

Clay Smith
Chief Editor, AILD
CWAG & AG Alliance
Clay.Smith@cwagweb.org

Hill v. Warsewa—Claim alleging right to fish on Arkansas River remanded to determine whether the plaintiff has asserted a generalized grievance under constitutional (Article III) standards

The plaintiff filed suit in state court alleging that the appurtenant landowner defendants improperly denied his right to fly fish at a location on the Arkansas River. He contended that the portion of the River at issue was navigable. The landowner defendants argued the contrary and removed to federal court where the plaintiff joined the State of Colorado as a defendant. All defendants moved to dismiss on, *inter alia*, constitutional and prudential standing grounds. The plaintiff requested remand for lack of subject matter jurisdiction. The district court dismissed the case, holding that the plaintiff lacked prudential standing because he asserted third party rights—i.e., those of Colorado—and presented only a generalized grievance. In a divided opinion, the panel reversed and remanded for determination under Article III standards whether the plaintiff raised a generalized grievance. *Hill v. Warsewa*, ___ F.3d ___, 2020 WL 370796 (10th Cir. Jan. 23, 2020).

The majority began by stating that “[t]his case presents questions about (1) the order in which constitutional standing and other threshold jurisdictional issues should be approached by federal courts, and (2) the content and application of the constitutional and prudential standing doctrines.” As to the first question, it rejected the plaintiff’s assertion “that the district court erred by analyzing prudential standing before sovereign immunity and constitutional standing.” Citing *Wilderness Society v. Kane County*, 632 F.3d 1162 (10th Cir. 2011) (en banc), the majority reasoned that “both this court and the Supreme Court have relied on *Ruhrgas* [*AG v. Marathon Oil Co.*, 526 U.S. 574 (1999)] to proceed directly to prudential standing without addressing other jurisdictional issues.” It added that, until the Supreme Court rules otherwise, “third party standing should continue to be analyzed under the framework of prudential standing.”

As the second question, the majority determined that the plaintiff was asserting not Colorado’s rights but his own:

In Mr. Hill’s telling, title vested in the state over a century ago because the river was navigable for title under Article IV and the Equal Footing Doctrine. Mr. Hill alleges that he has a specific, legally protected right to fish resulting from these alleged facts and law. The other parties and amici may ultimately be correct that Colorado law does not actually afford Mr. Hill the right to fish that he asserts, even if he can prove navigability as a factual matter. But in this regard “far-fetchedness is a question to be determined on the merits.”

Turning to the generalized grievance ground for dismissal, the majority held that “the district court misconstrued the generalized grievance analysis as applying to prudential rather than constitutional standing” (citing *Lexmark International Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)). It declined “[a]t this stage” to determine whether the district court reached the correct result and remanded, without taking a position on the issue, for determination of whether the plaintiff’s claim embodied a generalized grievance under constitutional standards.

The dissent argued that the panel should resolve the generalized grievance issue. “After all, the district court has already decided whether the claim constitutes a generalized grievance, and the parties have briefed the issue on appeal. I would tell the district court that it was right to regard the claim as a generalized grievance and that the only error was in dismissing the case rather than remanding it to state court.”

Decision link: <https://www.ca10.uscourts.gov/opinions/19/19-1025.pdf>