

**UNITED STATES COURT OF APPEALS**

**February 19, 2014**

**TENTH CIRCUIT**

**Elisabeth A. Shumaker**  
**Clerk of Court**

WILDEARTH GUARDIANS,

Plaintiff - Appellant,

v.

SCOTT BIDEGAIN, Chairman of the  
New Mexico State Game Commission,  
sued in his official capacity,

Defendant - Appellee,

and

JAMES LANE, Director of the New  
Mexico Department of Game and Fish,  
sued in his official capacity,

Defendant,

and

NEW MEXICO TRAPPERS'  
ASSOCIATION; NEW MEXICO  
COUNCIL OF OUTFITTERS &  
GUIDES, INC.; NEW MEXICO  
FARM & LIVESTOCK BUREAU;  
COALITION OF ARIZONA/NEW  
MEXICO COUNTIES FOR STABLE  
ECONOMIC GROWTH; UNITED  
SPORTSMEN FOR FISH AND  
WILDLIFE, INC.; NEW MEXICO  
CATTLE GROWERS'  
ASSOCIATION; NEW MEXICO  
FEDERAL LANDS COUNCIL,

No. 13-2001

(D.C. No. 1:12-CV-00118-LFG-KBM)

(D. New Mexico)

Defendants - Intervenor -  
Appellees.

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ARIZONA GAME AND FISH  
COMMISSION, STATE OF ALASKA;  
STATE OF GEORGIA; STATE OF  
IDAHO; STATE OF INDIANA;  
STATE OF KANSAS; STATE OF  
LOUISIANA; STATE OF  
MISSISSIPPI; STATE OF  
MONTANA; STATE OF  
OKLAHOMA; STATE OF TEXAS;  
STATE OF UTAH; SAFARI CLUB  
INTERNATIONAL,

Amici Curiae.

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**ORDER AND JUDGMENT\***

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Before **HOLMES**, **MATHESON**, and **BACHARACH**, Circuit Judges.

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WildEarth Guardians sued the Director of the New Mexico Department of Game and Fish and the Chairman of the New Mexico Game Commission, asserting statutory and regulatory violations. *See* Endangered Species Act, 16 U.S.C. § 1538(a) (2006); 50 C.F.R. § 17.84(k) (2011). In the complaint, WildEarth alleged that trappers improperly killed or injured Mexican gray wolves, which are

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\* This order and judgment does not constitute precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. R. 32.1(A).

protected by statute and regulation. WildEarth faulted the Chairman for the trappings, claiming that he had failed to enact regulations to protect the wolves.

The district court dismissed with prejudice WildEarth's claims against the Director and the Chairman and granted summary judgment to the Defendants. WildEarth appealed the district court's order respecting only the Chairman.

The Chairman asks us to affirm on the merits, but alternatively urges us to uphold the dismissal based on Eleventh Amendment immunity. Seeking to avoid Eleventh Amendment immunity, WildEarth invokes *Ex parte Young*, 209 U.S. 123 (1908), arguing that the Chairman had a duty to adopt regulations protecting against carelessness among trappers. WildEarth conceded during oral argument that as a single member of the state game commission, the Chairman had no authority to promulgate such regulations. This concession implicates issues involving not only Eleventh Amendment immunity, but also Article III standing. *See Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013) (discussing how a state official's responsibilities create a "common thread" between the analysis of Eleventh Amendment immunity and Article III standing).

When faced with jurisdictional issues involving Eleventh Amendment immunity and Article III standing, the Court can decide which to address first. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[A] federal court has leeway 'to choose among threshold grounds for denying

audience to a case on the merits.’” (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999))). We choose to focus first on Article III standing.

Redressability is the third requirement of constitutional standing, an “essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury is redressable only if there is a substantial likelihood that the requested relief would provide redress. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1158 (10th Cir. 2005). The Plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing redressability. *See N. Laramie Range Alliance v. FERC*, 733 F.3d 1030, 1034 (10th Cir. 2013).

At oral argument, the Plaintiff conceded that the Chairman alone could not redress its alleged injury. The Plaintiff’s concession is tantamount to a concession that it failed to establish Article III standing. *See Bronson v. Swensen*, 500 F.3d 1099, 1111 (10th Cir. 2007) (“The redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute.”).

In light of this concession, the Court dismisses the appeal and remands with instructions to the district court to vacate its judgment and dismiss the action without prejudice to refiling. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213,

1218 (10th Cir. 2006) (“[D]ismissals for lack of jurisdiction should be without prejudice.”).

Entered for the Court

Per Curiam