# FROM THE ENVIRONMENTAL LAW SECTION

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## *Standing*

### 1. Introduction

The Montana Supreme Court recognizes standing as a "threshold requirement of every case."[2] The starting point for a discussion of standing in Montana is Article VII, Section 4(1) of the Montana Constitution, which grants district courts jurisdiction over "cases at law and in equity." That provision has been interpreted as "embodying the same limitations as are imposed by federal courts under the Article III 'case or controversy' provision of the United States Constitution."[3] Succinctly stated, "A party must demonstrate a personal stake in the outcome of a controversy and some injury that would be alleviated successfully by maintaining the action to satisfy the standing requirement."[4]

A common threshold defense in environmental litigation is that the environmental plaintiff lacks standing to bring suit. While the Montana Supreme Court has recognized an expansive definition of standing in environmental cases, the increase in development activity in the fast growing areas of Montana has made land use planning a new battleground in environmental litigation. A narrowly drawn standing provision in the Montana Subdivision and Platting Act (Subdivision Act)[5] is being used by local governing bodies and developers in an effort to prevent judicial review of subdivision approvals. This column briefly summarizes the legal standards applicable to standing in environmental litigation in general, and specifically looks at the issue of standing to bring suit under the Subdivision Act.

### 2. General principles

In *Missoula City-County Air Pollution Control Board v. Board of Environmental Review*,[6] the local board sought judicial review challenging the state board's order approving conditions on an air quality permit issued to Stone Container Corporation and a declaratory ruling that the amended air quality rules were invalid. The District Court dismissed the suit on the basis that the local board lacked standing to bring an action on behalf of the Missoula public.[7] On appeal, the Montana Supreme Court began its analysis by recognizing that the concept of standing arises from two separate doctrines, the discretionary doctrine aimed at prudently managing judicial review of the legality of public acts, and the doctrine of constitutional limitations drawn from the "cases and controversies" definition of federal judicial power in Article III of the U.S. Constitution and the "cases at law and in equity" definition of state judicial power in Article VII, § 4 of the Montana Constitution:

> With respect to the prudential basis for standing, this Court has stated that the trial court's discretion cannot be defined by hard and fast rules, and that the importance of the question to the public "surely is an important factor." *Committee for an Effective Judiciary v. State* (1984), 209 Mont. 105, 110, 679 P.2d 1223, 1226. The constitutional aspect of standing requires the plaintiff to show that plaintiff has been personally injured or threatened with immediate injury by the alleged constitutional or statutory violation. *Olson*, 726 P.2d at 1166.[8]

In holding that Missoula's Air Pollution Control Board met the "personal stake" standard of injury or threat of injury, the court stated:

> It is clear to this Court that a citizen of Missoula, as one who breathes the air into which Stone Container is expelling pollutants, would have standing to bring this action. The Local Board is a person within the definition of that word at § 2-4-102(8), MCA, as "an individual, partnership, corporation, association, governmental subdivision, agency, or public organization of any character." In the same way as a citizen of the Missoula airshed is more particularly affected by the State Board's act than is a citizen of another area, the interest of the Local Board is distinguishable from and greater than the interest of the public generally.[9]

The threshold issue in the seminal case of *Montana Environmental Information Center (MEIC) v. Department of Environmental Quality*,[10] was whether the plaintiff environmental organizations had standing to challenge the constitutionality of a provision of the Montana Water Quality Act. The provision allowed discharges that degraded high quality

waters without review pursuant to Montana's non-degradation policy. In upholding the plaintiffs' standing, the *MEIC* Court applied a two-prong test: 1) the complaining party must clearly allege past, present, or threatened injury to her property or civil rights; and 2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.[11]

Relying on its decision in *Missoula City-County Air Pollution Control Board*, the court concluded:

> Based on these criteria, we conclude that the allegations in the Plaintiffs' complaint which are uncontroverted, established their standing to challenge conduct which has an arguably adverse impact on the area in the headwaters of the Blackfoot River in which they fish and otherwise recreate, and which is a source for the water which many of them consume.[12]

### 3. Standing under the Subdivision Act

Notwithstanding the Montana Supreme Court's expansive definition of standing in the context of environmental litigation, several district court rulings have interpreted the judicial review provisions of the Subdivision Act as severely limiting the standing of those who can seek judicial review of a local governing body's decision to approve a proposed subdivision.[13] Because such a constrained interpretation of standing represents a significant limitation on the ability of Montana citizens and organizations to seek judicial enforcement of important environmental and planning standards, this article next examines individual and associational standing under the Subdivision Act.

Section 76-3-625 MCA, provides in relevant part:

> (2) **A party identified in subsection (3) who is aggrieved by a decision of the governing body** to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat **may**, within 30 days after the decision, **appeal to the district court** in the county in which the property involved is located. The petition must specify the grounds upon which the appeal is made.
>
> **(3) The following parties may appeal** under the provisions of subsection (2):
> (a) the subdivider;
> (b) **a landowner with a property boundary contiguous to the proposed subdivision or a private landowner with property within the county** or municipality where the subdivision is proposed **if that landowner can show a likelihood of material injury to the landowner's property or its value** . . .
>
> (4) For the purposes of this section, **"aggrieved" means a person who can demonstrate a specific personal and legal interest,** as distinguished from a general interest, who has been or is likely to be **specially and injuriously affected by the decision.** (Emphasis added.)

Emblematic of the constrained interpretation of the standing requirements under § 76-3-625 MCA, is the District Court's recent dismissal of the attempted judicial review of a condominium project in *Swan Lakers and Bradley Wirth v. Board of County Commissioners of Lake County.*[14] There, the District Court held that neither the individual plaintiff nor the association had standing. This ruling is currently on appeal to the Montana Supreme Court.

#### a. Individual standing

In *Swan Lakers*, the individual plaintiff, Bradley Wirth, was an ordained minister who purchased a house and acreage located approximately 100 yards from the proposed condominium subdivision. This plaintiff submitted an affidavit establishing that the undisturbed waterfront location, upland wildlife, scenic views, and tranquil rural setting were key reasons why he purchased this property and that these attributes are valuable aspects of his real property. Wirth's affidavit described his belief that the proposed subdivision's noise, dust, visual impacts, and impacts to wildlife would cause material injury to the value of his property for providing solitude and the opportunity for contemplation.

The District Court recognized that Wirth satisfied several of the statutory requirements for standing under § 76-3-625 MCA, because he is

a county "landowner" who is "aggrieved" because he has demonstrated "specific personal and legal interest" at stake. However, the District Court denied Wirth standing by interpreting § 76-3-625(3)(b) MCA, to require financial harm to the value of his property.[15] However, this interpretation is not in accord with the rules of statutory construction.

"General rules of statutory construction require [courts] to interpret the statutory language . . . without adding to, or subtracting from it."[16] Neither the statute nor the rules of statutory construction require **financial** harm, so the court cannot add that requirement to it. Section 76-3-625(3)(b) MCA, states that the landowner can show "material injury to his property **or** its value." It does not limit standing to only those who can demonstrate injury to the property's "value," nor does it contain language requiring that "value" must be financial.

Second, "[w]ords and phrases used in the statutes in Montana are construed according to the context in the approved usage of the language."[17] As the Montana Supreme Court has previously determined in regard to the judicial review of the subdivision, impacts to material "property rights" include "increased property taxes, increased traffic, noise, and dust, and reduction in the quality of local services."[18]

Third, "[s]tatutory construction should not lead to absurd results if a reasonable interpretation can avoid it."[19] Included among the Subdivision Act's purposes are protecting a community's safety and environment.[20] The Legislature could not have reasonably intended to prohibit the standing of those landowners who can show the likelihood of material impact to these types of non-economic interests.

Finally, Montana's traditional standing test has never required a showing of monetary harm.[21] As with other legislation passed to protect the public health, safety, and welfare, the Montana Supreme Court has held that the Subdivision Act should be liberally construed to achieve these "beneficent objectives" and any exception should be given a narrow interpretation.[22] Because standing is an aspect of "access to the courts," as constitutionally protected under Article II, § 16 of the Montana Constitution, any restriction on access should be liberally construed in favor of the constitutional right.[23]

**b. Associational standing**

Over the course of the last 30 years, courts have recognized the doctrine of associational standing in a broad range of cases. In the leading case of *Hunt v. Washington Apple Advertising Commission*,[24] the U.S. Supreme Court recognized that:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[25]

In addition to the federal courts, which are bound by the associational standing rule enunciated by the United States Supreme Court in *Hunt*, appellate courts in at least 30 states have either adopted the *Hunt* associational standing test or otherwise allowed associations standing to represent the interests of their members.[26] In *Save the Valley, Inc. v. Indiana-Kentucky Electric Corp.*,[27] the petitions of three nonprofit organizations had been dismissed on the basis that they did not demonstrate that the nonprofits were "aggrieved or adversely affected" by the granting of the permit at issue, as required under the statute providing for review of an agency decision. After reviewing the U.S. Supreme Court's decision in *Hunt*, and noting that a number of states had adopted the *Hunt* test, the Indiana Court of Appeals held that the nonprofit organizations had standing, reasoning as follows:

> The Appellants were not proceeding in their own right nor were they asserting that the public as a whole was harmed by the granting of the permit. Instead, the Appellants were proceeding on behalf of specific members who were individually aggrieved or adversely affected by IDEM's decision. Because the Appellants were simply acting in a representational capacity on behalf of the members who were aggrieved or adversely affected by the granting of the permit, Indiana Code Section 4-21.5-3-7 is satisfied. In this context, **the associations' standing is based on its members possessing standing to seek administrative review in their own right.** We see no reason why the

> Appellants should not be permitted to seek administrative review under the doctrine of associational standing.[28]

The *Save the Valley* court also recognized important policy considerations underlying the doctrine of associational standing:

> As recognized by the Connecticut Supreme Court, associational standing advances two important objectives. First, allowing an association to represent its members' interests **promotes judicial economy and efficiency**. *Worrell*, 199 Conn. at 617, 508 A.2d 743. The *Hunt* requirements allow a single plaintiff, in a single lawsuit, to adequately represent the interests of many members, **avoiding repetitive and costly independent actions**. *Id.* at 617-18, 508 A. 2d 743. Associational standing also allows members, who would have standing in their own right, to **pool their financial resources** and legal expertise to help ensure complete and vigorous litigation of the issues. *Id.* at 618, 508 A.2d 743. A third reason for allowing associational standing was recognized by the Georgia Supreme Court when it observed that associations are generally **less susceptible than individuals to retaliations** by officials responsible for executing the challenged policies. *Aldridge*, 304 S.E.2d at 710.[29]

Closer to home, associational standing was also at issue in *Glengary-Gamlin Protective Association, Inc. v. Bonner County Board of Commissioners*,[30] where the Idaho Court of Appeals analyzed the issue this way:

> We first consider the question of organizational standing. Idaho Code § 67-6521, part of the Local Planning Act, provides that an "affected person" is entitled to be heard when an application for a permit is submitted to local land use authorities. An "affected person" is defined as "one having an interest in real property which may be adversely affected by the issuance or denial" of the permit. The statute further provides that after the land use authorities have made a final decision upon the application, an "affected person aggrieved" by the decision may "seek judicial review under the procedures provided by sections 67-5215(b) through (g) and 67-5216, Idaho Code." . . . In the present case, the Birds contend that the Association had no standing, as an "affected person aggrieved" by the Board's action, to seek judicial review of that action.

Noting that no previously reported Idaho decisions had addressed the issue of organizational standing, the *Glengary* court reviewed several federal cases, including *Hunt*. Next, the court reviewed an affidavit submitted to the district court by an officer of the Association, which established that he owned real property located adjacent and contiguous to the property, which was the subject of an application for a land use permit to develop a commercial air transport base.[31] Applying the *Hunt* test, the court concluded that the association had standing to pursue its complaint for judicial review.[32]

In Montana, the Supreme Court has long allowed organizations to bring lawsuits on behalf of its members in a wide variety of circumstances. Thus, as discussed above, in *Missoula City-County Air Pollution Board. v. Board of Environmental Review*, the interest of the local pollution control board, acting on behalf of local residents, was considered the equivalent to a personal stake sufficient to establish standing: "A citizen of Missoula, as one who breathes the air into which Stone Container is expelling pollutants, would have standing to bring this action."[33] Likewise, in *Geil v. Missoula Irrigation District*,[34] the Montana Supreme Court ruled that the district had standing as representative of those land owners likely to face increased tax assessments. In *Armstrong v. State*,[35] the court found that a health care professional had standing to litigate constitutional rights on behalf of his patients. Finally, in his concurring opinion in *Associated Press, Inc. v. Montana Department of Revenue*,[36] Justice Nelson discussed representational standing, pointing out that it has been repeatedly recognized by the Montana Supreme Court although it has not been explicitly identified as such.

While the Montana Supreme Court has not addressed the issue of associational standing to bring a claim pursuant to § 76-3-625 MCA, applying the above principles indicates that the Montana Supreme Court would likely find that an organization could pursue judicial review, so long as standing could be established through its members.[37]

### 4. Conclusion

The requirement of standing ensures that a real controversy is brought before the court for resolution. However, Montana's traditional standing test has never required a showing of monetary harm, and neither the standing test applied to environmental plaintiffs in general, nor the standing test articulated in the judicial review statute in the Subdivision Act, requires otherwise. Moreover, the Montana Supreme Court, consistent with federal case law and a large majority of state appellate holdings, recognizes the right of an organization to represent its members in court. As explained above, associational standing should properly be allowed in pursuing judicial review of decisions under the Subdivision Act.

### ENDNOTES

1. Chair of MTLA's Environmental Law Section. Thanks to Jack Tuholske, attorney for the plaintiffs in the Swan Lakers v. Board of County Commissioners of Lake County, discussed herein.

2. Matter of Paternity of Vainio (1997), 284 Mont. 229, 235, 943 P.2d 1282, 1286.

3. Olson v. Department of Revenue (1986), 223 Mont. 464, 470, 726 P.2d 1162, 1166.

4. Jones v. Montana University System, 2007 MT 82, ¶ 48, 337 Mont. 1, 155 .3d 1247.

5. §§ 76-3-101, et seq., MCA.

6. 282 Mont. 255, 937 P.2d 463 (1997).

7. Id., 282 Mont. at 259, 937 P.2d at 466.

8. Id.

9. Id., 282 Mont. at 262, 937 P.2d at 467-68.

10. 1999 MT 248, 296 Mont. 207, 988 P.2d 1236.

11. MEIC at ¶ 41, citing Gryczan v. State (1997), 283 Mont. 433, 442-43, 942 P.2d 112, 118.

12. Id., ¶ 48.

13. See, e.g., Swan Lakers and Bradley Wirth v. Board of County Commissioners of Lake County, Montana Twentieth Judicial District Court, Lake County, No. DV-05-143, Order and Memorandum of October 9, 2007, holding that plaintiffs lacked individual and associational standing to pursue judicial review pursuant to § 76-3-625, MCA. This decision is currently on appeal to the Montana Supreme Court.

14. Id.

15. Swan Lakers, Order and Memorandum dated Oct. 9, 2007, at pp. 16- 17.

16. Orr v. State, 2004 MT 354, ¶ 68, 324 Mont. 391, 106 P.3d 100.

17. Id.

18. Sweet Grass Farms, Ltd. v. Sweet Grass County, 2000 MT 147, ¶¶ 31-32, 300 Mont. 66, 2 P.3d 825 ("These impacts support the issuance of a preliminary injunction").

19. State v. Letasky, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288.

20. §§ 76-3-102, -501, MCA.

21. See Gryczan, 283 Mont. at 442-43, 942 P.2d at 118.

22. State ex rel. Florence-Carlton School Dist. v. Board of County Commissioners of Ravalli County (1978), 180 Mont. 285, 291, 590 P.2d 602, 605.

23. See, e.g.,G.B.B. Investments, Inc.v. Hinterkopf, 343 So.2d 899, 901 (Fla.App.1977).

24. 432 U.S. 333 (1977).

25. Hunt, 432 U.S. at 343. See also, Warth v. Selden (1975), 422 U.S. 490, 511. In Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. (2000), 528 U.S. 167, the U.S. Supreme Court applied these associational standing principles in holding that the environmental organizations had standing to bring citizen suits under the Clean Water Act.

26. See, e.g.Save the Valley, Inc. v. Indiana-Kentucky Electric Corp., 820 N.E.2d 677, 680 (Ind.Ct.App.2005) (listing states which have adopted the Hunt test).

27. Id.

28. Id. at 681-82 (emphasis added; footnote omitted).

29. Id. at 680-81 (emphasis added).

30. 106 Idaho 84, 675 P.2d 344 (1984).

31. Id., 106 Idaho at 88, 675 P.2d at 344.

32. Id., 106 Idaho at 89, 675 P.2d at 349.

33. 282 Mont. 255, 262, 937 P.2d 463, 467 (1997).

34. 2002 MT 269, ¶ 30, 312 Mont. 320, 59 P.3d 398.

35. 1999 MT 261, 296 Mont. 361, 366, 989 P.2d 364.

36. 2000 MT 160, ¶ 119, 300 Mont. 23, 4 P.3d 5.

37. In Swan Lakers, supra, if the Montana Supreme Court were to find that the individual and associational plaintiffs lacked standing under the statute, then the plaintiffs have asked the court to declare the statute unconstitutional, a subject beyond the scope of this short article. ◆

*"I hope we shall crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government in a trial of strength, and bid defiance to the laws of our country."*
*Thomas Jefferson*