

2008

# Lawrence Brown, Marilyn Brown, Joseph Sorensen, and Kathleen Sorenson v. The Division of Water Rights of the Department of Natural Resources of the State of Utah : 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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## **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, Sorensens, 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 Sorensens (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[,] 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 were 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 constitutionally restricted by the language of Article III of the United States

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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)).

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.

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<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.

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**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:

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