

United States Court of Appeals  
For the Eighth Circuit

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No. 20-2102

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Agred Foundation

*Plaintiff - Appellant*

v.

The United States Army Corps of Engineers; The Honorable Mark T. Esper, in his  
official capacity as Secretary of the United States Army

*Defendants - Appellees*

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Appeal from United States District Court  
for the Western District of Arkansas - Texarkana

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Submitted: February 18, 2021  
Filed: July 8, 2021

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Before SMITH, Chief Judge, WOLLMAN and STRAS, Circuit Judges.

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SMITH, Chief Judge.

The AGRED Foundation (AGRED) seeks a declaratory judgment regarding its rights and obligations under a written agreement with the United States. The United States Army Corps of Engineers (USACE), acting on behalf of the United States, moved to dismiss for lack of subject matter jurisdiction on the grounds that AGRED

lacks standing. The district court<sup>1</sup> dismissed AGRED's claim after concluding that its injury was not caused by the USACE. We affirm.

### *I. Background*

Lake Erling is a man-made reservoir located in Lafayette County, Arkansas. International Paper Company (IP) built Lake Erling in 1956 as a water source for its paper mill. The lake, which spans approximately 7,100 acres, covers some land owned by the United States. In 1952, before building the lake, IP entered into an Act of Exchange with the United States.<sup>2</sup> The Act of Exchange granted IP the right to flood the government's land, with several conditions. In relevant part, the Act of Exchange (1) prohibited IP from placing restrictions on the public's use of Lake Erling and (2) required IP to allow public access to the lake over IP's land. The Act of Exchange stated:

It is understood and agreed that International Paper Company shall place no restrictions upon the public use of the water area of the industrial water supply reservoir located on its lands either for flood control, recreational, wild life, or fishing and hunting purposes; and that

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<sup>1</sup>The Honorable Susan O. Hickey, Chief Judge, United States District Court for the Western District of Arkansas.

<sup>2</sup>The United States entered into the Act of Exchange pursuant to 33 U.S.C. § 558b, which provides:

In any case in which it may be necessary or advisable in the execution of an authorized work of river and harbor improvement to exchange land or other property of the Government for private lands or property required for such project, the Secretary of the Army may, upon the recommendation of the Chief of Engineers, authorize such exchange upon terms and conditions deemed appropriate by him, and any conveyance of Government land or interests therein necessary to effect such exchange may be executed by the Secretary of the Army . . . .

it will permit and grant access over its lands adjoining the water area over and through routes to be agreed upon and designated by the Company and the United States.

Compl., Ex. A, at 7, *Agred Found. v. U.S. Army Corps of Eng'rs*, No. 4:18-cv-04136-SOH (W.D. Ark. 2018), ECF No. 1-1. IP satisfied its obligations under the Act of Exchange, allowing public access to the lake and maintaining public access points over its land.

This state of affairs continued until 2013, when IP conveyed its interest in the land beneath Lake Erling to AGRED. As part of the conveyance, AGRED agreed to assume all of IP's obligations and duties under the Act of Exchange. AGRED and the United States entered into a Memorandum of Understanding ("Memorandum") regarding routes of public access to the lake. For example, the parties stipulated that the boat launch ramp at one end of the lake would continue to be a route of public access to Lake Erling and that designating the ramp as a route of public access "fulfills the parties' designation obligations in the Act of Exchange." Compl., Ex. D, at 2, *Agred Found. v. U.S. Army Corps of Eng'rs*, No. 4:18-cv-04136-SOH (W.D. Ark. 2018), ECF No. 1-4. The Memorandum did not address charging fees for other access to the lake.

Once AGRED assumed ownership of Lake Erling, it began charging fees for certain access to the water. This included fees for adjoining landowners to have private access to the lake, fees for permits to build or maintain structures along the water, and fees for boat and trailer decals. In March 2016, Friends of Lake Erling Association (FOLEA), a group of individuals who either live near or use the lake, sued AGRED for declaratory and injunctive relief in the Lafayette County Circuit Court. FOLEA sought to prevent AGRED from charging fees related to accessing Lake Erling. In June 2016, the state court granted FOLEA's motion for summary judgment. It agreed with FOLEA that AGRED's fee-generating program constituted

an impermissible restriction on the public's access to the lake pursuant to the Act of Exchange and permanently enjoined AGREED from charging fees to access the lake. AGREED appealed, but the Arkansas Court of Appeals dismissed the appeal in October 2017 for lack of a final order and remanded the case for further consideration. *See AGREED Found. v. Friends of Lake Erling Ass'n*, 2017 Ark. App. 510 (2017). The state court litigation is ongoing.<sup>3</sup>

Shortly after FOLEA sued AGREED, but prior to the state court's injunction, AGREED contacted the United States, requesting that it publicly recognize that AGREED is entitled to charge fees under the terms of the Act of Exchange. The United States, acting through the USACE, responded in August 2016 that it takes no position on the issue. It explained that "the Act of Exchange neither authorizes nor prohibits fee-setting and fee-collecting"; that "the [Memorandum], like the Act of Exchange, is silent on fee-setting and fee-collecting"; and that "[b]oth instruments speak for themselves[] as to what they include and what they omit." Compl., Ex. E, at 1, 2, *Agred Found. v. U.S. Army Corps of Eng'rs*, No. 4:18-cv-04136-SOH (W.D. Ark. 2018), ECF No. 1-5. It also noted that "fee-setting and fee-collecting by [AGRED] are not matters within the [USACE's] purview." *Id.* at 2.

Disappointed by the USACE's response, AGREED filed this action against the USACE, seeking a declaratory judgment that its fee-generating program is consistent with its rights under the Act of Exchange. The USACE moved to dismiss for lack of subject matter jurisdiction on the grounds that (1) AGREED lacks standing to sue, (2) the USACE is entitled to sovereign immunity, and (3) the Declaratory Judgment Act is not applicable to this case. The USACE maintained that it takes no position regarding whether AGREED is permitted to charge fees under the Act of Exchange.

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<sup>3</sup>The Lafayette County Circuit Court again granted summary judgment to FOLEA in May 2020. AGREED filed a second appeal, which is pending.

The district court granted the USACE’s motion to dismiss, concluding that it lacked subject matter jurisdiction over AGRED’s claim because AGRED does not have standing.<sup>4</sup> The district court held that AGRED had suffered an injury but that the injury alleged—being sued in state court by FOLEA—was not caused by the USACE. Rather, it found that “[t]he Lafayette County litigation was precipitated by [AGRED’s] decision to charge fees—not [the USACE’s] decision to remain silent on the issue.” *Agred Found. v. U.S. Army Corps of Eng’rs*, No. 4:18-cv-04136, 2020 WL 2114928, at \*5 (W.D. Ark. May 4, 2020). AGRED timely appealed.

## II. Discussion

Article III of the Constitution extends the judicial power of the United States to “Cases” and “Controversies” only. U.S. Const. art. III, § 2. “Constitutional standing (as opposed to statutory standing) is a threshold question that determines whether a federal court has jurisdiction over a plaintiff’s claims.” *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 716 (8th Cir. 2017).

The irreducible constitutional minimum of standing contains three requirements. First and foremost, there must be alleged (and ultimately proved) an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Second, there must be causation—a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant. And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. This triad of injury in fact, causation, and redressability constitutes the core of Article III’s case-or-controversy requirement . . . .

*Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102–104 (1998) (cleaned up).

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<sup>4</sup>Because the standing issue was dispositive, the district court did not address sovereign immunity and the applicability of the Declaratory Judgment Act.

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