defective because they required the court “to infer what events might transpire to cause [the Neighbors] harm in the future.” *Id.* ¶ 15 (citation and internal quotation marks omitted). The majority

“conclude[d] that although Plaintiffs have demonstrated an individual, particularized interest in the construction of McIntyre’s bridge, they have not demonstrated that any potential injury to their property is actual or imminent. The threat of any harm to their property is too speculative because it is contingent on unknown future events.” *Id.* ¶ 16 (emphasis added).

Judge Thorne dissented because the majority failed to accept the allegations in the complaint as true, essentially adjudicating factual issues on a motion to dismiss: “[S]tanding issues may present questions of fact that need to be resolved through the ordinary adversarial process. In this case, both the degree and likelihood of harm alleged by Plaintiffs constitute such questions of fact.” *Id.* ¶ 18 (citation and quotation marks omitted) (Thorne, J., dissenting).

[T]he only question we should be considering on appeal is whether Plaintiffs’ complaint *alleges* sufficient harm to confer standing, not whether that harm actually exists. I believe that the complaint clearly meets this requirement. The complaint alleges that McIntyre’s bridge will cause “immediate and irreparable harm,” “increase the risk of flooding in the surrounding areas,” and “cause significant erosion and damage to the Plaintiffs and other property owners adjacent to the bridge” if that flooding occurs. Taking these allegations as true, there is no doubt in my mind that Plaintiffs have alleged individualized harm sufficient to confer standing in this matter.

*Id.* ¶ 20 (Thorne, J., dissenting) (emphasis in original).

Judge Thorne emphasized that such allegations had yet to be proven, and that the Neighbors would “still have to establish their alleged facts in order for the district court to ultimately have jurisdiction to consider their complaint. But, that

is a matter for trial, or perhaps summary judgment.” *Id.* ¶ 21 (Thorne, J., dissenting). The standing issue “should not have been resolved against Plaintiffs upon a motion to dismiss.” *Id.* (Thorne, J., dissenting). Judge Thorne concluded:

McIntyre’s bridge may or may not present the risk of harm alleged by Plaintiffs. However, Plaintiffs did allege that the bridge will increase the risk of significant damage to their property, and that is sufficient, in my opinion, to survive a motion to dismiss for lack of standing. In granting the motion, the district court improperly weighed the degree of risk alleged by Plaintiffs when it should have simply accepted the allegation of increased risk as true. In my opinion, this was error by the district court, and I would reverse the dismissal order and remand this matter for further proceedings.

*Id.* ¶ 22 (Thorne, J., dissenting) (footnote omitted, emphasis added).

### **SUMMARY OF THE ARGUMENT**

The law of standing exists to ensure that a plaintiff has a personal stake in the litigation rather than a general or ideological grievance. The primary concern is to avoid judicial conflict with the constitutionally-based policy-making powers of the legislature and executive. Standing requirements weed out those who lack a concrete interest in the case. But standing analysis is not intended to determine the merits of a lawsuit – the threshold is low. Under this Court’s jurisprudence, a party has standing at the pleading stage if it (1) alleges 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.

The Neighbors easily meet these requirements. The complaint alleges that McIntyre's bridge directly endangers not generalized or public interests but the Neighbors' own homes and properties. There is a close causal relationship between those potential injuries, Defendants' actions, and the injunctive relief the Neighbors seek. And the injunctive relief they seek would redress the threatened injury. Nothing more is required.

The majority opinion errs in holding that the Neighbors were required to demonstrate an "actual or imminent harm" to their properties to survive McIntyre's motion to dismiss. This was error on three grounds. Op., ¶ 11. First, this Court has held that even "potential" harm to person or property creates standing – a plaintiff need not wait until the risk materializes before suing. *Sierra Club*, 2006 UT 74, ¶ 29. Second, an increased risk of injury to person or property is itself an actual harm for standing purposes. And third, at the pleading stage the Neighbors' allegations that the bridge increases the risk of significant damage to their properties are more than enough to establish standing.

None of which is to say that the Neighbors will ultimately prevail on the merits. The strength of the Neighbors' claims is not at issue. The only question is whether they have alleged a sufficient stake in the outcome to satisfy the low threshold for standing. They plainly have.

## ARGUMENT

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

#### **A. Standard of Review.**

“Whether a plaintiff has standing is a question of law” and hence on appeal the court “accord[s] no deference to the ruling of the trial court.” *Stocks*, 2000 UT App, ¶ 9 (quotation marks omitted); *Sierra Club*, 2006 UT 74, ¶ 15; *Provo City Corp. v. Willden*, 768 P.2d 455, 456 (Utah 1989). Additionally, this case was dismissed on the pleadings under Rule 12(b)(6). (R. 252 at 12-13.) On a motion to dismiss, a court presumes the truth of 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> The same rule applies to the threshold issue of standing. “For purposes of ruling on a motion to 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). And “[b]ecause the propriety of a 12(b)(6) dismissal is a question of law, [the appellate court] give[s] the trial court’s ruling no deference and review[s] it under a correctness standard.” *St. Benedict’s Dev. Co.*, 811 P.2d at 196.

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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.”).



The plaintiff has the ultimate burden to prove standing, but “[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*, 504 U.S. at 561.<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 be necessary, which “would, in many cases, supplant the trial process on the merits of the underlying claim.” *Id.* In sum, this Court should accept as true the material allegations in the complaint and construe them and all reasonable inferences in favor of the Neighbors.

**B. General Standing Principles.**

In contrast with Article III standing in federal courts, standing under Utah law is not strictly a matter of jurisdiction but of prudence and judicial modesty. “Unlike the federal system, the judicial power of the state of Utah is not

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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)).

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). The overarching concern guiding this Court’s standing jurisprudence is “to protect the separation of powers under the Utah Constitution.” *Sierra Club*, 2006 UT 74, ¶ 12.

Standing is a concept “rooted in the historical and constitutional role of the judiciary” as one of three separate and equal branches of government. [Citation omitted.] Through our case law, we have developed the requirement that a party have standing in order “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.* ¶ 11 (quoting *Jenkins*, 675 P.2d at 1149). Standing doctrine helps ensure that litigants do not use the judiciary to decide public policy issues that are the constitutional prerogative of the political branches. Courts are best equipped to address real disputes among real parties with a real stake in the outcome rather than broad questions of policy.<sup>3</sup>

Hence, this Court requires only that a plaintiff have a “personal stake in the outcome of the legal dispute.” *Jenkins*, 675 P.2d at 1148. Adverse parties with specific interests at stake ensure that the court has “a concrete factual context

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<sup>3</sup> This Court in *Sierra Club* underscored that separation-of-powers concerns lie at the heart of the standing analysis when it repeatedly emphasized that granting standing to two of the plaintiffs in that case would not encroach on the policy-making prerogatives of the executive or legislature and would not open the court doors to those with merely generalized grievances. *See Sierra Club*, 2006 UT, ¶¶ 11, 12, 17, 25, 26, 28.

conducive to a realistic appreciation of the consequences of judicial action.” *Id.* at 1149 (quotation marks and citation omitted). “It is generally insufficient 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 ensure 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.*, 2003 UT, ¶ 1130. The traditional test has three elements:

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).

**C. Sierra Club Establishes That Potential Harm to Person or Property Gives Rise to Standing Under Utah Law.**

This Court has already addressed standing in cases involving potential injury to person or property. In *Sierra Club*, the Sierra Club sought judicial review of a permit allowing a power company to build a coal-fired power plant in the vicinity of the Colorado Plateau. 2006 UT 74, ¶ 2. To support its standing, the Sierra Club submitted affidavits from three of its members. This Court held that two of the three had standing. One, Mr. Cass, alleged that the plant's future emissions would impair visibility (thus harming his videographer business), decrease the value of his property, and impair his health. *Id.* ¶ 4. The second, Ms. Roberts, alleged that future emissions would contaminate the soil, damage the crops of her farm, and affect her health and that of her children and neighbors. *Id.* ¶ 5.

Although these alleged injuries were based on fears of potential future effects, this Court had no trouble finding standing based on the fact that the alleged injuries were particular to them rather than society at large:

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 (emphasis added). The fact the alleged injuries were merely potential harms in no way undermined standing. This Court specifically concluded that Mr. Cass's and Ms. Roberts's concerns about potential health risks were alone

sufficient to confer standing – even before the harm actually developed or became imminent and despite the fact that the alleged harm might never develop:

We reject the suggestion that a party must identify a risk to an existing health condition in order to have standing. 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). By contrast, the third Sierra Club member had alleged only a generalized concern that was insufficient for standing: “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).

The majority below failed to address *Sierra Club*’s holding regarding potential injury. The rule it established is erroneous because, contrary to *Sierra Club*, it denies standing in potential injury cases. It requires a plaintiff to demonstrate an “actual or imminent” injury (Op., ¶ 16 (emphasis added)) rather than an “actual or potential injury.” *Sierra Club*, 2006 UT 74, ¶ 27 (emphasis added). The majority below essentially redefines “potential” to mean “imminent,” which is a much higher hurdle to overcome – at least as defined by the majority. Applying this more onerous standard, the majority held that the Neighbors lack standing despite acknowledging that “[i]t is clear from the complaint that [the

Neighbors] have a personal interest in the dispute” because “[t]heir property is at risk if there is significant flooding of Little Cottonwood Creek.” Op., ¶ 9.

If the majority’s high threshold had been the standard in *Sierra Club*, this Court would have been forced to deny standing because no one could show that an unconstructed power plant – one that might not be built for years – threatened “imminent” injuries to the health or property of specific individuals. Indeed, all the alleged health injuries this Court found sufficient for standing were mere risks (potential outcomes) that depended on unknown physiological reactions to various types of emissions. There was no suggestion in *Sierra Club* that anyone alleged a unique or documented health issue with the specific type of pollution the plant would emit. In fact, this Court rejected such a requirement. *Sierra Club*, 2006 UT 74, ¶ 29 (“We reject the suggestion that a party must identify a risk to an existing health condition in order to have standing.”). The plaintiffs alleged nothing more than potential and basically unknowable future risks created by the proposed power plant – there was never any assurance that the alleged future harms would occur. Yet this Court had no hesitation finding standing for the two plaintiffs who had alleged “potential harms” that were “particular to them.” *Id.* ¶¶ 24, 28. Unlike the majority below, this Court did not assess the seriousness of the risk or the likelihood that potential harms might occur, implicitly recognizing that such questions go to the merits of the case and not to standing.

This Court should reject the rule established by the majority below because it will result in dismissals based on standing in numerous cases seeking to prevent potential harms. Those, like the Neighbors, with compelling personal reasons to fear that nearby construction will result in serious damage to their properties in the event of flooding, earthquake, mudslides, or other natural and largely unpredictable phenomena will rarely be able to show that such risks are “imminent” – in the sense of “about to occur” – before it is too late for legal action and their properties are irreparably damaged or destroyed. Claims that a proposed building suffers from structural defects that create risks of severe harm to neighbors’ properties or persons would be dismissed at the pleading stage without ever reaching the merits. Potential environmental injuries – often based on projected health risks with potentially serious but ultimately uncertain future effects – could never be litigated before they materialized as specific injuries in specific individuals and thus were too late to stop. The decision below fundamentally conflicts with this Court’s standing jurisprudence and sound judicial policy.

**D. Federal Courts Also Recognize Standing in Cases Involving Merely Potential Harm.**

The majority below essentially ignored *Sierra Club* and instead relied heavily on what the court incorrectly understood to be federal standing law. *See* Op., ¶¶ 8-10, 14-15. Although federal standing law is more restrictive than Utah law because of Article III, federal courts have long held that a risk to health or

property is itself a type of actual injury sufficient to give rise to standing. “Courts have . . . left no doubt that threatened injury . . . is by itself injury in fact.” *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149, 160 (4th Cir. 2000) (potential environmental injury); *see also 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.”). “Threats or increased risk thus constitutes cognizable harm.” *Friends of the Earth, Inc.*, 204 F.3d at 160. The Fourth Circuit noted that although such threats are “probabilistic,” even so “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).

Federal courts have also recognized that the likelihood of the potential injury does not have to be great to confer standing under Article III. In *Natural Resources Defense Council v. EPA*, 464 F.3d 1 (D.C. Cir. 2006), the D.C. Circuit held that even a 1 in 200,000 risk that someone will develop nonfatal skin cancer as a result of an EPA rule was sufficient injury-in-fact for standing. The court acknowledged the same “actual or imminent, not ‘conjectural’ or ‘hypothetical’” language relied on by the majority below in this case. *Id.* at 6 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) and *City of Los Angeles v. Lyons*, 461 U.S.



95, 101-02 (1983)); Op., ¶ 10. But it explained that federal courts nevertheless allow standing based on “probabilistic” health or property injuries if plaintiffs “demonstrate a ‘substantial probability’ that they will be injured.” 464 F.3d at 6 (citations omitted). The court held that a 1 in 200,000 risk was substantial enough.

Likewise, 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 nearby creek. The Village asserted that the creek was “flood-prone” and that the 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 (citing *Pennell v. San Jose*, 485 U.S. 1 (1988), and *Bryant v. Yellen*, 447 U.S. 352 (1980)) (emphasis added).

In *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996), the court found standing based on a moderate increase in the risk of forest fires due to a logging plan approved by the Forest Service. Standing is proper, the court held, where the risk is “non-trivial” and “sufficient . . . to take a suit out of the category of the hypothetical.” *Id.* at 1234-35. The court observed 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.* at 1234.

The United States Supreme Court recently cited *Village of Elk Grove and Mountain States Legal Foundation* with approval in holding that the risks to a state’s sovereign territory of uncertain harms due to global warming can give rise to standing. *See Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 1458 n.23 (2007). Earlier, the High Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), allowed a suit to go forward where plaintiffs sued over approval of a new nuclear power plant. Part of their alleged injuries was the risk of a nuclear accident. Rejecting the assertion that the claim was not ripe (a closely related inquiry under Article III) because “no nuclear accident has yet occurred,” the Supreme Court held that the legal issues were sufficiently concrete to be ready for decision. 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 be imminent before a plaintiff can sue to prevent future harm.

The rule of these and other federal decisions overlooked by the court below is that “the injurious nature of risk itself” is an injury-in-fact for purposes of standing in cases involving potential injury to person or property. *Friends of the Earth, Inc.*, 204 F.3d at 160. Where that risk is non-trivial, standing is proper.

Federal decisions also recognize that proving the quantum of the increased risk of harm goes to the merits of the claim and generally should not be addressed as a matter of standing. 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 of aortic bypass stenosis. *Id.* at 570. The trial court held that 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 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>4</sup> Just like this Court in *Sierra Club*, the *Sutton* court 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 physical injury before allowing any redress whatsoever is both overly harsh and economically inefficient.” *Id.*; see *Sierra Club*, 2006 UT 74, ¶ 29 (“[W]e see no reason why these residents must actually develop a health problem before they have standing.”).

In a related vein, because of the injurious nature of risk itself, proving the inevitability and immediacy of the ultimate injury is not a prerequisite 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 a prison had standing. The court reasoned that the defendant “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].” On the contrary, the court held, “[o]ne need not wait for the

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<sup>4</sup> Consistent with federal decisions, this 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”).

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).

These federal decisions are consistent with this Court’s holding in *Sierra Club* and eminently sensible. The principle that risk of future harm to person or property is itself injurious comports with common sense. An increased risk of future damage to property – such as from an increased flood risk to a home – necessarily decreases the current value of the property, increases the costs of insurance, creates costs to ameliorate the risk, and decreases the enjoyment of ownership. These are real, not hypothetical, harms. If impairment of a person’s enjoyment of purely aesthetic things is enough for standing (*Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)), the same must be true of acts that diminish the physical integrity, value, safety, and enjoyment of one’s own home.

The majority decision below creates needless conflict with federal decisions recognizing “the injurious nature of risk itself.” *Friends of the Earth, Inc.*, 204 F.3d at 160. It relies on inapplicable language from federal cases rejecting speculative claims about future government infringement of personal or civil rights, such as the unpublished decision in *Resident Councils of Washington v. Thompson*, 2005 WL 1027123 (W.D. Wash.) (“*Resident Councils*”). *See Op.*, ¶ 10. In fact, the majority decision basically repeats the analysis in *Resident*

*Councils*. Plaintiffs there sought to prohibit the federal government “from implementing regulations which would permit the use of paid feeding assistants in nursing homes” because they believed the assistants lacked proper training. 2005 WL 1027123, p. \*1. But it was entirely “speculative” whether any of the individual plaintiffs would ever be affected by the regulations. *Id.* at p. \*4. Four of the five individual plaintiffs didn’t require feeding assistance and might never in the future. The fifth required such assistance but her condition made her “ineligible for feeding assistant aid” under the challenged regulations. *Id.* at p. \*4. Lacking even a present risk of harm, the court denied standing.

The other cases the opinion quotes involved civil rights claims based on flimsy speculation about future government infringements or claims based on legislation that had yet to pass.<sup>5</sup> None of these cases involved an actual, present

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<sup>5</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (denying standing for equitable relief based on speculative fears that police would use illegal chokehold during potential future stop for traffic violation or other offense; “The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.”) (internal quotation marks omitted); *Nelsen v. King County*, 895 F.2d 1248, 1252 (9<sup>th</sup> Cir. 1990) (denying standing in civil rights case against alcohol treatment center by former residents because “the threat of future harm to [plaintiffs] is based upon an extended chain of highly speculative contingencies,” including that plaintiffs would again become indigent alcohol abusers); *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 606 (D.C. Cir. 1996) (denying standing to sue FBI for mere retention of information files on plaintiffs because “speculative at best” that any injury would occur; “Such ‘someday’ injuries are insufficient.”); *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (third party lacks standing to challenge death sentence imposed on capital defendant who waived appeal rights where alleged interest is third party’s desire that criminal database be complete for purposes of evaluating his own

risk of injury such as exists here. The foregoing review demonstrates that even under Article III's more restrictive standing requirements numerous federal decisions have found standing based on potential injury to person or property. The opinion below sets too high a hurdle for standing based on a misreading of federal case law.

**E. The Complaint Establishes the Neighbors' Standing.**

The complaint alleges all that is necessary under the traditional test to establish standing at the pleading stage: the Neighbors allege that (1) they “ha[ve] been or will be adversely affected by the challenged actions”; (2) there exists “a causal relationship between the injury to [them], the challenged actions, and the relief requested”; and (3) “the relief requested [is] substantially likely to redress the injury claimed.” *Sierra Club*, 2006 UT 74, ¶ 19 (internal quotation marks and citations omitted).

**1. The Neighbors have alleged particularized injuries.**

The complaint alleges specific potential harms to the Neighbors' properties. It claims that the permit authorizes construction of a bridge that will reduce the

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capital crime in potential future sentencing proceedings); *LPA Inc. v. Chao*, 211 F.Supp.2d 160 (D.D.C. 2002) (no standing because no state has enacted the challenged legislation; “[T]he injury plaintiffs seek to avoid is too speculative to satisfy the standing requirements.”); *see also Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 580 (1985) (ripeness decision: challenge to constitutionality of federal arbitration requirement ripe because plaintiff “has been or inevitably will be subjected to” the requirement). The majority cites all of these cases in paragraphs 10 and 14-15 of the decision below.

natural stream channel's ability to conduct high water flows, heighten the potential for damming, and thus increase the risk of significant flood-related damage to the Neighbors' properties. (R. 4-5.) In the event of flooding caused or exacerbated by the bridge, the Neighbors allege that the natural stream environment will be adversely affected and potentially destroyed. (R. 5.)

In a preliminary analysis, the Secor Report of September 18, 2006 (also attached to the complaint) provided context for these allegations:

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 (Photos 7 and 8), 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. 67 (emphasis added); Add. at 32.)

Currently, a steep, exposed hill, devoid of plant growth, grass or any foliage, lies directly to the east between the Browns' home and the Creek. That escarpment provides lateral support to the Browns' home. Over time, erosion has



worn away the hill exposing alluvial soils at its base to the ever-running flow of the creek. (R. 25.) The escarpment is the west bank of the creek, just down grade from the proposed bridge and thus would be directly affected by any flooding. Erosion to the escarpment has already caused significant settlement and signs of collapse on the Browns' property and in their home. (R. 6, 67.) 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. (R. 6, 17, 67.) 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, flooding of the creek will impair the integrity of the ground supporting the Neighbors' homes. The bridge directly increases the risk of such flooding and thus of "significant property damage or worse." (R. 67.)

These allegations are more than enough to establish standing. Like the two plaintiffs in *Sierra Club*, the Neighbors have "allege[d] that [they have] 'suffered or will suffer[] some distinct and palpable injury that gives [them] a personal stake in the outcome of [this] legal dispute.'" *Id.* ¶ 19 (quoting *Jenkins*, 675 P.2d at 1148). Like the plaintiffs in *Sierra Club*, the Neighbors have a "personal stake in the outcome of the dispute" even though they face "potential harms" and "potential

injuries” rather than completed harms. *Id.* ¶¶ 23, 24, 26, 27, 29. Like the plaintiffs in *Sierra Club*, the Neighbors “are alleging private, rather than public, injuries.” *Id.* ¶ 24. And as in *Sierra Club*, the Neighbors “have a direct interest in the dispute as their . . . property values are at stake.” *Id.* ¶ 26. Judge Thorne accurately observed that “[the Neighbors] did allege that the bridge will increase the risk of significant damage to their property, and that is sufficient . . . to survive a motion to dismiss for lack of standing.” *Op.*, ¶ 22 (Thorne, J., dissenting).

Moreover, this case presents “no concern about courts . . . resolving questions that are best left to the other branches of government.” *Sierra Club*, 2006 UT 74, ¶ 26. The Neighbors are not “expressing generalized concerns about the [bridge’s] impact on the public at large.” *Id.* ¶ 28. They do not seek to use the courts to wage a “political or ideological dispute[] about the performance of government.” *Id.* ¶ 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.*, 204 F.3d at 157. They seek only to protect their homes and properties by judicial application of existing law to the specific facts of this case. A more traditional and appropriate context for invoking the jurisdiction of the courts is hard to imagine.

The alternative to granting standing here is the rule McIntyre advocated, which the district court adopted and the majority below affirmed. At the hearing on the Motion to Dismiss, the following exchange took place between the district court and McIntyre:

THE COURT: Assuming I grant your motion to dismiss and then the worst 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.

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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.

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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.)

In this understanding, potential plaintiffs must sit back and wait until the worst-case scenario is impending before they can petition the courts to protect them and their properties. That is not Utah law. Under all relevant precedent, the Neighbors have alleged a particularized injury.

## **2. The Complaint alleges causation.**

In *Sierra Club*, this Court had no difficulty finding sufficient allegations of causation: “Because the Executive Secretary [was] responsible for denying or granting permits for the construction and operation of the plant,” this 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 same is true here. The Neighbors’ injuries are directly caused by the Division’s approval of the permit to build the bridge. And the Neighbors have pointed to specific aspects of the bridge that will cause specific harms. The causation element of the test is not in dispute.

## **3. The relief the Neighbors seek would redress their injuries.**

Lastly, the Neighbors’ injuries are redressable, just like the injuries in *Sierra Club*:

[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.

Again, the same holds here. The Division has the authority to revoke the permit granted McIntyre and the district court has the authority to grant the equitable relief the Neighbors seek should they prevail on their claims. Such relief would immediately redress the injuries the Neighbors 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.

## **II. THE MAJORITY OPINION IS CONTRARY TO BEDROCK LAW GOVERNING MOTIONS TO DISMISS.**

Judge Thorne's dissent convincingly demonstrates that the majority opinion conflicts with basic standards of notice pleading and the legal assumption that factual allegations in the complaint are assumed true on a motion to dismiss. *See Op.*, ¶¶ 18-22 (Thorne, J., dissenting). Like the trial court before it, the majority essentially weighed the "evidence" in the complaint and then faulted the Neighbors for pleading "conclusory statements" (*id.* ¶ 13), for not providing "evidence that a similar flood is immediate" or impending, and for not supplying facts about "what

work was done to Little Cottonwood Creek [since 1984] to prevent future flooding.” *Id* ¶ 15.

Of course, the Neighbors never had an opportunity to present such evidence, and none of this is remotely necessary to plead standing. “[U]nder Utah’s liberal notice pleading requirements, all that is required is that the pleadings be sufficient to give fair notice of the nature and basis of the claim asserted and a general indication of the type of litigation involved.” *Fishbaugh v. Power & Light*, 969 P.2d 403, 406 (Utah 1998). These minimal requirements apply when pleading standing. *See Sierra Club*, 2006 UT 74, ¶ 32 (allegations of standing are “all that is required at this phase”). And “for purposes of evaluating a motion to dismiss, the facts alleged in the complaint are to be considered as true, with any inferences drawn in favor of the plaintiffs’ claims.” *Haymond*, 2004 UT 27, ¶ 5. Thus, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice [to establish standing].” *Lujan*, 504 U.S. at 561.

As Judge Thorne correctly summarized, the Neighbors’ allegations were more than sufficient under these standards:

The complaint alleges that McIntyre’s bridge will cause “immediate and irreparable harm,” “increase the risk of flooding in the surrounding areas,” and “cause significant erosion and damage to the Plaintiffs and other property owners adjacent to the bridge” if that flooding occurs. Taking these allegations as true, there is no doubt in my mind that Plaintiffs have alleged individualized harm sufficient to confer standing in this matter.

Op., ¶ 20 (Thorne, J., dissenting). To be sure, as Judge Thorne observed, “both the degree and likelihood of harm alleged by [the Neighbors] constitute . . . questions of fact.” *Id.* ¶ 19 (Thorne, J., dissenting). “Plaintiffs still have to establish their alleged facts in order for the district court to ultimately have jurisdiction to consider their complaint. But, that is a matter for trial, or perhaps summary judgment,” and not for a motion to dismiss. *Id.* ¶ 21 (Thorne, J., dissenting). The majority opinion “improperly weighed the degree of risk alleged by [the Neighbors] when it should have simply accepted the allegation of increased risk as true.” *Id.* ¶ 22 (Thorne, J., dissenting). Judge Thorne was exactly right.

Hence, in addition to misstating and misapplying the test for standing, the decision below is contrary to basic principles governing the pleading of standing and the adjudication of motions to dismiss. The majority opinion would result in the improper dismissal of numerous lawsuits for failure to plead standing with great specificity.

### **CONCLUSION**

On June 5, 1976, the Teton Dam burst, resulting in 11 deaths, more than \$300 million in damages, and the entire destruction of small towns.<sup>6</sup> The odds of such a catastrophe were so slim that there was really no opposition to the project.

---

<sup>6</sup> See Teton Dam, Wikipedia: The Free Encyclopedia at [http://en.wikipedia.org/w/index.php?title=Teton\\_Dam&oldid=285094438](http://en.wikipedia.org/w/index.php?title=Teton_Dam&oldid=285094438) (last visited May, 4, 2009).

Even as water started seeping through the dam, Bureau of Reclamation engineers overseeing the project saw no real threat and did not warn homeowners along the Snake River. Under the rule adopted by the majority below, homeowners living in the shadow of the Teton Dam would not have had legal standing to challenge its construction. The mere risk that the dam would break would not be enough. Standing would arise only when the deluge was imminent or certain, and a lawsuit too late to prevent disaster. That is not Utah law – nor should it be.

This Court should reverse the majority decision below and remand the case for further proceedings on the merits.

**REQUEST FOR ORAL ARGUMENT**

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

DATED this 5th day of May, 2009.

KIRTON & McCONKIE

A handwritten signature in black ink, appearing to read "Benson L. Hathaway, Jr.", written over a horizontal line.

Benson L. Hathaway, Jr.

Alexander Dushku

Peter C. Schofield

Justin W Starr

*Attorneys for Appellants/Plaintiffs*



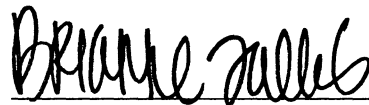
**CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of May, 2009, 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**

## **TABLE OF CONTENTS**

### **Judicial Decisions**

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### **Pleadings**

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And Agency Action and Complaint for Injunctive  
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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 [Signature] 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.

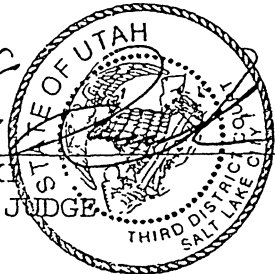
With respect to McIntyre's arguments regarding injunctive relief, Plaintiffs assert they do not at this time seek either a Temporary Restraining Order or a Preliminary Injunction. Rather, assert Plaintiffs, they request that the Court grant permanent injunctive relief as a remedy due to the damage that 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 out 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



---

<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<br>Defendant<br>3838 SOUTH WEST TEMPLE<br>SUITE 3<br>SLC, UT 84115                                |
| Mail   | BENSON L HATHAWAY JR<br>Attorney PLA<br>60 E SOUTH TEMPLE STE 1800<br>POB 45120<br>SALT LAKE CITY UT<br>84145-0120 |
| Mail   | JULIE I VALDES<br>Attorney DEF<br>1594 W N TEMPLE STE 300<br>POB 140855<br>SALT LAKE CITY UT<br>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)  
**KIRTON & McCONKIE**  
1800 Eagle Gate Tower  
60 East South Temple  
P.O. Box 45120  
Salt Lake City, UT 84145-0120  
Telephone: (801) 328-3600

*Attorneys for Petitioners/Plaintiffs*

**FILED DISTRICT COURT**  
Third Judicial District

MAY 14 2007  
SALT LAKE COUNTY  
By  Deputy Clerk

---

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

---

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

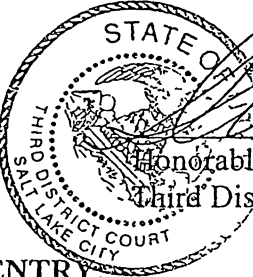
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Based upon the Memorandum Decision issued by the Court on April 20, 2007, granting Defendant James A. McIntyre's Motion to Dismiss Petitioners' Petition and Complaint, and based upon the Court's finding that Petitioners/Plaintiffs lack standing in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

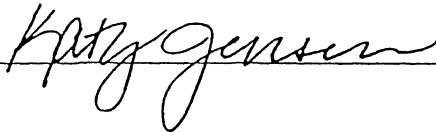
I hereby certify that on this 10<sup>th</sup> day of May 2007, a true and correct copy of the foregoing **ORDER OF DISMISSAL** was served on the following by the method indicated below:

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  
Utah Attorney General  
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Salt Lake City, UT 84116

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

  
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RECEIVED

OCT - 6 2008

This opinion is subject to revision before  
publication in the Pacific Reporter.

FILED  
UTAH APPELLATE COURTS

OCT 02 2008

KIRTON & McCONKIE IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Lawrence Brown, Marilyn Brown, )  
Joseph Sorenson, and Kathleen )  
Sorenson, individuals, )

Plaintiffs and Appellants, )

v. )

Division of Water Rights of )  
Department of Natural )  
Resources; Jerry D. Olds, in )  
his capacity as the Utah State )  
Engineer; and James A. )  
McIntyre, an individual, )

Defendants and Appellees. )

OPINION  
(For Official Publication)

Case No. 20070474-CA

F I L E D  
(October 2, 2008)

2008 UT App 353

-----

Third District, Salt Lake Department, 060920127  
The Honorable Glenn K. Iwasaki

Attorneys: Alexander Dushku, Benson L. Hathaway, Peter C.  
Schofield, and Justin W. Starr, Salt Lake City, for  
Appellants  
Sarah E. Viola, Salt Lake City, for Appellee McIntyre

-----

Before Judges Thorne, Billings, and Davis.

BILLINGS, Judge:

¶1 Plaintiffs Lawrence Brown, Marilyn Brown, Joseph Sorenson, and Kathleen Sorenson appeal the trial court's order dismissing their case against Defendants James A. McIntyre, the Division of Water Rights of the Department of Natural Resources (the Division), and Jerry D. Olds in his capacity as the Utah State Engineer, for lack of standing. We affirm.

#### BACKGROUND

¶2 Plaintiffs and McIntyre are neighbors with property along Little Cottonwood Creek. McIntyre has property located on both sides of Little Cottonwood Creek. In August 2006, McIntyre filed

an application with the Division to construct a bridge across the creek to connect the two parts of his property. Plaintiffs submitted an objection to McIntyre's application in September 2006. In October 2006, the Division approved McIntyre's application; Plaintiffs subsequently submitted a request for reconsideration of the Division's approval. The Division denied the request for reconsideration in November 2006.

¶3 On December 15, 2006, Plaintiffs filed a Petition for Judicial Review of Informal Administrative Proceedings and Agency Action and Complaint for Injunctive Relief (the Complaint) in the Third District Court, challenging the Division's grant of McIntyre's application. Specifically, Plaintiffs alleged that the bridge McIntyre proposed to build would "alter [Little Cottonwood Creek's] channel, and thereby diminish the natural channel['s] ability to conduct high water flows, heighten the potential for damming, and thus increase the risk of flooding" and the damage caused by flooding in the area where Plaintiffs reside. Plaintiffs claimed that the location of the bridge was "in an area of high flood risk" and that "in the event flooding occur[red] due in whole or in part to the construction of the proposed bridge, the natural [creek] environment [would] be adversely affected and potentially destroyed by the invading flood waters."

¶4 In response to the Complaint, McIntyre filed a Motion to Dismiss, claiming that Plaintiffs lacked standing. While McIntyre's Motion to Dismiss was pending, Plaintiffs filed a Motion for a Temporary Restraining Order and Preliminary Injunction. The trial court denied that motion in March 2007. In April 2007, the trial court granted McIntyre's Motion to Dismiss. Plaintiffs now appeal.

#### ISSUE AND STANDARD OF REVIEW

¶5 On appeal, Plaintiffs argue that the trial court erred when it granted McIntyre's Motion to Dismiss for lack of standing. "[T]he question of whether a given individual . . . has standing to request a particular [form of] relief is primarily a question of law . . . ." Washington County Water Conservancy Dist. v. Morgan, 2003 UT 58, ¶ 18, 82 P.3d 1125 (second alteration in original) (internal quotation marks omitted). Generally, "for purposes of evaluating a motion to dismiss, the facts alleged in the complaint are to be considered as true, with any inferences drawn in favor of the plaintiffs' claims." Haymond v. Bonneville Billing & Collections, Inc., 2004 UT 27, ¶ 5, 89 P.3d 171. However, in this case we look at more than just the statements and allegations made in the complaint because Plaintiffs attached an engineer's report to their complaint. Therefore, we

acknowledge that "there may be factual findings that bear on the issue [of standing]," and we review those factual findings "with deference." Berg v. State, 2004 UT App 337, ¶ 5, 100 P.3d 261 (internal quotation marks omitted).

#### ANALYSIS

¶6 Under Utah law, a plaintiff "must have standing to invoke the jurisdiction of the court." Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983). "[T]he first and most widely employed standard for establishing standing" is also referred to as the "traditional test for standing." Morgan, 2003 UT 58, ¶ 20 (internal quotation marks omitted). This test "'requires a plaintiff to show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute.'" Id. (quoting National Parks & Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 913 (Utah 1993)).

¶7 We use a three-part inquiry to determine whether a party has suffered such a distinct and palpable injury:

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."

Utah Chapter of the Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶ 19, 148 P.3d 960 (alterations in original) (quoting Jenkins, 675 P.2d at 1149-50). If a party can satisfy all three parts of this inquiry, then it has standing to pursue its claims. See id.

¶8 We begin by addressing the first part of this three-part inquiry--whether Plaintiffs have been or will be adversely affected by McIntyre's bridge. To make this determination, we examine whether Plaintiffs' interests are "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted); see also Sierra Club, 2006 UT 74, ¶ 20 (noting that the plaintiff must have "'a real and personal interest in the dispute'" (quoting Jenkins, 675 P.2d at 1150)).

¶9 The United States Supreme Court has noted that a particularized injury is one that "affect[s] the plaintiff in a

personal and individual way." Lujan, 584 U.S. at 560, n.1. It is clear from the complaint that Plaintiffs in this case have a personal interest in the dispute. They own property along Little Cottonwood Creek where McIntyre has built his bridge. Their property is at risk if there is significant flooding of Little Cottonwood Creek. Thus, Plaintiffs have a personal interest in the construction of McIntyre's bridge.

¶10 The requirement that the injury be actual or imminent is more troublesome. "The 'Supreme Court has consistently recognized that threatened rather than actual injury can satisfy . . . standing requirements.'" Harris v. Board of Supervisors, 366 F.3d 754, 761 (9th Cir. 2004) (quoting Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000) (en banc)). However, "when standing is based upon the threat of future injury, a plaintiff must show that the threat of injury is both real and immediate, not conjectural or hypothetical." Resident Councils of Wash. v. Thompson, No. C04-1691Z, 2005 U.S. Dist. LEXIS 33630, at \*11 (D. Wash. May 2, 2005) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)). There is no specific formula for determining when a future threat of injury qualifies as real or immediate. See id. Such a determination is individual and must be determined on a case-by-case basis. See Nelsen v. King County, 895 F.2d 1248, 1251 (9th Cir. 1990). However, "what a plaintiff must show is not a probabilistic estimate that the general circumstances to which the plaintiff is subject may produce future harm, but rather an individualized showing that there is a very significant possibility that the future harm will ensue." Id. at 1250 (emphasis added) (internal quotation marks omitted).

¶11 In determining whether Plaintiffs have suffered an actual or imminent harm, we review both Plaintiffs' complaint and the attached engineer's report. In Berg v. State, 2004 UT App 337, 100 P.3d 261, this court recognized a need to review "factual findings that bear on the issue [of standing]." Id. ¶ 5. In Berg, the State filed a motion to dismiss for lack of standing. See id. ¶ 3. Attached to the motion was a sworn affidavit from the Utah Attorney General stating specific facts regarding the standing issue. See id. The affidavit was reviewed by both the trial court and the appellate court in determining that the plaintiff did not have standing. See id. ¶¶ 4, 10. Similarly, we also review certain facts that bear on the standing issue in this case.

¶12 We conclude that Plaintiffs' claim is too speculative to amount to an actual or imminent injury. Plaintiffs' complaint makes the following allegations:



19. The approved bridge will . . . diminish the stream[']s ability to conduct high water flows and thereby increase risk and danger of flooding, and in the event flooding occurs, the surrounding stream environment will be unnecessarily and adversely affected.

20. Construction of the proposed bridge and access ramps will alter the streams channel, and thereby diminish the natural channel['s] ability to conduct high water flows, heighten the potential for damming, and thereby increase the risk of flooding in the surrounding areas.

21. As observed in the Spring of 1984, the location of the bridge is already in an area of high flood risk. The approved bridge, if constructed, will only enhance the already high flood risk and danger to . . . Plaintiffs' . . . properties.

22. In the event flooding occurs due in whole or in part to the construction of the proposed bridge, the natural stream environment will be adversely affected and potentially destroyed by the invading flood waters.

. . .

24. The [engineer's report] demonstrates that . . . [w]ater flow like that experienced in 1984 would flow over, and significantly increase the stress on, the bridge as approved.

25. The [engineer's report] . . . demonstrates that if flows similar to those in 1984 are experienced in the stream channel . . . the erosion could cause the stream banks to overflow and inundate the first level flood plains on both sides of the stream in the vicinity of the bridge. Such an event will cause significant erosion and damage to . . . Plaintiffs[' property].

. . .

28. Plaintiffs have already observed subsidence of their property in areas close to . . . Little Cottonwood Creek.

29. Additionally, Plaintiffs have observed foundation and settling cracks on structures located on the property as a result of the subsidence of the areas near . . . Little Cottonwood Creek.

30. The construction of a bridge in this environmentally fragile area will result in irreparable harm and damage to . . . Plaintiffs and their property.

¶13 These allegations do not rise to the level of demonstrating an actual or imminent injury to Plaintiffs. The majority of the allegations are simply conclusory statements that the bridge will alter Little Cottonwood Creek's natural stream flow and that Plaintiffs will suffer harm if a flood occurs. The complaint simply provides the Plaintiffs' opinions regarding their fears and concerns of a potential future harm.

¶14 We acknowledge that the complaint does assert some actual facts suggesting that a flood or high water flows would cause harm to Plaintiffs' property. These facts are supported by the engineer's report and are focused on the Little Cottonwood Creek flooding that occurred in 1984. Indeed, the engineer's report attached to the complaint shows a danger of possible damage to Plaintiffs' property if Little Cottonwood Creek's water flows reach the same levels that they did in 1984. However, the potential dangers are contingent on key, unknown events--an increased water flow or a flood--which are dictated by unknown weather patterns. Essentially, Plaintiffs' injury depends on "'contingent future events that may not occur as anticipated or indeed may not occur at all.'" Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580-81 (1985) (quoting 13A Charles Alan Wright et al., Federal Practice & Procedure § 3532 (2d ed. 1984)).<sup>1</sup> As the District of Columbia Circuit held, "[i]t is not

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1. We recognize that Thomas v. Union Carbide Agricultural Products, Co., 473 U.S. 568, 580-81 (1985), discusses the requirements for a ripeness challenge. However, "[a ripeness] argument could easily be reformulated in terms of standing. . . . 'The doctrines of standing and ripeness are closely related, and in [some] cases . . . overlap entirely.'" Lane v. Stephenson, No. 96-C-5565, 1996 U.S. Dist. LEXIS 18346, at \*8 n.4 (N.D. Ill. Dec. 9, 1996) (second alteration and second omission in original) (continued...)

enough . . . to assert that [the plaintiff] might suffer an injury in the future, or even that [the plaintiff] is likely to suffer an injury at some unknown future time. Such 'someday' injuries are insufficient." J. Roderick MacArthur Found. v. FBI, 102 F.3d 600, 606 (D.C. Cir. 1996).

¶15 Plaintiffs' complaint provides evidence of Little Cottonwood Creek flooding in 1984. However, the 1984 flood is the only specific evidence of flooding that Plaintiffs allege. That flood occurred over twenty years ago. Plaintiffs have not made any other allegations or offered any other evidence that a similar flood is immediate or at least "certainly impending," see Whitmore v. Arkansas, 495 U.S. 149, 158 (1990). Further, it is unknown what work was done to Little Cottonwood Creek after the 1984 flood to prevent future flooding in the area. Because Plaintiffs' injuries require this court "to infer what events might transpire to cause [Plaintiffs] harm in the future, the [standing] requirement[s are] not met." LPA Inc. v. Chao, 211 F. Supp. 2d 160, 164 (D.D.C. 2002).<sup>2</sup>

#### CONCLUSION

¶16 We conclude that although Plaintiffs have demonstrated an individual, particularized interest in the construction of McIntyre's bridge, they have not demonstrated that any potential injury to their property is actual or imminent. The threat of

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1. (...continued)

(quoting Smith v. Wisconsin Dept. of Agric., 23 F.3d 1134, 1141 (7th Cir. 1994)).

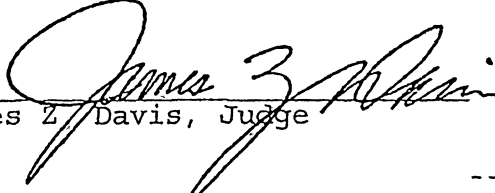
2. Defendants argue on appeal that Plaintiffs' claim for injunctive relief is not moot because the bridge has already been built. Given our decision on the standing issue, we do not need to address this issue. Still, we recognize that Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary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

any harm to their property is too speculative because it is contingent on unknown future events. Accordingly, we affirm.

  
Judith M. Billings, Judge

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¶17 I CONCUR: ....

  
James Z. Davis, Judge

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THORNE, Associate Presiding Judge (dissenting):

¶18 I respectfully dissent. Although I do not disagree with the majority's treatment of standing law as it applies to this case, I believe that the district court acted prematurely in determining a lack of standing at the motion to dismiss stage. Plaintiffs' complaint alleges an increased risk of substantial harm to their property as a result of McIntyre's bridge, and in my opinion, that is all that is necessary to survive a motion to dismiss.

¶19 "'[S]tanding is a jurisdictional requirement that must be satisfied' before a court may entertain a controversy between two parties." Jones v. Barlow, 2007 UT 20, ¶ 12, 154 P.3d 808 (alteration in original) (quoting Washington County Water Conservancy Dist. v. Morgan, 2003 UT 58, ¶ 6 n.2, 82 P.3d 1125). However, even though standing is a prerequisite to a court hearing a matter, that does not always mean that standing can be easily resolved early in the proceedings. Indeed, standing issues may present questions of fact that need to be resolved through the ordinary adversarial process. Cf. Morgan, 2003 UT 58, ¶ 23 ("Whether the Conservancy District advanced sufficient evidence to establish that its water rights would be enhanced by any forfeiture of the CPB's rights is a question of fact." (emphasis added)). In this case, both the degree and likelihood of harm alleged by Plaintiffs constitute such questions of fact.

¶20 "'When determining whether a trial court properly granted a motion to dismiss, we accept the factual allegations in the complaint as true and consider them, and all reasonable inferences to be drawn from them, in the light most favorable to

the non-moving party.'" Coroles v. Sabey, 2003 UT App 339, ¶ 2 n.1, 79 P.3d 974 (quoting Krouse v. Bower, 2001 UT 28, ¶ 2, 20 P.3d 895). Thus, the only question we should be considering on appeal is whether Plaintiffs' complaint alleges sufficient harm to confer standing, not whether that harm actually exists. I believe that the complaint clearly meets this requirement. The complaint alleges that McIntyre's bridge will cause "immediate and irreparable harm," "increase the risk of flooding in the surrounding areas," and "cause significant erosion and damage to the Plaintiffs and other property owners adjacent to the bridge" if that flooding occurs. Taking these allegations as true, there is no doubt in my mind that Plaintiffs have alleged individualized harm sufficient to confer standing in this matter.

¶21 Of course, Plaintiffs still have to establish their alleged facts in order for the district court to ultimately have jurisdiction to consider their complaint. But, that is a matter for trial, or perhaps summary judgment.<sup>1</sup> Cf. Utah Chapter of Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶ 28 n.3, 148 P.3d 960 (describing the procedures employed to determine standing in Morgan, 2003 UT 58, including a trial at which both sides were permitted to present expert witnesses). It should not have been resolved against Plaintiffs upon a motion to dismiss. Counsel argued as much at the hearing on McIntyre's motion:

[B]ased on the allegations, Your Honor, at this point, we would respectfully urge that

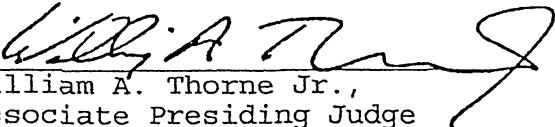
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1. Arguably, the district court converted McIntyre's motion to dismiss into a motion for summary judgment by considering materials outside of the complaint. See, e.g., Salmon v. Davis County, 916 P.2d 890, 897 (Utah 1996) ("'[L]abels do not control, [and] where the trial court, in effect, properly treats such a Rule 12(b)(6) motion as one for summary judgment but erroneously characterizes its action as a ruling on a motion to dismiss for failure to state a claim, the ruling will be reviewed as if it had been a ruling on a motion for summary judgment.'" (citation omitted)). The majority opinion does not address this aspect of the district court's decision, and I will not either. I do note, however, that if we were to treat this as a summary judgment I would still be inclined to reverse the district court based on Plaintiffs' request to be allowed to "flush in the facts." See, e.g., Oakwood Vill. LLC v. Albertsons, Inc., 2004 UT 101, ¶ 12, 104 P.3d 1226 (stating that a motion to dismiss "shall be converted into one for summary judgment if 'matters outside the pleadings are presented to and not excluded by the court' and all parties receive 'reasonable opportunity to present all material made pertinent to such a motion by Rule 56.'" (emphasis added) (quoting Utah R. Civ. P. 12(b))).

the plaintiffs ought to at least have an opportunity to flush in the facts. Mr. McIntyre ought to have the opportunity to get an engineering report and to see if there are disputes of the fact. And if so, then have a hearing on that issue. And then, Your Honor, then it would be ripe for this court to determine, are you an aggrieved party, or are you not an aggrieved party?

The procedure suggested by Plaintiffs' counsel would have provided an appropriate method of resolving the standing issue, although the trial court may have appropriately decided to proceed along another path.

¶22 McIntyre's bridge may or may not present the risk of harm alleged by Plaintiffs. However, Plaintiffs did allege that the bridge will increase the risk of significant damage to their property, and that is sufficient, in my opinion, to survive a motion to dismiss for lack of standing. In granting the motion, the district court improperly weighed the degree of risk alleged by Plaintiffs when it should have simply accepted the allegation of increased risk as true.<sup>2</sup> In my opinion, this was error by the district court, and I would reverse the dismissal order and remand this matter for further proceedings. Accordingly, I respectfully dissent from the majority opinion.

  
William A. Thorne Jr.,  
Associate Presiding Judge

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2. To the extent that Plaintiffs' complaint lacks clarity as to the degree of risk that it is asserting, I believe that it is reasonable to infer that they are alleging a substantial risk sufficient to confer standing in this matter. Plaintiffs are entitled to such reasonable inferences when facing a motion to dismiss. See Coroles v. Sabey, 2003 UT App 339, ¶ 2 n.1, 79 P.3d 974.

RECEIVED

OCT - 6 2008

KIRTON & McCONKIE

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of October, 2008, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

BENSON L. HATHAWAY  
ALEXANDER DUSHKU  
PETER C. SCHOFIELD  
JUSTIN W. STARR  
KIRTON & McCONKIE  
60 E S TEMPLE #1800  
PO BOX 45120  
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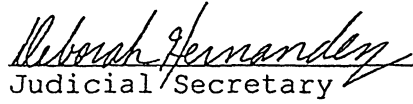
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THIRD DISTRICT, SALT LAKE  
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450 S STATE ST  
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SALT LAKE CITY UT 84114-1860

  
Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 060920127  
APPEALS CASE NO.: 20070474-CA



Benson L. Hathaway, Jr. (Bar No. 4219)  
Loyal C. Hulme (Bar No. 7554)  
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*Attorneys for Petitioners/Plaintiffs*

FILED  
DISTRICT COURT  
05 DEC 15 AM 11:26  
SALT LAKE COUNTY  
BY  
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.

PETITION FOR JUDICIAL REVIEW OF  
INFORMAL ADMINISTRATIVE  
PROCEEDINGS AND AGENCY ACTION  
AND COMPLAINT FOR INJUNCTIVE  
RELIEF

Judge: Iwasaki

Civil No. 000920127

Petitioners/Plaintiffs Lawrence Brown, Marilyn Brown, Joseph Sorenson, and Kathleen Sorenson, "Plaintiffs," by and through counsel undersigned, hereby Petition this Court for judicial review of final, informal, adjudicative administrative proceedings as described below and for a complaint against Respondents/Defendants hereby alleges and complains as follows:

## **PARTIES**

1. Lawrence Brown is an individual residing at 510 East 5600 South, Murray, Salt Lake County, State of Utah.

2. Marilyn Brown is an individual residing at 510 East 5600 South, Murray, Salt Lake County, State of Utah.

3. Joseph Sorenson is an individual residing at 5741 South Ridge Creek Road, Murray, Salt Lake County, State of Utah.

4. Kathleen Sorenson is an individual residing at 5741 South Ridge Creek Road, Murray, Salt Lake County, State of Utah.

5. The respondent agency is the Division of Water Rights ("Division") of the Department of Natural Resources of the State of Utah, with a mailing address of 1594 West North Temple, Suite 220, P.O. Box 146300, Salt Lake City, UT 84114-6480.

6. Jerry D. Olds is the Utah State Engineer and Director of the Division of Water Rights of the Department of Natural Resources of the State of Utah, with a mailing address of 1594 West North Temple, Suite 220, P.O. Box 146300, Salt Lake City, UT 84114-6480.

7. James A. McIntyre, "McIntyre," is an individual residing at 558 East 5600 South, Murray, Salt Lake County, State of Utah.

## **JURSDICTION AND VENUE**

8. Jurisdiction is proper in the above-entitled Court pursuant to Utah Code Ann. § 78-3-4(7)(a) and 63-46b-15.

9. Venue is appropriate in the above-entitled forum pursuant to Utah Code Ann. § 63-46b-15.

#### **BACKGROUND AND ADMINISTRATIVE PROCEEDINGS**

10. This is an action which seeks review of an administrative decision of the Division approving McIntyre's application for the construction of a bridge over the Little Cottonwood Creek located in an area between homes owned by the Plaintiffs. The proposed bridge would span an area which is environmentally fragile and which has been the site of significant flooding as recently as 1984. Should the proposed bridge be allowed to be constructed, the construction will cause immediate and irreparable harm to the Plaintiffs and their property.

11. On August 21, 2006, the Division received an application for the construction of a bridge across Little Cottonwood Creek submitted by McIntyre. *See* August 21, 2006 Application Number: 06-57-29SA from McIntyre, attached hereto as Exhibit "A."

12. If constructed, the proposed bridge would be placed between the home currently owned and occupied by Plaintiffs Lawrence and Marilyn Brown and the home currently owned and occupied by Plaintiffs Joseph and Kathleen Sorenson.

13. In response to the application, on September 20, 2006, Plaintiffs submitted, through counsel, an Objection to McIntyre's Application to Alter a Natural Stream. *See* September 20, 2006 letter, attached hereto as Exhibit "B."

14. On October 11, 2006, the Division approved Defendant McIntyre's application for Stream Channel Alteration Permit Number 06-57-29SA, effectively approving the construction of a bridge over Little Cottonwood Creek located at approximately 558 East 5600 South in Salt Lake County. *See* October 11, 2006 Letter from the Division, attached hereto as Exhibit "C."

15. On October 31, 2006, and in accordance with the requirements provided in Utah Code Annotated §63-46b-13 and Utah Administrative Code Rule R655-6-17, the Plaintiffs submitted a Request for Reconsideration of the Division's approval of Defendant McIntyre's application for Stream Channel Alteration Permit Number 06-57-29SA. *See* October 31, 2006 letter from Plaintiffs, attached hereto as Exhibit "D."

16. Thereafter, On November 17, 2006, the Division issued a letter to Plaintiffs in which the Division denied Plaintiffs' Request for Reconsideration and upheld its decision to approve Stream Channel Alteration Permit Number 06-57-29SA. *See* November 17, 2006 letter from the Division, attached hereto as Exhibit "E." This is the final agency action to be reviewed.

17. Plaintiffs are entitled to obtain *de novo* judicial review of this final agency action in these informal proceedings in accordance with Chapter 46b of Title 63 of the Utah Code in that Plaintiffs have exhausted all administrative remedies, judicial review is not expressly prohibited by statute, and Plaintiffs have filed this petition within 30 days after the date that the order constituting the final agency action was issued, as time is calculated under Rule 6(a) of the Utah Rules of Civil Procedure

18. Plaintiffs are entitled to relief from the final agency action as Utah Code Annotated § 73-3-29(4)(b) states in pertinent part that an application to alter or relocate a stream channel should not be approved if such alteration or relocation will "unreasonably or unnecessarily adversely affect . . . the natural stream environment; [or] unreasonably or unnecessarily diminish the natural channel's ability to conduct high flows."

19. The approved bridge will be in violation of Utah Code Annotated § 73-3-29(4)(b) in that it will diminish the streams ability to conduct high water flows and thereby increase the

risk and danger of flooding, and in the event flooding occurs, the surrounding stream environment will be unnecessarily and adversely affected.

20. Construction of the proposed bridge and access ramps will alter the streams channel, and thereby diminish the natural channels ability to conduct high water flows, heighten the potential for damming, and thereby increase the risk of flooding in the surrounding areas.

21. As observed in the Spring of 1984, the location of the bridge is already in an area of high flood risk. The approved bridge, if constructed, will only enhance the already high flood risk and danger to the Plaintiffs and other surrounding properties and landowners.

22. In the event flooding occurs due in whole or in part to the construction of the proposed bridge, the natural stream environment will be adversely affected and potentially destroyed by the invading flood waters.

23. In conjunction with Plaintiffs' Request for Reconsideration, Plaintiffs submitted a Hydrological Evaluation prepared by Secor International. *See* Secor Report, attached as Exhibit "F."

24. The Secor Report demonstrates that the approved bridge design provides for a one-foot clearance over a high water mark of 526 cubic feet per second. 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). Water flow like that experienced in 1984 would flow over, and significantly increase the stress on, the bridge as approved.

25. The Secor Report also demonstrates that if flows similar to those in 1984 are experienced in the stream channel (as altered by the construction of the approved bridge), the erosion could cause the stream banks to overflow and inundate the first level flood plains on both

sides of the stream in the vicinity of the bridge. Such an event will cause significant erosion and damage to the Plaintiffs and other property owners adjacent to the bridge.

26. Even if an alternative bridge design were considered, the danger of damage to the Plaintiffs would be present. The Secor Report detailed that the deck of the proposed bridge could be raised to 7.5 feet (6.5 feet to address the 1984 water flows, plus one additional foot of clearance). However, the access ramps on both sides of the deck would also have to be raised to meet the adjusted deck height.

27. While the design change would accommodate increased water flow, the adjusted access ramps could create a dam for debris caught on the bridge. 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.

28. Plaintiffs have already observed subsidence of their property in areas close to the Little Cottonwood Creek.

29. Additionally, Plaintiffs have observed foundation and settling cracks on structures located on the property as a result of the subsidence of the areas near the Little Cottonwood Creek.

30. The construction of a bridge in this environmentally fragile area will result in irreparable harm and damage to the Plaintiffs and their property.

**FIRST CLAIM FOR RELIEF  
(Review and Reversal of Agency Action)**

31. Plaintiffs incorporate herein all other allegations contained in this Petition and Complaint.

32. Plaintiffs are entitled to a review by trial *de novo* of the final agency action, with the Court making its own findings of fact and conclusions of law, giving no deference to the determinations and proceedings of the Division.

33. Plaintiffs are entitled to an order of the Court setting aside the agency action and, effectively, denying and reversing the Approval of the Application to Alter a Natural Stream Channel Number 06-57-29SA issued by the Division.

34. The Plaintiffs are further entitled to an order of the Court staying the Division's Approval of the Application to Alter A Natural Stream Channel Number 06-57-29SA pending final resolution by the Court should the Division refuse to order a stay.

**SECOND CLAIM FOR RELIEF**  
**(Preliminary and Permanent Injunctive Relief)**

35. Plaintiffs incorporate herein all other allegations contained in this Petition and Complaint.

36. Plaintiffs are in danger of suffering immediate and irreparable injury to their property rights if Defendant McIntyre constructs a bridge as has been approved by the Division.

37. If Defendant is not enjoined from constructing the proposed bridge and/or otherwise restrained as set forth herein, Plaintiffs will suffer irreparable harm.

38. Plaintiffs are entitled to obtain preliminary and permanent injunctive relief which enjoins and restrains Defendant McIntyre, his respective agents, employees, successors and assigns, from constructing a bridge in the area in question.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Lawrence Brown, Marilyn Brown, Joseph Sorenson, and Kathleen Sorenson pray for judgment against the Division and Defendant McIntyre on all claims for relief as follows:

1. For an order reversing and denying the Approval of the Application to Alter a Natural Stream Channel Number 06-57-29SA issued by the Division;
2. For the entry of a preliminary injunction and permanent injunction which enjoins and restrains Defendant McIntyre, his respective agents, employees, successors and assigns, from constructing a bridge in the area in question;
3. For costs and attorneys' fees incurred in this action; and
4. For such other and further legal and equitable relief as this Court deems appropriate under the circumstances.

DATED this 15 day of December, 2006.

KIRTON & McCONKIE

By: 

Benson L. Hathaway, Jr.  
Loyal C. Hulme  
Peter C. Schofield  
Attorneys for Plaintiffs

Plaintiff's Addresses:

Lawrence and Marilyn Brown  
510 East 5600 South  
Murray, Utah 84107

Joseph and Kathleen Sorenson  
5741 South Ridge Creek Road  
Murray, Utah 84107



Department of Natural Resources  
Salt Lake County Flood Control  
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308 East 4500 South, St.  
Murray, Utah 84107-3008  
801-208-7100 TEL  
801-208-7118 FAX

September 18, 2006

Mr. Loyal Hulme  
Kirtan & McConkie  
80 East South Temple, #1800  
Salt Lake City, Utah 84111

RE: Cursory Hydrological Review Report  
Proposed Bridge at 558 East 5600 South  
Murray, Utah 84017

Dear Mr. Hulme:

In accordance with SECOR International Incorporated (SECOR) proposal #09-12-06-01, please accept the following letter report documenting observed hydrological conditions directly upstream of 5600 South Street, in and around Little Cottonwood Creek (Creek). The purpose of the Cursory Hydrological Review was to evaluate flood potential and possible erosion hazards should the proposed McIntyre Bridge, as described in the Joint Permit Application Form, be constructed.

The site and surrounding area was visited on September 14, 2006 by Darin Worden, Senior Hydrologist for SECOR. Approximate property boundaries in the area were described by the Brown family. The area was observed from both the Brown and Sorenson properties along the river terrace on the west side of the Creek. Additionally, the Creek's channel was hiked from approximately 100 yards above the approximate proposed bridge location to the box culvert at 5600 South Street. A not to scale Area Map prepared with the site walk observation data is attached as Figure 1. Please refer to Figure 1 for a better understanding of the area descriptions provided below.

Photos with associated descriptions and explanations are attached. The photos were taken during the above referenced site visit. The photos are numbered 1 through 8. Photo 1 was taken on the up stream end of the observed area, and the photos continue in sequence to Photo 8, taken on the down stream end of the observed area. The approximate photo locations are presented on Figure 1. Further discussion of the photographs is presented in the following sections of this report.

#### General Setting

Little Cottonwood Creek in this area has incised (cut) into a former deltaic type depositional feature (river delta into a former lake) associated with a former and much higher level of the Great Salt Lake. The eastern flank of the channel is for the most part developed with residential housing. The majority of the homes adjacent to the channel appear to be situated on the 1<sup>st</sup> level floodplain approximately 8 to 10 feet above the current stream flow level.

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September 18, 2006  
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The western flank of the observed area is a combination of a river terrace extending an approximate 75 feet or more above the 1<sup>st</sup> level floodplain, and a small area (approximately 2-3 acres in size) which makes up the only 1<sup>st</sup> level floodplain area on the west side of the channel. There is currently no development in the 1<sup>st</sup> level floodplain area on the west side of the Creek; all current development is located on the river terrace, approximately 75 feet (or more) in elevation above the channel.

Based on review of information in the Joint Permit Application Form, the proposed bridge would be installed at the approximate location presented on Figure 1.

#### **Current and Existing Erosion Conditions**

The slope from the river terrace down to the channel, along the west side of the Creek, is very steep. With the exception of the approximate 2-3 acre 1<sup>st</sup> level floodplain area described above, the river terrace slope is in direct contact with the Creek's channel. The deltaic deposits which make up the river terrace are primarily fine sand and silt. The steep slope is quite unstable unless vegetated. Numerous areas of historic rill and gully erosion were observed. No recent erosion evidence was observed in these areas. Along the down stream end of the 1<sup>st</sup> level floodplain along the west side of the Creek, evidence of recent and very active erosion was observed. This erosion has been caused by the Creek's channel migration into the river terrace. The Brown Residence is located directly adjacent to the zone of greatest erosion. The Creek's cutting into the river terrace in this area has caused an approximate 20 foot high escarpment. Additionally, strong evidence of instability associated with mature trees directly above and around the escarpment was also observed. The approximate location of the escarpment and associated alignment of the Creek and the Brown Residence is presented on Figure 1.

No active erosion along the Creek's eastern flank was observed. The eastern channel bank has been armored with large rock in all cut-bank sections. A cut-bank section is along the outside stretch of a channel bend where typical erosion takes place. A good example of channel armoring is shown in Photo 3. The approximate location of observed channel armoring is presented on Figure 1.

Channel armoring was only observed in two areas along the Creek's western flank. One armored section, as shown in Photos 1 and 2, was observed approximately 100 yards upstream from the start of the 1<sup>st</sup> level floodplain. The second area of channel armoring was observed directly upstream and adjacent to the escarpment described above, and directly below and adjacent to the down stream end of the 1<sup>st</sup> level floodplain. This area is shown in Photos 4 and 5.

A key point is that from approximately 100 yards up stream from where the 1<sup>st</sup> level flood plain starts, to the escarpment located at the down stream end of this area, the western side of the channel has not been armored and is therefore, prone to erosion and subsequent channel migration. Additionally, it is likely that the channel forces responsible

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Salt Lake County Flood Control  
U.S. Army Corps of Engineers  
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for the escarpment have been at least partially enhanced by the placement of armoring and channel stabilization efforts along the east flank of the Creek.

#### **Potential Influences of the Proposed Bridge**

The proposed bridge would be located near the up stream end of the 1<sup>st</sup> level floodplain area located on the west side of the Creek. This approximate location is down stream of any armoring on the west side of the channel. As previously described, the lack of armoring on the west side of the channel translates to a greater risk of bank erosion and subsequent channel migration.

Building the proposed bridge as described in the Joint Permit Application Form could create a channel constriction – a point in the channel which would, under high flow conditions, providing an opportunity for typical debris (vegetation/trees, rocks, and any other urban material) to catch, backing up the water. If 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.

Photos 7 and 8 show settlement cracks along the eastern side of the Brown Residence. 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 (Photos 7 and 8), 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.

#### **Recommendations**

In the channel's current condition without construction of the bridge, the non-armored west bank and most importantly the escarpment area are at significant risk of further erosion and potential property damage. Building the bridge as proposed only increases the risks for significant erosion and associated flooding on both sides of Little Cottonwood Creek. It is SECOR's opinion that a complete engineering study be undertaken to evaluate these risks, before moving ahead with any stream alteration plans in this area. Additionally, SECOR recommends work begin immediately to stabilize the escarpment and more completely understand the Brown Residence settlement cracks.

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Please contact the undersigned if you require further clarification or additional information.

Sincerely,  
SECOR International Incorporated



Darin Worden  
Senior Hydrologist



David Dayton  
Senior Scientist

Attachments: Photos 1 through 8

Copies: 4 – Addressee



SECOR  
INTERNATIONAL  
INCORPORATED

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290 Conejo Ridge Ave, Suite 200  
Thousand Oaks, CA 91351  
805-230-1266 TEL  
805-230-1277 FAX

October 30, 2006

Mr. Loyal Hulme  
Kirton & McConkie  
60 East South Temple, #1800  
Salt Lake City, Utah 84111

RE: Proposed Bridge at 558 East 5600 South Street  
Salt Lake City, Utah  
Hydrologic Evaluation  
SECOR Project No.: 26OT.97000.06.0002

Dear Mr. Hulme:

SECOR International Incorporated (SECOR) is grateful for the opportunity to provide this hydrologic evaluation for the proposed bridge over Little Cottonwood Creek located at 558 East 5600 South Street in Salt Lake City, Utah (Site). The evaluation was conducted using information supplied by the property owner, Jim McIntyre, in his permit application along with readily available data on the creek morphology and historic flows. SECOR understands that this bridge has been permitted (No. 06-57-29SA) by the State of Utah Department of Natural Resources Division of Water Rights.

Photos of the Little Cottonwood Creek in the vicinity of the Site show extensive numbers of cobbles and boulders. Such size rock is typical of high flow conditions. Additionally, bank cuts indicate that the predominant soil in the area is composed of much finer particles such as sand and silt. Soils composed of finer particles are more susceptible to erosion. Thus, should the flows overtop the banks, overall erosion will likely increase.

The bridge design includes erosion protection in the form of riprap aprons beneath the respective ends of the bridge based on Sheet 1 of the materials supplied by MCM Engineering, Inc. (MCM) for the permit application. The Sheet 1 design details include the following:

- 1) Two opposing banks of layered loose riprap rock for energy dissipation to minimize erosion of channel banks,
- 2) Bank slopes as drawn on Sheet 1 at almost 1:1, which is steep and calculations herein use a more conservative 2:1 slope (27.5 degree angle);
- 3) High water mark is taken as 4318.00 feet relative to mean sea level (msl) and drawn five feet above the channel bottom,
- 4) Trapezoidal channels lined with rocks on the banks, but not on the bottom, and
- 5) Boulder riprap sized nominally at 18 inches throughout to protect the banks.

Calculations were conducted herein to estimate the required size of riprap for the design provided by MCM. These calculations are based in part on the US Army Corps of Engineers (ACOE; 1984) Engineer Manual and the US Department of Transportation

Hydraulic Engineering Circular No. 15, Third Edition (USDOT, 2005), and Figure 1.

Before conducting calculations, it was noticed that a design oversight exists on Sheet 1. The erosion potential is greatest where velocity of flow is greatest, which is at the bottom of the channel (aka creek bottom). No riprap is shown on the channel bottom. Assuming the channel bottom is composed of alluvial materials and not bedrock, riprap should be included along the channel bottom from bank to bank. Thus, even if the stream bank riprap is sized appropriately for future flows, scour could undermine the base of the riprap bank and result in its failure.

The calculations herein are very dependent on the assumptions made in the Sheet 1 design. For instance, channel geometry affects flow rate, flow rate affects shear stress, shear stress affects appropriate rock size selection, rock size affects channel geometry, etc. Thus, it is not the intent of these calculations to derive an appropriate final design. The intent is to evaluate whether the specified riprap size of 18 inches is adequate for armoring the banks, and the channel bottom if such was properly included in the design.

#### Overview of Calculations

The hydrologic evaluation applied here uses simplified flow dynamics. Hydrologic parameters used include flow rate, channel geometry, channel slope, and shear stress. Flow velocity and depth of water vary depending on channel bed geometry, slope, and roughness. These are in part functions of rock size and shape. Shear stress conditions affect the loose riprap lining the channel as larger shear stresses require larger riprap.

A design flow rate is not assumed, though once the calculations are complete, the resultant flows are compared to historic flows between gauging Stations Crestwood (#239) and 300 West (approximately 6 miles northwest of Crestwood). The Site is located approximately ½ of the way between these two stream flow gauging stations. Initial iterations to derive flows and velocities for creek stages of 1, 2, 3, 4, and 5 feet were calculated using Manning's Equation assuming a trapezoidal cross-section.

#### Manning's Equation

The most widely used equation to describe a channel's average velocity is Manning's empirical equation:

$$V = \frac{k}{n} \cdot R^{2/3} \cdot S^{1/2}$$

Where:

$V$  = average velocity (ft/sec);

$k$  = 1.49 (when Manning's equation is expressed in English units);

$n$  = Manning's roughness coefficient (unitless);

$R$  = hydraulic radius of the flow (ft); and

$S$  = channel slope (or, more rigorously, energy slope) (ft/ft).

The hydraulic radius is defined as the flow cross-sectional area divided by the wetted perimeter. The flow rate is obtained by multiplying the average flow velocity by the cross-section area.

For a trapezoidal cross-section:

$$Q = VA$$

Where:

$$V = \frac{k}{n} R^{2/3} S^{1/2}$$

$$R = \frac{A}{P}$$

$$A = \frac{y}{2}(b + T)$$

$$P = b + y \cdot \left[ \left( \sqrt{1 + z_1^2} \right) + \left( \sqrt{1 + z_2^2} \right) \right]$$

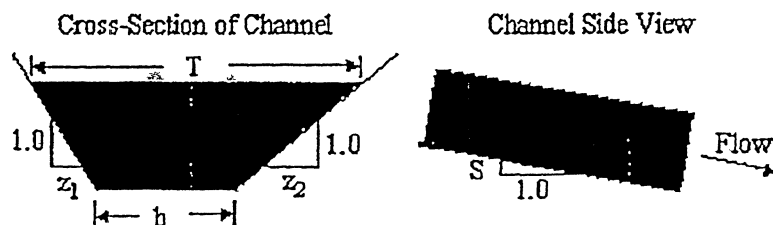
$$T = b + y \cdot (z_1 + z_2)$$

And  $b$  is the channel base width,  $T$  is the top of channel width,  $y$  is flow depth, and  $z_1$  and  $z_2$  are horizontal widths of opposite banks (see graphic below). The Froude number equation is:

$$F = V \cdot \sqrt{\frac{T}{(g \cdot A \cdot \cos \theta)}}$$

Where:

$$\theta = \tan^{-1}(S)$$



### **Roughness Coefficient**

The selection of an appropriate value for Manning's roughness coefficient ( $n$ ) is often based on observation and experience. Manning's  $n$  values vary with material lining the channel bed and banks, with the amount of vegetation growth in the channel, but also with flow depth. Since higher flows would require larger riprap, which have higher Manning's  $n$  values, calculations herein used larger  $n$  values for deeper flow depths (Tables 1 and 2).

### **Channel Slope**

The channel slope is not linear over the approximately 300 yards surveyed up and downstream of the Site. Therefore, an average slope was used based on elevations at the respective ends of the surveyed creek reach. This resulted in an average slope of 0.00926 ft/ft, which is relatively gentle. This single slope value was used here for the loose riprap size calculations.

### **Velocities and Flow Rates**

Flow rate ( $Q$ ) of water in a channel is governed by depth of water, hydraulic gradient, channel geometry, and roughness coefficient. This relationship takes into account principles of conservation of linear momentum, which take into account variations in momentum related to shear stress. The results are calculations of flow velocity and flow rate. Derivation of these values for creek flow depths were specified at 1, 2, 3, 4, and 5 feet (Table 2). Velocities calculated were 2.80 to 4.04 feet per second (ft/sec) for 1 and 5 foot flow depths, respectively. Flows were 50 to 526 cubic feet per second (ft<sup>3</sup>/sec) for 1 and 5 foot flow depths, respectively.

Historic annual peak flow data at the two gauging stations mentioned above are as high as 898 ft<sup>3</sup>/sec on June 1, 1984. This flow is 70% higher than the flow of 526 ft<sup>3</sup>/sec derived for a water depth of 5 feet. Since the historic data span an interval of less than 25 years, it is possible that flows could even be higher in a 100-year flood scenario. Indeed, in order to obtain a flow of 898 ft<sup>3</sup>/sec using Manning's equation, the depth of water would have to be 6.58 feet, which is above the bottom of the bridge. Thus, debris in the flow would catch on the structure.

### **Shear Stress**

The hydrodynamic force created by water flowing in a channel causes a shear stress on the channel bottom and banks. The bed material resists this shear stress by a tractive force. Tractive force theory states that the flow-induced shear stress should not produce a force greater than the tractive resisting force of the bed material. The permissible or critical shear stress ( $\tau_p$ ) in a channel defines the force required to initiate movement of the channel bed or lining material (e.g., riprap erosion).



Shear stress in a channel is unevenly distributed over its wetted surface. The highest shear stress occurs parallel to the bed gradient at maximum flow depth (i.e., creek bottom) and will change in proportion to changes in either of these parameters. Because of the uneven distribution of shear stress, channel design should be based on shear stress at maximum flow depth as is represented by the following relationship. The permissible shear stress ( $\tau_p$  in units of lb/ft<sup>2</sup>) for a straight channel occurs on the channel bed at maximum depth, and can be computed as follows:

$$\tau_p = \left( V_p \cdot n \cdot \sqrt{\gamma \cdot d} / (\alpha \cdot R^{1/6}) \right)^2$$

Where,

$V_p$  = permissible velocity (calculated from Manning's equation of flow);  
 $n$  = Manning's coefficient;  
 $\gamma$  = unit weight of water (62.4 lb/ft<sup>3</sup>);  
 $d$  = maximum depth of flow (ft);  
 $\alpha$  = unit conversion constant (1.49); and  
 $R$  = hydraulic radius (cross-section area over perimeter length, A/P; ft).

Solving Manning's equation for depth of flow, the maximum shear stress can be calculated.

Flow around bends also creates secondary currents, which impose higher shear stresses on the channel sides and bottom compared to straight reaches. The maximum shear stress in a bend is a function of the ratio of channel curvature to bottom width. The bend shear stress can be computed using the following relationship:

$$\tau_b = K_b \tau_p$$

Where,

$\tau_b$  = bend shear stress (lb/ft<sup>2</sup>)  
 $K_b$  = ratio of channel bend to bottom shear stress, a function of  $R_c/B$   
 $R_c$  = radius to the centerline of the channel (ft)  
 $B$  = bottom width of the channel (ft)  
 $\tau_p$  = maximum permissible shear stress (lb/ft<sup>2</sup>)

For the Site, the bends were considered sufficiently large that  $K_b$  was at its constant minimal value. Thus, bend shear stress will only be slightly larger than straight channel shear stress in the calculations herein.

### Bed Material (Loose Riprap) Size

The permissible shear stress for non-cohesive soils is a function of mean diameter of the channel material. In this application, bed material in contact with flow will be riprap of boulder dimensions. For large riprap, the permissible shear stress is given by the following

equation:

$$\tau_p = F \cdot (\gamma_s - \gamma) D_{50}$$

Where,

$\tau_p = \tau_d$  = permissible shear stress (lb/ft<sup>2</sup>)  
 $F$  = Shields' parameter (0.047, dimensionless)  
 $\gamma_s$  = unit weight of stone (165.4 lb/ft<sup>3</sup>);  
 $D_{50}$  = mean riprap size (ft)

Solving the equation for stone size, we get:

$$D_{50} = \tau_p / (F \cdot (\gamma_s - \gamma))$$

Where the channel makes a turn, the riprap size is calculated using the bend shear stress ( $\tau_b$ ) instead of the permissible shear stress ( $\tau_p$ ).

$$D_{50} = \tau_b / (F \cdot (\gamma_s - \gamma))$$

For trapezoidal channels lined with gravel or riprap, having side slopes steeper than 3 horizontal to 1 vertical (>3:1), side slope stability must also be considered. This analysis is performed by comparing the tractive force ratio between side slopes and channel bottom ( $K_2$ ) with the ratio of shear stresses exerted on the channel sides and bottom ( $K_1$ ). The required rock size for the side slopes is found using the following equation:

$$(D_{50})_{sides} = K_1 / K_2 (D_{50})_{bottom}$$

The tractive force ratio,  $K_2$  can also be calculated using the following equation:

$$K_2 = \sqrt{1 - \sin^2 \theta} / \sin^2 \phi$$

Where,

$\theta$  = angle of side slope (degrees) and  
 $\phi$  = angle of repose (degrees) of the rock.

## Summary

The design specifications submitted by MCM calculate to a design riprap that is equivalent to the side sizes as called out on Sheet 1 (18 inches). However, Sheet 1 does not specify bottom riprap, of any size. Bottom riprap should be included that is a mean diameter of 10 inches. These calculations apply for a flow equivalent to that of the maximum observed over the last 25 years. There is no evidence that this flow represents a 100-year event. Such an event could result in substantially larger flows, in which case these riprap sizes are insufficient to resist erosion.

While the Sheet 1 specifications are over-designed for the specified flow, it is prudent practice to place anchor rock along the up gradient and down gradient edges of a loose riprap surface. Anchor rocks are somewhat larger than the design size. The Sheet 1

design shows no such rock. Additionally, to strengthen loose riprap, it is common practice to place smaller rock (e.g., cobbles) in the interstices of the riprap as keys to lock the rock matrix. No mention of this is made in the application materials.

Given the one foot clearance of the bridge over the design high water mark (526 ft<sup>3</sup>/sec flow rate), the observed flow of more than 70% over the design water height flow (898 ft<sup>3</sup>/sec on June 1, 1984), and the known entrainment of trees in high flows on Little Cottonwood Creek, it is very likely that this bridge would catch debris and be overtopped, which would significantly increase stress on the bridge and increase erosion potential in the area. Additionally, the calculated 6.58 foot water depth at the 898 ft<sup>3</sup>/sec flow rate, using the channel geometry created by construction of the bridge, would overtop existing banks in the area and begin to inundate the first level floodplain on both sides of Little Cottonwood Creek.

An alternative to constructing the bridge as approved would be to raise the deck to allow a total of 7.5 feet of water flow depth (6.5 feet as calculated for the 898 ft<sup>3</sup>/sec flow rate plus 1 additional foot of free board) to pass under the bridge. This design change would require raising the access ramps on both sides of Little Cottonwood Creek an equal height. This would solve the issue associated with passing the 898 ft<sup>3</sup>/sec flow under the bridge; however, the access ramps then create a dam whereby if the bridge catches debris or trees, a greater volume of water can be backed up behind the bridge. The bridge deck would be at an elevation higher than the surrounding stream banks and backed up water would pour over the stream banks onto the first level floodplain on both sides of the Creek. In this scenario, raising the height of the bridge deck may actually increase the flooding potential to a greater degree, when compared to constructing the bridge as approved.

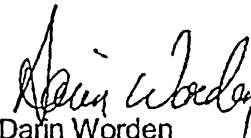
In conclusion, the approved design for permit No. 06-57-29SA is inadequate to address erosion and would further enhance erosion and flooding potential in the vicinity of the bridge. Using either bridge design as described above increases the risks to the home owners in the area.

Please call us with any questions you may have regarding this report at (805)230-1266 x282, or (801)327-7814.

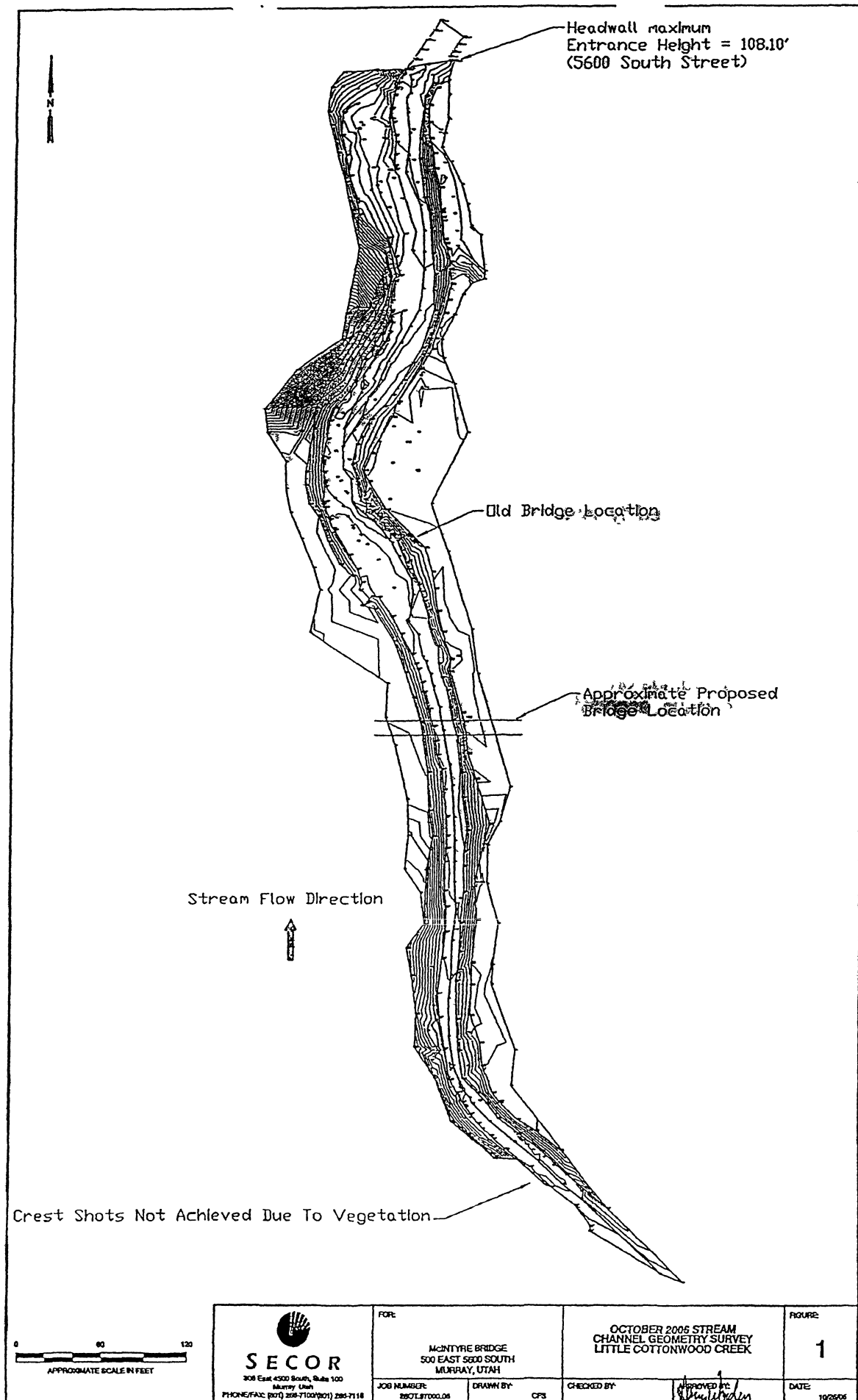
Sincerely,  
SECOR International Incorporated


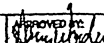
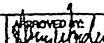


James "Jay" MacPherson, Ph.D., P.E.  
Senior Engineer



Darin Worden  
Senior Hydrologist

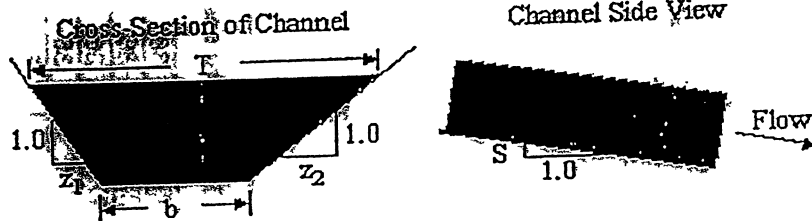


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| <br><b>SECOR</b><br>308 East 4500 South, Suite 100<br>Murray, Utah<br>PHONE/FAX: (801) 268-7100/(801) 268-7118 | FOR:<br>MCINTYRE BRIDGE<br>500 EAST 5600 SOUTH<br>MURRAY, UTAH |                  | OCTOBER 2005 STREAM<br>CHANNEL GEOMETRY SURVEY<br>LITTLE COTTONWOOD CREEK                            |   | FIGURE<br><b>1</b> |
|   | JOB NUMBER:<br>280187000.06                                    | DRAWN BY:<br>CPS | CHECKED BY:<br> | APPROVED BY:<br> | DATE:<br>10/25/06  |

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Table 1. McIntyre Permit No. 06-57-29SA

Example Manning's Equation Calculation



$$Q = VA \quad V = \frac{k}{n} R^{2/3} S^{1/2} \quad R = \frac{A}{P} \quad A = \frac{y}{2} (b + T)$$

$$P = b + y \left( \sqrt{1 + z_1^2} + \sqrt{1 + z_2^2} \right) \quad T = b + y(z_1 + z_2)$$

$$R = \frac{A}{P} \quad \theta = \tan^{-1}(S)$$

<http://www.lmnoeng.com/manning.htm>

|                 |     |         |
|-----------------|-----|---------|
| <b>Data:</b>    |     |         |
| Slope           | S = | 0.00926 |
| Base            | b = | 16 feet |
| Bank Slope      | z = | 2       |
| Unit conversion | k = | 1.49    |
| Manning Coeff   | n = | 0.047   |
| Depth of water  | y = | 1 feet  |

|                       |     |                 |
|-----------------------|-----|-----------------|
| <b>Calculations:</b>  |     |                 |
| Channel surface width | T = | 20 feet         |
| Wetted Perimeter      | P = | 20.47214 feet   |
| Area                  | A = | 18 sq ft        |
| Hydraulic Radius      | R = | 0.879244 feet   |
| Velocity              | V = | 2.799842 ft/sec |
| Flow rate             | Q = | 50.39715 cfs    |

## Hydraulics Calculations

| Slope   | Base Width  | Bank Slope | Manning's Coefficient | Depth of Water | Velocity      | Flow Rate                   | Lineal Shear Stress               | Bend Shear Stress |         |       |                                   |
|---------|-------------|------------|-----------------------|----------------|---------------|-----------------------------|-----------------------------------|-------------------|---------|-------|-----------------------------------|
| S       | B<br>(feet) | z          | n                     | d<br>(feet)    | V<br>(ft/sec) | Q<br>(ft <sup>3</sup> /sec) | $\tau_p$<br>(lb/ft <sup>2</sup> ) | $R_c$<br>(feet)   | $R_c/B$ | $K_b$ | $\tau_b$<br>(lb/ft <sup>2</sup> ) |
| 0.00926 | 16          | 2          | 0.08                  | 5              | 4.04          | 526                         | 9.82                              | 200               | 12.5    | 1.05  | 10.3                              |
| 0.00926 | 16          | 2          | 0.08                  | 4              | 3.59          | 344                         | 6.56                              | 200               | 12.5    | 1.05  | 6.9                               |
| 0.00926 | 16          | 2          | 0.056                 | 3              | 4.39          | 290                         | 3.89                              | 200               | 12.5    | 1.05  | 4.1                               |
| 0.00926 | 16          | 2          | 0.047                 | 2              | 4.18          | 167                         | 1.85                              | 200               | 12.5    | 1.05  | 1.9                               |
| 0.00926 | 16          | 2          | 0.047                 | 1              | 2.80          | 50                          | 0.51                              | 200               | 12.5    | 1.05  | 0.5                               |

 $K_b$  = function of  $R_c/B$  $R_c$  = radius to the centerline of the channel [feet]

Side slope (degrees) 27.5

B = bottom width of the channel [feet]

## Rock Size Estimates

| Base Width  | Depth of Water | Lineal Shear Stress               | Bend Shear Stress                 | Rock Size Bottom                    | Rock Size Bend                    | B/y   | $K_1$ | $\theta$  | $\phi$    | $K_2$ | Rock Size Sides                    |
|-------------|----------------|-----------------------------------|-----------------------------------|-------------------------------------|-----------------------------------|-------|-------|-----------|-----------|-------|------------------------------------|
| B<br>(feet) | d<br>(feet)    | $\tau_p$<br>(lb/ft <sup>2</sup> ) | $\tau_b$<br>(lb/ft <sup>2</sup> ) | $D_{50(\text{bottom})}$<br>(Inches) | $D_{50(\text{bend})}$<br>(Inches) |       |       | (degrees) | (degrees) |       | $D_{50(\text{sides})}$<br>(Inches) |
| 16          | 5              | 9.82                              | 10.31                             | 10                                  | 11                                | 3.20  | 0.50  | 27.5      | 36        | 0.71  | 7                                  |
| 16          | 4              | 6.56                              | 6.89                              | 7                                   | 7                                 | 4.00  | 0.50  | 27.5      | 36        | 0.71  | 5                                  |
| 16          | 3              | 3.89                              | 4.08                              | 4                                   | 4                                 | 5.33  | 0.50  | 27.5      | 36        | 0.71  | 3                                  |
| 16          | 2              | 1.85                              | 1.94                              | 1.9                                 | 2                                 | 8.00  | 0.50  | 27.5      | 36        | 0.71  | 1.4                                |
| 16          | 1              | 0.51                              | 0.53                              | 0.5                                 | 0.6                               | 16.00 | 0.50  | 27.5      | 36        | 0.71  | 0.4                                |

$$K_2 = \sqrt{(1 - \sin^2 \theta / \sin^2 \phi)}$$

$$(D_{50})_{\text{sides}} = K_1 / K_2 (D_{50})_{\text{bottom}}$$